

# **NIGERIAN BANKING LAW REPORTS**

**[1985 – 1989]**

**VOLUME 4**

**Published by Nigeria Deposit Insurance Corporation**



**2006**

**Nigeria Deposit Insurance Corporation**

Plot 447/448 Airport Road

Central Business District

P.M.B. 284, Garki

Abuja, Federal Capital Territory [FCT]

Nigeria

Tel: +23495237715-6, +523696740-44

This Volume is to be cited as  
**[1985 – 1989] 4 N.B.L.R.**

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ISSN 1595-1030

Printed by:

**LexisNexis Butterworths South Africa**

Durban: 215 North Ridge Road, Morningside, 4001

Johannesburg: Grayston 66, 2 Norwich Close, Sandton, 2196

Cape Town: Ground Floor, Watford House, 2 Ring Road, Century City,  
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Printed and bound by Interpak Books Pietermaritzburg

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## TABLE OF CONTENTS

Index of Table of Cases Reported .....	xiii
Index of Subject Matter .....	xv
Index of Cases referred to.....	xxv
Index of Statutes referred to .....	xlix
Index of Rules referred to .....	liii
Index of Books referred to.....	lv



## TABLE OF CASES REPORTED

	<i>Page</i>
Adedeji v. National Bank of Nigeria Limited .....	382
Aeroflot Soviet Airlines Limited v. United Bank for Africa Limited .....	80
African Continental Bank Limited v. Egbunike and others .....	424
Akinsanya v. United Bank for Africa Limited .....	171
Attorney-General, Bendel State and others v. United Bank of Africa Limited .....	146
Bank of the North Limited v. Obi .....	59
Central Bank of Nigeria v. Manexport SA and others	348
Chukwuedo v. First Bank Nigeria Limited .....	40
Isindinzo v. Adeniyi .....	9
Nasaralai Enterprises Limited v. Arab Bank Nigeria Limited .....	281
National Bank of Nigeria Limited v. Guthrie (Nigeria) Limited and another .....	368
National Bank of Nigeria Limited v. Okusolubo .....	17
Oguma Associated Companies (Nigeria) Limited v. Esiso and others .....	64
Salawu v. Union Bank (Nigeria) Limited .....	132
Savannah Bank of Nigeria Limited and another v. Ajilo and another .....	444
Siemers Export KG v. West German and Nigeria Trading Co Limited and another .....	27
Takaya v. Union Bank of Nigeria Limited .....	1
Union Bank (Nigeria) Limited v. Adediran .....	331
Uzuegbu v. Progress Bank of Nigeria Limited .....	400



## INDEX OF SUBJECT MATTER

### BANKING

Acceptance of shipping documents by customer without complaint – Where customer authorised his account to be debited – Customer's right to subsequently complain about irregularities in shipping documents – Appropriate time to reject irregular shipping documents by customer *Akinsanya v. United Bank for Africa Limited [1985 – 1989] 4 N.B.L.R. 171 (Supreme Court of Nigeria)*

Account – Uncertainty of money due – Proper action *Oguma Associated Companies (Nigeria) Limited v. Esiso and others [1985 – 1989] 4 N.B.L.R. 64 (High Court of Bendel State)*

Agency – Giving of financial advice by bank on how a customer's business is to be managed – Whether creates agency relationship – Whether the person named becomes the agent of the bank *Oguma Associated Companies (Nigeria) Limited v. Esiso and others [1985 – 1989] 4 N.B.L.R. 64 (High Court of Bendel State)*

Banker/customer relationship – Bank granting overdraft to customer- Dishonour of cheques drawn there on – Breach of banker/customer relationship *Uzuegbu v. Progress Bank of Nigeria Limited [1985 – 1989] 4 N.B.L.R. 400 (Court of Appeal, Kaduna Division)*

Banker/customer relationship – Banker's commercial credits – Categories of contracts involved – Obligation of parties – Duties of banker on receipt of shipping documents – Whether banker could debit customer's account even when seller failed to ship goods to customer *Akinsanya v. United Bank for Africa Limited [1985 – 1989] 4 N.B.L.R. 171 (Supreme Court of Nigeria)*

**BANKING – continued**

Banker/customer relationship – Cheque issued by customer payable to self – Proceeds of cheque paid to wrong person – Liability of bank for negligence – When customer will be liable for contributory negligence *Takaya v. Union Bank of Nigeria Limited* [1985 – 1989] 4 N.B.L.R. 1 (High Court of Kaduna State)

Banker/customer relationship – Customer paying through bank official – Bank official not authorised to receive cash – Payment eventually not made – Fraud established against bank official – Liability of bank therefore *Salawu v. Union Bank (Nigeria) Limited* [1985 – 1989] 4 N.B.L.R. 132 (Court of Appeal, Kaduna Division)

Banker/customer relationship – Duty of care owed by the bank *Chukwuedo v. First Bank Nigeria Limited* [1985 – 1989] 4 N.B.L.R. 40 (High Court of Bendel State)

Banker/customer relationship – Money paid into account – Deposit teller stamped and initialled by banker – Banker denied receipt of deposit – Handwriting and document experts confirmed that both stamp and teller were genuine – Whether the stamped and initialled teller was sufficient to prove lodgement of deposit – Teller duly stamped and initialled by banker – Customer need not prove that bank official who authenticated teller had authority *Aeroflot Soviet Airlines Limited v. United Bank for Africa Limited* [1985 – 1989] 4 N.B.L.R. 80 (Supreme Court of Nigeria)

Banker/customer relationship – Negligence of bank official – Vicarious liability of bank *Takaya v. Union Bank of Nigeria Limited* [1985 – 1989] 4 N.B.L.R. 1 (High Court of Kaduna State)



**BANKING – continued**

Bankers commercial credit – Irrevocable credits –  
Meaning of *Akinsanya v. United Bank for Africa  
Limited [1985 – 1989] 4 N.B.L.R. 171 (Supreme  
Court of Nigeria)*

Central bank – Whether under a duty to furnish foreign  
exchange to any person *Central Bank of Nigeria v.  
Manexport SA and others [1985 – 1989] 4 N.B.L.R.  
348 (Court of Appeal, Lagos Division)*

Cheques – Customer issuing cheque payable to self –  
Proceeds of cheque paid to wrong person – Customer  
claiming amount in cheque with interest – Propriety  
of – Need to lead evidence as to rate of interest  
*Takaya v. Union Bank of Nigeria Limited [1985 –  
1989] 4 N.B.L.R. 1 (High Court of Kaduna State)*

Cheques – Need for number on the cheque to correspond  
with number on its counterfoil *Isindinzo v. Adeniyi  
[1985 – 1989] 4 N.B.L.R. 9 (High Court of Lagos  
State)*

Cheques – Unauthorised signature on a cheque – Payment  
thereof after notification of withdrawal of mandate –  
Effect – Payment of cheque without authorised  
signature – Whether payment made in due course of  
bank's business – Section 24 Bill of Exchange Act,  
Cap 20, Law of the Federation of Nigeria, 1958  
*Union Bank (Nigeria) Limited v. Adediran [1985 –  
1989] 4 N.B.L.R. 331 (Court of Appeal, Kaduna  
Division)*

Cheques – Wrongful dishonour of cheque – Measure of  
damages where customer not a trader *Chukwuedo v.  
First Bank Nigeria Limited [1985 – 1989] 4  
N.B.L.R. 40 (High Court of Bendel State)*

**BANKING – continued**

Cheques – Wrongful dishonour of cheque – Payee not a customer of bank – Whether bank liable *Chukwuedo v. First Bank Nigeria Limited* [1985 – 1989] 4 N.B.L.R. 40 (High Court of Bendel State)

Customer drawing a cheque over amount in account – Effect *African Continental Bank Limited v. Egbunike and others* [1985 – 1989] 4 N.B.L.R. 424 (Court of Appeal, Enugu Division)

Foreign exchange – Whether the central bank obliged to furnish foreign exchange to any person *Central Bank of Nigeria v. Manexport SA and others* [1985 – 1989] 4 N.B.L.R. 348 (Court of Appeal, Lagos Division)

Garnishee order – Nature of *Siemers Export KG v. West German and Nigeria Trading Company Limited and another* [1985 – 1989] 4 N.B.L.R. 27 (High Court of Anambra State)

Garnishee order absolute – Failure of garnishee to appear – Application to discharge order – Whether the court that made order has jurisdiction to discharge same – Principle governing *Siemers Export KG v. West German and Nigeria Trading Company Limited and another* [1985 – 1989] 4 N.B.L.R. 27 (High Court of Anambra State)

Garnishee proceedings – Disclosure of third party interest – Duty of court *Siemers Export KG v. West German and Nigeria Trading Company Limited and another* [1985 – 1989] 4 N.B.L.R. 27 (High Court of Anambra State)

Garnishee proceedings – Parties thereto *Siemers Export KG v. West German and Nigeria Trading Company Limited and another* [1985 – 1989] 4 N.B.L.R. 27 (High Court of Anambra State)

**BANKING – continued**

Irrevocable documentary credit – Duty on the issuing bank to refuse re-imburement – The right of the confirming and the issuing banks for reimbursement – Payment made against non-confirming documents – Effect – Undue delay in rejecting payment over non-confirming documents – Effect *Attorney – General, Bendel State and others v. United Bank of Africa Limited [1985 – 1989] 4 N.B.L.R. 146 (Supreme Court of Nigeria)*

Letter of credit – Transaction between the parties involved – Nature of *Nasaralai Enterprises Limited v. Arab Bank Nigeria Limited [1985 – 1989] 4 N.B.L.R. 281 (Supreme Court of Nigeria)*

Loan agreement – Terms of the agreement – Duty on banker to bring to the notice of customer thereof *National Bank of Nigeria Limited v. Okusolubo [1985 – 1989] 4 N.B.L.R. 17 (High Court of Ogun State)*

Loan agreement – Where customer disputes amount claimed by bank – On whom lies the onus of proof *National Bank of Nigeria Limited v. Okusolubo [1985 – 1989] 4 N.B.L.R. 17 (High Court of Ogun State)*

Loans and advances – Guarantee – Admission by principal debtor – Whether necessarily admission by guarantor *National Bank of Nigeria Limited v. Guthrie (Nigeria) Limited and another [1985 – 1989] 4 N.B.L.R. 368 (Court of Appeal, Lagos Division)*

Mortgages – Valid legal mortgage – How created over landed properties – Requirement for governor's consent – Scope of – Whether required for deemed

**BANKING – continued**

grant *Savannah Bank of Nigeria Limited and another v. Ajilo and another* [1985 – 1989] 4 N.B.L.R. 444 (Supreme Court of Nigeria)

Overdraft facility – Absence of a formal agreement – Effect *Bank of the North Limited v. Obi* [1985 – 1989] 4 N.B.L.R. 59 (High Court of Kwara State)

Overdraft facility – Payment of cheque to a banker which resulted in overdraft – Purport of *Bank of the North Limited v. Obi* [1985 – 1989] 4 N.B.L.R. 59 (High Court of Kwara State)

Security for banker's advances – Governor's consent as mandatory requirement for a valid mortgage – Mortgagor relying on his failure to obtain Governor's consent to invalidate the mortgage – Whether transaction can be declared null and void at his instance – Where customer defaults in repayment of loan – Whether banker can rely on a mortgage to which Governor's consent has not been obtained – Whether such mortgage is illegal or voidable – Mortgage of land under the Land Use Act, 1978 – Requirement of Governor's consent – Whether the requirement also applies to deemed holder of right of occupancy *Adedeji v. National Bank of Nigeria Limited and another* [1985 – 1989] 4 N.B.L.R. 382 (Court of Appeal, Lagos Division)

Transferable credits – Meaning of transferable credits – Whether banker could pay seller even when there are irregularities in the shipping documents – Whether the insertion of the name of a third-party in Bill of Lading transfers credit *Akinsanya v. United Bank for Africa Limited* [1985 – 1989] 4 N.B.L.R. 171 (Supreme Court of Nigeria)

## **BANKING MATTERS**

Agency – Action – Commencement of action – Party to be sued *Oguma Associated Companies (Nigeria) Limited v. Esiso and others* [1985 – 1989] 4 N.B.L.R. 64 (High Court of Bendel State)

Agency – Existence thereof – Onus of proof *Oguma Associated Companies (Nigeria) Limited v. Esiso and others* [1985 – 1989] 4 N.B.L.R. 64 (High Court of Bendel State)

Agency – Types thereof *Oguma Associated Companies (Nigeria) Limited v. Esiso and others* [1985 – 1989] 4 N.B.L.R. 64 (High Court of Bendel State)

## **CONTRACT**

Exemption clauses in contract between banker and customer – Scope of – How construed *Akinsanya v. United Bank for Africa Limited* [1985 – 1989] 4 N.B.L.R. 171 (Supreme Court of Nigeria)

## **EVIDENCE**

Deposit – Acknowledgement of deposit in bank – What constitutes documentary proof thereof *Aeroflot Soviet Airlines Limited v. United Bank for Africa Limited* [1985 – 1989] 4 N.B.L.R. 80 (Supreme Court of Nigeria)

## **JURISDICTION**

Admiralty jurisdiction of the Federal High Court – Whether extends to bankers documentary credit – Section 7(1)(d) of the Federal High Court Act *Akinsanya v. United Bank for Africa Limited* [1985 – 1989] 4 N.B.L.R. 171 (Supreme Court of Nigeria)

Fiscal foreign exchange measures – Action involving foreign exchange measures – Jurisdiction of court – Where lies – Whether with the State High Court or

## **JURISDICTION – *continued***

Federal High Court *Central Bank of Nigeria v. Manexport SA and others* [1985 – 1989] 4 N.B.L.R. 348 (Court of Appeal, Lagos Division)

Letter of credit – Principles governing *Nasaralai Enterprises Limited v. Arab Bank Nigeria Limited* [1985 – 1989] 4 N.B.L.R. 281 (Supreme Court of Nigeria)

## **LAND LAW**

Land Use Act – Governor’s consent – Need for governor’s consent before alienation of land – Section 22 Land Use Act – Scope of – Whether covers land deemed granted by governor under section 34(2) of the Act *Savannah Bank of Nigeria Limited and another v. Ajilo and another* [1985 – 1989] 4 N.B.L.R. 444 (Supreme Court of Nigeria)

## **LETTERS OF CREDIT**

Buyer authorising payment on defective documents – Whether a waiver is thereby created which disentitles buyer from refusing payment thereafter *Nasaralai Enterprises Limited v. Arab Bank Nigeria Limited* [1985 – 1989] 4 N.B.L.R. 281 (Supreme Court of Nigeria)

Doctrine of estoppel-in-pais applicable *Nasaralai Enterprises Limited v. Arab Bank Nigeria Limited* [1985 – 1989] 4 N.B.L.R. 281 (Supreme Court of Nigeria)

Inspection of documents – Duties of bank *Nasaralai Enterprises Limited v. Arab Bank Nigeria Limited* [1985 – 1989] 4 N.B.L.R. 281 (Supreme Court of Nigeria)

**LETTERS OF CREDIT – *continued***

Sale of goods by documentary credit – Nature of contract created therein *Nasaralai Enterprises Limited v. Arab Bank Nigeria Limited* [1985 – 1989] 4 N.B.L.R. 281 (Supreme Court of Nigeria)

**STATUTE**

Interpretation of statutes – Construction of statutes – Narrower construction and wider construction – Attitude of court *Savannah Bank of Nigeria Limited and another v. Ajilo and another* [1985 – 1989] 4 N.B.L.R. 444 (Supreme Court of Nigeria)

**TORT**

Vicarious liability – Fraud perpetrated by a bank official – Whether bank vicariously liable *Salawu v. Union Bank (Nigeria) Limited* [1985 – 1989] 4 N.B.L.R. 132 (Court of Appeal, Kaduna Division)

**WORDS AND PHRASES**

“Deemed” – Meaning of *Savannah Bank of Nigeria Limited and another v. Ajilo and another* [1985 – 1989] 4 N.B.L.R. 444 (Supreme Court of Nigeria)

“Irrevocable credit” – Meaning of *Akinsanya v. United Bank for Africa Limited* [1985 – 1989] 4 N.B.L.R. 171 (Supreme Court of Nigeria)

“Trader” – Meaning of *Chukwuedo v. First Bank Nigeria Limited* [1985 – 1989] 4 N.B.L.R. 40 (High Court of Bendel State)





## INDEX OF CASES REFERRED TO

### *Nigerian*

#### A

- Abowaba v. Adesina 12 W.A.C.A. 18 [1985 – 1989] 4 N.B.L.R. 106 (Supreme Court of Nigeria)
- Abubakar v. Nana (1974) 5 S.C. 83 [1985 – 1989] 4 N.B.L.R. 415 (Court of Appeal, Kaduna Division)
- Adegbenro v. Akintola (1962) 1 All N.L.R. 422 [1985 – 1989] 4 N.B.L.R. 200 (Supreme Court of Nigeria)
- Adejumo v. Governor of Lagos State (1970) 1 All N.L.R. 183 [1985 – 1989] 4 N.B.L.R. 380 (Court of Appeal, Lagos Division)
- Adeleke v. Yerokun (1965) N.M.L.R. 291 [1985 – 1989] 4 N.B.L.R. 390 (Court of Appeal, Lagos Division)
- Adereti v. A.G Western Nigeria (1965) 1 All N.L.R. 254 [1985 – 1989] 4 N.B.L.R. 422 (Court of Appeal, Kaduna Division)
- Adesanya v. President (1981) 5 S.C. 112 [1985 – 1989] 4 N.B.L.R. 46 (High Court of Bendel State); [1985 – 1989] 4 N.B.L.R. 476 (Supreme Court of Nigeria)
- Adeshina v. Lemonu (1965) 1 All N.L.R. 233 [1985 – 1989] 4 N.B.L.R. 460 (Supreme Court of Nigeria)
- Adetutu v. Aderohunmu (1974) 6 S.C. 108 [1985 – 1989] 4 N.B.L.R. 341 (Court of Appeal, Kaduna Division)
- Adeyemi v. Bamidele (1968) 1 All N.L.R. 31 [1985 – 1989] 4 N.B.L.R. 415 (Court of Appeal, Kaduna Division)
- African Continental Bank Ltd v. Agbayin 5 F.S.C. 18 [1985 – 1989] 4 N.B.L.R. 113 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 144 (Court of Appeal, Kaduna Division)
- Afuwape v. Shodipe 2 F.S.C. 62 [1985 – 1989] 4 N.B.L.R. 228 (Supreme Court of Nigeria)

- Agbajo v. A.G. Federal Republic of Nigeria (1986) 2 N.W.L.R. (Part 23) 538 [1985 – 1989] 4 N.B.L.R. 202 (Supreme Court of Nigeria)
- Ajani v. Giwa (1986) 3 N.W.L.R. (Part 32) 796 [1985 – 1989] 4 N.B.L.R. 341 (Court of Appeal, Kaduna Division)
- Ajibade v. Mayowa (1978) 9-10 S.C. 1 [1985 – 1989] 4 N.B.L.R. 62 (High Court of Kwara State)
- Akeredolu v. Akinremi (1986) 2 N.W.L.R. (Part 25) 710 [1985 – 1989] 4 N.B.L.R. 503 (Supreme Court of Nigeria)
- Akinsanya v. United Bank for Africa (1986) 4 N.W.L.R. (Part 35) 273 [1985 – 1989] 4 N.B.L.R. 301 (Supreme Court of Nigeria)
- Akinwunmi v. Idewu (1969) 1 All N.L.R. 319 [1985 – 1989] 4 N.B.L.R. 415 (Court of Appeal, Kaduna Division)
- Akpene v. Barclays Bank (Nig) Ltd (1977) 1 S.C. 47 [1985 – 1989] 4 N.B.L.R. 387 (Court of Appeal, Lagos Division); [1985 – 1989] 4 N.B.L.R. 503 (Supreme Court of Nigeria)
- Alaye of Effon v. Fasan 3 F.S.C. 68 [1985 – 1989] 4 N.B.L.R. 228 (Supreme Court of Nigeria)
- Alhaji Baba Baki Saleti v. Alhaji Talle Shehu (1986) 1 S.C. 332 [1985 – 1989] 4 N.B.L.R. 387 (Court of Appeal, Lagos Division)
- Amachree v. Kallio 2 N.L.R. 108 [1985 – 1989] 4 N.B.L.R. 460 (Supreme Court of Nigeria)
- Amadi v. Apphu (1972) 1 All N.L.R. 409 [1985 – 1989] 4 N.B.L.R. 342 (Court of Appeal, Kaduna Division)
- American International Insurance Co. Ltd v. Ceekay Traders Ltd (1985) 5 S.C. 81 [1985 – 1989] 4 N.B.L.R. 215 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 293 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 356 (Court of Appeal, Lagos Division)

Index of Cases referred to

---

- Amos Bros and Co Ltd v. British West Africa Corporation Ltd 14 W.A.C.A. 220 [1985 – 1989] 4 N.B.L.R. 47 (High Court of Bendel State)
- Anukanti v. Ekwonyeaso (1978) 1 S.C. 37 [1985 – 1989] 4 N.B.L.R. 418 (Court of Appeal, Kaduna Division)
- Arimi v. Bashorun (1979) 1 F.N.R. 226 [1985 – 1989] 4 N.B.L.R. 62 (High Court of Kwara State)
- Armels Transport v. Martins (1970) 1 All N.L.R. 27 [1985 – 1989] 4 N.B.L.R. 418 (Court of Appeal, Kaduna Division)
- Aromire v. Awoyemi (1972) All N.L.R. 101 [1985 – 1989] 4 N.B.L.R. 413 (Court of Appeal, Kaduna Division)
- Ashubiojo v. A.C.B. (1966) 2 All N.L.R. 203 [1985 – 1989] 4 N.B.L.R. 49 (High Court of Bendel State)
- Automatic Telephone v. Federal Military Government (1968) 1 All N.L.R. 429 [1985 – 1989] 4 N.B.L.R. 229 (Supreme Court of Nigeria)
- Ayodele James v. Mid-Motors Nigeria Limited (1978) 11-12 S.C. 31 [1985 – 1989] 4 N.B.L.R. 139 (Court of Appeal, Kaduna Division)

**B**

- Balogun v. Agboola (1974) 10 S.C. 111 [1985 – 1989] 4 N.B.L.R. 415 (Court of Appeal, Kaduna Division)
- Balogun v. N.B.N. Ltd (1978) 3 S.C. 155 at 163-164 [1985 – 1989] 4 N.B.L.R. 421 (Court of Appeal, Kaduna Division)
- Bank of America v. Alexander (1969) 2 All N.L.R. 258 [1985 – 1989] 4 N.B.L.R. 49 (High Court of Bendel State)

- Bank of America v. Nigeria Travel Agencies (1967) All N.L.R. 156 [1985 – 1989] 4 N.B.L.R. 343 (Court of Appeal, Kaduna Division)
- Barclays Bank DCO v. Hassan (1961) All N.L.R. 836 [1985 – 1989] 4 N.B.L.R. 62 (High Court of Kwara State)
- Barclays Bank of Nigeria v. Mahmud (1976) 1 F.N.R. 26 [1985 – 1989] 4 N.B.L.R. 62 (High Court of Kwara State)
- Braide v. Adoki 10 N.L.R. 15 [1985 – 1989] 4 N.B.L.R. 460 (Supreme Court of Nigeria)
- Bronik Motors Ltd v. Wema Bank Ltd (1983) 6 S.C. 158 [1985 – 1989] 4 N.B.L.R. 217 (Supreme Court of Nigeria)
- Bronik Motors Ltd v. Wema Bank Ltd (1985) 6 N.C.L.R. 1 [1985 – 1989] 4 N.B.L.R. 356 (Court of Appeal, Lagos Division)
- Bucknor-Maclean v. Inlaks Ltd (1980) 8-11 S.C.1 [1985 – 1989] 4 N.B.L.R. 241 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 463 (Supreme Court of Nigeria)

## C

- Commerce Assurance Ltd v. Alli (1986) 3 N.W.L.R (Part 29) 404 [1985 – 1989] 4 N.B.L.R. 340 (Court of Appeal, Kaduna Division)

## D

- D.P.P. v. Obi (1961) 1 All N.L.R. 458 [1985 – 1989] 4 N.B.L.R. 200 (Supreme Court of Nigeria)
- Dabiri v. Gbajumo (1961) 1 All N.L.R. 225 [1985 – 1989] 4 N.B.L.R. 343 (Court of Appeal, Kaduna Division)
- Dickson v. Solicitor-General Benue Plateau State (1974) 5 S.C. 21 [1985 – 1989] 4 N.B.L.R. 462 (Supreme Court of Nigeria)

Index of Cases referred to

---

Duramani Ngekgla v. Tribal Authority Nongowa Chiefdom  
(1953) 14 W.A.C.A. 325 [1985 – 1989] 4 N.B.L.R. 390  
(Court of Appeal, Lagos Division)

Dzungwe v. Gbishe (1985) 2 N.W.L.R. (Part 8) 528 [1985 –  
1989] 4 N.B.L.R. 490 (Supreme Court of Nigeria)

E

Emegokwue v. Okadigbo (1973) 4 S.C. 171 [1985 – 1989] 4  
N.B.L.R. 434 (Court of Appeal, Enugu Division)

Enang v. Adu (1981) 11-12 S.C. 2 [1985 – 1989] 4  
N.B.L.R. 388 (Court of Appeal, Lagos Division)

Esi v. Moruku 15 N.L.R. 116 [1985 – 1989] 4 N.B.L.R. 510  
(Supreme Court of Nigeria)

Eweka v. Amadasum (1983) 8 S.C. 87 [1985 – 1989] 4  
N.B.L.R. 378 (Court of Appeal, Lagos Division)

Ezeani and others v. Ejidike (1965) N.M.L.R. 95 at 98 [1985  
– 1989] 4 N.B.L.R. 8 (High Court of Kaduna State)

F

Fadare v. A.G. Oyo State (1982) 4 S.C. 1 [1985 – 1989] 4  
N.B.L.R. 387 (Court of Appeal, Lagos Division)

Far East Mercantile Ltd v. Jacke Philips Photo Ltd (1974) 1  
All N.L.R. 246 – 252 [1985 – 1989] 4 N.B.L.R. 32 (High  
Court of Anambra State)

Fashanu v. Adekoya (1974) 6 S.C. 83 [1985 – 1989] 4  
N.B.L.R. 139 (Court of Appeal, Kaduna Division)

G

George v. Dominion Flour Mills Ltd (1963) 1 All N.L.R. 71  
[1985 – 1989] 4 N.B.L.R. 88 (Supreme Court of  
Nigeria); [1985 – 1989] 4 N.B.L.R. 138 (Court of  
Appeal, Kaduna Division); [1985 – 1989] 4 N.B.L.R.  
434 (Court of Appeal, Enugu Division)

George v. U.B.A (1972) 8-9 S.C. 274 [1985 – 1989] 4  
N.B.L.R. 88 (Supreme Court of Nigeria)

## H

Hispanic Construction (Nig.) Ltd v. Odogiyan (1986) 4 N.W.L.R. 248 [1985 – 1989] 4 N.B.L.R. 362 (Court of Appeal, Lagos Division)

## I

Ibanga v. Usanga (1972) E.C.S.L.R. 150 [1985 – 1989] 4 N.B.L.R. 342 (Court of Appeal, Kaduna Division)

Idosu v. Ojikutu 14 W.A.C.A. 88 [1985 – 1989] 4 N.B.L.R. 36 (High Court of Anambra State)

Ifezue v. Mbadugha (1984) 5 S.C. 79 [1985 – 1989] 4 N.B.L.R. 501 (Supreme Court of Nigeria)

Ikoku v. Obi (1962) 1 All N.L.R. Vol. (Part 1) 194 [1985 – 1989] 4 N.B.L.R. 439 (Court of Appeal, Enugu Division)

Imam v. A.B.U. (1970) N.N.L.R. 37 [1985 – 1989] 4 N.B.L.R. 442 (Court of Appeal, Enugu Division)

Iwenofu v. Iwenofu (1975) 9-11 S.C. 79 [1985 – 1989] 4 N.B.L.R. 415 (Court of Appeal, Kaduna Division)

## J

James v. Mid-Motors Nigeria Ltd (1978) 11-12 S.C. 31 [1985 – 1989] 4 N.B.L.R. 139 (Court of Appeal, Kaduna Division)

Jammal Steel Structures Ltd v. A.C.B. Ltd (1973) 1 All N.L.R. Part 2 208 [1985 – 1989] 4 N.B.L.R. 251 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 301 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 356 (Court of Appeal, Lagos Division)

Jibosu v. Obadina (1962) W.N.L.R. 303 [1985 – 1989] 4 N.B.L.R. 24 (High Court of Ogun State)

Job Okorie Iroegbu v. Benjamin Ochiobi and others (1972) [1985 – 1989] 4 N.B.L.R. 339 (Court of Appeal, Kaduna Division)

Index of Cases referred to

---

**Jobi v. Oshinlaja** (1963) 1 All N.L.R. 12 [1985 – 1989] 4 N.B.L.R. 119 (Supreme Court of Nigeria)

**Jules v. Ajani** (1980) 5-7 S.C. 96 [1985 – 1989] 4 N.B.L.R. 439 (Court of Appeal, Enugu Division)

**L**

**Lawal v. Dawodu** (1972) 8-9 S.C. 83 [1985 – 1989] 4 N.B.L.R. 415 (Court of Appeal, Kaduna Division)

**Lewis and Peat v. Akhimien** (1976) 7 S.C. 157 [1985 – 1989] 4 N.B.L.R. 435 (Court of Appeal, Enugu Division)

**M**

**Mandilas Limited v. Anyanru** (unreported) CA/L/140/86, delivered on 26/2/87 [1985 – 1989] 4 N.B.L.R. 388 (Court of Appeal, Lagos Division)

**Mamiso v. Pate** (1971) N.B.L.R. 62 [1985 – 1989] 4 N.B.L.R. 511 (Supreme Court of Nigeria)

**Metalimpex v. A.G. Leventis and Co. (Nig.) Ltd** (1976) 2 S.C. 102 [1985 – 1989] 4 N.B.L.R. 138 (Court of Appeal, Kaduna Division)

**Mobil Oil (Nigeria) Ltd v. Coker** (1971) 1 N.M.L.R. 58 [1985 – 1989] 4 N.B.L.R. 340 (Court of Appeal, Kaduna Division)

**Mogaji v. Cadbury (Nig.) Ltd** (1985) 7 S.C. 59 (1985) 2 N.W.L.R. (Part 7) 393 [1985 – 1989] 4 N.B.L.R. 386 (Court of Appeal, Lagos Division)

**Mogaji v. Odofin** (1978) 3 S.C. 91 [1985 – 1989] 4 N.B.L.R. 423 (Court of Appeal, Kaduna Division)

**N**

**Nahman v. Odutola** (1953) 14 W.A.C.A. 381 [1985 – 1989] 4 N.B.L.R. 456 (Supreme Court of Nigeria)

**Nakyauta v. Maikima** (1977) 6 S.C. 51 [1985 – 1989] 4 N.B.L.R. 456 (Supreme Court of Nigeria)

Nasr v. Bouari (1969) 1 All N.L.R. 35 [1985 – 1989] 4 N.B.L.R. 471 (Supreme Court of Nigeria)

Nishizawa Ltd v. Jethwani (1984) 12 S.C. 234 [1985 – 1989] 4 N.B.L.R. 362 (Court of Appeal, Lagos Division); [1985 – 1989] 4 N.B.L.R. 372 (Court of Appeal, Lagos Division)

Nwakwere v. Adewunmi (1967) N.M.L.R. 45 [1985 – 1989] 4 N.B.L.R. 439 (Court of Appeal, Enugu Division)

Nwobodo v. Onoh and 5 others (1984) 1 S.C. 40 [1985 – 1989] 4 N.B.L.R. 439 (Court of Appeal, Enugu Division)

## O

Obimonure v. Erinosho (1966) 1 All N.L.R. 250 [1985 – 1989] 4 N.B.L.R. 38 (High Court of Anambra State); [1985 – 1989] 4 N.B.L.R. 378 (Court of Appeal, Lagos Division)

Obisanya v. Nwoko (1974) 6 S.C. 69 [1985 – 1989] 4 N.B.L.R. 415 (Court of Appeal, Kaduna Division)

Ochonma v. Unosi (1965) N.M.L.R. 321 [1985 – 1989] 4 N.B.L.R. 88 (Supreme Court of Nigeria)

Oduola v. Coker (1981) 5 S.C. 197 [1985 – 1989] 4 N.B.L.R. 241 (Supreme Court of Nigeria)

Oguntimeyin v. Gubere (1964) 1 All N.L.R. 176 [1985 – 1989] 4 N.B.L.R. 342 (Court of Appeal, Kaduna Division)

Oilfield Supply Centre Ltd v. Johnson (1987) 2 N.W.L.R. (Part 58) 625 [1985 – 1989] 4 N.B.L.R. 397 (Court of Appeal, Lagos Division)

Oilfield Supply Centre Ltd v. Johnson (1986) 5 S.C. 310 [1985 – 1989] 4 N.B.L.R. 397 (Court of Appeal, Lagos Division)

Oja v. Ogboni (1976) 4 S.C. 69 [1985 – 1989] 4 N.B.L.R. 340 (Court of Appeal, Kaduna Division)

Ojikutu v. Fella 10 W.A.C.A. 628 [1985 – 1989] 4 N.B.L.R. 47 (High Court of Bendel State)



Index of Cases referred to

---

- Ojokolobo v. Alamu (1987) 3 N.W.L.R. (Part 40) 179 **[1985 – 1989] 4 N.B.L.R. 499 (Supreme Court of Nigeria)**
- Okebola v. Molake (1975) 5 U.I.L.R. 204 **[1985 – 1989] 4 N.B.L.R. 138 (Court of Appeal, Kaduna Division)**
- Okolo v. Uzoka (1978) 4 S.C. 77 **[1985 – 1989] 4 N.B.L.R. 415 (Court of Appeal, Kaduna Division)**
- Okporaoke v. Egunonu and others (1941) 7 W.A.C.A. 53 **[1985 – 1989] 4 N.B.L.R. 442 (Court of Appeal, Enugu Division)**
- Olubadan-in-Council v. Lagunju 12 W.A.C.A. 464 **[1985 – 1989] 4 N.B.L.R. 261 (Supreme Court of Nigeria)**
- Omonfoman v. Okoeguale (1986) 5 N.W.L.R. (Part 40) 179 **[1985 – 1989] 4 N.B.L.R. 495 (Supreme Court of Nigeria)**
- Omonuwa v. Oshodin and Ehanire (1985) 2 N.W.L.R. (Part 10) 924; **[1985 – 1989] 4 N.B.L.R. 341 (Court of Appeal, Kaduna Division)**
- Onobruchere and Anor v. Esegine (1986) 2 S.C. 385 **[1985 – 1989] 4 N.B.L.R. 442 (Court of Appeal, Enugu Division)**
- Orjiako v. Orjiako JD 27/1955 (Unreported) **[1985 – 1989] 4 N.B.L.R. 511 (Supreme Court of Nigeria)**
- Oyenuga v. Provisional Council of University of Ife (1965) N.M.L.R. 9; **[1985 – 1989] 4 N.B.L.R. 340 (Court of Appeal, Kaduna Division)**
- Oyewole v. Standard Bank of West Africa (1968) 2 All N.L.R. 32 **[1985 – 1989] 4 N.B.L.R. 49 (High Court of Bendel State)**

**P**

- Phares v. Abdalah (1941) 7 W.A.C.A 15 **[1985 – 1989] 4 N.B.L.R. 372 (Court of Appeal, Lagos Division)**

## Q

Quo Vadis Hotels and Restaurant Ltd v. Commissioner of Lands (Mid-Western State and others) (1973) 6 S.C. 71 [1985 – 1989] 4 N.B.L.R. 396 (Court of Appeal, Lagos Division)

Queen v. Ogoto (1961) All N.L.R. 700 [1985 – 1989] 4 N.B.L.R. 412 (Court of Appeal, Kaduna Division)

## R

Rabiu v. State (1980) 8-11 S.C. 130 [1985 – 1989] 4 N.B.L.R. 477 (Supreme Court of Nigeria)

Rosenje v. Bakare (1973) 3 S.C. 131 [1985 – 1989] 4 N.B.L.R. 415 (Court of Appeal, Kaduna Division)

## S

Saligun v. Mersh (1980) 1 P.S.L.R. 337 [1985 – 1989] 4 N.B.L.R. 38 (High Court of Anambra State)

Savannah Bank of Nigeria Ltd and another v. Ajilo (1987) 2 N.W.L.R. (Part 57) 421 [1985 – 1989] 4 N.B.L.R. 390 (Court of Appeal, Lagos Division)

Shell B.P. v. Cole (1978) 3 S.C. 183 [1985 – 1989] 4 N.B.L.R. 415 (Court of Appeal, Kaduna Division)

Shonekan v. Smith (1964) 1 All N.L.R. 168 [1985 – 1989] 4 N.B.L.R. 387 (Court of Appeal, Lagos Division)

Skenconsult (Nig) Ltd v. Ukey (1981) 1 S.C. 6 [1985 – 1989] 4 N.B.L.R. 378 (Court of Appeal, Lagos Division)

Societe Generale De Surveillance S.A. v. Rastico Nigeria Ltd CA/L/57/84 (Unreported) [1985 – 1989] 4 N.B.L.R. 246 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 357 (Court of Appeal, Lagos Division)

Solanke v. Abed (1962) 1 All N.L.R. 230; (1962) N.R.N.L.R. 92 [1985 – 1989] 4 N.B.L.R. 393 (Court of Appeal, Lagos Division); [1985 – 1989] 4 N.B.L.R. 487 (Supreme Court of Nigeria)

Index of Cases referred to

---

Sonuga v. Anadein (1967) N.M.L.R. 77 [1985 – 1989] 4  
**N.B.L.R. 106 (Supreme Court of Nigeria)**

Sonuga v. Anadein (1967) 1 All N.L.R. 91 [1985 – 1989] 4  
**N.B.L.R. 380 (Court of Appeal, Lagos Division)**

Surakatu v. Nigeria Housing Development Society Ltd  
(1981) 4 S.C. 26 [1985 – 1989] 4 **N.B.L.R. 241**  
**(Supreme Court of Nigeria)**

**T**

Taiwo Ajani (for himself and on behalf of Agbaruru family)  
v Situ Giwa (1986) 3 N.W.L.R. (Part 32) 796 [1985 –  
1989] 4 **N.B.L.R. 340 (Court of Appeal, Kaduna**  
**Division)**

The British India Insurance Co Nig. Ltd v. Tharwades  
(1978) 3 S.C. 143 [1985 – 1989] 4 **N.B.L.R. 442 (Court**  
**of Appeal, Enugu Division)**

Tikatore Press Ltd v. Abina and another (1973) 1 All N.L.R.  
400 [1985 – 1989] 4 **N.B.L.R. 47 (High Court of Bendel**  
**State)**

**U**

U.B.A. Ltd v. A.G. Bendel State FCA/B/109/81 of 10/9/81  
[1985 – 1989] 4 **N.B.L.R. 279 (Supreme Court of**  
**Nigeria)**

Ude v. Agu (1961) 1 All N.L.R. 61 [1985 – 1989] 4  
**N.B.L.R. 188 (Supreme Court of Nigeria)**

Uyovwukerhi v. Afonughe (1976) 5 S.C. 85 at 91 [1985 –  
1989] 4 **N.B.L.R. 460 (Supreme Court of Nigeria)**

**W**

West African Shipping Agency (Nig.) Ltd and Another v.  
Kalla (1978) 3 S.C. 21 [1985 – 1989] 4 **N.B.L.R. 79**  
**(High Court of Bendel State)**

Western Steel Works Ltd and another v. Iron and Steel  
Workers Union (1986) 3 N.W.L.R. (Part 30) 617 [1985 –  
1989] 4 **N.B.L.R. 198 (Supreme Court of Nigeria)**

Woluchem v. Gudi (1981) 5 S.C. 291 [1985 – 1989] 4  
N.B.L.R. 417 (Court of Appeal, Kaduna Division)

Y

Yesufu v. A.C.B. Ltd (1981) 1 S.C. 74 at 92 [1985 – 1989] 4  
N.B.L.R. 6 (High Court of Kaduna State); [1985 –  
1989] 4 N.B.L.R. 420 (Court of Appeal, Kaduna  
Division)

Yesufu v. Nigeria Tobacco Co. Ltd (1977) 6 S.C. 39 [1985 –  
1989] 4 N.B.L.R. 139 (Court of Appeal, Kaduna  
Division)

*Foreign*

A

AG v. GE Railway Co (1879) 27 W.R. 759 [1985 – 1989] 4  
N.B.L.R. 256 (Supreme Court of Nigeria)

Allen v. London County and Westminster Bank (1915) 31  
T.L.R. 210 [1985 – 1989] 4 N.B.L.R. 421 (Court of  
Appeal, Kaduna Division)

Arab Bank v. Ross (1952) Q.B.D. 216 [1985 – 1989] 4  
N.B.L.R. 440 (Court of Appeal, Enugu Division)

Archbold v. Spanglett (1961) 1 All E.R. 417 [1985 – 1989]  
4 N.B.L.R. 390 (Court of Appeal, Lagos Division)

Ardennes (Cargo owners) v. Ardennes (Owners) (1950) 2  
A.E.R. 517 [1985 – 1989] 4 N.B.L.R. 250 (Supreme  
Court of Nigeria)

Asburg Park and Ocean Grove Bank v. National City Bank  
of New York 35 N.Y.S. 2nd 985 [1985 – 1989] 4  
N.B.L.R. 268 (Supreme Court of Nigeria)

Ash and Anor. v. Hutchinson and Co. (Publishers) Ltd and  
others (1936) 1 Ch. 489 [1985 – 1989] 4 N.B.L.R. 377  
(Court of Appeal, Lagos Division)

Attorney-General v. Brown (1920) 1 K.B. 773 [1985 –  
1989] 4 N.B.L.R. 476 (Supreme Court of Nigeria)

Index of Cases referred to

---

**B**

- Bank Melli Iran v. Barclays Bank DCO (1951) 2 LL. Rep 367 [1985 – 1989] 4 N.B.L.R. 161 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 268 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 299 (Supreme Court of Nigeria)
- Banque Indochine v. J.H. Rayner Ltd (1983) 1 Q.B. D717 [1985 – 1989] 4 N.B.L.R. 223 (Supreme Court of Nigeria)
- Barraclough v. Brown (1857) A.C. 615; [1985 – 1989] 4 N.B.L.R. 359 (Court of Appeal, Lagos Division)
- Barclays Bank Ltd v. Inland Revenue Commissioner (1961) A.C. 509 [1985 – 1989] 4 N.B.L.R. 500 (Supreme Court of Nigeria)
- Becker v. Marvin City Corporation PC (1977) A.C. 271 [1985 – 1989] 4 N.B.L.R. 197 (Supreme Court of Nigeria)
- Blakey v. Lathan (1889) [1985 – 1989] 4 N.B.L.R. 256 (Supreme Court of Nigeria)
- Blay v. Solomon 12 W.A.C.A. 177 [1985 – 1989] 4 N.B.L.R. 188 (Supreme Court of Nigeria)
- Blundel v. Rimmer (1971) 1 W.L.R. 125 [1985 – 1989] 4 N.B.L.R. 372 (Court of Appeal, Lagos Division)
- Bozson v. Altrincham (1930) 1 Q.B. 807 [1985 – 1989] 4 N.B.L.R. 188 (Supreme Court of Nigeria)
- Brooks and Co. v. Blackburn Benuet Society (1884) A.C. 857 [1985 – 1989] 4 N.B.L.R. 441 (Court of Appeal, Enugu Division)
- Burrels and Sons v. Read (1894) 11 T.L.R. 36 [1985 – 1989] 4 N.B.L.R. 32 (High Court of Anambra State)
- Buswell v. Goodwin (1971) 1 All E.R. 418 at 421 [1985 – 1989] 4 N.B.L.R. 398 (Court of Appeal, Lagos Division)

**C**

- Canada Sugar Refining Co. Ltd v. R (1898) A.C. 735 **[1985 – 1989] 4 N.B.L.R. 466 (Supreme Court of Nigeria)**
- Cane v. Seloceve Ltd (Martins Bank Ltd Garnishee) 57 TLR 601 **[1985 – 1989] 4 N.B.L.R. 37 (High Court of Anambra State)**
- Central Newbury Motors Car Auctions Ltd v. Unity Finance Ltd and Anor. Mercury Motors, Third Parties (1957) 1 Q.B. 371 **[1985 – 1989] 4 N.B.L.R. 314 (Supreme Court of Nigeria)**
- Clifford v. Parker 113 E.R. 1012 **[1985 – 1989] 4 N.B.L.R. 272 (Supreme Court of Nigeria)**
- Coleman v. Riches (1955) 16 C.B. 104 **[1985 – 1989] 4 N.B.L.R. 125 (Supreme Court of Nigeria)**
- Commonwealth Shipping Representative v. P. and O. Branch Services (1923) A.C. 91 **[1985 – 1989] 4 N.B.L.R. 115 (Supreme Court of Nigeria)**
- Cox and Wheatcroft v. Hickman (1861) 8 HL Case 268 **[1985 – 1989] 4 N.B.L.R. 72 (High Court of Bendel State)**
- Craig v. Kanseen (1943) 1 K.B. 262 **[1985 – 1989] 4 N.B.L.R. 378 (Court of Appeal, Lagos Division)**
- Cuthbert v. Roberts Lubbock and Co. (1909) 2 Ch.D. 226 **[1985 – 1989] 4 N.B.L.R. 422 (Court of Appeal, Kaduna Division); [1985 – 1989] 4 N.B.L.R. 441 (Court of Appeal, Enugu Division)**

**D**

- Davidson v. Barclays Bank (1940) 56 T.L.R. 343 **[1985 – 1989] 4 N.B.L.R. 421 (Court of Appeal, Kaduna Division)**
- Doherty v. Royal Bank of Scotland (1963) S.L.R. (Notes) 43 **[1985 – 1989] 4 N.B.L.R. 121 (Supreme Court of Nigeria)**
- Dunlop Pneumatic Tyre Co Ltd v. Selfridge and Co Ltd (1915) A.C. 847 **[1985 – 1989] 4 N.B.L.R. 366 (Court of Appeal, Lagos Division)**

Index of Cases referred to

---

**E**

- East End Dwellings Co. Ltd v. Finsbury Borough Council (1952) A.C. 109 [1985 – 1989] 4 N.B.L.R. 500 (Supreme Court of Nigeria)
- Edward Owen Engineering Ltd v. Barclays Bank International Ltd and Umma Bank (1978) 1 Lloyd's Rep. 166 [1985 – 1989] 4 N.B.L.R. 297 (Supreme Court of Nigeria)
- Egerton v. Shirley (1945) [1985 – 1989] 4 N.B.L.R. 256 (Supreme Court of Nigeria)
- Ellis v. Allen (1914)\_ 1 Ch.D. 904 [1985 – 1989] 4 N.B.L.R. 372 (Court of Appeal, Lagos Division)
- Equitable Trust Company of New York v. Dawson Partners Ltd (1927) 27 U.L.R. 49 [1985 – 1989] 4 N.B.L.R. 268 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 298 (Supreme Court of Nigeria)

**F**

- Fairlie v. Denton (1828) 8 B and C 395 [1985 – 1989] 4 N.B.L.R. 75 (High Court of Bendel State)
- Farnworth Finance Facilities Ltd v. Attryde (1970) 1 W.L.R. 453 [1985 – 1989] 4 N.B.L.R. 276 (Supreme Court of Nigeria)
- Fibrosa Spolka Akcna v. Fairbairn Lawson Combe Barbour Ltd (1943) A.C. 32 [1985 – 1989] 4 N.B.L.R. 91 (Supreme Court of Nigeria)
- Flash v. London and South Western Bank (1915) 31 T.L.R. 344 [1985 – 1989] 4 N.B.L.R. 400 (Court of Appeal, Kaduna Division)
- Foley v. Hill (1848) 2 H.L. Case 28 [1985 – 1989] 4 N.B.L.R. 6 (High Court of Kaduna State); [1985 – 1989] 4 N.B.L.R. 420 (Court of Appeal, Kaduna Division)
- Frost v. London Joint Stock Bank (1906) 22 T.L.R. 760 [1985 – 1989] 4 N.B.L.R. 421 (Court of Appeal, Kaduna Division)

Fung Kai Sun v. Chan Fui Hing (1951) A.C. 489 [1985 – 1989] 4 N.B.L.R. 126 (High Court of Nigeria)

Furge v. Sharwood (1841) 2 Q.B. 388 [1985 – 1989] 4 N.B.L.R. 72 (High Court of Bendel State)

## G

Gatoil Inc. v. Arkwright Boston Co. (1985) A.C. 25 [1985 – 1989] 4 N.B.L.R. 240 (Supreme Court of Nigeria)

George Whitechurch Ltd v. Cavanagh (1902) A.C. 117 [1985 – 1989] 4 N.B.L.R. 126 (Supreme Court of Nigeria)

Gibson v. Westminster Bank Ltd (1939) 2 KB 882 (1939) 3 All E.R. 577 [1985 – 1989] 4 N.B.L.R. 55 (High Court of Bendel State)

Glynn v. Margetson and Co. (1893) A.C. 351 [1985 – 1989] 4 N.B.L.R. 226 (Supreme Court of Nigeria)

Great Western Insurance Co of New York v. Guriliffe (1874) 9 Ch App 525 at 541 [1985 – 1989] 4 N.B.L.R. 79 (High Court of Bendel State)

Greer v. Down Supply Co. (1927) 2 K.B. 28 [1985 – 1989] 4 N.B.L.R. 314 (Supreme Court of Nigeria)

Guarantee Trust Co. of New York v. Hannay and Co. (1915) 2 K.B. 536 [1985 – 1989] 4 N.B.L.R. 359 (Court of Appeal, Lagos Division)

## H

Hampdon v. Wallis (1884) 27 Ch. D. 251 [1985 – 1989] 4 N.B.L.R. 375 (Court of Appeal, Lagos Division)

Hamzeh Malas and Sons v. British Imex Industries Ltd (1958) 2 Q.B.127 [1985 – 1989] 4 N.B.L.R. 297 (Supreme Court of Nigeria)

Hapenstall v. Jackson, Barclays Bank Ltd [1939] 2 All E.R. 10 [1985 – 1989] 4 N.B.L.R. 37 (High Court of Anambra State)



Index of Cases referred to

---

- Harbute's Plasticine Ltd v. Wayne Tank and Pump Co. Ltd  
(1970) 1 Q.B. 847 [1985 – 1989] 4 N.B.L.R. 276  
(Supreme Court of Nigeria)
- Harn v. Nicoles (1701) 1 Salk 289 [1985 – 1989] 4  
N.B.L.R. 139 (Court of Appeal, Kaduna Division)
- Harris v. Gamble (1878) 7 Ch. D. 877 [1985 – 1989] 4  
N.B.L.R. 436 (Court of Appeal, Enugu Division)
- Hill v. Hill (Park Lane) Ltd (1949) A.C. 530 [1985 – 1989]  
4 N.B.L.R. 470 (Supreme Court of Nigeria)
- Hirschorn v. Evans (Barclays Bank Ltd Garnishee) [1938] 3  
A11 E.R. 491 [1985 – 1989] 4 N.B.L.R. 6 (High Court  
of Kaduna State) [1985 – 1989] 4 N.B.L.R. 420 (Court  
of Appeal, Kaduna Division)
- Hunt v. Allied Bakeries Ltd (1956) 1 W.L.R. 1326 [1985 –  
1989] 4 N.B.L.R. 197 (Supreme Court of Nigeria)

I

- Isaac's and Sons v. Salbstein (1916) 2 K.B. 139 [1985 –  
1989] 4 N.B.L.R. 237 (Supreme Court of Nigeria)

J

- Jacob v. Morries (1902) 1 Ch. 816 [1985 – 1989] 4  
N.B.L.R. 121 (Supreme Court of Nigeria)
- Jacobs v. L.C.C. (1950) 1 A.E.R. 737 [1985 – 1989] 4  
N.B.L.R. 93 (Supreme Court of Nigeria)
- J.H. Rayner and Co. and The Oilseeds Trading Co. v.  
Hambros Bank Ltd (1943) Llyods Rep. 10 (C.A.) [1985 –  
1989] 4 N.B.L.R. 299 (Supreme Court of Nigeria)
- Joachimson v. Swiss Bank Corporation (1921) 3 K.B. 110  
[1985 – 1989] 4 N.B.L.R. 6 (High Court of Kaduna  
State); [1985 – 1989] 4 N.B.L.R. 420 (Court of Appeal,  
Kaduna Division)
- Julia, The (1860) 14 M.O.O. P. C.C. 210 [1985 – 1989] 4  
N.B.L.R. 423 (Court of Appeal, Kaduna Division)

**K**

Kenyon Son and Graven Ltd v. Baxter Hoare and Co. Ltd  
(1971) 1 W.L.R. 519 [1985 – 1989] 4 N.B.L.R. 276  
(Supreme Court of Nigeria)

Kwei Tek Chao and others (Trading as Zung Fu Co.) v.  
British Traders and Shippers Ltd N.V. Handels-  
maateshappij J. Smits Import-Export Third Party (1954) 2  
Q.B. 459 at 480 and 481; (1954) 1 Lloyd's Rep. 16 at 48  
and 49 [1985 – 1989] 4 N.B.L.R. 313 (Supreme Court  
of Nigeria)

**L**

Lancashire Welders Ltd v. Harland and Wold Ltd (1950) 2  
All E.R. 1096 [1985 – 1989] 4 N.B.L.R. 372 (Court of  
Appeal, Lagos Division)

Lancaster Motor Co v. Bremith (1941) 1 K.B. 675 [1985 –  
1989] 4 N.B.L.R. 37 (High Court of Anambra State)

Landergan v. Feast (1886) 55 L.T. 42 [1985 – 1989] 4  
N.B.L.R. 373 (Court of Appeal, Lagos Division)

Lectang v. Cooper (1965) 1 Q.B. 229 [1985 – 1989] 4  
N.B.L.R. 360 (Court of Appeal, Lagos Division)

Lincoln College (1595) 3 Co. Rep. 586 [1985 – 1989] 4  
N.B.L.R. 466 (Supreme Court of Nigeria)

Lloyd v. Grace, Smith and Co (1912) A.C. 716 [1985 –  
1989] 4 N.B.L.R. 93 (Supreme Court of Nigeria); [1985  
– 1989] 4 N.B.L.R. 139 (Court of Appeal, Kaduna  
Division)

London Jewellers Ltd v. Attenborough (1934) 2 K.B. 206  
[1985 – 1989] 4 N.B.L.R. 93 (Supreme Court of  
Nigeria)

London Joint Stock Bank v. Macmillan and Arthur (1918)  
A.C. 777 [1985 – 1989] 4 N.B.L.R. 141 (Court of  
Appeal, Kaduna Division); [1985 – 1989] 4 N.B.L.R.  
421 (Court of Appeal, Kaduna Division)

Index of Cases referred to

---

**M**

- Marshall v. James (1905) 1 Ch. 432; (1905) WN 28 **[1985 – 1989] 4 N.B.L.R. 32 (High Court of Anambra State)**
- Martin v. Nader, Dresdner Bank (Garnishee) (1906) 2 K.B. 26 **[1985 – 1989] 4 N.B.L.R. 32 (High Court of Anambra State)**
- Matthews v. Smallwood (1910) 1 Ch. 777 **[1985 – 1989] 4 N.B.L.R. 314 (Supreme Court of Nigeria)**
- Manchester Trust v. Furness (1895) 2 Q.B. 539 **[1985 – 1989] 4 N.B.L.R. 314 (Supreme Court of Nigeria)**
- Mckenzie v. British Linen Co. (1881) 6 A.C. 82 **[1985 – 1989] 4 N.B.L.R. 86 (Supreme Court of Nigeria)**
- Midland Bank Ltd v. Seymour (1950) 2 L.L. Rep. 147 **[1985 – 1989] 4 N.B.L.R. 278 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 304 (Supreme Court of Nigeria)**
- Mohd v. Central Securities PC (1983) 76 **[1985 – 1989] 4 N.B.L.R. 196 (Supreme Court of Nigeria)**
- Moore v. Peachey (1892) 66 LT 138 **[1985 – 1989] 4 N.B.L.R. 32 (High Court of Anambra State)**
- Morris v. C.W. Martin and Sons Ltd (1966) 1 Q.B. 716 **[1985 – 1989] 4 N.B.L.R. 125 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 145 (Court of Appeal, Kaduna Division)**

**N**

- Nokes v. Doncaster Amalgamated Collieries Ltd (1940) A.C. 1014 **[1985 – 1989] 4 N.B.L.R. 466 (Supreme Court of Nigeria)**

**O**

- Obrien v. Killean (1914) 21 R.R. 63 **[1985 – 1989] 4 N.B.L.R. 32 (High Court of Anambra State)**

**P**

- Panchaud Freres S.A. v. Et. General Grain (1970) Lloyd's Rep. 53 [1985 – 1989] 4 N.B.L.R. 299 (Supreme Court of Nigeria)
- Pardoe v. Pardoe 82 L.T.R. 547 [1985 – 1989] 4 N.B.L.R. 489 (Supreme Court of Nigeria)
- Parr's Banking Company Ltd v. Yates (1898) 2 GP 461 [1985 – 1989] 4 N.B.L.R. 24 (High Court of Ogun State)
- Pasma v. Weekes (1950) S.C. 441 [1985 – 1989] 4 N.B.L.R. 79 (High Court of Bendel State)
- Pavia and Co. S.P.A. v. Thurmann-Nielsen (1952) 2 Q.B. 84 [1985 – 1989] 4 N.B.L.R. 182 (Supreme Court of Nigeria)
- Paying II v. Anguandah 12 W.A.C.A. 284 [1985 – 1989] 4 N.B.L.R. 415 (Court of Appeal, Kaduna Division)
- Phases v. Abdalah (1914) W.A.C.A. 15 [1985 – 1989] 4 N.B.L.R. 368 (Court of Appeal, Lagos Division)
- Photo Production Ltd v. Securicor Transport Ltd (1980) A.C. 827 [1985 – 1989] 4 N.B.L.R. 226 (Supreme Court of Nigeria)
- Plunkett v. Barclays Bank (1906) 22 T.L.R. 171 [1985 – 1989] 4 N.B.L.R. 421 (Court of Appeal, Kaduna Division)
- Pole v. Leask (1863) 3 L.J. Ch 155 [1985 – 1989] 4 N.B.L.R. 71 (High Court of Bendel State)
- Porselt v. White (1885) 31 Ch. D. 52 CA [1985 – 1989] 4 N.B.L.R. 375 (Court of Appeal, Lagos Division)
- Prigg v. Pennsylvania 10 I.L. Ed. 1060 [1985 – 1989] 4 N.B.L.R. 477 (Supreme Court of Nigeria)
- Pritchard v. Westminster Bank Limited (1909) 1 W.L.R. 547 [1985 – 1989] 4 N.B.L.R. 32 (High Court of Anambra State)

Index of Cases referred to

---

**R**

- R. v. Norfolk County Court 60 L.J. Q.B. 380 [1985 – 1989] **4 N.B.L.R. 464 (Supreme Court of Nigeria)**
- R. v. Prince II Cox C.C. 193 [1985 – 1989] **4 N.B.L.R. 422 (Court of Appeal, Kaduna Division)**
- Re Page (1910) 1 Ch. 489 [1985 – 1989] **4 N.B.L.R. 198 (Supreme Court of Nigeria)**
- Re Wingham (1940) P. 187 [1985 – 1989] **4 N.B.L.R. 477 (Supreme Court of Nigeria)**
- Read v. Brown (1888) 22 Q.B.D. 128 [1985 – 1989] **4 N.B.L.R. 361 (Court of Appeal, Lagos Division)**
- Reid v. Covert 354 US 177 Set 1222, I.L. Ed 2dH 41148 [1985 – 1989] **4 N.B.L.R. 477 (Supreme Court of Nigeria)**
- Richards v. Gellatly (1872) L.R. 7 CP 127 at 131 [1985 – 1989] **4 N.B.L.R. 74 (High Court of Bendel State)**
- Ruben v. Corcat Fingall Consolidated (1906) A.C. 439 [1985 – 1989] **4 N.B.L.R. 125 (Supreme Court of Nigeria)**
- Rutler v. Tregent (1879) 12 Ch. D. 758 [1985 – 1989] **4 N.B.L.R. 436 (Court of Appeal, Enugu Division)**

**S**

- Salaman v. Warner (1891)1 Q.B. 734 [1985 – 1989] **4 N.B.L.R. 188 (Supreme Court of Nigeria)**
- Salter Rex and Co. v. Gosh (1971) 2 Q.B. 597 [1985 – 1989] **4 N.B.L.R. 191 (Supreme Court of Nigeria)**
- Shannon Realities Ltd v. Villede St. Michael (1924) A.C. 185 [1985 – 1989] **4 N.B.L.R. 466 (Supreme Court of Nigeria)**
- Singh and Co. v. Banque de Indochine (1974) 2 All E.R. 754 [1985 – 1989] **4 N.B.L.R. 224 (Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R. 297 (Supreme Court of Nigeria)**

- Singh v. Kulubyu (1961) 33 P.C. 67 [1985 – 1989] 4 N.B.L.R. 511 (Supreme Court of Nigeria)
- Skith Bird v. Blower [1939] 2 All E.R. 406 [1985 – 1989] 4 N.B.L.R. 79 (High Court of Bendel State)
- Smith v. Davies (1884) 27 Ch. D. 251 [1985 – 1989] 4 N.B.L.R. 372 (Court of Appeal, Lagos Division)
- Soproma S.P.A. v. Marie and Animal By-Products Corporation (1966) 1 Lloyd's Rep. 367 [1985 – 1989] 4 N.B.L.R. 308 (Supreme Court of Nigeria)
- Spurling Ltd v. Brandshaw (1956) 1 W.L.R. 461 [1985 – 1989] 4 N.B.L.R. 226 (Supreme Court of Nigeria)
- Standard Discount Co. v. Le Grange (1876 - 78) 3 C.P.A. 69 [1985 – 1989] 4 N.B.L.R. 190 (Supreme Court of Nigeria)
- Sussie Atlantique Societe d'Armement Maritime S.A.V.N. v. Rottendamsale Kolar Centrale (1967) A.C. 361 [1985 – 1989] 4 N.B.L.R. 226 (Supreme Court of Nigeria)
- Sztejn v. J. Henry Schroeder (1941) 31 N.Y.S. 2nd 631 [1985 – 1989] 4 N.B.L.R. 298 (Supreme Court of Nigeria)

## T

- Technistudy Ltd v. Killand (1976) 3 A.E.R. 632 [1985 – 1989] 4 N.B.L.R. 197 (Supreme Court of Nigeria)
- The Antonis P. Lemons (1985) 1 A.C. 711 [1985 – 1989] 4 N.B.L.R. 240 (Supreme Court of Nigeria)
- Thomas v. Jones [1921] 1 K.B. 22 at 37 [1985 – 1989] 4 N.B.L.R. 75 (High Court of Bendel State)
- Tildesley v. Harper (1878) 10 Ch. 293 [1985 – 1989] 4 N.B.L.R. 340 (Court of Appeal, Kaduna Division)

Index of Cases referred to

---

Towers v. Berretts (1786) 1 I.R. 133 [1985 – 1989] 4  
**N.B.L.R. 100 (Supreme Court of Nigeria)**

Tuet v. Rodriguez (1965) 176 SO. 2nd 550 [1985 – 1989] 4  
**N.B.L.R. 268 (Supreme Court of Nigeria)**

Turquand v. Board of Trade (1886) 11 A.C. 286 [1985 –  
1989] 4 N.B.L.R. 476 (Supreme Court of Nigeria)

U

U.C.M. v. Royal Bank of Canada H.L. (E) (1983) A.C. 196  
[1985 – 1989] 4 N.B.L.R. 207 (Supreme Court of  
Nigeria)

U.G.S. Finance Ltd v. National Mortgage United Bank of  
Greece (1964) 1 LL. Rep. 446 [1985 – 1989] 4 N.B.L.R.  
226 (Supreme Court of Nigeria)

United City Merchant (Investments) Ltd v. Glass Fibres and  
Equipment Ltd (1982) A.C. 168; [1985 – 1989] 4  
N.B.L.R. 159 (Supreme Court of Nigeria); [1985 –  
1989] 4 N.B.L.R. 225 (Supreme Court of Nigeria)

United City Merchants and another v. Royal Bank of  
Canada (1982) 2 W.L.R. 1039 [1985 – 1989] 4 N.B.L.R.  
207 (Supreme Court of Nigeria)

United City Merchants (Investments) Ltd v. Royal Bank of  
Canada (1983) A.C. 168 [1985 – 1989] 4 N.B.L.R. 295  
(Supreme Court of Nigeria)

W

Wallersteiner v. Moir (1974) 1 W.L.R. 991 [1985 – 1989] 4  
N.B.L.R. 436 (Court of Appeal, Enugu Division)

Warner v. Sampson (1959) 1 Q.B. 287 [1985 – 1989] 4  
N.B.L.R. 436 (Court of Appeal, Enugu Division)

Way v. Solomon (1947) 12 W.A.C.A. 175 [1985 – 1989] 4  
N.B.L.R. 245 (Supreme Court of Nigeria)

Westminister Bank Ltd v. Banco Nasionale di Credito  
(1928) 81 L.L. Rep. 306 [1985 – 1989] 4 N.B.L.R. 279  
(Supreme Court of Nigeria); [1985 – 1989] 4 N.B.L.R.  
161 (Supreme Court of Nigeria); [1985 – 1989] 4  
N.B.L.R. 328 (Supreme Court of Nigeria)

Wiedemann v. Walpole (1891) 2 Q.B. 534 [1985 – 1989] 4  
N.B.L.R. 74 (High Court of Bendel State)

Y

Yeoman Credit Ltd v. Apps (1962) 2 Q.B. 508 [1985 –  
1989] 4 N.B.L.R. 226 (Supreme Court of Nigeria)



## INDEX OF STATUTES REFERRED TO

### *Nigerian*

#### **Bills of Exchange Act, 1958**

s 24 .....	[1985 – 1989] 4 N.B.L.R. 339
s 60 .....	[1985 – 1989] 4 N.B.L.R. 337
s 90(1).....	[1985 – 1989] 4 N.B.L.R. 339

#### **Evidence Act, 1958**

s 34 .....	[1985 – 1989] 4 N.B.L.R. 7
s 73 .....	[1985 – 1989] 4 N.B.L.R. 115
s 76 .....	[1985 – 1989] 4 N.B.L.R. 116
s 99 .....	[1985 – 1989] 4 N.B.L.R. 119
s 148 .....	[1985 – 1989] 4 N.B.L.R. 126

#### **Evidence Law Eastern Nigerian, 1963**

s 137 .....	[1985 – 1989] 4 N.B.L.R. 438
-------------	------------------------------

#### **Federal High Court Act, No. 13, 1973**

s 7(1)(b)(iii) .....	[1985 – 1989] 4 N.B.L.R. 356
s 7(i)(b)(iii) .....	[1985 – 1989] 4 N.B.L.R. 251
s 8 .....	[1985 – 1989] 4 N.B.L.R. 356
s 24 .....	[1985 – 1989] 4 N.B.L.R. 356

#### **Federal Revenue Court Act**

s 7(1).....	[1985 – 1989] 4 N.B.L.R. 204
-------------	------------------------------

#### **Illiterates Protection Law (Cap 47)**

generally .....	[1985 – 1989] 4 N.B.L.R. 24
-----------------	-----------------------------

#### **Land Tenure Law of Northern Nigeria, 1992**

generally .....	[1985 – 1989] 4 N.B.L.R. 506
-----------------	------------------------------

#### **Land Use Act, 1978**

s 1 .....	[1985 – 1989] 4 N.B.L.R. 456
s 2(1)(a) .....	[1985 – 1989] 4 N.B.L.R. 495
s 2(1)(b) .....	[1985 – 1989] 4 N.B.L.R. 495

Nigerian Banking Law Reports

---

s 5(1)(a) .....	[1985 – 1989] 4 N.B.L.R. 456
s 5(1)(b) .....	[1985 – 1989] 4 N.B.L.R. 496
s 5(1)(c) .....	[1985 – 1989] 4 N.B.L.R. 496
s 5(2) .....	[1985 – 1989] 4 N.B.L.R. 496
s 6(1)(a) .....	[1985 – 1989] 4 N.B.L.R. 496
s 6(1)(b) .....	[1985 – 1989] 4 N.B.L.R. 496
s 9 .....	[1985 – 1989] 4 N.B.L.R. 459
s 15 .....	[1985 – 1989] 4 N.B.L.R. 462
s 20 .....	[1985 – 1989] 4 N.B.L.R. 467
s 21 .....	[1985 – 1989] 4 N.B.L.R. 386
s 22 .....	[1985 – 1989] 4 N.B.L.R. 386
	[1985 – 1989] 4 N.B.L.R. 390
	[1985 – 1989] 4 N.B.L.R. 391
s 34 .....	[1985 – 1989] 4 N.B.L.R. 462
s 34(1) .....	[1985 – 1989] 4 N.B.L.R. 451
s 34(2) .....	[1985 – 1989] 4 N.B.L.R. 386
	[1985 – 1989] 4 N.B.L.R. 455
s 34(4) .....	[1985 – 1989] 4 N.B.L.R. 456
s 34(6)(b) .....	[1985 – 1989] 4 N.B.L.R. 386
s 34(7) .....	[1985 – 1989] 4 N.B.L.R. 482
s 37 .....	[1985 – 1989] 4 N.B.L.R. 461
s 36 .....	[1985 – 1989] 4 N.B.L.R. 382
s 38 .....	[1985 – 1989] 4 N.B.L.R. 457
s 39 .....	[1985 – 1989] 4 N.B.L.R. 455
s 39(1)(a) .....	[1985 – 1989] 4 N.B.L.R. 455
s 39(4) .....	[1985 – 1989] 4 N.B.L.R. 456
s 40 .....	[1985 – 1989] 4 N.B.L.R. 470
s 41 .....	[1985 – 1989] 4 N.B.L.R. 456
s 45 .....	[1985 – 1989] 4 N.B.L.R. 456
s 48 .....	[1985 – 1989] 4 N.B.L.R. 456

**Lands and Native Rights Ordinance, 1919**

generally .....	[1985 – 1989] 4 N.B.L.R. 393
-----------------	------------------------------

**Merchant Shipping (Amendment) Decree No. 9 of 1978**

generally .....	[1985 – 1989] 4 N.B.L.R. 289
s 5 .....	[1985 – 1989] 4 N.B.L.R. 290

Index of Statutes referred to

---

**Pre-Shipment Inspection of Imports Act, No. 36, 1978**

s 9(2) ..... [1985 – 1989] 4 N.B.L.R. 357

**Public Lands Acquisition Ordinance, 1903**

generally ..... [1985 – 1989] 4 N.B.L.R. 474

**Supreme Court Act, 1960**

s 22 ..... [1985 – 1989] 4 N.B.L.R. 123

s 31(1)(2)(a) ..... [1985 – 1989] 4 N.B.L.R. 253

***Foreign***

**Administration of Justice Act, 1959 (England)**

s 1 ..... [1985 – 1989] 4 N.B.L.R. 203

s 1(i)(h) ..... [1985 – 1989] 4 N.B.L.R. 204

**Uniform Customs Practice for Documentary Credits,  
1974**

generally ..... [1985 – 1989] 4 N.B.L.R. 263

article 7 ..... [1985 – 1989] 4 N.B.L.R. 221

article 8(a) ..... [1985 – 1989] 4 N.B.L.R. 283



## INDEX OF RULES REFERRED TO

### *Nigerian*

#### **Anambra State High Court (Civil Procedure) Rules**

- Order 33, rule 9.....[1985 – 1989] 4 N.B.L.R. 435
- Order 33, rule 10.....[1985 – 1989] 4 N.B.L.R. 435
- Order 33, rule 11.....[1985 – 1989] 4 N.B.L.R. 435

#### **Court of Appeal Rules, 1981**

- Order 6, rule 3(a).....[1985 – 1989] 4 N.B.L.R. 389

#### **High Court (Civil Procedure) Rules, 1975**

- Order 5, rule 5(c).....[1985 – 1989] 4 N.B.L.R. 61
- Order 10, rule 9.....[1985 – 1989] 4 N.B.L.R. 62
- Order 24, rule 5(3).....[1985 – 1989] 4 N.B.L.R. 61
- Order 27, rule 8.....[1985 – 1989] 4 N.B.L.R. 7
- .....[1985 – 1989] 4 N.B.L.R. 62

#### **High Court (Civil Procedure) Rules, Ogun State**

- Order 29, rule 7.....[1985 – 1989] 4 N.B.L.R. 17

#### **High Court of Lagos State (Civil Procedure) Rules, 1972**

- Order 9, rule 2.....[1985 – 1989] 4 N.B.L.R. 12
- Order 10, rule 1.....[1985 – 1989] 4 N.B.L.R. 352
- Order 10, rule 3.....[1985 – 1989] 4 N.B.L.R. 352
- Order 22, rule 1.....[1985 – 1989] 4 N.B.L.R. 380
- Order 22, rule 5.....[1985 – 1989] 4 N.B.L.R. 380
- Order 35, rule 1.....[1985 – 1989] 4 N.B.L.R. 12
- Order 35, rule 2.....[1985 – 1989] 4 N.B.L.R. 12

#### **Supreme Court Rules, England**

- Order 49, rule 18.....[1985 – 1989] 4 N.B.L.R. 27



## INDEX OF BOOKS REFERRED TO

- Achike *Commercial Law in Nigeria***  
 page 158 ..... [1985 – 1989] 4 N.B.L.R. 345
- Bowstead on Agency (13ed)**  
 page 24, illus 3 ..... [1985 – 1989] 4 N.B.L.R. 72
- Bullen, Leake and Jacobs *Precedent of Pleading* (12ed)**  
 page 83 ..... [1985 – 1989] 4 N.B.L.R. 436
- Chalmer's *Bills of Exchange* (13ed)**  
 page 24 ..... [1985 – 1989] 4 N.B.L.R. 344  
 page 72 ..... [1985 – 1989] 4 N.B.L.R. 331
- Chitty's *Contracts* (24ed)**  
 para 1784 ..... [1985 – 1989] 4 N.B.L.R. 360  
 para 1785 ..... [1985 – 1989] 4 N.B.L.R. 360
- Chitty's *Contracts* (25ed)**  
 vol 1, page 1472, para 884 . [1985 – 1989] 4 N.B.L.R. 226
- Craies *Statute Law* (7ed)**  
 page 118 ..... [1985 – 1989] 4 N.B.L.R. 490  
 page 127 ..... [1985 – 1989] 4 N.B.L.R. 444
- Cross's *Precedent in English Law* (3ed)**  
 page 22 ..... [1985 – 1989] 4 N.B.L.R. 171
- Ellingers *Documentary Letters of Credit***  
 page 155 ..... [1985 – 1989] 4 N.B.L.R. 275
- English and Empire Digest***  
 vol 21, page 747,  
 article 1790..... [1985 – 1989] 4 N.B.L.R. 33
- Gutteridge and Megrah: *The Law of Bankers***  
***Commercial Credits* (7ed)**  
 page 77 ..... [1985 – 1989] 4 N.B.L.R. 275
- Halsbury's *Laws of England* (3ed)**  
 para 138 ..... [1985 – 1989] 4 N.B.L.R. 321  
 vol 9, para 350-351..... [1985 – 1989] 4 N.B.L.R. 359

**Halsbury's Laws of England (4ed)**

- vol 1, para 784 ..... [1985 – 1989] 4 N.B.L.R. 78
- vol 4, para 906 ..... [1985 – 1989] 4 N.B.L.R. 490

**Maxwell Interpretation of Statutes (10ed)**

- page 212 ..... [1985 – 1989] 4 N.B.L.R. 394
- page 213 ..... [1985 – 1989] 4 N.B.L.R. 382
- page 293 ..... [1985 – 1989] 4 N.B.L.R. 486

**Odger's Principles of Pleading and Practice (21ed)**

- page 46 ..... [1985 – 1989] 4 N.B.L.R. 6
- page 47 ..... [1985 – 1989] 4 N.B.L.R. 6

**Okoye's Civil Proceeding**

- vol 1, page 70, para 78 ..... [1985 – 1989] 4 N.B.L.R. 33

**Orojo's Nigeria Commercial Law and Practice**

- vol 1, page 316, para 6.3 .... [1985 – 1989] 4 N.B.L.R. 344

**Paget's Law of Banking (8ed)**

- page 33 ..... [1985 – 1989] 4 N.B.L.R. 343
- page 84 ..... [1985 – 1989] 4 N.B.L.R. 420

**Sarna's Letters of Credit**

- page 121 ..... [1985 – 1989] 4 N.B.L.R. 275

**Supreme Court Practice, 1979**

- para 13/34/3 ..... [1985 – 1989] 4 N.B.L.R. 373

**Supreme Court Practice, 1982**

- para 27/2/1 ..... [1985 – 1989] 4 N.B.L.R. 368
- para 2/1 ..... [1985 – 1989] 4 N.B.L.R. 380
- para 2/2 ..... [1985 – 1989] 4 N.B.L.R. 380

**Supreme Court Practice, 1985**

- order 14 ..... [1985 – 1989] 4 N.B.L.R. 363
- para 14/1/2 ..... [1985 – 1989] 4 N.B.L.R. 363
- para 12/1/3 ..... [1985 – 1989] 4 N.B.L.R. 363
- para 27/3/2 ..... [1985 – 1989] 4 N.B.L.R. 376



*a*

## Takaya v. Union Bank of Nigeria Limited

HIGH COURT OF KADUNA STATE

*b*

MOHAMMED CJ

Date of Judgment: 3 APRIL 1985

Suit No.: K.D.H. 273/82

*c* *Banking – Banker/customer relationship – Cheque issued by customer payable to self – Proceeds of cheque paid to wrong person – Liability of bank for negligence – When customer will be liable for contributory negligence*

*d* *Banking – Banker/customer relationship – Negligence of bank official – Vicarious liability of bank*

*e* *Banking – Cheques – Customer issuing cheque payable to self – Proceeds of cheque paid to wrong person – Customer claiming amount in cheque with interest – Propriety of – Need to lead evidence as to rate of interest*

### Facts

*f* The plaintiff was a customer of the defendant bank. He had an account at the Zaria branch. On Friday, 14th May, 1982, he went to the bank, wrote out a cheque for ₦6,300 payable to “cash” and handed it over to the cashier. After waiting for two hours, except for the brief period he went to buy newspapers, he inquired from the cashier who told him that the money had been paid to one Yusuf who presented himself as the houseboy of the plaintiff but showed no letter of authority to collect the money.

*h*

The defendant later agreed to pay the plaintiff the ₦6,300 but not the interest demanded by the plaintiff.

*i* The plaintiff therefore brought this action claiming the sum of ₦6,300 representing the value of the cheque. Interest at 10% per annum until judgment is delivered and thereafter at 6% until the judgment is satisfied; and ₦1,000 being general damages for inconvenience of securing the said amount from other source.

*j*

The plaintiff did not call evidence as to interest and the defendant contended that the plaintiff having refused to accept the offer to pay the ₦6,300 he is estopped from claiming interest.

**Held –**

1. The relation in law between a banker and his customer is that of debtor and creditor. When a bank credits the current account of its customer with a certain sum, the bank becomes a debtor to the customer in that sum. Also, when a bank debits the current account of a customer with a certain sum, the customer becomes a debtor to the bank in that sum. Whichever party is the creditor is entitled to sue, if demand for payment was not complied with.
2. Since the plaintiff did not call evidence that the bank rate of interest as at 14th May, 1982 was 10% and not less, the court will not grant this item of claim.
3. In a plea of contributory negligence, the defendant admits the negligence but that the plaintiff has contributed to their negligence. In the instant case, the cashier of the defendant was negligent and the defendants are vicariously liable for her negligence. They were in breach of their duty to the plaintiff to take care that they did not pay his cheque to someone who did not have authority to be paid. The act of the plaintiff in going out of the bank did not in any way contribute to the negligence.

*Judgment for the plaintiff.*

**Cases referred to in the judgment**

***Nigerian***

*Ezeani v. Ejidike* (1965) N.M.L.R. 95 at 98

*Yesufu v. ACB* (1981) 1 S.C. 74 at 92

*a Foreign*

*Foley v. Hill* (1848) 2 H.L. Case 28

*Hirschorn v. Evans (Barclays Bank Ltd Garnishee)* (1938)3

*b All E.R.* 491 at 498

*Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. 110

**Nigerian statute referred to in the judgment**

*c Evidence Act*, section 134

**Nigeria rule of court referred to in the judgment**

*d High Court (Civil Procedure) Rules*, Order 27, rule 8

**Books referred to in the judgment**

*Odger's Principle of Pleading and Practice* (21ed) pages 46-47

*e Paget's Law of Banking* (8ed), page 83-84

**Counsel**

For the plaintiff: *Dauda*

*f For the defendant: Amartey*

**Judgment**

*g MOHAMMED CJ:* The plaintiff's claim against the defendant as itemised in paragraph 17 of the statement of Claim are as follows:–

*h i. ₦6,300 representing the value of the cheque No. 36755/082226.*

*ii. Interest at 10% per annum until judgment is delivered and thereafter at 6% until the judgment is satisfied.*

*i iii. ₦1,000 being general damages for inconvenience of securing the said amount from other source.*

The gist of the plaintiff's case against the defendants is that on Friday 14/5/82 he went to the defendant Zaria branch where he had an account and wrote a cheque for ₦6,300 payable to "cash" and handed it to the cashier. The cashier

*j*

paid the sum of ₦6,300 to someone who was not authorised by the plaintiff to receive the cash. *a*

Only the plaintiff testified for himself and his evidence is straightforward. He told this Court that on Friday 14/5/82 he went to the Zaria branch of the defendants, wrote out a cheque for ₦6,300 payable to cash and handed it over to a lady cashier. The cashier looked at the cheque and him before stamping it and passing it over for clearance. He sat on a bench and waited. After about 2 hours of waiting he went to the cashier to enquire. The cashier asked if he was not Bala Takaya and on answering her in affirmative she said he had collected his money. He denied being paid. The cashier then told plaintiff that he had sent one Yusuf or anyone to collect the money. The cashier insisted that Yusuf went to her and told her that plaintiff had issued two cheques and that he, Yusuf was to collect the ₦6,300. She showed plaintiff the name Yusuf written at the back of the cheque. When plaintiff insisted he had neither collected the money nor sent anybody to collect it, then cashier yelled and closed her till. *b c d e*

Plaintiff tried to see the accountant without success. After a long time of waiting he finally saw the manager who without hearing plaintiff's side of the story accused him of negligence. When however plaintiff told him what happened he changed his mind. Plaintiff asked the manager to pay him the ₦6,300, there and then but the manager refused on the ground that he had to have police report to do that. After some correspondence as evidenced in exhibits 1-4, the defendants agreed to pay the plaintiff the ₦6,300 but not the interest demanded by plaintiff. *f g h*

The plaintiff said during the 2 hour wait in the bank he went out briefly to buy newspaper and have his watch fixed. He was out for only about ten minutes. *i*

For their part the defendants called 2 witnesses. DW1 was the cashier to whom plaintiff handed over his cheque on 14/5/82. She passed the cheque for reference and after it was *j*

- a* returned to her she recorded it in her book and called the name of the drawer, “Mallam Bala Takaya” three times. She said nobody answered. So she kept the cheque aside. She
- b* knew that “Mallam Bala Takaya” was the drawer of the cheque because of the signature and the endorsement on the back of the cheque. She paid the ₦6,300 on plaintiff’s cheque to one Mallam Yusuf who she said claimed to be Bala Takaya’s houseboy. About 10 minutes after she paid
- c* this ₦6,300 to Yusuf plaintiff complained to her about the cheque he had earlier on presented. She said she explained to him how she paid it out to Yusuf. Plaintiff denied sending Yusuf or anyone to collect the sum in his cheque. At this
- d* time Yusuf was no longer in the bank premises.

- In cross-examination the witness said she is conversant with all the precautions necessary before a cashier pays out money. Witness said that in respect of the plaintiff’s cheque,
- e* in view of the endorsement at the back, it can be paid to bearer and she paid to bearer. From her experience and by banking practice a cashier is required to look at people who present cheques to him for purposes of identification at
- f* payment stage. She did not however look at the person who presented this cheque, as 14/5/82 was a busy day. By banking rules where someone else, other than the drawer is to be paid, he is required to sign the cheque at presentation. In this
- g* case only the drawer signed, the presenter did not sign. Witness further said that she called plaintiff’s name 3 times because he was the only person she was supposed to pay the cash to. She however paid to Yusuf and not to plaintiff because the former introduced himself to her as the latter’s
- h* house-boy and mentioned the amount on the cheque. She conceded that it would have been better, by banking practice if Yusuf had produced a letter of introduction signed by plaintiff. She also agreed that she took a risk in paying Yusuf without plaintiff’s signed letter of introduction and
- i* authority to pay.

- DW2 saw the cheque in question. She handled it in her official capacity and returned it to 1 D.W as everything about
- j* it was in order.

In his address Mr *Amarley*, counsel for defence said defendants are not denying negligence, it is on the strength of this admission of negligence that they agreed to pay plaintiff the ₦6,300. He conceded the first item of the plaintiff's claim and since this is so plaintiff's first item of claim, ₦6,300 succeeds.

On the second item of the claim, learned counsel for defendants submitted that the plaintiff having refused to accept defendants' offer to pay him the ₦6,300 (which offer was made in February, 1983) he is estopped from claiming any interest therein either before or after that date. No authority was however cited by counsel to support this view. Mr *Daudu*, for the plaintiff, submitted, by reference to the Supreme Court decision in: *Chief F. Yesufu v. African Continental Bank Ltd* (1981) 1 S.C. 74 at page 92 that the banker/customer relationship is that of creditor and debtor. Learned Counsel also relied on Odgers' *Principles of Pleading and Practice* (21ed), pages 46-47. He further submitted that in the circumstances of this case the plaintiff is entitled to interest which the bank would ordinarily have charged, had the current account of the plaintiff been overdrawn or had the plaintiff been a debtor to the bank.

I have read the decision in *Chief F Yesufu* and there is no doubt that Mr *Daudu* stated the correct position of the laws as far as the relationship of banker/customer is concerned. Bello JSC, in the *Yesufu* case (*supra*) said on page 92:—

“Since the celebrated case of *Foley v. Hill* (1848) 2 H.L. Case 28 the relation in law between a banker and his customer has been that of a debtor and creditor: see also *Hirschorn v. Evans (Barclays Bank Ltd Garnishee)* (1938) 3 All E.R. 491 at page 498. When a bank credits the current account of its customer with a certain sum, the bank does become a debtor to the customer in that sum: *Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. 110; and conversely when a bank debits the current account of a customer with a certain sum, the customer becomes a debtor to the bank in that sum: See Paget's *Law of Banking*, (8ed), page 84. Whichever party is the creditor is entitled to sue, if demand for payment was not complied with, the other party for money lent see: *Joachimson v. Swiss Bank Corp (supra)*.”

*a* While the principle enunciated above is quite clear it does not dispose of the issue of claim for interest. Plaintiff claims “10% interest per annum until judgment is delivered and thereafter at 6% until the judgment is satisfied.” The plaintiff however did not call any evidence in proof of this claim and clearly the burden of proving it is on him. See section 34 of the Evidence Act. In the absence of any evidence that the bank rate of interest as at 14/5/82 was 10% and not less, this item of claim cannot succeed and it is dismissed. I should add that I am quite conscious of the statement of defence and the address of learned counsel on this matter. I remind myself that a plaintiff’s case is not won or lost on the weakness of a defendant’s case; it is won or lost on its own strength, built up by proof of the assertions he has made.

*e* Another point: plaintiff in addition to the 10% interest per annum also claims 6% interest from date of judgment until judgment is satisfied. While no evidence on this has been led, it occurred to me that this might not be unrelated to the provision of Order 27, rule 8 High Court (Civil Procedure) Rules. Order 27, rule 8 however provides for interest at the rate of 10% from date of judgment and this is apparently automatic unless otherwise ordered by the Court.

*g* On the last item the defendant pleaded contributory negligence. They argued that the act of the plaintiff in leaving the bank contributed to their negligence. It must be pointed out that in a plea of contributory negligence the defendants admit negligence. So what I am to decide here is whether the plaintiff’s act of going out of the bank did in fact contributed to the negligence. I am unable to hold that the plaintiff contributed to the defendant’s negligence. 1DW, the cashier clearly admitted paying the proceeds of the cheque to the wrong person and this she did without taking all necessary precautions of ensuring that she paid to the right person. Her evidence in this regard shows:—

*j* “I agree I took a risk in paying Yusuf without plaintiff’s signed letter of introduction and authority to pay.”

1DW is an employee of defendants and defendants are vicariously liable for her acts. She was no doubt negligent and the defendants are vicariously liable for her negligence. They were in breach of their duty to the plaintiff to take care that they did not pay his cheque to someone who did not have authority to be paid. As I said the act of the plaintiff in going out of the bank did not in any way contribute to this negligence. Accordingly I find the defendants liable in negligence.

What remains is to assess damages for this negligence. The plaintiff said as a result of it he suffered a lot of inconvenience. He was going to pay back debts but because of this episode he could not pay back the debts. He claims ₦1,000 for this inconvenience. There is not much to guide me on how much this inconvenience is worth in money terms, although reference was made to *Ezeani and others v. Ejidike* (1965) N.M.L.R. 95 at page 98. All the same, considering the time it has taken plaintiff in this Court and the inconvenience I assess damages for the negligence at ₦450 which I award to him against the defendants.

Altogether judgment is entered for plaintiff against the defendant in ₦6,300m being the value of his cheque and ₦450 being damages for negligence. I assess costs at ₦300 for plaintiff against defendants.



*a*

## Isindinzo v. Adeniyi

*b*

HIGH COURT OF LAGOS STATE

LONGE J

Date of Judgment: FRIDAY 28 JUNE 1985

Suit No.: ID 91/83

*c*

*Banking – Cheques – Need for number on the cheque to correspond with number on its counterfoil*

### Facts

*d*

The plaintiff sued the defendant for the sum of ₦65,000 being special and general damages for breach of contract to install and maintain five radio telephone equipment in plaintiff's premises within 14 weeks. The defendant failed to appear in Court nor his counsel even though the Court discovered that he filed a defence.

*e*

*f*

The Court ordered that evidence be adduced by the plaintiff in proof of his claim. The plaintiff tendered a receipt which he said was issued for payment made to the defendant. He said that the defendant never performed the contract within 14 weeks as agreed upon and as a result he had to rent radio telephones from another Company for which he paid money. No document was tendered in proof thereof. The receipts tendered by the plaintiff to support the Contract agreement bear dates which were earlier in time than the date of the Contract agreement.

*g*

*h*

*i*

The plaintiff also tendered a receipt issued by the defendant and the counterfoil of the cheque issued by the plaintiff but the number on the counterfoil was different from the number of cheque quoted on the receipt allegedly issued by the defendant.

*j*

The plaintiff also claimed general damages but nothing was said about this by the plaintiff's witness and his Counsel.

**Held –**

1. A cheque should bear the same number with its counter-foil.

*Plaintiff's claim dismissed.*

**Nigerian rules of court referred to in the judgment**

High Court (Civil Procedure) Rules, Lagos, Order 9, rule 2, Order 35, rules 1 and 2

**Counsel**

For the plaintiff: *Cunsam*

**Judgment**

**LONGE J:** The plaintiff's claim against the defendant as endorsed on plaintiff's writ of summons dated 11th February, 1983 is as follows:–

“The sum of ₦65,000 (sixty five thousand naira) being special and general damages for breach of contract to install and maintain five radio, telephone equipments in plaintiff's premises within 14 weeks.”

The plaintiff gave the particulars of the amount as follows:–

## Special damages:

1. On agreement dated 25th January, 1982	₦	20,040.25
2. On quotation dated 8th March, 1982	₦	25,567.30
3. Cost of rentals	₦	3,500.00
4. Operators salaries	₦	5,000.00
	₦	54,107.55
General damages: Loss of use	₦	10,892.45
Grand Total	₦	65,000.00

In a statement of claim dated 11th February, 1983 the plaintiff describes himself as a quantity surveyor and that the defendant is a principal partner in the firm of Messrs Esugo Isiadmiso and Partners based in Lagos.

- a* In paragraph 2 of the statement of claim the plaintiff further describes the defendant as a Communications Engineer who at the time was engaged in the supply, installation and maintenance of radio telephones in plaintiff's offices in Lagos, Enugu and Jos.

The statement of claim further shows that:

- c* 1. There was an agreement dated 25th January, 1982 signed by both parties for the execution of the installation.
2. That consequent on this agreement two sums of money that is ₦20,040.25k and ₦25,567.30k were paid to the defendant.
- d* 3. That various steps were taken by the plaintiff on behalf of the defendant in order to facilitate the work of the defendant like application for License from the Federal Ministry of Telecommunication and the training of staff that would work with the radio when installed.
- e* 4. That the job is expected to be executed within 14 weeks.
5. That on May, 1982, several months after the job should have been completed the defendant brought and installed two radios at plaintiff's premises but that these radios did not function and defendant had to remove them for maintenance.
- f* 6. That the radios were never returned and the police had to intervene.
- g* 7. That in March, 1982, the defendant contracted to install three more radios for the plaintiff.
- h* 8. That as a result of the defendant's breach to install and maintain the radio telephones the plaintiff incurred expenses in renting radio telephones.

- i* A bailiff's affidavit of service dated 3rd March, 1983 shows that the defendant was served with the Writ of Summons and statement of claim on 28th April, 1983.

- j* The defendant never filed any Memorandum of Appearance neither did he cause a statement of defence to be served on the plaintiff.

The plaintiff then brought a Motion on Notice dated 13th October, 1983 under Order 9, rule 2 and Order 35, rules 1 and 2 of the High Court of Lagos State (Civil Procedure) Rules praying for leave to enter judgment against the defendant for default of appearance and defence. a  
b

Order 9, rule 2 permits the plaintiff to ask for judgment in default of appearance by the defendant. The plaintiff could do so under any of the rules in Order 9 if the amount is a liquidated one. The plaintiff never stated under which of the other rules in Order 9 he sought the leave for judgment. The court too believing that the sum of money claimed is not only a liquidated one decided to take evidence rather than give leave to enter judgment. c  
d

This suit proceeded to hearing on 27th September, 1984. The plaintiff called only one witness to establish his case. e

The witness is one Mr Ujobundu Ojimaga. He described himself as the administrative manager of the plaintiff's company. He testified that he was in charge of administrative duties in the plaintiff's company. He said he acted for the principal partner in the plaintiff's company on certain matters within his knowledge and such matters delegated to him by the principal partner. He testified that he knew the defendant and that the defendant had shown himself as an expert in internal communications and engineering services. f  
g

The witness said that pursuant to an agreement dated 25th February, 1982 entered between the plaintiff and the defendant, the plaintiff paid the sum of ₦20,040 to the defendant for the supply, maintenance and installation of two radio telephones at Enugu and Aguda, Lagos at plaintiff's premises. He said the defendant issued a receipt. He then tendered receipt No. 0037 of 20th October, 1981 for ₦20,040.25k and it was admitted as exhibit 1. He also tendered some documents which he said the defendant submitted to the plaintiff as quotation for the jobs. These quotation h  
i  
j

- a* sheets were admitted as exhibits 2, 2A, 2B, 2C, 2D and 2E. These documents carry the plaintiff's official stamp which bears the date of 5th October, 1981. The witness testified
- b* that these documents were submitted by the defendant before he was paid the amount on exhibit 1. The witness then tendered the contract document between the parties, the document was admitted as exhibit 3.
- c* He testified further that since it was necessary to obtain license before operating any radio the plaintiff obtained such license and tendered three receipts obtained by the plaintiff in the process. The receipts were received as exhibits 4, 4A and 4B; 5, 5A; 6 and 6A.

Exhibit 4 dated 4th December, 1981 is for ₦20,500

Exhibit 4A dated 21st January, 1983 is for ₦500

- e* On behalf of Omile Products Ltd, Enugu exhibit 4B dated 21st January, 1983 is for ₦500 exhibits 5-6 are the licenses. The witness testified further that on 8th March, 1982 another
- f* contract was awarded to the defendant and that the defendant submitted quotation for it. He tendered a document, received as exhibit 7 as being the quotation. He also tendered the counterfoil of a bank cheque showing the sum of ₦25,567.30k as the cheque issued to the defendant for the
- g* quotation price on exhibit 7. The counterfoil cheque was received as exhibit 8. He tendered a receipt which he was issued for the payment of the sum of ₦25,567.30k to the defendant. The receipt was admitted as exhibit 8A. He said the
- h* defendants never performed the contract within 14 weeks as agreed upon. He said because of failure of defendant to execute the contract, the plaintiff rented two radio telephones from Harris Corporation. He said they paid ₦3,000 for the
- i* rentals and paid ₦5,000 to the operators they employed. None of these accounts had any document to support it. The plaintiff closed his case.

- j* Alhaji Gusau, plaintiff's counsel then addressed the Court. The counsel submitted that the contract had not been executed

within the time. He submitted that plaintiff paid for it and *a*  
when plaintiff did not get what he contracted for he was put  
into additional expenses. He referred me to the various sums  
of money paid by the plaintiff to the defendant. He urged me *b*  
to hold that the defendant had caused a breach of contract to  
the plaintiff. He urged me to find for the plaintiff as per the  
Writ of Summons. Let it be noted from the onset that al-  
though the plaintiff claims the sum of ₦10,892.45k as gen- *c*  
eral damages, the only witness of the plaintiff never touched  
upon this aspect of plaintiff's case during his evidence-in-  
chief. The plaintiff's counsel too never addressed me on it.  
However, if it is found that the plaintiff has established his *d*  
case against the defendant the Court is at liberty to award  
any general damages it deems fit in the circumstances.  
When the evidence in this case and the address was com-  
pleted, judgment was reserved till 22nd November, 1984. In *e*  
the course of writing the judgment, it was discovered that  
the defendant had filed a statement of defence to the suit on  
5th May, 1983, the statement of defence was not endorsed  
with the plaintiff's address consequently it was never served.  
The court refused to close its eyes to this statement of de- *f*  
fence, the judgment was therefore not written and the suit  
was further adjourned in order to get in touch with the de-  
fendant to defend the suit in the light of the statement of de-  
fence he had filed. Several efforts were made by the court *g*  
bailiff to get the defendant. The plaintiff's counsel checked  
the defendant's address in the companies registries, Lagos  
but all efforts to trace him proved abortive. The Court then  
decided to review the plaintiff's case and deliver judgment. *h*

As shown in the plaintiff's evidence the basis for the con-  
tractual relationship between the plaintiff and the defendant  
is the contract agreement executed by both parties. The *i*  
agreement is exhibit 3 in this suit. Exhibit 3 is dated 25th  
January, 1982.

One very noticeable fact in the plaintiff's case is that all  
the first set of receipts tendered as exhibits to support the *j*

*a* contract agreement bear date, which are earlier in time to the contract agreement. There is no evidence before me that the jobs were done and paid for before the contract agreement was executed. For instance receipt No. 0037 for ₦20,040k is dated 20th October, 1981 whereas the agreement under which the job is said to have been done is dated 25th January, 1982, exhibit 3. Secondly exhibit 4 for ₦2,500 is dated 4th December, 1981.

*b* I find it hard to believe that these receipts of earlier dates are used for the jobs contracted for exhibit 3. Exhibit 4A, another receipt dated 21st January, 1983 is within exhibit 3 as regards date but the amount on it ₦500 is said to have been received from one Omile Products Ltd” a name that is different from the plaintiff’s name in this case. There is no explanation in connection of that name to the plaintiff.

*c* Exhibit 4B is another receipt for the sum of ₦500 and it is dated 21st January, 1983 that is within the date of exhibit 3, however, the amount is said to be for the renewal of the Radio License. The plaintiff’s evidence is that he applied for and obtained a License for the defendant to install the radio’s and not that he renewed a Radio License. Thus for the reasons I have shown above I do find the plaintiff’s claim on the first item as endorsed on the writ of summons had been strictly proved. It is dismissed. The plaintiff has not specifically pleaded the amount for obtaining license and renewal of it. The evidence to these points therefore go to no issue and the claims are dismissed.

*d* Although, the plaintiff testified on rentals of radio sets, there is no document or receipts to support such rental and the amount paid for the rental. This is an item of special claim and it must be strictly proved. The claim of ₦3,000 for rental is also dismissed. The plaintiff also testified on the amount of ₦5,000 allegedly paid as salaries. The evidence on this point is very scanty and I do not find that it has established the claim. For instance, the plaintiff has not told the Court how many of such staff were employed, for what

period and at what salary per month. There are no salary vouchers tendered or receipts of payment to the staff. The item is another one of special claims which must be strictly proved.

The last item of claim is for ₦25,567 based on exhibit 7, in a quotation for work submitted by the defendant. The plaintiff testified and tendered exhibits 8 and 8A as the counterfoil of cheque and the receipt issued by the defendant respectively for the payment of this amount. While one may not doubt plaintiff's evidence on this aspect of the matter, one has to say that a proper and close examination of exhibits 8 and 8A submitted by the plaintiff have nothing to recommend them as documents that can validly support oral evidence. exhibit 8 is the counterfoil of a cheque for ₦25,567 with cheque number 474795 of 9th March, 1982 however the receipt allegedly issued to cover this amount is not only improperly dated but is endorsed to the effect that the amount was paid by a cheque number. "BAVE 364860" I believe a cheque should bear the same number with its counterfoil. It is not so in this instance and this has created a vacuum in the plaintiff's claim under this item. I do not believe that these two documents have succeeded to establish the plaintiff's claim of ₦25,567.30.

The trite principle of law is that even if the defence fails to defend the suit plaintiff cannot get judgment except he establishes his case within the law as laid down. In this suit the plaintiff has not so satisfied me in his claim against the defendant.

From the facts I have found in this case the plaintiff's case against the defendant has not been made out. The case is therefore dismissed. There shall be costs of ₦200 for the defendant against the plaintiff.



*a*

**National Bank of Nigeria Limited v.  
Okusolubo**

*b*

HIGH COURT OF OGUN STATE

CRAIG CJ

Date of Judgment: 16 JULY 1985

Suit No.: AB 128/84

*c*

*Banking – Loan agreement – Terms of the agreement – Duty on banker to bring to the notice of customer thereof*

*Banking – Loan agreement – Where customer disputes amount claimed by bank – On whom lies the onus of proof*

*d*

**Facts**

The plaintiff claims the sum of ₦15,063.07 at the rate of 13% per annum being overdraft facility granted to the defendant who had been a customer since 1974.

*e*

The defendant in 1976 applied for the said overdraft by his application dated 29th October, 1976 requesting for ₦15,000. The bank only agreed to grant the sum of ₦6,000 and that approval was communicated to the defendant verbally.

*f*

**Held –**

*g*

1. Where a customer disputes the amount claimed by the bank, the onus is on the bank to prove the entire contract, the sum borrowed and the terms of the loan.

*h*

2. Where there is an agreement for an overdraft facility to a customer, it is the duty of the bank to bring all the terms of the loan agreement clearly to the notice of the customer.

*i*

Plaintiff's claims succeeds in part.

**Cases referred to in the judgment**

***Nigerian***

*j*

*Jibosu v. Obadina* (1962) W.N.L.R. 303

**Foreign**

*a*

*Parr's Banking Company Ltd v. Yates* (1898) 2 G.P. 460

**Nigerian statutes referred to in the judgment**

*b*

High Court (Civil Procedure) Rules, Ogun State, Order 29, rule 7

Illiterates Protection Law (Cap 47) 1978

*c*

**Counsel**

For the plaintiff: *Adenekan*

For the defendant: *Madandola*

*d*

**Judgment**

**CRAIG CJ:** The plaintiff is a limited liability Company engaged in banking business throughout Nigeria, and it has made a claim against one of its customers for:

*e*

- “1. the sum of ₦15,063.07 at 13% per annum interest until final payment being overdraft taken by the defendant from the Abeokuta branch of the plaintiffs.
2. The defendant refused to settle the overdraft in spite of repeated demands by the plaintiffs.”

*f*

Perhaps, it is necessary at this early stage of the judgment, to say that although the plaintiff is one of the oldest and well established banking houses in Nigeria, yet the case presented in this instance was that of a confused and disorganised creditor. Important letters were not produced at the trial whilst some of those tendered were either badly defaced or totally illegible. What is more, the only witness for the bank had no personal knowledge of the origin of the debt.

*g*

*h*

Briefly, the facts are that the defendant has been a customer of the bank since 1974, and some time in 1976, he applied for an overdraft. In his application, dated 29th October, 1976 (exhibit 21) the defendant asked for ₦15,000; there was no written reply to this request, but according to the plaintiff's witness, the bank agreed to grant the defendant only a sum of ₦6,000 and that approval was conveyed to the defendant verbally.

*i*

*j*

*a* I pause here for a moment to say that this bit of evidence conflicts with exhibit 23, a letter written by the defendant to acknowledge the loan. In it, the defendant said:

*b* “Dear Sir,

*Re: Application for an Overdraft of ₦15,000*

I thank you for your letter dated 17th December, 1976 on the above subject matter.

*c* I write to thank you for the approval of ₦6,000 for me, with the rate of interest and the period of the facility.

Thanks for your co-operation.

Yours Faithfully,

*d* (Sgd)

Adisa Okusolubo.”

This document clearly shows that:

*e* (a) The approval for the overdraft was communicated to the defendant in writing.

(b) The agreement for an overdraft was subject to some terms and conditions.

*f* Now the letter dated 17th December, 1976 referred to in exhibit 23 was not tendered in evidence and no oral testimony was given about the rate of interest or the period of the facility granted. Indeed, Alhaji Moliki Folarin (PW1) stated that

*g* he joined that Imo branch of the bank in September, 1982 and he could not, therefore, have given evidence of the incidence which took place in 1976. He however, tendered exhibits 27-27D, 39-42. These are the bank’s ledger cards relating to the defendant’s account. On the front of exhibit 41

*h* these words were written in red ink apparently by a bank official:

<i>i</i>	“Overdraft Limit	Interest Rate
	₦6,000	10%

Expiry date: 15th June, 1977

Special Instructions: Facilities continue

*j* Application for renewal pressing.”

Although these details have been admitted in evidence, they were not signed by the defendant and it was obvious that they were intended for official use by the bank. What is important is that the plaintiff must show that the terms and conditions shown on the ledger cards were the same as were agreed upon, and communicated to the defendant in the bank's letter dated 17th December, 1976. Unfortunately, that evidence was not forthcoming.

Again, the bank's witness tells me that the defendant's statement of accounts were sent to him from time to time; (the defendant denied this fact) yet, no copy of such statement was tendered in evidence and I am unable to say whether these extra details were ever inserted in the statements forwarded. In this respect, I notice that there are other details in red ink and pencil marks on these cards and it is difficult to say which, if any, of these details were inserted in the customer's statement of account. In the absence of the evidence of a bank official who was working on the defendant's account at the material time, I cannot say that these statements were ever forwarded. On a calm reflection. I accept the evidence of the defendant that he did not receive any statement of account and hold that no statements were forwarded to him.

As previously stated, exhibit 41 shows that the overdraft facility was for a period of 6 months from 17th December, 1976 to 15th June, 1977. The Ledger Card (exhibit 27) shows that when that period expired, the overdraft was increased to ₦7,000 and the period was extended for one year up to 15th June, 1978. There was no evidence to show that the increase was granted at the instance of the defendant or that the terms and conditions of this new contract were ever communicated to the defendant.

However, later events showed that on 24th May, 1978 the defendant made a request for an extension of "the overdraft facilities of ₦7,000 which expire on 15th June, 1978 for another six months": see exhibit 24.

*a* Again, there was no reply to this request nor was there evidence that the plaintiff agreed to grant the overdraft and at what rate of interest.

*b* I make mention of these facts because if the agreement between the parties is to be recognised at law then it must carry all the attributes of a contract.

*c* In the present case, one finds that in some instances, the defendant made offers, which were not accepted, in other instances, moneys were given out to the defendant without any request for such moneys. I cannot imagine a more unprofessional way of transacting business with a bank customer.

However, that may be, the defendant continued to operate his account until sometime in April, 1978, see exhibit 39.

*e* The plaintiff's witness referred to the various Ledger Cards already in evidence and stated that as at October, 1984, the defendant was owing a sum of ₦15,603.07 which represents the principal loan granted together with interest at 13%. He

*f* did not say what the principal loan was or how the amount was arrived at. He also did not say when the bank increased the rate of interest from 10% to 13% and whether the new rate was with the agreement of the defendant. He concluded his evidence by saying that the plaintiff has made several

*g* demands for this amount but that the defendant has refused to pay.

When this witness was cross-examined, he admitted that

*h* there is no record in the plaintiff's office to show the amount of interest agreed upon. He also agreed that some ledger relating to the defendant's accounts were missing but he was later recalled and he tendered a few more ledgers as exhibits

*i* 39-42. But he had to agree that some of these ledgers have become defaced and the contents of one or two are totally illegible.

*j* In his own defence, the defendant agreed that he asked for an overdraft from the plaintiff and that the bank approved a

sum of ₦6,000 for him. He operated the account by virtue of the letter (exhibit 28) and the various cheques which he issued. He said that after he was granted the overdraft, the manager asked him to sign some papers, which he did. He said that he was an illiterate and could only just sign his name. He could not read or write in English and did not know the contents of what he had signed. He said that the manager did not tell him that the overdraft would carry any interest nor did he communicate to him the fact that any interest was payable on the loan. In fact he did not know about the interest until he got the bank's letter (exhibit 34) dated 4th August, 1982 in which he was asked to pay ₦10,966.23. He was surprised to receive this letter, and he made enquiries from the bank manager. According to the witness, this was the first time that he knew that any interest was chargeable on the overdraft, which he had received. He asked for a statement of his account, but the bank refused to give him one. Up till today, the bank has not given him any statement. He admitted that he wrote (exhibit 26) but he denied that he was owing the sum of money (₦13,390) shown in the letter.

At the close of evidence, both counsel addressed the Court. Mr Madandola referred me to the four issues settled in the case which are as follows:

1. What is the amount of the overdraft granted to the defendant?
2. Is any interest payable on the said overdraft and if so, how much?
3. How much, if any amount is due from the defendant to the plaintiff?
4. Was any demand made by the plaintiff for the repayment of the overdraft?

In regard to the first point, Mr Madandola asked the Court to hold that only an overdraft of ₦6,000 was made to the defendant and it is only this amount that could be recovered from him. On the second issue, counsel submitted that there

- a* was no agreement to pay any interest on the loan and unless a particular rate of interest was agreed upon, the plaintiff could not impose just any interest on the defendant.
- b* Furthermore, Counsel asked the Court to hold that the defendant was an illiterate and submitted that it was the duty of the plaintiff to explain to him clearly how much the bank was charging on the overdraft.
- c* Finally, Counsel referred to exhibits 27-42, the Ledger Cards and said that there was nothing on these cards to show how much was the interest and how much was the capital and nothing further to show the interest due has accrued.
- d* In respect of the 3rd issue, Counsel submits that the Court should hold that the defendant is not liable to the plaintiff in any amount. He referred me to the Ledger Cards and said
- e* that these cards are unreliable because the entries made on them are faint and indecipherable. With regard to the fourth issue, counsel agreed that demands were made as per exhibits 25, 29, 30 and 32 but argued further that in spite of these
- f* demands, the onus is still on the plaintiff to prove the amount claimed.
- In his reply, Mr Adenekan submitted on the first issue that once the defendant was shown to have operated his account,
- g* he has to pay whatever amount is due on that account. counsel submitted that in banking practice, there is nothing to prevent the plaintiff from allowing the defendant to draw more than has been agreed upon.
- h* As to this, I would like to say that if there is an agreement for an overdraft of ₦6,000 and the plaintiff allowed the defendant to draw twice that amount, then the bank cannot sue on the original agreement. In respect of the excess, all that
- i* the bank could do is to sue for money had and received. On the question of illiteracy, the bank's counsel submitted that since there was no thumb impression on any of the cheques or letters by the defendant he should be regarded as a literate
- j* person. Counsel referred me to the provisions of the Illiterates

Protection Law (Cap 47) and to the case of *Jibosu v. Obadina* (1962) W.N.L.R. page 303. a

I have considered these submissions. I have also looked at the various exhibits tendered in this case. I refer particularly to the cheques (exhibits 1-18), and I have come to the conclusion that the defendant is an illiterate. None of the cheques which were tendered before me was shown to have been written out by the defendant himself, and I accept his evidence that whenever he wanted to withdraw moneys from his account, he would handover his cheque book whether to a bank official or to any bank customer present to assist him in writing out the cheque. This bit of evidence is confirmed by all entries made in the teller (exhibit 28). But if I am in any doubt at all, that doubt has been dispelled by the entries on exhibit 21, the supposed application made by the defendant for the said overdraft. On the last page of that document, there is provision for the applicant to affix his left hand thumb impression on the paper if he is illiterate, and the defendant is shown to have done so on the space for that purpose. I bear in mind that this form (exhibit 21) was provided by the bank and it was put in evidence by the plaintiff. b  
c  
d  
e  
f

This means that as from the date (29th October, 1976) when the defendant applied for the overdraft, the bank knew that he was an illiterate. In my view, it is now too late for the bank to say that the defendant is a literate person. I am satisfied from the evidence that he is an illiterate. g

Mr Adenekan's reply on the second issue makes very interesting reading. He submitted that the defendant must be held to be aware that he has to pay interest on the overdraft granted. He then went on to say that the rate of interest chargeable is a matter of law and banking practice and does not require a specific agreement with the defendant. Counsel refers me to the case of *Parr's Banking Company Ltd v. Yates* (1898) 2 G.P. 460 at 467. h  
i

Regrettably, counsel did not refer me to any Nigerian Law on the question of overdraft or to the rate of interest chargeable j



*a* on it nor was there any evidence of the banking practice to which Mr Adenekan has referred.

*b* In the end, I remain unconvinced that any particular rate of interest was agreed upon or communicated to the defendant.

Whilst I am prepared to accept that no bank will grant a loan to a customer free of charge yet, I cannot forget that the  
*c* interest payable vary in accordance with the size or nature of the loan, thus the interest on a business loan would

be different from that on a building loan or an ordinary overdraft. In my view, when a customer disputes the amount  
*d* claimed, the onus is on the bank to prove the entire contract the sum borrowed and the terms of the loan. In the particular circumstances of this case and bearing in mind the fact that the defendant is a total illiterate. I hold that the plaintiff has  
*e* failed to discharge that onus satisfactorily.

It now remains for me to find out how much is really due to the plaintiff. I must confess that I am in some difficulty in  
*f* this regard. The bank has made a claim for a definite sum of money, that is, ₦15,063.07 and it is the plaintiff's duty to prove that amount. Now, it is clear that this amount represents the overdraft granted together with the agreed interest. The question then is, what was the agreed rate of interest. I  
*g* notice that on the first page of the Ledger Card (exhibit 41), the rate of interest shown there was 10% and this rate continues for another three pages. But on exhibit 42 the rate of interest shown was 11% whilst on exhibit 27(*b*) the rate of  
*h* interest shown was 14%. Finally, in exhibit 27(*d*), the rate of interest is 13% and this is the rate which was reflected on the Writ of Summons. Now, the question is: Why does this rate of interest continue to change in this fashion; secondly  
*i* was the change agreed upon between the parties and communicated to the defendant? If so, when and how? I regret to say that no evidence was given to satisfy me on all these important issues and in the circumstances, it would be wrong to  
*j* speculate on the particular interest payable.

However, I have on record the fact that the defendant agreed that he took an overdraft of ₦6,000 but he denied that the plaintiff informed him that any interest was payable. I have watched the defendant in the witness box and having regard to his level of understanding, it is possible that what he says may be true.

In any case, it is the duty of the plaintiff to bring all the terms of the loan agreement clearly to the notice of the defendant. I am satisfied that the plaintiff did not do so.

Finally, as to whether or not there was a formal demand for the debt, I am satisfied that there was. Indeed, the plaintiff was shown to have made a demand in August, 1982 (exhibit 34) and the defendant admitted receiving the letter. Another demand was made in December, 1983 (exhibit 25) and in reply to this, the defendant wrote the letter (exhibit 26) on 19th January, 1984. In it he admitted owing the bank. He then pleaded for some time to settle his indebtedness. I have carefully gone through this letter and I agree with Mr Mandandola, the defence counsel that the defendant did not agree owing any specific amount. Rather, his admission was of a general nature, and it was for the plaintiff to prove the actual amount due and owing.

I have held that there is no clear proof of any rate of interest and I can only give judgment for the specific amount which has been admitted and that is ₦6,000.

In the final analysis, I hereby give judgment for a sum of ₦6,000 being amount proved to have been due and owing to the plaintiff.

However, in view of the particular circumstances of this case, and in view of the general nature of the plaintiff's business, which is that of money lending, it is ordered that the defendant shall pay interest on the judgment debt at the rate of 5% per annum from the date of the judgment until final payment.

*a*

**Siemers Export KG v. West German and  
Nigeria Trading Co Limited and another**

*b*

HIGH COURT OF ANAMBRA STATE

NWOKEDI CJ

Date of Judgment: 17 SEPTEMBER 1985

Suit No.: E/299/82

*c* **Banking – Garnishee order – Nature of**

*Banking – Garnishee order absolute – Failure of garnishee  
to appear – Application to discharge order – Whether the  
court that made order has jurisdiction to discharge same –*

*d*

*Principle governing*

*Banking – Garnishee proceedings – Disclosure of third  
party interest – Duty of court*

*e*

*Banking – Garnishee proceedings – Parties thereto*

**Facts**

*f*

This is an application by the Union Bank of Nigeria Ltd to discharge a Garnishee order absolute made in its absence in respect of the money standing to the credit of a judgment debtor, namely, West German and Nigeria Trading Co Limited, with the bank. The order was made in favour of the

*g*

Judgment Creditor, namely, SIEMERS EXPORT KG.

*h*

In the affidavit in support of the application, the applicant deposed to the facts that by a letter dated 16th February, 1984, the applicant was instructed that the defendant/judgment debtor had gone into voluntary liquidation and consequently the applicant on the instructions of the judgment debtor closed its account and transferred same to the “Liquidation Account”; that by another letter dated 18th

*i*

February, 1984, the applicant was duly informed that one Mr SC Onochie had been appointed a liquidator of the defendant/judgment debtor and that he had the sole authority to operate the “Liquidation Account”; that on 22nd March,

*j*

1984, the applicant was served with the garnishee order *nisi*

and the said document was forwarded to Mr Onochie whom the applicant's manager erroneously believed was the proper party to defend the application; that Mr Onochie led the applicant's manager to believe that he, Mr Onochie, was the person answerable for the account of the judgment debtor; that the said manager believed that Mr Onochie was representing the interest of the court and the garnishee and owing to the said beliefs, the applicant left the issue with Mr Onochie and consequently did not appear in court to show cause why the Garnishee order nisi should not be made absolute.

The counter-affidavit of the plaintiff/respondent stated that the allegations contained in the applicant's affidavit were false but the basis of the falsity was not given nor counter-facts deposed to. No oral evidence was called to enable the court establish the veracity or otherwise of the said contradictory paragraphs.

The main objection of the plaintiff/judgment creditor to the application is that a writ of *feri facias* had already been issued against the applicant by the court.

**Held –**

1. A garnishee order is an equitable remedy and is exercisable at the discretion of the court. As an equitable remedy, it cannot be employed to work injustice.
2. A court has jurisdiction to entertain an application to discharge a garnishee order absolute, which it had made, if good cause is shown for the exercise of the court's discretion.
3. The fact that an applicant failed to show cause *per se* would not debar the court from exercising the discretion in its favour, if sufficient reasons are adduced as to why the applicant failed to show good cause.
4. The court in deciding whether or not to set aside a garnishee order absolute made in the absence of the applicant, has to consider the reasons for the said absence.

- a* 5. A garnishee order is very much like a default judgment obtained in the absence of a defendant. Every consideration must depend on the facts on the case, why the
- b* applicant failed to show cause.
6. A garnishee interest is normally between the plaintiff/judgment creditor and the garnishee. It is the garnishee that is required to show cause.
- c* 7. Where a third-party interest is disclosed in a garnishee proceedings, the court has a duty to inquire into the said interest once it has been brought to its knowledge, by any means or at any stage of the proceedings.
- d* 8. A defendant/judgment debtor is not a party to the garnishee proceeding, therefore it is an irregularity for a defendant/judgment debtor to appear in the proceedings.

*e* **Cases referred to in the judgment**

*Nigerian*

- Far East Mercantile Ltd v. Jacke Philips Photo Ltd* (1974) 1 All N.L.R. 246-252
- f* *Idosu v. Ojikutu* 14 W.A.C.A. 88
- Obimonure v. Erinosho* (1966) 1 All N.L.R. 250
- Saligun v. Mersh* (1980) 1 P.S.L.R. 337

*g* **Foreign**

- Burrels and Sons v. Read* (1894) 11 T.L.R. 36
- Cane v. Seloceve Ltd (Martins Bank Ltd Garnishee)* 57 T.L.R. 601
- h* *Hapenstall v. Jackson, Barclays Bank Ltd* [1939] 2 All E.R. 10
- i* *Lancaster Motor Co. v. Bremith* (1941) 1 K.B. 675
- Marshall v. James* (1905) 1 Ch. 432; (1905) W.N. 28
- Martin v. Nader, Dresdner Bank (Garnishee)* (1906) 2 K.B. 26
- j* *Moore v. Peachey* (1892) 66 L.T. 138

*Obrien v. Killeen* (1914) 21 R.R. 63

*a*

*Pritchard v. Westminster Bank Ltd* (1909) 1 W.L.R. 547

**Foreign rule of court referred to in the judgment**

*b*

Supreme Court Rules England, Order 49, rule 18

**Books referred to in the judgment**

1985 *White Book*, Supreme Court of England, Order 49, rule 18 *c*

*English and Empire Digest* Volume 21, page 747, article 1790

Okoye, *Obi Civil Proceeding* Volume 1, page 70, paragraph 78 *d*

**Counsel**

For the plaintiff: *Bashorun* with *Bob-Manual* *e*

For the defendant, for the garnishee/applicant: *Izundu* with *Jegede*

**Judgment** *f*

**NWOKEDI CJ:** The plaintiff/judgment creditor/respondent had on 22nd February, 1983, obtained judgment against the defendant/judgment debtor/respondent, in this High Court, for the payment of a sum of a ₦715,491.11. Part of this judgment debt was paid. The balance thereof was ₦515,491.11. By an *ex parte* application filed pursuant to section 83 of the Sheriff and Civil Process Act (Cap 189) this Court on 20th March, 1984, issued a garnishee order *nisi* on the present garnishee/applicant, to show cause why an order should not be made against it for the payment to the judgment/creditor of the amount of the said debt due and owing or as much as will satisfy the judgment debt. The applicant was duly served with the said order *nisi* on 22nd March, 1984. The applicant took no steps in answer to the said order. The court on 19th July, 1984, made the order *nisi*, absolute. On 21st July, 1985, the applicant's bank was attached following an order for execution dated 15th January, 1985. *g*  
*h*  
*i*  
*j*

- a* Following this development, the applicant has filed the present application seeking the following orders:
- b* (a) to set aside the order of the honourable Court made on the 19th July, 1984, in the above suit whereby it was ordered that execution be levied against the garnishee for debts purportedly owing by and due from the garnishee to the above named judgment debtor;
- c* (b) that the writ of *feri facias* issued on this action on 15th January, 1985, by this Court directed to the sheriff and bailiffs of the court and all proceedings hereunder may be stayed and or set aside as being irregular and or wrongful on the grounds that the sum which is by the endorsement of the said writ directed to be levied was not at the time of the issue of the said writ due or owing under garnishee order *nisi* made on 20th March, 1984;
- d* and that the said writ misrepresented the Garnishee Order made by this Court.
- e*

By leave of this Court the applicant added a third relief as follows:

- f* (c) to discharge the garnishee order absolute made by the court in this suit on 9th July, 1984.
- g* The application is supported by an affidavit of 15 paragraphs to which were exhibited three documents. The plaintiff/judgment creditor/respondent filed a counter-affidavit to which were exhibited three documents. The respondent filed a notice of preliminary objection to the present application
- h* on the ground that this Honourable Court was *functus officio* to the application, as the order for garnishee had already been executed, prior to the present application. This notice was not pursued and with the amendment above referred to,
- i* both counsel argued the application *simpliciter* on its merits.

- The first issue to be resolved is whether this Court has jurisdiction to discharge a garnishee order absolute, after the same has been decreed by the court and execution effected.
- j* he learned counsel for the applicant has argued affirmatively

on the issue. He submitted that even if the applicant had appeared, and admitted the debt, but later found that the admission was in error, the court could still be prayed to set aside the order absolute, whether the mistake was mutual or not. He relied on *Moore v. Peachey* (1892) L.T. 138. *Burrell and Sons v. Read* (1894) 11 T.L.R. 36; *Marshall v. James* (1905) 1 Ch. 432, *O'Brien v. Killiean* (1914) 2 1 R.R. 63, *English Empire Digest* Volume 21 page 747, article 1790; *Far East Mercantile Ltd v. Jackie Phillips Photo Ltd* (1974) 1 All N.L.R. Paragraph 2, page 246 at 252. In reply, the learned counsel for the respondent/judgment creditor, submitted that having made the order, the court became *functus officio* and would not review same. He relied on 1985 White Book Order 49, rule 18. Replying to cases above cited by the learned counsel for the applicant, he submitted, that they referred to those which were decided on appeal from the decisions of Registrars in Chambers to the Judge and not on the decisions of the High Court. He contended that the only remedy available to the applicant was to go on appeal, since this Court cannot now sit on appeal over its own decision.

A garnishee order is an equitable remedy and is exercisable at the discretion of the court: see *Martin v. Nader, Dresdner Bank Garnishee* (1906) 2 K.B. 26 and *Pritchard v. West Minster Bank Ltd* (1909) 1 W.L.R. 547 C.A. As an equitable remedy, it cannot be employed to work mischief or injustice. Thus in *Burrell and Sons v. Read*, the garnishee order absolute was set aside following the determination of an issue between the parties, which showed that the said order, ought not to have been made. The order absolute was set aside by the District Registrar. On appeal to the Judge in Chambers, he reversed the said order on the ground that the District Registrar had no jurisdiction to set aside an order after it had been made absolute. On appeal to the Court of Appeal, Lord Esher MR held that the order made by the district registrar must be allowed to stand for the reasons given in the judgment.



*a* In other words, the contention that the district registrar had no jurisdiction was disallowed. In *Moore v. Peachey* (1892) 66 L.T. 198, it was held that, a garnishee order made upon  
*b* evidence afterwards proved to be mistaken may be set aside, although, it had been made absolute and acted upon. In this case the garnishee even consented to the order being made absolute. Later, it discovered that it had made a mistake in  
*c* so consenting. It applied to the court that the order absolute be set aside even though the garnishee had effected payment. The court nevertheless held that the order absolute must be set aside and the judgment creditor was made to refund the money. This however was an appeal from the decision of a judge in chambers who had refused the application to set the order aside. This was followed by Joyce J, in *Marshall v. James* (1905) W.N. 28: (1905) 1 Ch. 432, Joyce J, in setting aside a garnishee absolute stated as follows:

*e* “On the authority of *Moore v. Peachey* and on general principles, I have come to the conclusion that I must do what I can to remedy the injustice done by the garnishee order. In my opinion, there is no particular sanctity about a garnishee order, although, it may  
*f* have been made absolute and is so termed.”

This was not an appeal from the District Registrar but the Judge himself was prayed to discharge a garnishee order absolute which he had previously made. In *O’Brien v. Killiean*  
*g* (1914) 21 R.R. 63 (see also *English and Empire Digest* page 747 article 1790, Volume 21), the plaintiff obtained an order absolute against the garnishee who had failed to show cause. The debt allegedly owed by the garnishee had in fact been  
*h* assigned even before the order *nisi*. It was held that the court had jurisdiction to set aside the order absolute, and in the circumstances, did set aside. In his *Essays in Civil Proceedings* Volume 1 page 70 paragraph 78, the learned author Obi  
*i* Okoye stated the position as this:

*j* “78. If a garnishee who has been served with the order *nisi* fails to appear in Court, on the return date and has made no payment in court, the court can make the order absolute . . . But the court has inherent jurisdiction, on application to set aside the order absolute obtained under such circumstances.”

I therefore hold the view that this Court has the jurisdiction to entertain an application to discharge a garnishee order absolute, which it had made, if good cause is shown for the exercise of the court's discretion.

The learned Counsel for the respondent has argued that execution had already taken place. It is obvious from the papers filed that the garnishee had effected no payment to the creditor/respondent. Although even if payment had been made, the court can still order that the creditor/respondent returns the money to the applicant as was done in *Marshall v. James* and *Burrell and Sons v. Read* above. That execution had been effected is therefore no bar to the present application being considered on its merits.

I will next consider whether the failure of the applicant to show cause after the order *nisi* had been served on it, may debar it from praying that the order absolute be set aside. I have already stated that a garnishee order is an equitable remedy and can be invoked or revoked on equitable grounds if good cause is shown. I do not think that the fact that the applicant failed to show good cause *per se* would debar the court from exercising the discretion in its favour if sufficient reasons are adduced as to why the applicant failed to show cause.

It is very much like a judgment obtained in the absence of the defendant. Every consideration must depend on the facts of the case. Why did the applicant fail to show cause to the order *nisi*? Paragraphs 2 to 9 of the affidavit in support of the application tell the story. By letter dated 16th February, 1984, the applicant was instructed that the defendant/judgment debtor/respondent had gone into voluntary liquidation. The applicant accordingly, on the instructions of the judgment debtor/respondent, closed its account and transferred same to the "Liquidation Account." The said letter is exhibit A exhibited in paragraph 3 of the affidavit in support. Paragraph 4 of the said affidavit, deposes that by a letter

*a* dated 18th February, 1984 the applicant was duly informed that one Mr SC Onochie had been appointed a liquidator of the defendant/judgment debtor/respondent and that he had  
*b* sole authority to operate the “Liquidation Account.” The letter in connection with this is exhibit B. On 22nd March, 1984, the applicant was served with the garnishee order *nisi* and the said document was forwarded to Mr Onochie whom  
*c* the applicant’s manager erroneously believed was proper party to defend the application. Paragraph 8 of the said affidavit, deposes that Mr Onochie led the applicant’s manager to believe that he, Mr Onochie, was the person answerable  
*d* for the account of the judgment debtor. Paragraph 9 deposes that the said manager believed that Mr Onochie was representing the interest of the said court and the garnishee. Owing to the said beliefs, the applicant left the issue with Mr Onochie. Though in paragraph 5 of the counter-affidavit, it  
*e* was deposed that the allegations in paragraphs 3, 4, 5, 6, 7 and 8 of the affidavit in support were completely false, the basis of the falsity was not given nor counter facts deposed. No oral evidence was called to enable the court to establish  
*f* the veracity or otherwise of the said contradictory paragraphs.

On the contrary, Mr Onochie in a purported answer to the order *nisi* filed two affidavits, a counter-affidavit filed on  
*g* 23rd April, 1984 and further counter-affidavit filed on 26th April, 1984. These sought to show that prior to the order *nisi*, the defendant/judgment debtor/respondent had gone  
*h* into liquidation with the full knowledge of the plaintiff/judgment creditor/respondent. The record of proceedings show that on 7th April, 1984, which was the date given for the applicant to appear and show cause, the applicant was not  
*i* in court and not represented. Ironically, the defendant/judgment debtor/respondent appeared with its counsel and asked for a short adjournment to file a statement of account of the applicant which was the first garnishee. The application received further adjournments until 26th June,  
*j* 1984 when once again Mr CO Akpangbo appearing for the

defendant/judgment debtor/respondent argued against the application to make the order absolute. On 19th July, 1984, EO Araka CJ, (as he then was) sitting in this Court, made the garnishee order absolute.

A garnishee interest is normally between the plaintiff/judgment creditor and the garnishee. It is the garnishee that is required to show cause. The defendant/judgment debtor/respondent was not served with the order *nisi* and was not a party to the garnishee proceedings. Nonetheless its liquidator appeared in court with counsel and was granted audience.

This irregular appearance engendered a confusion because instead of determining whether there was any debt due from the applicant to the judgment creditor, the argument turned to whether the Liquidator had properly disbursed the funds at his disposal. This confusion is evidenced on reading the court's ruling. I am aware that the ruling on the application and the record of proceedings were not exhibited by the affidavits or counter-affidavits before the court. This Court however will not close its eyes to its own records and documents filed in the proceedings in the case. The liquidator it would appear failed in his attempt to stop the order absolute. In consequence the order *nisi* was made absolute against the applicant. Admittedly where a third party interest is disclosed in a garnishee proceedings, the court has a duty to inquire into the said interest once it has been brought to its knowledge, by any means or at any stage of the proceedings. See *Idosu v. Ojikutu* 14 W.A.C.A. 88. The court can summon the third party to appear in the proceedings or the third party may apply to be joined as a party. Neither was done in the case: I am not, as if it were, sitting on appeal on the said order, but as I have above shown, there has been an irregularity in the proceedings which bred a confusion that left the vital interest of the applicant undetermined, namely, whether there was any money due to the judgment creditor from the

- a* applicant at the time the order *nisi* was served. The intervention of the liquidator and the absence of the applicant left the vital question unanswered. In deciding whether to set aside the order absolute, made in the absence of the applicant, the
- b* court has to consider the reasons for the said absence. In leaving the issue to the liquidator, the court has to consider whether the mistake in the procedure made by the applicant's manager was excusable.

- c*
- Some arguments have been directed to this Court as to the substance of the application for the garnishee orders. The first was that having closed the account of the defendant/judgment debtor/respondent, and having transferred all its funds to the Liquidation Account, the garnishee had no money in its possession belonging to the defendant/judgment debtor. The account was closed on 16th February, 1984, by a letter of that date. It was more than a
- d* month thereafter that the garnishee was served with the order *nisi*. The learned Counsel for the applicant relied on the cases of *Lancaster Motor Coy v. Bremith* (1941) 1 K.B. 675 and *Hapenstall v. Jackson, Barclays Bank Ltd* [1939] 2 All
- e* E.R. 10. I do not think that it is necessary for me to dwell on this at this stage, until it is established whether the alleged liquidation was genuinely effected and when and what funds were really in dispute, on the date the garnishee order *nisi*
- f* was served on the applicant. Monies in possession of the
- g* Liquidator is for this irrelevant to the applicant.

- Another point raised by the learned Counsel for the applicant, was that the order authorising execution dated 15th
- h* July, 1985, was a nullity in that it deviated from the order *nisi* served on the applicant as well as from the order absolute. He relied on *Cane v. Seloceve Ltd (Martins Bank Ltd Garnishee)* 57 T.L.R. 601. First the said order recited a
- i* judgment obtained on 22nd February, 1983, against the garnishee while no such judgment existed.

- Secondly, ordering the garnishee to pay a specific sum as stated in the said order absolute, entailed that the garnishee-
- j* had so much money in its possession, when the order *nisi*

was served. Thirdly the garnishee contended that it was not served with the other absolute before the order of execution was issued. The above defects the learned Counsel contended rendered the order absolute and writ of execution null and void. He relied on *Siligum v. Mersh* (1980) 1 P.S.L.R. 337; *Obimonure v. Erinosh* and *Another* (1966) All N.L.R. 250. The above points go to the merits of the ruling. It is not for this Court to sit on appeal on the judgment of its predecessor. This is a matter for the Court of Appeal. What is presently required is to see whether there are sufficient reasons to justify letting the applicant, who was absent at the hearing of the application for order *nisi* to be made absolute, have an opportunity to put forward its case as the said ruling or judgment was given in its absence.

Such other points as to jurisdiction, the fundamental validity of the writ of execution, and even the entire proceedings, were raised. Once again, it is not necessary for me to consider these legal arguments. What I have to consider at this stage, I once again reiterate, is whether the applicant can at this stage be permitted to show cause to the order *nisi*.

Assuming that what the applicant is saying is correct, it runs the risk of double payment or at least paying the plaintiff/judgment creditor/respondent more than it is entitled from it. This would if correct, prove a matter of gross injustice, more especially as the sum involved is colossal. I am aware that the applicant failed to show cause, but I accept the reason offered for this, the mistake arising from ignorance of legal process which even in *Moore v. Peachey* above, the mistake received the *imprimatur* of the garnishee's solicitor, the court did however rectify the mistake. Order LIV, rule 2 of the High Court Rules provides as follows:

"The court may in all causes or matters make any order which it considers necessary for doing justice, whether such order has been expressly asked for by the person entitled to the benefit of the order or not."

- a* I have in addition considered the order absolute as a judgment obtained in the absence of the defendant, in this case, the garnishee. Under Order XLI, rule 5 of our High Court
- b* Rules:
- “Any judgment obtained against a party in the absence of such party may on sufficient cause shown, be set aside by the court upon such terms as may deem fit.”
- c* In my opinion, justice will be served as between the parties if all return to the order *nisi*. Parties will then be in a position to address the court on the issue of jurisdiction, ascertain clearly the indebtedness or otherwise, of the applicant to the judgment debtor at the date of the service of the order
- d* *nisi*. I think that the plaintiff/judgment creditor/respondent may be compensated in costs for the default of the applicant. This Court hereby:
- e* (a) Sets aside the order of the execution dated 15th January, 1985, made against the applicant.
- (b) Sets aside the garnishee order absolute made in these proceedings dated 19th July, 1984.
- f* (c) Grants the applicant leave to show cause to the garnishee order *nisi*.
- (d) Grants Mr SC Onochie Liquidator to the defendant/judgment debtor/respondent leave to apply to be
- g* joined as a third-party to the proceedings if he so deserves.
- (e) The applicant should pay to the plaintiff/judgment creditor/respondent a sum of ₦500 being costs assessed
- h* and fixed in respect of this application.

*a*

## Chukwuedo v. First Bank Nigeria Limited

HIGH COURT OF BENDEL STATE

ONOBUN J

Date of Judgment: 12 NOVEMBER 1985

Suit No.: O/12/85

*b*

*Banking – Banker/customer relationship – Duty of care owed by the bank*

*c*

*Banking – Cheques – Wrongful dishonour of cheque – Measure of damages where customer not a trader*

*Banking – Cheques – Wrongful dishonour of cheque – Payee not a customer of bank – Whether bank liable*

*d*

*Words and phrases – “Trader” – Meaning of*

### Facts

*e*

The plaintiff purchased a bank draft of ₦31,500 from the defendant’s branch at Minna. The draft was cashable at the defendant’s branch at Agbor.

The plaintiff paid the draft into his account with the New Nigerian Bank which allowed him to draw on the uncleared draft since he enjoyed some confidence there.

*f*

When his bank presented the draft to the defendant bank it was returned unpaid because it was alleged the signature on it was irregular. With this situation, the plaintiff’s account with his bank was overdrawn and he lost the confidence of his bank. The draft was later represented and paid when the Minna branch of the defendant’s bank certified the draft as genuine.

*g*

*h*

The plaintiff therefore sued the defendant bank for special and general damages for negligence and loss of profit he would have made on some contracts which he could not execute because of non-payment of the draft when first presented.

*i*

The defendants contended however that they could not be liable to the plaintiff who was not their customer.

*j*



*a* **Held –**

- b* 1. It is settled law that a customer is entitled to recover damages for wrongful dishonour of his cheque, which could be nominal damages if he is not a “trader.” When he is a trader however, he is entitled to substantial damages without pleading and proving actual damage.
- c* 2. The bank is under a duty of care not only to ensure that its customer’s account is correctly debited with the amount on the draft, it is also under a duty to see that the third party is paid in accordance with the command of its customer.
- d* 3. A bank is negligent in returning a customer’s cheque unpaid for a number of days and a customer who is a business (trader) is entitled to substantial damages without pleading and proving actual damage.
- e* 4. The word “trader” is defined as business especially mechanical or mercantile employment as opposed to a profession carried on as means of livelihood or profit.
- f* *The plaintiff’s claims succeeds.*

**Cases referred to in the judgment**

*g* **Nigerian**

*Adesanya v. President F.R.N.* (1981) 5 S.C. 112

*h* *Amos Bros and Co Ltd v. British West Africa Corporation Ltd* 14 W.A.C.A. 220

*Ashubiojo v. A.C.B.* (1966) 2 All N.L.R. 203

*Bank of America v. Alexander* (1969) 2 All N.L.R. 258

*i* *Ojikutu v. Fella* 10 W.A.C.A. 628

*Oyewole v. Standard Bank of West Africa* (1968) 2 All N.L.R. 32

*j* *Tikatore Press Ltd v. Abina* (1973) 1 All N.L.R. 400

**Foreign**

*Gibson v. Westminster Bank Ltd* (1939) 2 K.B. 882; (1939) 3 All E.R. 577

**Counsel**

For the plaintiff: *Makwe*

For the defendant: *Bello*

**Judgment**

**ONOBUN J:** Plaintiff's claim in paragraph 20 of his statement of claim, is the sum of ₦500,000 (five hundred thousand naira) being general and special damages against the defendant for negligently returning and delaying the payment to him, defendant bank's draft no MD/F 007243 for ₦31,500. (thirty-one thousand five hundred naira), which negligence and delay caused plaintiff loss, inconvenience considerable trouble and expenses, itemised in paragraph 18 of the statement of claim as follows:

“(a) Special Damage:		₦	
1	Transport to Minna and back to Ogwashi Uku	200.00	<i>f</i>
2	Feeding for three days	200.00	
3	Hotel accommodation for 2 days	100.00	
4	Profit lost on the ₦400,000.00 contract	50,000.00	<i>g</i>
5	Loss of earning from Chukwuedo block Industry Oguwashi-Uku from 27th April, 1984 to 5th June, 1984 ie 40 days:	10,000.00	<i>h</i>
(b) General Damages:			
	For great trouble, inconvenience, anxiety, injury to credit and loss	439,500.00	<i>i</i>
Total		500,000.00”	

To prove his case, the plaintiff gave evidence and called two witnesses.

- a* His case briefly stated, is that on 12th April, 1984, he travelled from Ogwashi-Uku to Minna in Niger State where the Nigerian Grains Board issued a bank draft drawn on Minna
- b* branch of the defendant in his business name in the sum of ₦31,500 payable at their Agbor branch. He has two business names “Juga Edo Construction Company” and “Chukwuedo Blocks Industry”. The following day, (13/4/84) he paid this
- c* draft, tendered in this proceedings by DW1 and marked exhibit A, into his bank account with the New Nigerian Bank Limited, Ogwashi-Uku branch. On the strength of this, he was allowed to make withdrawals from his account with the
- d* said New Nigerian Bank. On 26/4/84 when he again went to see the manager New Nigeria Bank Ogwashi-Uku the manager told him that his draft had been returned unpaid with the endorsements “second signature irregular”, whereupon his account with the New Nigeria Bank Ogwashi-Uku became overdrawn by the sum of ₦3,491.50. He had travel
- e* again to Minna branch of the defendant bank who issued the draft (exhibit A) taking with him the said unpaid draft, and pleaded with them to issue another draft in place of the returned one. At Minna, the unpaid draft was taken from him, and he was told to go, and so he returned to Ogwashi-Uku. The following day, he went to see the manager of Agbor branch of the defendant bank, to enquire from him what had
- f* happen to his draft, but he was sent out from his office by the manager. On his way from Agbor to Ogwashi-Uku, because of the confused state of his mind, he was involved in an accident and his vehicle got damaged. It cost him ₦1,500
- g* to repair the vehicle. His block Moulding Industry suffered a setback because he now had no money to pay his workers. He also lost a building contract of ₦400,000 he had won in Ogwashi-Uku because he had no money to commence
- h* work on the building within the stipulated time. New Nigeria Bank, Ogwashi-Uku branch, also put a stop to the former practice of allowing him to make withdrawals on “uncleared effects” because he was no longer credit worthy. He
- i* was also put into the extra expense of having to travel from
- j*

Ogwashi-Uku to Minna to show the unpaid draft to the branch manager of the defendant bank here, and incurred hotel bills for staying in Minna. *a*

He admitted under cross-examination by defendant's counsel that although he had some money to his credit in his account with the New Nigeria Bank, Ogwashi-Uku at the time exhibit A was dishonoured, it was not enough for him to carry on his business. That the draft was returned unpaid on 26/4/84. That he paid the New Nigeria Bank Ogwashi-Uku to have the draft which he described as being "cash" in banking parlance, to be "specifically cleared," saying that under normal circumstances, it would have taken six to seven days to get the draft cleared. *b*  
*c*  
*d*

His first witness, Joseph Chukwuma Osodi, an accountant with the New Nigeria Bank Ogwashi-Uku confirmed in his evidence that on 13/4/84 the plaintiff lodged a draft for ₦31,500 in his account with their bank. That they gave value for the draft by crediting plaintiff's current account with the amount of the draft. *e*

The draft was then sent to defendant's branch at Agbor, from where it was returned unpaid about two weeks later with the reason, "signature irregular." That before this, plaintiff had been allowed to draw on this uncleared effect, making his account to show a debit balance of over three thousand naira, at the time the draft was returned, unpaid. After this, plaintiff's account which used to be actively operated ceased to be so, and so the New Nigeria Bank lost confidence in his account, and instruments presented by him to the bank. They no longer honoured plaintiff's cheques on the spot, and he was advised to go out and look for money to keep his account in credit which he did. According to this witness, the New Nigeria Bank Limited Ogwashi-Uku, sent the draft to the defendant's branch at Agbor by post on a date he said he could not remember. *f*  
*g*  
*h*  
*i*

The second plaintiff's witness who described himself as the Managing Director of Christoni International Holdings Nigeria Limited, told the court that his company awarded to *j*

- a* the plaintiff, a building contract to build a storey building of four flats of three bed rooms each, and a bungalow of four bedrooms at the total cost of ₦400,000, but the plaintiff  
*b* failed to execute the contract, and they wrote to him, terminating the contract.

*c* Although this contract was said to be in writing, signed by both parties, he was unable to tender a copy of such an agreement.

He admitted that no mobilisation fee was paid to the plaintiff in awarding the contract.

- d* For the defence, one Pius O Akpala, defendant's branch manager, Agbor who represented the defendant bank told the court that on 25/4/84 a draft of ₦31,500 drawn on Agbor branch of the bank was presented to him for payment. The  
*e* draft was drawn in favour of "Juga Construction Company." After examining the draft which came through New Nigeria Bank Limited, Agbor branch by the normal clearing system, he discovered that the second signature on it was irregular."  
*f* He therefore returned the draft unpaid with endorsement on it "second signature irregular" on 26/4/84, to the New Nigeria Bank Agbor. On 18/5/84, one Zeph Egbuhole (DW1) a supervisor at their Minna branch came to him at Agbor to  
*g* confirm the genuineness of the draft, and he immediately credited New Nigeria Bank Agbor with the proceeds of the draft. On 21/5/84, after closing hours, plaintiff came into his office to see him over the draft, and he informed him that the  
*h* draft had been paid.

- i* Cross-examined by Counsel for the plaintiff, he admitted that a "Bank Draft" is equivalent to money and that the second signature on the draft was irregular when compared with the specimen of the second signatory with the branch at Agbor, claiming that he was careful in the decision he made in having to return the draft unpaid for the reasons already stated by him. He admitted also that he had to pay the same  
*j* draft after the DW1 had come from Minna to confirm it as

genuine. He would however not know if the plaintiff was deprived of the use of the proceeds of the draft as a result of his having to return it unpaid. He denied telling the plaintiff to go to Minna if he was not satisfied with the reasons he gave him (plaintiff) for dishonouring the draft.

The DW1 in confirming that the draft which he had to tender as exhibit A was returned to them at Minna branch of the bank, unpaid because of the endorsement on it that the second signature is irregular, told the court that on 17/5/81, their Minna branch manager sent him to Agbor with the draft, to confirm its genuineness. On 18/5/84, he presented the draft to the manager of Agbor branch. He admitted under cross-examination that the endorsement “second signature irregular” had to be cancelled on the draft (exhibit A), and the draft credited to New Nigeria Bank, Agbor. That defendant’s manager at Agbor should have retained the unpaid draft at Agbor, and send a message to them in Minna that the draft could not be paid for the reasons he earlier stated in evidence, instead of returning it to Minna branch unpaid. That this message could have been sent either by post, radio message, telephone or any other method. He concluded his evidence under cross-examination thus:

“We paid on the same second signature earlier marked as irregular without the signatory signing again.”

He however explained when re-examined by their Counsel that they have no radio link with Agbor branch of the defendant bank.

Counsel for both parties later addressed the court as follows:

For the defendant, *CD Bello Esq*, submitted that the plaintiff had no *locus standi* to bring his present action since the draft (exhibit A) was drawn and made payable to Juga Construction Company and not in the plaintiff’s name for which he cited the case of *Adesanya v. The President of the Federal Republic of Nigeria and another* (1981) 5 S.C. 112.

- a* 1. That there being no *nexus* between the plaintiff and Juga construction Company as the payee of the draft, plaintiff had no legal competence to bring his action, and cited *Ti-*
- b* *katore Press Ltd v. Abina and another* (1973) 1 All N.L.R. 400.
2. That plaintiff and his witnesses failed to identify the draft (exhibit) in the course of their evidence in the witness
- c* box, arguing that there could be so many drafts of the same amount issued by Minna branch of the defendant Bank the same day.
- d* 3. That plaintiff has failed to prove strictly as required by law, the special damages claimed by him, and went on to give reasons why this is so, in each of the five items in this head of plaintiff's claim.
- e* 4. That plaintiff claimed in both his Pleadings and evidence that his current account with the New Nigeria Bank Limited, Ogwashi Uku became over drawn because his draft was returned unpaid, but failed to prove this by not tendering his statement of Account with the said branch and
- f* cited section 148(d) of the Evidence Act, and the case of *Ojikutu v. Fella* 10 W.A.C.A. 628 at 638. That plaintiff should be deemed to have abandoned this averment in his
- g* pleadings.
5. That there is no evidence upon which the court could base its assessment of damages and referred to the cases of *Amos Bros and Co Ltd v. British West Africa Corpora-*
- h* *tion Ltd* 14 W.A.C.A. 220.

Finally, that on the balance of probabilities, plaintiff has failed to prove his case, and so it should be dismissed.

*i* For the plaintiff, *TC Makwe Esq*, submitted that:

1. Plaintiff has proved his case on the balance of probabilities and should be awarded special and general damages against the defendant for negligently returning his draft
- j* (exhibit A), unpaid.

2. That the issues involved in this case have been narrowed down by the pleadings of both parties and referred to paragraphs 5, 13, and 14 of the defendant's statement of defence where the defendants admitted that they returned exhibit A which they issued to the plaintiff, unpaid. a  
b

That defendants admitted by their representative, manager Agbor branch, that exhibit A was returned to the New Nigeria Bank Agbor on 26/4/84, and DW1 also gave in evidence that he was informed in Minna on 17/5/84 that exhibit A was returned to them, and that he carried it with him to Agbor branch of their bank on 18/5/84, and New Nigeria Bank Agbor was paid the amount of the draft the same day. c  
d

3. That defendants on their own admissions therefore have confirmed that they did not pay the draft between 26/4/84 and 18/5/84. That the court should consider if this delay for about 21 days was reasonable in the circumstances since exhibit A is by itself, "cash." That exhibit, A which is dated 12/4/84, was paid by the plaintiff into his account 13/4/84. e  
f

4. That there is evidence before the court that draft is cash, and plaintiff began to draw on it with his bankers in Ogwashi Uku from the date it was paid in. That from 13/4/84 to 5/6/84 when the draft was subsequently credited into his account with the New Nigeria Bank Ogwashi Uku, he had suffered some detriment, draft being cash. g  
h

5. That the name on the draft has been sufficiently linked with the plaintiff by his evidence in paragraph 1 of this statement of claim. i

That in any case, the defendants failed to raise any preliminary objection on this when served his statement of claim on them. That plaintiff has therefore established his *Locus* in bringing this action, and so the case of j



- a* Senator Adesanya cited by Counsel for the defendant on this issue, is irrelevant.
- b* 6. That from the unchallenged evidence before the court, plaintiff has shown that he is a “trader” (businessman) and as such he is entitled to substantial damages for his instrument having to be dishonoured and cited *Bank of America v. Edward Alexander* (1969) 2 All N.L.R. 258.
- c* On wrongful dishonour of a customer’s cheque, he cited *Ashubiojo v. A.C.B.* (1966) 2 All N.L.R. 203.
- d* The plaintiff is therefore entitled to substantial damages for wrongful dishonour of his draft without his having to prove and plead actual special damage. *Oyewole v. Standard Bank of West Africa* (1968) 2 All N.L.R. 32.
- e* 7. That having admitted issuing exhibit A to the plaintiff and collecting Commissions and other bank charges from him, defendants have broken their contract by dishonouring the draft so issued by them. He cited *Nigerian Bar Journal*, Volume, 19 No. 2 of 1983, pages 131-135.
- f* 8. That plaintiff who is a “trader” has lost credit with his bankers New Nigeria Bank, as led by him in his evidence and that of the accountant from that bank.
- g* 9. That if the court finds that the evidence led on the claim to special damage is insufficient in law, it could take into consideration in awarding general damages, the loss or expenses incurred by the plaintiff under these various items of claim to special damage.
- h* 10. On paragraphs 13 and 14 of the statement of defence, he submitted that since payment was still made on exhibit A as originally signed, and the endorsement “second signature irregular” had to be cancelled, it is clear that
- i* the defendant’s bank manager, Agbor was negligent in refusing payment on it.

*j* The only valid point of law raised by *CD Bello* from the submissions of Counsel for the plaintiff is that there is no “customer” and “bank” relationship between plaintiff and

the defendants, and so the authorities cited by Counsel on this, do not apply to the facts of this case. a

The first question I would like to treat in this judgment is the issue raised by counsel for the defendant bank that the plaintiff has no *locus standi* to bring this action because the draft, which is the cause of action in this suit was issued in the name of “Juga Construction Company” and not in the name of the plaintiff. That there is no *nexus* between the plaintiff, Joseph Chukwuedo and Juga Construction Company. b  
c

I must say that although the Writ of summons in this suit was taken out in the name of Joseph Chukwuedo as plaintiff *simpliciter*, paragraph 1 of the plaintiff’s statement of claim has averred that the plaintiff who is a builder carries on his business under the name of “Juga Edo Construction Company”. This in my view has clearly shown the *nexus* between the plaintiff and the name written on the draft (exhibit A) as Payee ie “Juga Edo Construction Company.” In his evidence in the witness box, plaintiff gave evidence of this fact when he told the court that he carries on business in the name of Juga Edo Construction Company, and Chukwuedo Concrete Block Industry. d  
e  
f

Paragraph 1 of the said statement of claim reads:

“The plaintiff is a builder carrying on Business under the name of Juga Edo Construction Company in Aniocha Local Government Area within the jurisdiction of this Honourable Court. The plaintiff is also the Managing Director of Chukwuedo Concrete Block Industry at Ogwashi Uku.” g

Although it is the practice to state in the writ of summons in cases like this that the plaintiff carries on business “under the name and style of so and so Company,” this has never been regarded as an immutable requirement, especially, as in the case in hand, where the plaintiff has clearly shown in his pleadings, the *nexus* between his name and his business name, on exhibit A. h  
i

It would have been incompetent in law for the plaintiff to bring his present action in the name of Juga Edo Construction Company, which not being a “legal person” cannot be j

*a* sued, since the plaintiff's pleadings did not say that Juga  
*b* Edo Construction Company is a Company registered under  
 the Company's Decree, 1968, in which case it would be a  
 juristic person.

I therefore find myself unable to accept defendant's coun-  
 sel's submission on this, and so the case of *Adesanya v. the*  
*President of the Federal Republic of Nigeria and Another*  
*c* cited by him in support of his argument will not apply to the  
 facts in this case, and is to this extent, incompetent.

The "Kernel" of the plaintiff's case is to be found in para-  
 graphs 3, 4, 5, 6, 7, 8, 13, 14 and 17 of his statement of  
*d* claim which I have decided, for purposes of clarity, to re-  
 produce below as follows:

*e* "3. The plaintiff is a customer to the New Nigeria Bank Lim-  
 ited Ogwashi Uku and runs a current account with the said  
 bank.

*f* 4. On 12th April, 1984 the Nigeria Grains Board gave the de-  
 fendant the sum of ₦31,500 (thirty-one thousand, five hun-  
 dred naira) to pay to the plaintiff. The defendant therefore  
 issued a Draft for ₦31,500 (thirty-one thousand, five hun-  
 dred naira) to the plaintiff who went personally to Minna  
 and collected the said draft.

*g* 5. The plaintiff returned to Ogwashi Uku with the draft and on  
 13th April, 1984 he paid the said Draft into his account with  
 the New Nigeria Bank Limited Ogwashi Uku.

*h* 6. As a reliable customer of New Nigeria Bank Limited, the  
 plaintiff's account was immediately credited with the value  
 of the Draft from which he made immediate withdrawal's to  
 run his business.

*i* 7. The New Nigeria Bank Limited Ogwashi-Uku sent the  
 Draft to the First Bank of Nigeria Limited Agbor for collec-  
 tion but the Draft was negligently returned to the New Ni-  
 geria Bank Limited Ogwashi-Uku on 26th April, 1984 with  
 second signature irregular written on it.

*j* 8. The return of the said Draft made the plaintiff's account  
 overdrawn to the tune of ₦3,491.54 (three thousand, four

hundred and ninety-one naira and fifty kobo) and his business was paralysed. *a*

13. The plaintiff went to First Bank of Nigeria Limited Agbor to complain to the manager but the plaintiff was dismissed with ignominy and told to go and clear with First Bank of Nigeria Limited Minna. *b*

14. The plaintiff took the returned draft and went to First Bank of Nigeria Limited, Minna for a replacement but he was told that the second signature on the Draft was not irregular and sent the draft back to the First Bank of Nigeria Limited, Agbor. The said draft was later paid by the First Bank of Nigeria Limited, Agbor branch on 54th June, 1984. *c*

17. As a result of the return of the draft the plaintiff has lost the privilege of being allowed to draw on uncleared effects.” *d*

In proof of the averments contained in the above paragraphs of his pleadings, plaintiffs gave in evidence that after collecting the draft for ₦31,000 (exhibit A) issued by the Nigerian Grains Board in his favour, the draft having been drawn on the defendant's Minna branch and payable in their Agbor branch, he took the draft to his bank, New Nigeria Bank Limited, Ogwashi-Uku and paid same into his current account with the bank on 13/4/84, for collection from the defendant's branch at Agbor. The manager of New Nigeria Bank, Ogwashi-Uku allowed him to make withdrawals from his account on the strength of exhibit A which in banking parlance is regarded as cash. That to his surprise when he went to see the manager, New Nigeria Bank, Ogwashi-Uku on 26/4/84, he was told that exhibit A had been returned by the defendant's Agbor branch unpaid because the signature of the second signatory on it was said to be irregular. *e*

As a result of this, his current account with his bank became overdrawn by ₦3,491.50. As a result of the dishonour of exhibit A he had to travel to Minna branch of defendant's bank, taking with him the unpaid draft (exhibit A). That Minna branch of the defendant bank then confirmed that the second signature on exhibit A was not irregular. Earlier on, he had met the Agbor branch manager of the defendant bank *f*

he had met the Agbor branch manager of the defendant bank *g*

he had met the Agbor branch manager of the defendant bank *h*

he had met the Agbor branch manager of the defendant bank *i*

he had met the Agbor branch manager of the defendant bank *j*

*a* who after treating him inhumanly directed him to their Minna branch to complain. That on 5th June, 1984, the same draft was paid by Agbor branch of the defendant bank. That  
*b* as a result of the return of exhibit A unpaid the New Nigeria Bank Ogwashi-Uku has lost confidence in instruments paid into his account by him, and the privilege which he enjoyed in the past of being allowed to draw on uncleared effects or instrument was stopped.

*c* Plaintiff's evidence that as a result of exhibit A having to be dishonoured by the defendant bank, has caused his current account with the New Nigeria Bank Ogwashi-Uku to be over-drawn by ₦3,491.50 was confirmed by PW1, an accountant with the New Nigeria Bank, Ogwashi-Uku. He also confirmed plaintiff's evidence that for the same reason, they  
*d* lost confidence in plaintiff's current account, which had ceased to be actively operated, thereafter, they no longer allowed him to draw on uncleared effects paid by him.  
*e*

The defendant's representative manager Agbor branch of the bank, while admitting that he had to return exhibit A unpaid, maintained that the second signature on it was irregular, and so he was not in anyway negligent in returning the same unpaid. He admitted also that he had to pay the draft (exhibit A) on the same second signature, when the DW1 came from their Minna branch, the issuing branch, that exhibit A was genuine. That this payment was made on 18/5/84.  
*f*  
*g*

Paragraphs 6, 9 and 14 of the defendant's statement of defence, also reproduced hereunder, point to the fact that the defendants have admitted issuing exhibit A to the plaintiff; that the manager of their Agbor branch returned the draft unpaid; and that the same draft (exhibit A) was subsequently paid only on 18/5/84, despite the alleged irregular second signature.  
*h*  
*i*

These paragraphs read as follows:

*j* "6. Further, the defendant avers that the said draft for ₦31,500 was issued by its Minna branch to the plaintiff following his

written application to the defendant. The defendant shall *a*  
rely on the said application at the trial of this suit.

9. In further answer to paragraph 7 of the statement of claim *b*  
the defendant avers that New Nigeria Bank Limited, Ogowashi Uku through New Nigeria Bank Limited, Agbor sent the said draft for ₦31,500 to the defendant's Agbor branch for collection. New Nigeria Bank Limited, Agbor presented the draft to the defendant's Agbor branch on 25th April, 1984. The defendant's Agbor branch returned the draft unpaid to New Nigeria Bank Limited, Agbor through the normal cheque clearing process on 26th April, 1984 with the reasons. 'Second Signature Irregular' written on it by the defendant's Agbor branch. The return of the draft by the defendant was in good faith and in accordance with usual banking practice. *c*  
*d*

14. In further answer to paragraph 14 of the statement of claim, *e*  
the defendant avers that when the plaintiff took the draft to the defendant's Minna branch, the branch returned the same through one of its supervisors to the defendant's Agbor branch confirming that the second signature on the draft was actually irregular but that the said draft was genuine and really emanated from the defendant's Minna branch and that the same should be paid by the defendant's Agbor branch. Consequently upon that confirmation, the defendant's Agbor branch then immediately paid New Nigeria Bank Limited, Agbor the proceeds of the draft, ie ₦31,500 on 18th May, 1984." *f*  
*g*

From the evidence before the court and the admissions by the defendant bank in their pleadings, there is no doubt in my mind that the Agbor branch manager of the defendants was negligent, when he returned exhibit A unpaid with the inscription "Second Signature Irregular." This view which I hold, is strengthened by the fact that it was on the same exhibit A that payment was, made to the New Nigeria Bank Agbor on 18/5/84, an interval of thirty-five days from the date the plaintiff paid exhibit A into his Account with the New Nigeria Bank, Ogowashi Uku, or an interval of twenty-three days from the time defendants admitted (25/4/84) that *h*  
*i*  
*j*

*a* exhibit A was presented to their Agbor branch by New Nigeria Bank Agbor, for payment, and they had to return it unpaid for the reason already stated.

*b* No matter whatever way one looks at it, the delay of 35 days or 23 days going by the defendant's admission, in paying a bank draft, like exhibit A, which both parties have admitted is "cash", is in my view, most unreasonable.

*c* Instead of returning exhibit A by the manager of Agbor branch of the defendants, would it not have been more expeditious for him to have sent a telegram or a special errand to their Minna branch to confirm the genuineness of exhibit A, in the same manner that the DW1 was sent to Agbor from Minna on 18/5/84? For how long will Nigeria Commercial banks treat their customers and other persons having dealings with them, with disrespect and lack of consideration?

*e* The evidence before me in this case shows that the plaintiff is a businessman ("trader") who carries on businesses in the trade or business names of Juga Edo Construction Company and Chukwuedo Block Industry, Ogwashi Uku. It is settled law that a customer is entitled to recover damages for wrongful dishonour of his cheque, which could be nominal damages if he is not a "trader." When he is a trader however, he is entitled to substantial damages without pleading and proving actual damage *Gibson v. Westminster Bank Ltd* (1939) 2 K.B. 882; (1939) All E.R. 577; *Ashubiojo v. A.C.B. Ltd* (1966) 2 All N.L.R. 203.

*f* The next question I will now consider, is whether or not from the evidence before the court, the plaintiff in this action could be designated "a trader," so as to be entitled to substantial damages without pleading and proving actual damages.

*j* The case of *Bank of America (National Trust and Savings Association) v. Edward Alexander* (1969) 2 All N.L.R. 258 decided by Sowemimo J as he then was, on appeal from the decision of a Lagos Magistrate Court, readily lends assistance.

In that case, the plaintiff/respondent, a company director who has a current account with the defendant/appellant bank had requested his bank in London to transfer the sum of £1,500 to his account with the defendant bank. Two days after, he was informed by the manager of the bank that the money had arrived; he issued a cheque for £250 in favour of one Swannnick for a business transaction, but the cheque was dishonoured by the defendant/appellant bank. The trial magistrate having given judgment for the plaintiff/respondent by awarding substantial damages to him for the wrongful dishonour of his cheque as a “trader,” the defendant/appellant appealed to the High Court.

It was contended by defendant/appellant among other grounds that the trial Magistrate was wrong in law in holding that the plaintiff/respondent was entitled to substantial damages since his occupation did not come within the term “trade.”

It was held that the word “trade” is defined “as business especially mechanical or mercantile employment as opposed to a profession carried on as means of livelihood or profit.” That applying this definition to the occupation of the plaintiff/respondent as described in the evidence before the trial Magistrate, it comes within the definition of the word “trade.”

The plaintiff in the case in hand in both his pleadings and evidence, has described himself as a businessman carrying on business in the name of “Juga Edo Construction Company” and “Chukwuedo Concrete Block Industry” which can properly be described as “Mechanical or Mercantile employment” as opposed to a profession. The plaintiff therefore falls with the definition of a “trader,” and I therefore find and hold that he is entitled to substantial damages without pleading and proving actual damage for exhibit A which is itself “cash,” having to be negligently dishonoured by the defendant bank on 26/5/84.

It is true that all the cases referred to above in this judgment had to do with the cheques of customers having to be



- a* wrongly dishonoured by their bankers in which case there is breach of contract of customer/bank relationship, unlike in the case in hand where strictly speaking, the plaintiff cannot be said to be a customer of the defendant bank. In any view
- b* however, there are no compelling reasons where the principles enunciated in those cases, cannot be applied to a case like this, where owing to the negligence of the bank on which a customer has drawn a draft in favour of a third-
- c* party, the bank has dishonoured or unreasonably delayed payment of the draft, which to all intents and purposes is regarded as cash. The bank in my view, is under a duty of care not only to ensure that its customer's account is correctly
- d* debited with the amount on the draft, it is also under a duty to see that the third-party is paid in accordance with the command of its customer, who has had to pay extra commissions to his bank for issuing the draft.
- e* I find and hold that the defendant bank having been negligent in returning exhibit A unpaid for an unreasonable period of twenty three days, plaintiff as a businessman (trader) is entitled to substantial damages without pleading and proving actual damage.
- f*

The issue raised by the defendant's counsel that neither the plaintiff nor his witnesses identified exhibit A, seems to me, to be most irrelevant since both in their pleadings and evidence, defendants have admitted issuing exhibit A in the sum of ₦31,500 to Juga Edo Construction Company, and not to any other person at their Minna branch on 12/4/84, and payable in their Agbor branch.

- g*
- h* In assessing general damages, the plaintiff having failed to prove the items of special damages in paragraph 18 of his statement of claim strictly as required by law, I will take into consideration the detriment; anxiety, loss of credibility suffered by him in the eyes of his bankers (New Nigeria Bank) and the inconvenience and expenses of his having to travel from Ogwashi Uku to Minna to report to the defendant bank's Minna branch of the dishonour of exhibit A, and
- i*
- j* most importantly, the set back his business had to suffer as a

result of lack of funds, to carry on his business, and I award *a*  
the sum of ₦6,500 against the defendant as general  
damages.

Plaintiff's action succeeds; ₦6,500 damages against the *b*  
defendants.

*a*

## Bank of the North Limited v. Obi

*b*

HIGH COURT OF KWARA STATE

OLAGUNJU J

Date of Judgment: 19 DECEMBER 1985

Suit No.: KWS/OKHC/53/83

*c*

*Banking – Overdraft facility – Absence of a formal agreement – Effect*

*Banking – Overdraft facility – Payment of cheque to a banker which resulted in overdraft – Purport of*

*d*

### **Facts**

*e*

The plaintiff who are bankers sued the defendant claiming the sum of ₦53,550.92 as the balance of a debt incurred by the defendant by way of overdraft facilities granted to him by the plaintiff. The plaintiff further claimed 10% interest on the loan from the 18th of October, 1984 when the action was filed in this Court up to today, the date of judgment, and an additional 10% interest from the date of judgment up to the date when the judgment debt is finally liquidated.

*f*

The defendant failed to show up at the trial despite substituted service. The plaintiff proceeded to prove its case in the defendant's absence.

*g*

### **Held –**

*h*

1. When a customer draws a cheque on his banker which resulted in an overdraft, he was in effect asking for a loan.

*i*

2. When a customer with the consent of his bankers, overdraws his account, he must have asked for and be granted an overdraft facility and it is immaterial to the banker's claim that the customer/debtor did not enter into any formal agreement before the overdraft facilities were granted to him.

*j*

*Judgment entered for the plaintiff.*

**Cases referred to in the judgment**

*a*

***Nigerian***

*Ajibade v. Mayowa* (1978) 9-10 S.C. 1

*b*

*Arimi v. Bashorun* (1979) 1 F.N.R. 226

*Barclays Bank of Nigeria v. Mahmud* (1976) 1 F.N.R. 26 at page 29

*Barclays Bank DCO v. Hassan* (1961) All N.L.R. 836

*c*

**Nigerian rule of court referred to in the judgment**

High Court (Civil Procedure) Rules, Kwara State, (1975), Order 5, rule 5(c), Order 10, rule 9, Order 24, rule 5(3), Order 27, rule 8

*d*

**Counsel**

For the plaintiff: *Oniyangi*

*e*

For the defendant: Appearance not stated

**Judgment**

**OLAGUNJU J:** The plaintiff who are bankers sued the defendant claiming the sum of ₦53,550.92 as the balance of a debt incurred by the defendant by way of overdraft facilities granted to him by the plaintiff. The plaintiff further claimed 10% interest on the loan from the 18th of October, 1984 when the action was filed in this Court up to today, the date of judgment, and an additional 10% interest from the date of judgment up to the date when the judgment debt is finally liquidated.

*f*

*g*

*h*

As it was not possible to serve the defendant who is shown to be living at Onitsha outside the jurisdiction of this Court with the writ of summons and other process personally leave was granted to the plaintiff to serve the process by publishing both the writ of summons and the statement of claim in a national newspaper circulating within Onitsha in Anambra State. Accordingly, the two documents were published in the Punch Newspapers of 12/7/84 and 5/12/84, respectively. See exhibits B-B1 and C-C1. A process which satisfies the due

*i*

*j*

*a* service on the defendant in compliance with Order 5, rule 5(c) of Kwara State High Court (Civil Procedure) Rules, 1975, hereinafter referred to as “the Court’s Rules.”

*b* The defendant did not appear in Court after necessary process were served on him. Thus after I was satisfied that the process had been duly served on him and acting by virtue of Order 24, rule 5(3) of the Court’s Rules I gave leave  
*c* to the plaintiff to prove their case when on the hearing date the defendant did not show up.

The plaintiff’s Okene branch accountant, Mr Patrick  
*d* Ngwe, told the Court that on 12th February, 1981 the defendant opened a current account No. 502377, with the plaintiff and that in the course of the operation of the account he overdrew it by issuing out cheques for which the plaintiff  
*e* gave credit and paying into his account cheques drawn on other banks which were returned unpaid when it was sent for clearance. In support of this the witness produced the defendant’s statement of account, exhibit 3.

*f* Exhibit 3 confirms the testimony of the witness as it shows that between 3rd April, 1981 and 30th June, 1981 the defendant overdrew his account on two cheques to the tune of ₦43,000 and paid into his account two cheques of other  
*g* banks totalling ₦23,000 which were returned to the plaintiff unpaid and for which the defendant had already received credit. Although the statement also shows that during the same period the defendant paid into his account some paltry  
*h* amounts his accounts remained largely in debt.

The witness told the court that as of 25th July, 1983 the defendant had overdrawn his account by ₦53,550.92 including both the principal sum, interest and sundry charges such as  
*i* Solicitor’s charges. He further deposed that the indebtedness was brought to the notice of the defendant through letters, exhibits 4 and 5, and a demand for settlement of the account was made through the same letters to none of which the de-  
*j* fendant replied.

As I said earlier the defendant neither appeared in Court throughout the trial nor filed a defence. On the authority of *Ajibade v. Mayowa and Another* (1978) 9-10 S.C. 1; (see also: *Arimi v. Bashorun and others* (1979) 1 F.N.R. 226), the plaintiff is entitled to judgment on their pleadings which were not denied by the defendant: see also Order 10, rule 9 of the Court's Rules.

In any case, I am satisfied on the evidence before me strengthened by the failure of the defendant to file any defence, a failure which is tantamount to an admission of the plaintiff's claim, that the defendant is indebted to the plaintiff to the tune of ₦53,550.92. I agree with the submission of learned counsel for the plaintiff buttressed by the case of *Barclays Bank of Nigeria v. Mahmud* (1976) 1 F.R.N. 26 at page 29, which he cited to me and which is apposite that "when a client paid a cheque to his banker which resulted in an overdraft he was in effect asking for a loan." The similitude is equally true that when a customer, with the consent of his bankers, overdraws his account he must have asked for and granted an overdraft and I hold that it is immaterial to the claim of the bankers that the customer/debtor did not enter into any formal agreement before the overdraft facilities were granted to him.

Having been satisfied both on the pleadings and the evidence before me that the defendant is indebted to the plaintiff in the sum of ₦53,550.92. I hold that the plaintiff is entitled to judgment and I enter judgment for them in that amount. I also order that interest shall be paid on that amount at the rate of 10% per annum from 18th October, 1984, the date this action was filed, to today, *both days inclusive*.

The plaintiff also asked for an order for payment of 10% interest on the judgment debt from today until judgment debt is liquidated. In the light of Order 27, rule 8 of this Court's Rules strengthened by the case of *Barclays Bank DCO v. Hassan* (1961) All N.L.R. 836, cited to me by learned Counsel for the plaintiff, I do not think that that demand is unreasonable.

- a* Accordingly, I further order that the judgment debt shall attract interest at the rate of 10% per annum until the debt is finally liquidated and the interest is to run from tomorrow.
- b* Judgment for the plaintiff in the sum of ₦53,550.92 with 10% interest from 18th October, 1994 till judgment debt is liquidated. I will hear Counsel on cost.

## Oguma Associated Companies (Nigeria) Limited v. Esiso and others

HIGH COURT OF BENDEL STATE

UWAIFO J

Date of Judgment: 27 DECEMBER 1985

Suit No.: W/25/82

*Banking – Account – Uncertainty of money due – Proper action*

*Banking – Agency – Giving of financial advice by bank on how a customer's business is to be managed – Whether creates agency relationship – Whether the person named becomes the agent of the bank*

*Banking matters – Agency – Action – Commencement of action – Party to be sued*

*Banking matters – Agency – Existence thereof – Onus of proof*

*Banking matters – Agency – Types thereof*

### Facts

The plaintiff company were at the material time doing transport and haulage business (and were indeed incorporated for that purpose) but at a point the business needed reactivation. This much is obvious from paragraph 5 of the statement of claim which reads: "Sometime in 1978, the 3rd defendant, in order to reactivate the business account of the plaintiff with it, appointed the 1st defendant as its agent to manage the transport haulage business of the plaintiff."

The bank however said that the plaintiff company was anxious to find a way out of their financial obligation to the bank. The plaintiff company then asked for further financial assistance from the bank who did not want to commit more money into that business. The first defendant had then approached the bank for assistance to run a similar business. Instead of giving him money, the bank directed him to Chief



*a* JO Oguma, the managing director of the plaintiff Company, for any suitable working relationship between them.

*b* This is what the plaintiff company, in addition to other facts to be mentioned later, relied on to allege that the first defendant was all along the bank's agent. But the bank in paragraph 11 of their statement of defence said:

*c* "The third defendant did no more than to introduce the parties to each other with a view to their jointly arranging to reactivate the plaintiffs' business and eventually liquidating the plaintiff's indebtedness to the third defendants."

*d* The first defendant did meet Chief Oguma. There were certain arrangements reached. Some trucks and equipment were delivered by the plaintiffs' company to be run under the control of the first defendant. The business made no noticeable progress.

*e*

**Held –**

*f* 1. The fact that a bank recommended a person to a customer as being a competent person to handle the customer's business, does not make such person the agent of the bank.

2. Agency may arise in 3 (three) of 5 (five) ways:

*g* (a) By express appointment.

(b) By ratification.

*h* (c) By estoppel – Agency by estoppel arises when a person has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent and knows that that other person is about to act on that belief although in fact no agency really existed.

*i*

*j* 3. The onus is on the person dealing with anyone as an agent to show that agency in fact exist or that the principal, (even if there is in fact no agency) is estopped from disputing it.

4. It is wrong for a party to commence an action against both principal and agent. Such party must elect to sue either the principal or agent. Once he elects to sue one, the other is released from liability. a
5. Where a particular amount due to a person is yet to be ascertained but it is certain that some particular amount is due, the proper action is for an account. b
- Plaintiff's claim dismissed.* c

### Cases referred to in the judgment

#### *Nigerian*

*West African Shipping Agency (Nig.) Ltd v. Kalla* (1978) S.C. 21 d

#### *Foreign*

*Basma v. Weekes* (1950) S.C. 441 e

*Cox and Wheatcroft v. Hickman* (1861) 8 H.L. Case 268

*Fairlie v. Denton* (1828) 8 B. and C. 395

*Furge v. Sharwood* (1841) 2 Q.B. 388

*Great Western Insurance Co of New York v. Guriliffe* (1874) 9 Ch. App 525 at 541 f

*Pole v. Leask* (1863) 3 L.J. Ch. 155 at 161 162

*Richards v. Gellatly* (1872) L.R. 7 C.P. 127 at 131

*Skith Bird v. Blower* [1939] 2 All E.R. 406 g

*Thomas v. Jones* [1921] 1 K.B. 22 at 37

*Wiedemann v. Walpole* (1891) 2 Q.B. 534

### Books referred to in the judgment

Bostead on Agency, (13ed) page 24, Illus. 3 h

Halsbury's *Laws of England*, (4ed), Volume 1, paragraph 784

#### **Counsel**

For the plaintiff: *Chief Kehinde*

For the first and second defendants: *Odje*

For the third defendant: *Sogbesan* j

**a Judgment**

**UWAIFO J:** It seems the plaintiff company maintained two accounts with the third defendant bank (simply to be referred to as the bank), one called the loan account (exhibit OAC 19) and the other, current account (exhibit OAC 20). Both accounts are shown in those exhibits to be in substantial debit. The bank referred to this indebtedness in paragraphs 7, 8, 9, 10 and 11 of their statements of defence.

The plaintiff company were at the material time doing transport and haulage business (and were indeed incorporated for that purpose) but at a point the business needed re-activation. This much is obvious from paragraph 5 of the statement of claim which reads: “Sometime in 1978, the third defendant, in order to reactivate the business account of the plaintiff with it, appointed the first defendant as its agent to manage the transport haulage business of the plaintiff.”

The bank however said that the plaintiff company was anxious to find a way out of their financial obligation to the bank. The plaintiff company then asked for further financial assistance from the bank who did not want to commit more money into that business. The first defendant had then approached the bank for assistance to run a similar business. Instead of giving him money, the bank directed him to Chief JO Oguma, the Managing Director of the plaintiff company, for any suitable working relationship between them.

This is what the plaintiff company, in addition to other facts to be mentioned later, relied on to allege that the first defendant was all along the bank’s agent. But the bank in paragraph 11 of their statement of defence said:

“The third defendant did no more than to introduce the parties to each other with a view to their jointly arranging to reactivate the plaintiffs’ business and eventually liquidating the plaintiff’s indebtedness to the third defendants.”

The first defendant did meet Chief Oguma. There were certain arrangements reached. Some trucks and equipment were

delivered by the plaintiffs company to be run under the control of the first defendant. The business made no noticeable progress. The plaintiff company now claim against the defendants jointly and severally as follows:

1. The sum of ₦8,754,740 (eight million, seven hundred and fifty-four thousand, seven hundred and forty naira) being the amount of hire of twenty four (24) trucks and three (3) equipments (*sic*) ie one fork lift and two bulldozers hired out for and on behalf of the plaintiff by the first defendants himself and for and on behalf of the second and third defendants as agent and/or representative of the second and third defendants for the period of August, 1978 to January, 1982;
2. Payment to the plaintiff of monies due to the plaintiff in respect of the hire of the said twenty-four (24) trucks and three (3) equipments (*sic*) from the month of February, 1982 until the return of the trucks and equipment as in claim (3) below or payment for them as made in claim (4) below at the following rates:
  - (a) For each of the twenty four (24) trucks at ₦300 per day.
  - (b) For the forklift trucks at ₦25 per hour for 8 hours per day.
  - (c) For the bulldozer No. HD 11B at ₦40 per hour for 8 hours per day and
  - (d) For the bulldozer No. HD 16B at ₦50 per hour for 8 hours per day.
3. Return of all the twenty-four (24) trucks and three (3) equipments to the plaintiff; and
4. In the alternative to (3) above, payment to the plaintiff of the value of the trucks and equipments or of the value of such of the trucks and equipments as is or are not returned to the plaintiff.”

As said earlier the bank wanted the plaintiff company's business reactivated and they thought this might be feasible

- a* by involving the first defendant. Discussion took place. The plaintiff company wrote on 1st June, 1978 (exhibit OAC 3) to the bank asking for confirmation that the following were
- b* agreed: (1) that to solve the indebtedness, the bank proposed partnership between the plaintiff company, the first defendant and his company; (2) that the new body would take over the management of the trucks; (3) that the bank would
- c* fully assist to reactivate the transport business by providing necessary funds; (4) that the bank had confidence in the said arrangement which would be operated on profit sharing basis; (5) that from the plaintiff company's share, they would
- d* reduce their indebtedness to the bank.

- In reaction, the bank wrote on 6th June, 1978 (exhibit OAC 2) to JO Oguma saying that they were in agreement with his establishing a working relationship with the first
- e* defendant in order to reactivate his business account provided he was prepared to pass the management to the first defendant.

- On 8th June, 1978, a meeting was held by JO Oguma, Samuel Onodiana of the plaintiff company and the defendant. The minutes (exhibit OAC 4) were signed by Onodiana and the first defendant. It was there said among others that a new company be formed to which the plaintiff company would appoint the Chairman and one Director, the first
- g* defendant to appoint two Directors and the bank to appoint one Director, and a new account to be opened with the bank in the name of the proposed company. A copy of the minutes was sent to the bank by letter dated 10th June, 1978
- h* (exhibit OAC 5) signed by Onodiana.

- The bank later complained to the plaintiff company through their solicitors in a letter dated 25th August, 1978
- i* (exhibit OAC 7) that they were surprised that the first defendant to whom the management of the business had been entrusted by the plaintiff company had failed "to meet with the manager of the bank to finalise all arrangements and
- j* would still very much want to protect their interest having

regard to the colossal amount they have released to you as *a*  
loan to purchase the vehicles used for the business.” They  
requested full compliance with the agreement reached on 8th  
June so that they (the bank) would be represented in the new *b*  
company and an account accordingly opened with them in  
the name of the new company.

The bank was ignored. They were not represented in the *c*  
new company. An account was not opened with them in the  
new name. Instead, there is some evidence that JO Oguma  
and the first defendant later opened a joint account with the  
New Nigeria Bank Limited, Warri. The bank, in a letter (ex- *d*  
hibit OAC) written by their branch manager, Adebayo  
Owolabi (DW3), on 28th August, 1978, protested to the  
manager New Nigeria Bank Limited, about the said joint ac-  
count. exhibit OAC 22 shows that such account existed. *e*

Two more documents which conclusively show the rela-  
tionship between the plaintiff company and the first defen-  
dant ought to be referred to here. One was signed on 14th *f*  
July, 1978 by JO Oguma as Chairman/Managing Director of  
the plaintiff Company (exhibit OAC 16). It reads:

“BE IT KNOWN TO ALL CONCERNED THAT I, JAMES OK-  
PAKO OGUMA, the Chairman of the Board of Directors and the *g*  
Managing Director of Oguma Associated companies (Nig.) Lim-  
ited a company incorporated under the laws of Nigeria and carry-  
ing on business at No. 211B Warri/Sapele Road, Effurun, DO  
HEREBY ANDBY THESE PRESENTS TRANSFER the powers *h*  
and duties vested in me in my capacity as the Chairman and  
Managing Director Associated Companies (Nig.) Limited to  
Yoma Esisio of 13 Oil Field Road, Effurun for and on behalf of  
Songhai Haulage Limited a Company to be incorporated. The  
powers and duties so transferred and vested in Yoma Esisio is lim- *i*  
ited to all powers and duties normally exercised by James Ok-  
pako Oguma in relation to transport Haulage division of the  
Company and it shall include the power for Yoma Esisio to use  
the premises normally used with the transport business, appoint *j*  
and do away with employees employed in the Division.”

- a* It was intended as a power of attorney vesting certain powers and duties on the first defendant. If that created the first defendant agent, he was the agent of the plaintiff company.
- b* The other document was signed on 15th July, 1978 between JO Oguma as Chairman of the plaintiff Company and the first defendant (exhibit OAC 17). It states:
- “I, Yoma Esiso, of No. 13 Oil Field Road, Effurun, Bendel State of Nigeria, hereby acknowledge the following:
- c* That James Okpako Oguma, Chairman of Oguma Associated Companies (Nigeria) Limited and I, Yoma Esiso, have for some time now been in negotiation regarding joint ownership by his Company and myself and Sole Management, by myself, of the
- d* premises, twenty tractor/trailers and five operational vehicles plus all equipment attendant to these formerly owned and managed by Transport Division of Oguma Associated Companies (Nig.) Limited which said Company (Songhai) is formed along the lines of a
- e* comprehensive legal contract signed by myself and James Okpako Oguma on the 12th of July, 1978.
- That agreement along the lines as spelt out above has been reached.
- f* That by a power of attorney dated 14th July, 1978 said James Okpako Oguma did transfer to me rights and powers formerly held by him as Chief Executive of the Transport Division of Oguma Associated Companies (Nig.) Limited in my capacity as
- g* Executive Director of Songhai Haulage Company Limited.
- I hereby solemnly acknowledge all responsibilities normally inferred in the execution of such transfers.”
- I cannot see the basis for alleging that the first defendant
- h* was the bank’s agent. Agency may arise in one of five ways but only three which seem relevant here need be mentioned; agency by express appointment, agency by estoppel and agency by ratification. There is no single evidence here of
- i* agency by express appointment or ratification. In respect of agency by estoppel, the famous observation of Lord Crantworth in *Pole v. Leask* (1863) 3 L.J. Ch 155 at 161-162 may be quoted. It says:
- j* “No one can become the agent of another person except by the will of that person. His will may be manifested in writing, or

orally or simply by placing another in a situation in which according to the ordinary rules of Law or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him... This proposition, however, is not at variance with the doctrine that *where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that belief, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed . . .*

Another proposition to be kept constantly in view is, that the burden of proofs is on the person dealing with anyone as an agent, through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it.” (Emphasis added.)

From the documents there is no express agency. Indeed all that there is, is clear evidence that the first defendant contracted independently for himself to the knowledge and acceptance of JO Oguma for the plaintiff company to perform certain functions. Exhibits OAC 16 and OAC 17 confirm this. But it ought to be said he acted in trust for the plaintiff company. No other evidence, oral or documentary, proves that he was the bank’s agent.

By way of illustration, I will refer to a situation where a debtor, by deed, assigns his business and effects to A and B as trustees to continue the business in his name, for the benefit of his creditors. There is a provision in the deed, which enables A, and B to employ the debtor to carry on the business and they so employ him. In that circumstances the debtor becomes an agent of A and B for the purpose of carrying on the business and they are liable on contacts made by him in the ordinary course thereof in his own name: see *Furge v. Sharwood* (1841) 2 Q.B. 388. The debtor in that situation is not, nor are A and B, the agents of the creditors in carrying on the business: see *Cox and Wheatcroft v. Hickman* (1861) 8 H.L. Case 268. See *Bowstead on Agency*, 13ed page 24, illustration 3.



- a* It follows that if A and B carry on the business themselves, they will be agents of the debtor but not of the creditor. That roughly represents the facts of the present case whereby the first defendant is not an agent of the bank.

However, learned Counsel for the plaintiff company on exhibits OAC 9, 10 and 13 written by the plaintiff company either direct to the bank or copied to them. In exhibits OAC 9 and OAC 10 copied to the bank, it is alleged that the first defendant claimed to be the bank's agent. The two letters are dated 18th and 20th April, 1979 respectively. In exhibit OAC 13 dated 27th May, 1980 addressed to the bank reference is made to the first defendant as "your agent."

This assertion cannot be taken seriously in view of exhibits OAC 2, OAC 3, OAC 4, OAC 5, OAC 7, OAC 8, OAC 16 and OAC 17. It had earlier been proposed that the plaintiff company would appoint the Chairman and one director, the first defendant would appoint two directors and the bank one director onto the Board of the proposed company to run the transport business. This shows that the bank wanted a place on the Board in their own right.

Therefore the said exhibits OAC 9, OAC 10 and OAC 13 which the plaintiff company rely on to say that the first defendant was the bank's agent because the bank did not reply to refute the relevant allegation therein, and consequently that that amount to admission of agency, cannot be accepted to have that effect. The evidence of Adebayo Owolabi (DW3) in reference to the said three exhibits is that the bank would not reply letters when it is thought that it is not worth the trouble. I think that it is quite justified in the present circumstances having regard to the known accepted and actual relationship between the parties.

The bank never at any time acted as to lead the plaintiff company, from their conduct, to believe that the first defendant was appointed to act as their agent. If the plaintiff company decided late in the day to make that assertion without

grounds whatever, except what they alleged the first defendant said to them that ought not to bother the bank as to waste their time in making refutations. The plaintiff company have simply not discharged the burden on them to prove the alleged agency. a  
b

It has been said that the mere failure to reply to a letter in which certain claim or allegation are made does not amount to an admission. It depends on the circumstances. In *Richards v. Gellatly* (1872) L.R. 7 C.P. 127 at 131 Wiles J said: c

“It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it, and that his omissions to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded, and the absurdity of acting upon it demonstrated. It may be otherwise where the relationship between the parties is such that a reply be properly expected.” d  
e

This observations was cited by Bowen LJ with approval in *Wiedeman v. Walpole* (1891) 2 Q.B. 534 where he himself said at page 539: f

“There must be some limitations placed upon the doctrine that silence when a charge is made amounts to evidence of an admission of the truth of the charge. The limitation is, I think this: Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than he would not.” g

In that same case Lord Esher M.R. tried to give instances where letters ought to be answered. He said at pages 537-538: h

“Now there are cases business and mercantile cases in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other, ‘but you promised me that you would do this or i  
j

- a* that', if the other does not answer the letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement."
- b* But as can be seen, the above illustrations are entirely different from what we have in the present case. First, the instances given stated what the other party said directly in the business or negotiation not what he was alleged by another person to
- c* have said. Secondly, the alleged admission must not seem to be completely out of tune with undisputed evidence (particularly in documentary form) such as to make the allegation look a diversionary gimmick. Therefore the guiding principle
- d* should always apply, namely, that silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not.
- e* This conforms to what Lord Tenterden said in *Fairlie v. Denton* (1828) 8 B. and C. 395 that:
- f* "what is said to a man, before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but . . . it is too much to say, that a man by omitting to answer a letter . . . Admits the truth of the statements that letter contains." Similarly Bankes LJ said in *Thomas v. Jones* [1921] 1 K.B. 22 at 37:
- g* "There is authority for this proposition, that if the only fact relied upon is the mere fact that the letter was not answered, without any surrounding circumstances which would make it natural that it should be answered, that is not in itself corroborative evidence. I do not find any facts here which would render it natural that that letter should be answered'."
- h* From all the facts available, it is clear to me that at no time did the first defendant act as the bank's agent. All that happened was that the bank was worried that the plaintiff company had a large financial obligation to them. The plaintiff company's
- i* business to which that huge sum was committed was not doing well or indeed had become dormant. It required reactivation. The plaintiff company thought if they got more money the business could look up. The bank was not prepared to take further
- j* financial risk with the plaintiff company.

They felt that if reactivation was possible, a new management was desirable. They thought the first defendant might provide the necessary impetus. They left both parties to sort matters out. The parties came up with an arrangement, which impressed the bank, particularly handing the management of the new business to the first defendant, offering an opportunity to the bank to participate through appointing one director and opening an account in the name of the new company with them. They were disappointed in respect of the last two conditions.

In fact JO Oguma (Chairman and Managing Director of the plaintiff company) and Yoma Esiso (the first defendant who was managing the so called new company) had opened a joint account in another bank in order, perhaps, to keep the bank out of the arrangement. It was later that the first defendant writing on behalf of Songhai Haulage Limited promised the bank to pay ₦10,000 monthly with effect from 30th March, 1979 towards the liquidation of the plaintiff company's indebtedness: see exhibit OAC 8. The plaintiff company was aware of this arrangement. On 25th May, 1979 they wrote to enquire from the bank the total amount so far paid through that instalmental payment: see exhibit OAC 12. It is altogether unwarranted to impute agency between the first defendant and bank.

If the bank were to be charged with anything at all it might have (remotely) been negligent misrepresentation arising from their advice that the business could be reactivated if the first defendant was given the management. But here there would have been obvious difficulty. The suggestion contained in the bank's letter dated 6/6/78 (exhibit OAC 2) was not followed. A partnership was proposed initially and later a holding company. Again the bank was to be given an opportunity to be represented on the Board of the company to be formed. That might have ensured expert financial guidance. That also was made impossible by JO Oguma and the first defendant.

- a* There was some argument as to how many trucks were taken over by the first defendant. The plaintiff company says 24, the first defendant says about 17. Exhibit OAC 17 puts the matter as “twenty tractor/trailer and five operational vehicles plus all equipment attendant to those formerly owned and managed by the Transport Division of Oguma Associated Companies (Nig.) Limited.” I have already said he was to manage the business under a power of attorney (exhibit OAC 16).

Indeed in exhibit OAC 10 (page 2, paragraph 3), the plaintiff company wrote:

- d* “By Mr Yoma Esiso’s letter of 16/3/79 on behalf of Songhai Haulage, the repayment of the loan has commenced; confirmation of the deduction of ₦10,000 for the month of March by the bank was made by the bank manager at about 11:30am. on Thursday 12/4/79 at the bank to the undersigned. There is no doubt therefore that the bank has implicit confidence in Mr Yoma Esiso and his management. He should therefore be able to liquidate the loan to the bank in good time with the twenty (20) trucks transferred to him to manage.”
- e*
- f* I think that created agency or trust of some sort.
- That being so, this was a kind of business arrangement. There was no question of the hire of the vehicle and equipment as if there was a contract for that purpose or an understanding that the first defendant should pay hire charges. It was a pure business venture intended to salvage the plaintiff company from their indebtedness. If the business has not been successful or as successful as was envisaged, it does not mean the first defendant would have to pay hire charges. It only would mean that the business ended up like the “South Sea Bubble” of 1720.
- g*
- h*
- i* I agree with the defence Counsel that if there was to be any action open to the plaintiff company, it would be for an account against the first defendant and/or such other party with whom the plaintiff company can establish the relationship of principal and agent or some form of trusteeship of fiduciary relationship in connection with the transaction. But it must be
- j*

remembered that the relationship between the plaintiff company and the first defendant has not been brought formally to an end. The power of attorney has not been revoked. It should also be remembered that Chief JO Oguma himself appears to have participated in the said venture in one form or another even up to the point of opening a joint account with the first defendant. He only started to complain of bad management or exclusion by the first defendant at a stage. These are matters, which on the whole cannot be ignored, even in an appropriate action.

I do not however agree with the submission that the plaintiff company have no *locus standi* to sue. They did not sell their property in question but to all intents and purposes merely created a business condition to allow another to put them, hopefully, in profitable use. They were and remain the owners of the said property as principal while the other became agent.

The difficulty about the plaintiff company suing for income from hire, as they have done, is two fold: first, as already, said there was no contract of hire; secondly, it was not within the contemplation of the parties at the time of the transaction what the hire costs of those trucks and equipment were. Otherwise it is well recognised that a principal may sue for loss sustained by him through breach of duty on the part of an agent if the loss sustained was within the contemplation of the parties at the time when the contract or transaction was made in accordance with general principles: see Halsbury's *Laws of England*, 4ed, Volume 1 paragraph 784.

But in the present case, the plaintiff company is simply assuming that the trucks and equipment were daily hired out. They assume what the hire charges ought to be. They want it to be accepted that the defendants have or ought to have the value of the hire charges in their possession or else be damaged if that money was not in fact so earned. They want the second and third defendants who had nothing to do with the

- a* transaction with them to be made jointly liable. The entire claim to the money is based on what has not been ascertained yet. In my view this would have been a proper occasion for an action for an account: see *Great Western Insurance Co of New York v. Cunliffe* (1874) 9 Ch App 525 at 541.

- b* I am afraid I do not find the plaintiff company's claim made out. I do not know how the second defendant company comes in at all. As for the bank I believe I have sufficiently shown that it was erroneous for the plaintiff company to ever regard them as the first defendant's principal. If they had been, it would have been wrong still to sue both. From the circumstances of this case, the plaintiff company would have had to elect to sue either and once this was done, the other would be released from liability: see *West African Shipping Agency (Nig.) Ltd and Another v. Kalla* (1978) 3 S.C. 21 approving *Skith Bird v. Blower* [1939] 2 All E.R. 406 per Luxmoore LJ and *Basma v. Weekes* (1950) A.C. 441.

- c* It is not even possible to order a return of the trucks and equipment unless there was a proper action where it would have been established how they were made for the business, if they are still serviceable and whether any has lawfully passed to a third party. In the circumstances I hold that this action is misconceived and it is hereby dismissed. I award *d* ₦1,000 costs in favour of first and second defendants and *e* ₦1,000 costs in favour of the third defendant.

**Aeroflot Soviet Airlines Limited v. United  
Bank for Africa Limited**

SUPREME COURT OF NIGERIA

ESO, UWAIS, COKER, KARIBI-WHYTE, OPUTA JSC

Date of Judgment: 16 MAY 1986

S.C.: 224/1984

*Banking – Banker/customer relationship – Money paid into  
account – Deposit teller stamped and initialled by banker –  
Banker denied receipt of deposit – Handwriting and docu-  
ment experts confirmed that both stamp and teller were  
genuine – Whether the stamped and initialled teller was suf-  
ficient to prove lodgement of deposit – Teller duly stamped  
and initialled by banker – Customer need not prove that  
bank official who authenticated teller had authority*

*Evidence – Deposit – Acknowledgement of deposit in bank –  
What constitutes documentary proof thereof*

**Facts**

The appellants, who were plaintiffs in the lower court, had a  
current account with the Central Lagos Branch of the re-  
spondent bank. The appellant claimed that they paid a total  
sum of ₦9,750 into their account between 5th and 22nd  
May, 1978 with respondent's tellers which were stamped  
with "cashier No. 5 stamped" and also initialled.

However, the sum of ₦9,750 deposited was not credited to  
the account of the appellant in the statement of account for  
May, 1978. Consequently, the appellant wrote several letters  
informing the respondent of the omission and requesting that  
their account be credited with the sum of ₦9,750. When the  
respondent failed to credit the account of the appellant, the  
appellant brought an action claiming damages for conver-  
sion in the sum of ₦9,750 or payment of the ₦9,750 as  
money had and received by the defendant/respondent to the  
use of the plaintiff/appellants and interest on the said sum of  
₦9,750 at current bank rate from 5th May, 1978.



- a* The respondents denied ever receiving the sum of ₦9,750 from the appellants and that the cashier's stamp used to authenticate the paying – were during that period not in use, having been reported missing before the dates the appellants claimed to have lodged the deposit.

*c* They stated further that the signature of the cashier on the stamp could not be that of the person so claimed because he was on leave between March 23 and May 15, 1978 at the relevant period and on resumption did not work as cashier stamp No. 5. However, handwriting document experts confirmed that both stamp and the initials were genuine.

*d* The trial Judge held that the respondent bank had been negligent in allowing a stamp which was reported missing to have been used and entered judgment for the appellant.

*e* The respondent appealed to the Court of Appeal which allowed the appeal and dismissed the appellant's claims on the ground that the trial Judge based his judgment on negligence which was not pleaded. The appellants appealed to the Supreme Court which allowed the appeal.

*f* **Held –**

- g* 1. That with such clear evidence as to banking procedure and with the production of the bank tellers by the appellant which were proved to have been stamped and initialled by one of the staff of respondent, the claim of the appellants that they paid money into the respondent bank had been proved.
  - h* 2. Since the evidence of the appellant that they paid money into the bank stood unchallenged by the respondent, the learned trial judge was right in finding for the plaintiff/appellant
  - i* 3. In view of the fact that the teller was duly stamped and initialled by the staff of respondent bank, the appellant need not prove that the bank official who actually stamped and initialled, the teller had the authority of the respondent to do so.
- j*

***Per Curiam***

*a*

“There is no doubt that if it is established that the stamp of cashier No. 5 was used by an official of the respondent bank despite the security measures adopted, the bank will be liable in action for negligence.”

*b*

**Cases referred to in the judgment**

***Nigerian***

*c*

*Abowaba v. Adesina* 12 W.A.C.A. 18

*African Continental Bank v. Agbanyin* 5 F.S.C. 18

*George v. Dominion Flour Mills Ltd* (1963) 1 All N.L.R. 71

*d*

*George v. U.B.A* (1972) 8-9 S.C. 274

*Jobi v. Oshinlaja* (1963) 1 All N.L.R. 12

*Ochonma v. Unosi* (1965) N.M.L.R. 321

*Sonuga v. Anadein* (1967) N.M.L.R. 77

*e*

***Foreign***

*Coleman v. Riches* (1955) 16 C.B. 104

*Commonwealth Shipping Representative v. P and O Branch Services* (1923) A.C. 91

*f*

*Doherty v. Royal Bank of Scotland* (1963) S.L.R (Notes) 43

*Fibrosa Spolka Akcna v. Fairbairn Lawson Combe, Barbour Ltd* (1943) A.C. 32

*g*

*Fung Kai Sun v. Chan Fui Hing* (1951) A.C. 489

*George Whitechurch Ltd v. Cavanagh* (1902) A.C. 117,

*Jacobs v. L.C.C.* (1950) 1 All E.R. 737

*h*

*Jacob v. Morries* (1902) 1 Ch. 816

*Lloyd v. Grace, Smith and Co* (1912) A.C. 716

*London Jewellers Ltd v. Attenborough* (1934) 2 K.B. 206

*Mckenzie v. British Lines Co* (1881) 6 A.C. 82

*i*

*Morris v. C.W. Martin and Sons Ltd* (1966) 1 Q.B. 716

*Moses v. Macferlan* (1760) 2 Burr 1005 at 1012

*Ruben v. Corcat Fingall Consolidated* (1906) A.C. 439

*Towers v. Berretts* (1786) 1 T.R. 133

*j*

**a Nigerian statutes referred to in the judgment**

Evidence Act, sections 73 and 76

Supreme Court Act, 1960, section 22

**b Counsel**

For the Appellant: *Popoola*

For the respondent: *Nwke* (with him *Nwokolo*)

**c Judgment**

**KARIBI-WHYTE JSC:** (*Delivering the lead judgment*) This is an appeal against the judgment of the Court of Appeal. On the 26th April, 1984, the Court of Appeal, holden at Lagos, in a unanimous decision of the lead judgment of Uthman Mohammed JCA, reversed the judgment of Martins J of the High Court of Lagos State which entered judgment for appellants as plaintiffs in an action for money had and received against the respondents as defendants.

The facts of the case in the trial Court were that appellants were at all material times the customers of the respondent bank, and had an account with them. Appellants also in the normal course of business paid money into the respondent bank in a teller provided by the respondent bank. As evidence of acknowledgment of each sum so paid, respondent bank stamped and initialled the teller through which the money was paid. At the end of each month, respondent bank sent to appellant a statement of the account of appellant in the respondent bank, reflecting sums paid into respondent bank in favour of the appellant.

In June, 1978, when the statement of account for May was received, the appellant discovered that certain sums paid into respondent's bank in favour of the appellant for the days 5, 9, 12, 17, 22 were not reflected in the statement of account, resulting in a total shortage of payment of ₦9,750. Appellant then wrote several letters dated 6th, 12th, 13th June, 1978, to the respondent to point out this omission and asked for rectification. The respondent's bank did not reply to the letter complaining about the fact or the reminders. The appellants thereafter reported the matter to the Police for action and

subsequently brought action against the respondent bank, claiming as follows— *a*

1. Damages for conversion in the said sum of ₦9,750.
2. Alternatively, payment of the said sum of ₦9,750 as money had and received by the defendant to the use of the plaintiffs. *b*
3. Interest on the said amount of ₦9,750 at current bank rate from 5th May, 1978. *c*

In paragraph 3 of the statement of claim admitted by the respondent bank, appellants maintained a current account No. 7043 at the respondent's Central Lagos Branch at No. 97/105 Broad Street, Lagos and went on to plead further as follows:— *d*

- “4. On various dates in May, 1978 the plaintiff brought its messenger one Christopher Onyeogani who deposited various sums of money in cash with the defendant to the Credit of the plaintiffs said account that is to say: *e*

On 5/5/78	plaintiffs deposited	₦2,500
On 9/5/78	plaintiffs deposited	₦1,500
On 12/5/78	plaintiffs deposited	₦2,500
On 17/5/78	plaintiffs deposited	₦ 500
On 22/5/78	plaintiffs deposited	<u>₦3,000</u>
	TOTAL	<u>₦9,750</u>

These various deposits had been duly recorded on the defendants' tellers (paying-in-slips) and their receipt by the defendant bank duly acknowledged by the defendant's Cash Received Stamp impression. The said tellers (paying-in-slips) are hereby pleaded and shall be founded upon at the trial. *f* *g*

5. Sometime in June, 1978 the plaintiffs received from the defendants a statement of the plaintiffs' said current account. The plaintiffs then discovered that the deposits enumerated in paragraph 4 above had not been credited to their said current account. *i*

The statement dated 6th June, 1978 is pleaded.

6. There upon the plaintiffs on 6th June, 1978 by a letter complained to the defendants about the unrecorded deposits. *j*

- a* Receiving no reply the plaintiffs sent a reminder on 12th June, 1978 and again on 13th June, 1978. These letters are hereby pleaded and shall be relied upon at the trial.
- b* 10. In the premises, the defendants have wrongfully deprived the plaintiffs thereof, whereby the plaintiffs have suffered damages to the value of the sum of the said deposits.
11. In the alternative, the defendants have and received the said sum of ₦9,750 to the use of the plaintiffs and are liable to repay the said sum to the plaintiffs.”
- c*

The respondents in paragraph 4 of their statement of defence denied paragraph 4 of the statement of claim in its entirety and admits the averments in paragraphs 5 and 6, of the statement of claim. Respondents also denied the averments in paragraphs 10 and allegations in paragraph 11(1) and (2) of the statement of defence.

*d*

*e* Thus at the trial only those facts in respect of which issues were joined were before the trial Court for consideration. This is essentially the averments in paragraphs 4, 10 and 11 of the statement of claim. The issue then concisely stated

*f* was whether the sums claimed to have been paid by the appellant into the respondent bank on his behalf were so paid. Accordingly, if they were so paid, is the respondent bank liable to the appellant if the sums were not credited to the account of the appellant.

*g*

Before the trial Court, the appellant gave evidence of the payment of the sums alleged not credited to its account, by showing that the teller used in paying the money was stamped with the respondent bank's stamp normally used in the normal course of duty. Evidence of handwriting and document experts was called to establish whether the document and the initials were a forgery. The evidence of the experts did not disclose there was any forgery and indeed they were both positive that both the stamp and the document were genuine.

*h*

*i*

The defence of the appellants was that no such money claimed by the appellant was paid into the account of the

*j*

appellants on the dates alleged, because as they said, the cashier's stamp used to authenticate the paying in tellers were during that period not in use, having been reported missing. Furthermore, the signature of the cashier on the stamp could not be that of the person so claimed because he was on leave between March, 23 and May 15, 1978 at the relevant period, and on resumption did not work as cashier stamp No. 5.

In his finding, the trial Judge stated as follows—

“It is abundantly clear that the monies were paid into the bank, the defendant has not called any evidence in rebuttal to say that the monies were never received by the defendant or paid into the defendant bank. The evidence of the first PW that these monies were paid into the bank stood unchallenged. What the defendants were saying was that the stamps on the teller booklets exhibits B to B4 were not that of the bank as the cashier stamp No. 5 was missing at the time the monies were paid in.

Query: How did cashier stamp No. 5 get to be stamped and initialled on exhibits B to B4. Evidence of the second and third PW's was that there were similarities both on the stamp impressions and initials when compared with the pages the defendant admitted having received monies stated on these pages.”

The learned trial Judge went further to state that:

“... However, a bank would not be permitted to retain money paid in, but omitted to be credited, even if the customer had not noticed its omission from his bank statement.”

Referring to the *Mckenzie v. British Linen Co* (1881) 6 A.C. 82, the trial Judge said:

“Where a bank stamps a paying slip counterfoil, it bears the onus of showing that a different sum was actually received from that acknowledged on the counterfoils.”

The learned trial Judge held respondents liable on the ground that:

“on the totality of the evidence and exhibits tendered, I am of the view that the plaintiff's case is proved and judgment is entered in favour of the plaintiff as per his writ of summons with 5% interest with effect from 22nd May, 1978, until judgment debt is liquidated.”

- a* The defendants, now respondents appealed against that judgment to the Court of Appeal. There were three grounds of appeal. I reproduce grounds 1 and 2 relevant grounds relied upon in the Court of Appeal to reverse the judgment of the learned trial Judge. They are as follows:

*g* **GROUND OF APPEAL**

- c* 1. The learned trial Judge erred in law when he said in his judgment that the defendant was negligent in the performance of its work and so was responsible for the loss of the money, the subject matter of the claim.

*d* **PARTICULARS OF ERROR**

- e* (i) There was no plea of negligence in the statement of claim and consequently negligence was not an issue in the suit.
- f* (ii) The learned trial Judge did not call upon any of the counsel to address him on the issue of negligence before he decided the case.
- f* 2. The learned trial Judge misdirected himself on the facts when he held that the plaintiff was entitled to judgment against the defendant.

**PARTICULARS**

- g* There was no evidence that the teller alleged to (be) the evidence of the payment was signed by a cashier of the defendant bank.
- h* 3. The judgment is against the weight of evidence.
- h* 4. That the whole judgment be set aside.
21. In the judgment of the Court of Appeal reversing the trial Judge the Court observed:
- i* “The learned Counsel for the appellants, Mr *Nweke* submitted that negligence was not specifically pleaded in the statement of claim and it was never an issue at the trial, but the learned trial judge nevertheless rested the whole judgment on the issue of negligence. This is the prime factor of the whole appeal. I agree with Mr
- j* *Nweke* because it is a fact beyond all doubts that the respondent

did not plead negligence in their statement of claim. An allegation of a negligent conduct was neither expressed nor implied and it could not be deduced from the averments in the statement of claim.”

The learned Justice of the Court of Appeal, then referred to passages of findings of negligence on the part of the trial Judge and came to the conclusion that the trial Judge based the liability of the defendants on the findings of negligence against them. The Court of Appeal was thus led into the assumption that even if negligence was established against the respondent, it was not an issue between the parties, and no valid judgment could be founded on such finding – *George v. Dominion Flour Mills Ltd* (1963) 1 All N.L.R. 71; *George v. U.B.A.* (1972) 8-9 S.C. 274; *Ochonma v. Asinin Unosi* (1965) N.M.L.R. 321 were cited in support of the view.

The plaintiffs, who were respondents in the court below and are now the appellants, have challenged the judgment of the court on three grounds of appeal, alleging misdirection on grounds of law and error in law. Concisely stated, the appellants are contending that:

- (a) the Court of Appeal misdirected itself in law when they concluded that the learned trial Judge rested the whole judgment on the issue of negligence;
- (b) the Court of Appeal did not decide the appeal before them on the evidence on the printed record and the exhibits tendered at the trial.

The grounds of appeal excluding the particulars are as follows:

#### *GROUND OF APPEAL*

- A. The learned Justices of the Court of Appeal misdirected themselves in law when they concluded that the learned trial Judge “rested the whole judgment on the issue of negligence.”

#### PARTICULARS

- (i) the word “negligent” as used in the judgment of the learned trial Judge did not expressly or impliedly



- a* connote “negligence” as tort or legal terminology but was used merely as an English vocabulary in the sense of “nonchalant.”
- b* (ii) the word “negligent,” in whatever sense it was used, occurred only in the learned trial Judge’s “Observations” and not in the findings of the Judge.
- c* (iii) the learned Justices of the Court of Appeal dwelled solely on the learned trial Judge’s “Observations” and failed to read the last paragraph of the judgment, which contained the findings of the trial Court, and on what the findings were based expressly:
- d* “on the strength of the above observations and on the totality of the evidence and exhibits tendered, I am of the view that the plaintiff’s case is proved and judgment is entered in favour of the plaintiff *as per his writ of summons* with 5% interest with effect from 22nd May, 1978 until judgment debt is liquidated.” (emphasis supplied by me.)
- e*
- f* B. The learned Justices of the Court of Appeal erred in law when they failed to decide the appeal on the evidence on the printed record and exhibits tendered at the trial Court.

#### PARTICULARS OF ERROR

- g* The whole judgment of the learned Justices of the Court of Appeal was based solely and exclusively on the issue of negligence whereas negligence was not the issue between the parties but “money had and received by the defendant to the credit of the plaintiff which money the defendants have wrongfully converted to their own use.” In failing to address themselves to the evidence on the printed record and exhibits, and by dwelling extensively, solely and exclusively on “negligence” (which is not the issue between the parties) and in the process dismissed the plaintiff’s claim, a miscarriage of justice has occurred, and this miscarriage occurred principally because the learned Justices of the Court of Appeal neglected
- i*
- j* their duty to re-examine the whole evidence, both oral

and documentary, that was tendered at the Court of trial *a*  
as well as examine the whole course of proceedings as  
compiled in the record of appeal.

- C. The learned Justices of the Court of Appeal misdirected *b*  
themselves in law when they set aside the judgment of  
Martins J in the Suit No. L.D. 1218/1980 and entered an  
order for the dismissal of the suit.

### *PARTICULARS* *c*

1. An appeal Court which fails to decide the issues between  
the parties on the printed evidence and exhibits tendered  
but decides the appeal on technicality of law would be *d*  
wrong to enter an order of dismissal, which operates by  
res judicata to bar the plaintiff/appellants from further re-  
dress. The order of the Court of Appeal therefore caused  
substantial injustice to the plaintiff/appellant. *e*

2. If the learned Justices of the Court of Appeal were right  
in saying in their judgment:

“if any evidence was entered suggesting that the appellants were  
negligent it will go to no issue, and it should be ignored.” *f*

Counsel to the appellants, Mr Folarin *Popoola*, and Mr  
*Nweke* for the respondent bank have both filed detailed  
briefs of their argument. These were orally expatiated upon  
before us. The issue could obviously be narrowed down to *g*  
the only point, whether the Court of Appeal was right in  
holding that the learned trial Judge decided the case before  
him on the issue of negligence which was not an issue be-  
tween the parties. This was the only ground considered by *h*  
the Court of Appeal and on which the judgment of the  
learned trial Judge was set aside.

In his brief of argument, Mr Folarin *Popoola* dealt exhaus- *i*  
tively with this issue and analysed the various significances  
of the use of the word “negligence,” in the case by the trial  
Judge. In his submission; the word “negligent” as used  
within context had nothing to do with “negligence” as a tort  
which must be specifically pleaded. In his view, the word *j*

- a* meant no more than its dictionary meaning of “want of attention,” “carelessness,” “nonchalant,” “indifferent” or “casual.” It was argued that negligence in this sense did not
- b* connote a head of liability or damage in respect of which an action could be brought. This being the sense in which the word was used it was not necessary to plead it, since it was not being relied upon in the action. Mr *Nweke* in his reply
- c* supported the judgment of the Court of Appeal, which represented his submission in that Court.

- On a careful analysis of paragraphs 4 and 11 of the statement of claim, and paragraph 4 of the statement of defence it
- d* is obvious that the claim before the learned trial Judge was only one for (*a*) damages for conversion of the sum of ₦9,750; and (*b*) alternatively payment of the said sum of ₦9,750 as money had and received by the defendants to the
- e* use of plaintiffs, and (*c*) interest at the current bank rate from 5th May, 1978.

- The common law action for money had and received has always been used wherever conversion lies, and money has
- f* been received on behalf of the plaintiff by the defendant, to compel the defendant to restore such money to its true owner. Since the action for money had and received is alternative to conversion, the plaintiff is entitled to waive the wrong and sue for money had and received. As Lord Wright
- g* expressed it in *Fibrosa Spolka Akcna v. Fairbairn Lawson Combe, Barbour Ltd* (1943) A.C. 32 at page 64:

- h* “the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect instrument to prevent unjust enrichment, aided by the various methods of technical equity which are also available, as they were found to be in *Sinclair v. Brougham*.”

- i* The action for money had and received, though for the purposes of pleadings made alternative to an action for conversion, is an independent course of action, and lies even where the action for conversion may be unavailable. See *Fibrosa Spolka Akcna v. Fairbairn Lawson, Combe Barbour Ltd*
- j* (1943) A.C. 32. There seems to be no doubt that a customer’s

claim to monies received by a banker on his account would be for money had and received. Hence when the plaintiff, a customer of a bank, in action for money had and received proves that the defendant banker has received on his account the money claimed, the plaintiff is undoubtedly in a position to receive such money.

In an action for money had and received, the negligence of the defendant is not a necessary element of the liability. The essential ingredients are that money due to the plaintiff has been paid to the defendant and who has been unjustly enriched by such payment. It is therefore unconscientious and *contra aequum et bonum* for the defendant to retain it as against the plaintiff.

The Court of Appeal would seem to have been misled by the contention of the appellant before them and therefore accepted the submission that the learned trial Judge decided the case before him and found respondent liable on the principle of negligence. Nothing is further from the true legal position. I agree with the view of Mr *Popoola* for the appellants that the use of the word “negligence” in the context can only connote carelessness. This follows upon the contention of the respondents that the stamp of cashier No. 5 was under lock and key, and that the cashier to whom the official use of the stamp was assigned was on leave at the relevant time when appellant claimed that it was used in certifying money paid into the respondent’s bank. The stamp nevertheless was used to certify the lodgements of sums of money in favour of the appellants.

It is conceded that the learned trial Judge found that the respondents were negligent in not detecting that the stamp for cashier No. 5 which was under lock and key and assigned to a person who was on leave, was being used by another during the period it was supposed to be under lock and key and the official supposed to have used it was on leave. This is clearly not a finding that the monies claimed were paid to

- a* and received by the respondent bank in favour of the appellant. There is no doubt that if it is established that the stamp of cashier No. 5 was used by an official of the respondent bank despite the security measures adopted, the bank will be
- b* liable in action for negligence. See *Lloyd v. Grace, Smith and Co* (1912) A.C. 716.

- c* However if the evidence is not one of negligence, but that the payments allegedly made by the plaintiff were in fact made to the defendants in favour of the plaintiff, then this will be sufficient establishment of the liability in an action for money had and received in favour of the plaintiff. I think
- d* it is this latter view that appealed to the learned trial Judge when he said:

- e* “It is abundantly clear that the monies were paid into the bank, the defendant bank has not called any evidence in rebuttal to say that the monies were never received by the defendant or paid into the defendant bank. The evidence of first PW that these monies were paid into the bank stood unchallenged.”

- f* This is undoubtedly a finding that the money claimed by the appellant was paid into the defendant bank. It is not a finding that the defendant bank was liable because of a finding of negligence on their part. It seems to me unarguable that the Court of Appeal ignored the finding that the monies
- g* claimed by the appellant were paid into the respondent bank, which reasoning was relevant to the claim before the trial Judge but accepted the finding of negligence against the defendant which was in no respect relevant to the claim before
- h* him. Even if it is conceded that there were two reasons in support of the judgment of the learned trial Judge, the approach of the Court of Appeal was wrong. It is well settled that where two reasons are given for a judgment they may
- i* both constitute the *ratio decidendi* for such judgment, *Jacobs v. L.C.C.* (1950) 1 All E.R. 737, *London Jewellers Ltd v. Attenborough* (1934) 2 K.B. 206. A reason given by a judge is not to be regarded as *obiter dictum* merely because another reason equally valid was also given. Where, How-
- j* ever, in a judgment two reasons appear to have been given,

the *ratio decidendi* can only be that reason which is consistent with the facts and the claim before the Court. a

In the appeal before us, and in the face of the two reasons for the decision given by the learned trial Judge, it cannot be correctly surmised that the finding of negligence was a possible reason for the decision of the learned trial Judge. The only grounds of appeal against the judgment of the learned trial Judge in the Court of Appeal was on the finding of negligence allegedly made by the learned trial Judge. That being the only ground of appeal, and determined by the Court of Appeal is in my opinion patently erroneous. There is no appeal against the finding that the monies claimed, by the appellant were paid into the responding bank. That finding remains unchallenged. b  
c  
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The first ground of appeal that the Court of Appeal misdirected itself in law in holding that the learned trial Judge rested the whole judgment on the issue of negligence succeeds. e

I do not consider it necessary to deal with the other grounds of appeal which are merely amplifications of the first ground. The appeal is therefore allowed. The judgment of the Court of Appeal dated 26th April, 1984 together with the costs awarded is accordingly set aside. f

Respondent shall pay ₦300 as costs to the appellants. g

**ESO JSC: (Presiding)** I respectfully agree with the judgment which has just been read by my learned brother Karibi-Whyte JSC a preview of which I have already had, and I will also allow the appeal. h

The facts in this case are simple. The appellants – Aeroflot Soviet Airlines – opened a current account with the United Bank for Africa Limited, hereinafter referred to as the respondents, or the bank as the case may be. According to the normal banking practice, the bank provided the appellants with a teller in which the appellants entered any sum it paid to the bank. Also, in accordance with normal banking practice, i  
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*a* the bank stamped every entry, after the amount had been paid in by or on behalf of the appellants.

*b* In the normal banking practice, stamping and initialling such entry in the teller constitutes an acknowledgement, by the bank, of the receipt of the sum from the customer. Indeed, the witness for the bank gave this evidence. As it is pertinent to this appeal, I will reproduce the relevant portion of the evidence.

*c* Timothy Olusegun Akanni a Branch Accountant of the bank gave this evidence of bank practice. He said:

*d* “Any payment made by the customer of the bank must be acknowledged and this acknowledgment in the form of receipt stamp being issued to each receiving cashier. The stamp will be used by the cashier to stamp both the original and duplicate copies of the teller after the cashier has satisfied that the money paid in is correct. The cashier keeps the original of the teller and hands over the duplicate copy to the customer. The payment made by the customer is recorded on the cashier paying slip. The cashier will initial both copies. This method is not peculiar to our bank alone it is the method used by all banks.” (Italics mine for emphasis.)

Before this witness gave the above quoted evidence, a receiving cashier of the bank, one Phillip Adekanmi Adewunmi, called as witness by the bank, had said:

*g* “On the arrival of a customer to save money on current account we collect the tellers we check that in the teller the account No. is written and the proper names of the customers are entered in the teller. The money is then collected and checked against the figure written in the teller. If they are in agreement, the tellers are stamped and initialled. The stamping and initialling is evidence of receipt of money on behalf of the bank.” (Italics mine.)

*h* Now, the case of the appellants was that when they received the statement of account for the month of May, 1978, they discovered that certain sums of money for the 5th, 9th, 12th, 17th and 22nd May, 1978 were not reflected in the statement though the tellers reflected the entries duly stamped and initialled. This made the appellants to raise a query with the

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bank but the bank showed no reaction. The appellants there-  
upon referred the matter to the Police and subsequently filed  
the present action in Court. a

The claim was: b

1. For ₦9,750 being conversion of money had and received  
to the credit of the plaintiffs (the appellants in this  
Court). c
2. Interest at bank rate.
3. ₦1,000 for taxation.

The case of the bank was, however, to deny that the money  
claimed in the writ was paid to the bank. Perhaps it is neces-  
sary to state herein the paragraph of the statement of claim  
which the bank denied. The plaintiffs stated as follows— d

4. On various dates in May, 1978 the plaintiff brought its  
messenger one Christopher Onyeayemi (*sic*) deposited  
various sums of money in cash with the defendant to the  
credit of the plaintiffs' said account, that is to say: e

On 5/5/78	plaintiffs deposited	₦2,500	f
On 9/5/78	plaintiffs deposited	₦1,250	
On 12/5/78	plaintiffs deposited	₦2,500	
On 17/7/78	plaintiffs deposited	₦ 500	
On 22/7/78	plaintiffs deposited	<u>₦3,000</u>	g
	TOTAL	<u>₦9,750</u>	

These various deposits had been duly recorded on the defen-  
dants' tellers (paying in slip) and their receipt by the defen-  
dant bank duly acknowledged by the defendants' "cash re-  
ceived" stamp impression. The said tellers (paying in slips)  
are hereby pleaded and shall be founded upon at the trial. h

The bank's reaction to this, as I have earlier said, was one  
of denial but I think it is better to state herein specifically  
that denial: i

- "4. (i) The defendant denies that the plaintiff deposited to its  
credit a total of ₦9,750 or any other sum as alleged in  
paragraph 4 of the statement of claim or at all. j



- a* (ii) The defendant further avers that the said cash received stamp impression is not the impression of the defendants' stamp as alleged or at all.
- b* (iii) The defendant denies the receipt of any other form of acknowledgment of any deposit by the plaintiff or at all."

*c* And so issues were joined, the plaintiffs/appellants alleging that they paid in the sum in question to their credit with the bank as evidenced by the tellers which they pleaded, and the bank not only denying that deposit but as they themselves said in their pleadings "further averred certain facts to wit," the cash received stamp impression was not theirs.

*d* And so, in so far as the onus of proof is concerned, the position is clear. While the plaintiffs were to prove that they made the deposit, once that had been proved, the onus was on the defendants that the evidence relied upon by the plaintiffs, that is, the bank tellers were not stamped by the bank.

*e* The learned trial Judge held after taking evidence that:

*f* "It is abundantly clear that the monies were paid into the bank, the defendant has not called any evidence in rebuttal to say that the monies were never received by the defendant or paid into the defendant bank. The evidence of the first PW that these monies were paid into the bank stood unchallenged."

As regards the defence put up by the bank, the Court held:

*g* "What the defendant was saying was that the stamps on the teller booklets . . . were not that of the bank as the cashier stamp No. 5 was missing at the time the monies were paid in."

*h* On how the stamp got to be stamped and initialled on the tellers, the learned trial Judge held:

*i* "Evidence of the second and third PW's (that is the Chief Superintendent of Police who gave expert evidence as a hand writing expert and an Acting Superintendent of Police also a handwriting expert) was that there were similarities both on the stamp impressions and initials when compared with the pages the defendant admitted having received monies stated in these pages."

*j* In the view of the learned trial Judge, the defendants treated the missing cashier stamp No. 5 with great levity and they must face the consequence of such a negligent act on their

part. The trial Court found in favour of the plaintiffs and entered judgment in their favour as per the writ of summons with 5% interest. a

The defendants appealed to the Court of Appeal and in a judgment delivered by Uthman Mohammed JCA, with which Kazeem and Kutigi JJCA agreed, the appeal was allowed and the judgment of the High Court was set aside. b

It is interesting to set out here the basis for the finding of the Court of Appeal. Uthman Mohammed JCA said— c

“the most important ground of appeal is in respect of an error in law where the learned trial Judge said, in his judgment, that the appellants were *negligent* in the performance of their work and so were responsible for the loss of the money . . .” d

The learned Justice then indicated that there were a number of places in the judgment where the learned trial Judge made important findings based on the negligence. He held that negligence was not pleaded in the case, that negligence was a very serious allegation against a party in a case of this nature and when the learned counsel for the plaintiffs brought to the notice of the Court that the trial Judge did not base his decision on negligence but on the strength of the Judge’s observation and the totality of the evidence before the Court, the Court of Appeal said learned counsel would not be right in that submission, at the same time, referring to the two last paragraphs in the judgment of the High Court to wit: e

“On a serious note the defendant bank should have acted, swiftly on an issue of serious allegation like this and when they knew that their cashier stamp No. 5 was missing and could not be reached by any outsider than officials of the bank and it was this cashier No. 5 stamp that was used in carrying out this operation, *I am of the view that the defendant bank was negligent* on the strength of the above observations and on the totality of the evidence and exhibits tendered I am of the view that the plaintiff’s case is proved and judgment is entered in favour of the plaintiff as per his writ of summons with 5% interest with effect from 22nd May, 1979 until judgment debt is liquidated.” f

While the Court of Appeal underlined the words “I am of the g

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- a* view that the defendant bank was negligent”, thus placing emphasis on those words, I think every word in those paragraphs are of importance, and so not just some should have
- b* been singled out for emphasis to conclude whether the judgment was based on negligence as Uthman Mohammed JCA said or “entirely on what he thought was the negligence of the defendants,” as Kazeem JCA (as he then was) put it in
- c* his concurring judgment or on the strength of the learned trial Judge’s observations on negligence *plus the totality* of the evidence and exhibits (that is the tellers which indicated acknowledgment of payment by the plaintiffs).
- d* The plaintiffs have now appealed to this Court on two grounds of appeal which are fully set out in the Judgment of my learned brother Karibi-Whyte JSC. Briefs were filed and we heard oral arguments.
- e* With respect, I think the Court of Appeal had a complete misconception of the case of the plaintiffs and the treatment given to the evidence by the trial Court. The statement of Claim shows *per adventure* that the claim was for damages
- f* for conversion of the plaintiffs’ money paid to the bank or in the alternative claim for the amount in *quasi contract*, as money had and received, that is, a claim in enrichment *in-justa causa*.
- g* As far back as 1760, Lord Mansfield in *Moses v. Macferlan* (1760) 2 Burr 1005 at 1012 had beautifully rationalised the principles behind claim for money had and received. He put it in a prosaic form:
- h* “This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies for money which, *ex aequo et bono*, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him payable in point of honour and honesty, although it could not have been recovered from him by any
- i* course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or for money
- j* fairly lost at play: because in all these cases the defendant may

retain it with a safe conscience, though by positive law he was  
debarred from recovering. But it lies for money paid by mistake;  
or upon a consideration which happens to fail; or for money got  
through imposition (express or implied); or extortion; or oppres-  
sion; or an undue advantage taken of the plaintiff's situation, con-  
trary to the laws made for the protection of persons under those  
circumstances. In one word, the gist of this kind of action is that  
the defendant, upon the circumstances of the case, is obliged by  
the ties of natural justice and equity to refund the money.”

That was Lord Mansfield who, six years later, in *Towers v. Berretts* (1786) 1 T.R. 133 declared himself to be a great friend to the action for money had and received. He referred to the action as:

“a very beneficial action and founded on principles of eternal justice.”

Whether it is unjust enrichment, conversion, or refund of money had and received on the credit of the plaintiff, it is my view that the claim of the plaintiffs was, as they put it themselves, not in tort of negligence, but for a wrongful conversion of money had and received to the credit of the plaintiffs. Nowhere did they claim negligence, and so it was not necessary to plead negligence, and if evidence of the negligence of the defendants was given, it was in process of their denial as to the stamp on the tellers.

The evidence given by the defendant's witnesses is so clear as to banking procedure and the effect of bank tellers purportedly signed and initialled by or on behalf of the bank.

With such clear evidence as to banking procedure and with the production of the bank tellers which were proved to have been stamped and initialled by one of the bank's officials, the case for the plaintiffs has been proved. He has discharged the onus placed upon him. The defendants failed to discharge the onus which had shifted on them and the learned trial Judge stood, on my view in an unimpeachable pedestal in finding for the plaintiff.

- a* I agree with the judgment of my learned brother Karibi-Whyte JSC that the appeal should be allowed and it is hereby allowed. I abide by the orders contained in the aforesaid judgment.
- b*

**UWAIS JSC:** I have had the opportunity of reading in draft the judgment read by my learned brother Karibi-Whyte JSC and I entirely agree with it.

- c* I desire only to add the following. It is pertinent to draw attention to the fact that in the Court of Appeal, the respondent herein who was the appellant, filed 3 grounds of appeal. Of these, the second ground reads as follows:

- d* “2. The learned trial Judge misdirected himself on the facts when he held that the plaintiff was entitled to judgment against the defendant.

*PARTICULARS*

- e* There was no evidence that the teller alleged to be evidence of the payment was signed by a cashier of the defendant bank.”

- f* Although arguments of both the parties to the appeal were heard by the lower court, neither the lead judgment (per Mohammed JCA) nor the concurring judgments (per Ka-zeem JCA (as he then was) and Kutigi JCA) adverted to the points canvassed. So that the judgment of the Court of Ap-  
*g* peal was not in anyway based on the argument advanced on the ground.

- Now in the appeal before us, the respondents have not filed a cross appeal complaining against the failure of the Court  
*h* of Appeal to consider their contention under the said ground. I am therefore unable to see the basis on which the issue of the proof of the payments made by the appellants to the respondents’ cashier can be a point that positively calls for our  
*i* consideration. In any event, the finding of fact made at the trial by the learned trial Judge on that score is as follows:

“It is abundantly clear that the monies were paid into the bank.”

- This finding was not set aside by the Court of Appeal and  
*j* we are not called upon by any of the parties to the appeal

before us to reverse it. It is unassailable that the fact remains, as found by the trial court, that the appellants had paid to the respondents the sums claimed as money had and received.

It is for these and the reasons contained in the judgment of my learned brother Karibi-Whyte JSC that I too will allow this appeal with ₦300 costs to the appellants. The judgment of the Court of Appeal, with the consequential order therein, is hereby set aside and the judgment of Martin J is restored.

**COKER JSC:** (*Dissenting*) I have had the advantage of reading in advance the draft of the lead majority judgment just delivered by my learned brother Karibi-Whyte JSC and regret to dissent after a very careful consideration of all the issues raised in this appeal and at the trial and in the Court below. I have come to the decision that this appeal must fail and should be dismissed. In coming to this decision, it is necessary for me to put the issues and facts of the case in their right perspective before proceeding to the arguments of counsel on the appeal.

This appeal is by the plaintiffs in the High Court of Lagos State and the respondents in the Court below. In the trial Court, they claimed the sum of ₦9,750 being money had and received or for conversion of the said sum. Pleadings were exchanged and witnesses called by the two parties and at the conclusion of the hearing, the trial Court entered judgment in favour of the plaintiffs for the amount claimed with costs. The defendants appealed to the (Federal) Court of Appeal on three grounds. The appeal was allowed on the first ground, and although the two other grounds were argued along with the first, the Court below considered it unnecessary to give any decisions on the two other grounds. The judgment of the trial Court was set aside and the plaintiffs' case was dismissed with costs.

The plaintiffs have now appealed to this Court.

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*i* $j$

*PARTICULARS OF ERROR**a*

The whole judgment of the learned Justices of the Court of Appeal was based solely and exclusively on the issue of negligence whereas negligence was not the issue between the parties but ‘money had and received by the defendants which they have wrongfully converted to their own use.’ In failing to address themselves to the evidence on the printed record and exhibits, and by dwelling extensively, solely and exclusively on negligence (which is not the issue between the parties) and in the process dismissed the plaintiff’s claim, a miscarriage of justice has occurred, and this miscarriage occurred principally *because the learned Justices of the Court of Appeal neglected their duty to re-examine the whole evidence, both oral and documentary, that was tendered at the Court of trial as well as examine the whole course of proceedings as compiled in the record of appeal.*

*b**c**d**e*

- 3.C.The learned Justices of the Court of Appeal misdirected themselves in law when they set aside the judgment of Martins J in the Suit No. L.D./1218/80 and entered an order for the dismissal of the suit.

*f**PARTICULARS**g*

1. An appeal Court which fails to decide the issue between the parties on the printed evidence, and exhibits tendered but decides the appeal on technicality of law would be wrong to enter an order of dismissal, which operates by *res judicata* to bar the plaintiff/appellant from further redress. The order of the Court of Appeal therefore caused substantial injustice to the plaintiff/appellant.
2. If the learned Justices of the Court of Appeal were right in saying in their judgment:
 

‘if any evidence was entered suggesting that the appellants were negligent it will go to no issue, and it should be ignored.’

*h**i**j*



- a* . . . they were wrong in failing to ignore the alleged  
*b* offending evidence, expunge that bit and then decide  
the case on what ever remained of the admissible and  
relevant evidence.’
3. A Court of Appeal, before entering an order for dismissal  
of a suit, must first satisfy itself that the plaintiff had  
failed to prove his claim at the trial court and that an or-  
*c* der for dismissal was the correct and proper order which  
the trial Court ought to have made.
4. If the learned trial Judge was indeed wrong in basing his  
*d* judgment on negligence (and the plaintiff/appellant does  
not so admit) it was a mistake of the Judge and not that  
of the plaintiff/appellant or of his Counsel. As the plain-  
tiff/appellant have no control on this act of the learned  
*e* trial Judge, they were not to suffer the irreparable dam-  
age which an order for dismissal of the suit will cause (if  
allowed to remain on (judicial record) by operation of *res*  
*judicata*.
- f* 5. In the absence of any reference in the judgment of the  
Court of Appeal to the effect that the plaintiff had failed  
to prove their case, basing the judgment only and solely  
on alleged mistake of the trial Judge, and if the learned  
*g* Justices of the Court of Appeal were right in doing so  
(and the plaintiff/appellants believe that their Lordships  
were wrong) the correct order they ought to have made  
was a retrial.”
- h* In his brief and oral argument under ground 1, Mr Folarin  
*Popoola*, learned Counsel for appellants, contended that the  
issue of negligence was neither specifically pleaded nor was  
evidence given by either party in support of negligence. He  
*i* submitted that the Court of Appeal was in error therefore to  
have reversed the judgment which, he argued, was based not  
only on the observations but on the totality of the evidence  
before the trial Court. These observations are stated in the  
*j* appellant’s brief, namely:–

- “1. The defendants should have acted swiftly when they knew that their cashier stamp No. 5 was missing and could not be reached by an outsider other than the officials of the bank and that it was the cashier No. 5 stamp that was used in carrying out this operation.
2. It is impossible for anyone outside to have got hold of the stamp. Evidence abounds that cashier stamp No. 5 was missing although it was handed over to the cash officer when first defendant witness was going on vacation leave. It would appear from the evidence above that the defendant bank was negligent.”

Learned Counsel then argued that although the fact that the cashier stamp No. 5 was missing was not pleaded, it was the defendants themselves that proffered that evidence. Therefore, the defendant cannot complain. In support of the submission, he cited the cases of *Sonuga v. Anadein* (1967) N.M.L.R. 77 and *Abowaba v. Adesina* 12 W.A.C.A. 18. Counsel argued that the proper thing was for the court below to reject such inadmissible evidence of second defendant witness.

Learned Counsel then submitted that it was on the totality of evidence and observations on which the learned trial Judge gave his judgment in favour of the plaintiffs. He argued it was therefore wrong for the Court below to consider only one of the reasons given by the trial Court. He argued that “a reason given by a judge for his decision is not to be regarded as a mere *obiter dictum* merely because he has given another reason also” in support of his submission, Counsel cited a number of cases including:

- Jacobs v. L. C. C.* (1950) All E.R. 7371.
- Holman v. I.R. Commissions* (1966) 2 All E.R. 66.
- Robinson and Scott Silicons Ltd* (1962) 1 All E.R.
- Rogers v. Astlery (No. 2)* (1966) 1 All E.R. 937.
- Rovers v. Longsdon* (1967) 2 All E.R. 49.
- Rayman v. Soole* (1967) 1 All E.R. 339.
- Samuel Alugbue v. Okwuegbunam Chine and another* (1963) 1 All N.L.R. 28 and

*a* *London Jewellers Ltd v. Attenborough* (1934) 2 K.B. 206.

As regards ground 2, learned Counsel referred to the lead judgment of the Court below and pointed out that only one of the three grounds of appeal was considered by the learned Justice of Appeal (Mohammed). He submitted that if he had considered the case on the whole evidence he would have found that:

- b*
- c* “(i) the issue between the parties was not negligence but ‘money had and received or wrongful conversion;’
- (ii) that the evidence led by the plaintiff was on how and by whom the monies were paid to defendant bank, and the events that followed after discovery of the discrepancy in the statement of account;
- d* (iii) that all facts in issue to found on ‘money had and received or, wrongful conversion’ were pleaded and evidence led on them and on nothing else;
- e* (iv) that it was the defendant bank that led or volunteered evidence from which the learned trial Judge, among other things, inferred, negligence;
- f* (v) that quite apart from the inference of negligence, the learned trial Judge had abundance of evidence to ground his decision in favour of plaintiff.”

*g* Arguing the third ground, Mr *Popoola* pointed out that the Court below erred in making an order of dismissal of the plaintiffs’ claim notwithstanding the overwhelming evidence in support of the judgment of the trial Court.

He finally submitted:–

- h* “1. that the deposits were made by the plaintiff’s messenger to the defendant bank;
2. that the defendant bank received the deposits on 5 payment slips;
3. that the impression of cashier stamp No. 5 on which the bank received the deposits were carefully examined by Police expert photographer and handwriting expert with the aid of Microscope and found all the stamp impressions bear the same character.”
- i*

That is, they were produced from one stamp:

- j* “4. that the plaintiffs have been deprived of the money.

5. that of the 2 possible suspects (that is, the plaintiff's Christopher and officials of the defendant bank) it was not the plaintiff's Christopher that deprived the plaintiff of the money since Christopher had been tried (with full participation by the defendant bank who provided second, third and fourth Prosecution Witnesses) but was discharged and acquitted."

He then submitted in his brief that the defendant's bank could succeed in their defence only if they adduced additional evidence to prove:

- "1. that the first DW, who was using cashier stamp No. 5 before proceeding on leave, was the only cashier who could use cashier stamp No. 5 at the defendant branch bank; that is to say, cashier stamp No. 5 was specifically made for the first DW;
2. that cashier stamp No. 5 was under safe custody of the bank when the first DW was on leave and so could not be reached by unauthorised bank officials who could have used it to collect money on behalf of the bank;
3. that the initials of cashiers (and especially that of the only cashier No. 5) of the defendant branch bank were registered with the customer/plaintiff."

The respondents in reply in their brief submitted that the questions for determination in this appeal are:

1. Whether the findings of Martins J was based entirely on negligence, which was not an issue at the trial.
2. Whether the appellant satisfactorily establish its claim in respect of money had and received.

It is convenient at this stage to state the issues and evidence before the trial Court.

In the statement of claim, plaintiffs pleaded *inter alia*:

- "3. The plaintiffs maintained and maintain a current account No. 7043 at the defendant's said Central Lagos Branch at No. 97/105 Broad Street, Lagos.
4. On various dates in May, 1978 the plaintiff brought (*sic*) its messenger one Christopher Onyeomani deposited various

- a* sums of money in cash with the defendant to the credit of the plaintiffs said account that is to say:
- |          |            |                      |               |
|----------|------------|----------------------|---------------|
|          | On 5/5/78  | plaintiffs deposited | ₦2,500        |
| <i>b</i> | On 9/5/78  | plaintiffs deposited | ₦1,250        |
|          | On 12/5/78 | plaintiffs deposited | ₦2,500        |
|          | On 17/7/78 | plaintiffs deposited | ₦ 500         |
|          | On 22/7/78 | plaintiffs deposited | <u>₦3,000</u> |
| <i>c</i> |            | TOTAL                | <u>₦9,750</u> |
- d* These various deposits had been duly recorded on the defendants' tellers (paying in slips) and their receipt by the defendant bank duly acknowledged by the defendant's Cash Received Stamp impression. The said tellers (paying-in-slips) are hereby pleaded and shall be founded upon at the trial.
- e* 5. Sometime in June, 1978 the plaintiffs received from the defendants a statement of the plaintiffs' said current account. The plaintiffs then discovered that the deposits enumerated in paragraph 4 above had not been credited to their said current account. The statement dated 6th June, 1978 is pleaded.
- f* 7. By a letter dated 14th June, 1978 the plaintiffs reported the matter to the Assistant Inspector General of Police Force C.I.D., Alagbon Close, Ikoyi and sought Police Assistance. This letter is hereby pleaded.
- g* 8. By a letter dated 30th November, 1978 the Police C.I.D. informed the plaintiffs (*a*) that their former messenger Christopher Onyeomani had been arrested and charged under Suit No. A/1/7/78 with stealing and conspiracy to steal and (*b*) that the cash Received Stamp impression on the said tellers (paying in slips) belonged to the defendants. This letter is pleaded and shall be relied upon at the trial.
- h* 9. *The plaintiffs' former messenger who made the said five deposits on behalf of the plaintiffs at the defendants' Lagos Central Branch* was accordingly tried on the said two counts by the Chief Magistrate V.B.A. Famakinwa, Esq. sitting at Court 1, Magistrate's Court, Lagos. At the trial the
- i* prosecution called five witnesses namely: The general manager of the plaintiff who were the complainant company; the third, fourth and 5th prosecution witnesses were bankers, employees of the defendant. *In his judgment delivered on 13th August, 1978 the Chief Magistrate V.B.A. Famakinwa Esq. discharged and acquitted the accused. The said*
- j*

*judgment of V.B.A. Famakinwa Esq. is pleaded and shall be founded upon at the trial.* a

The plaintiffs plead a letter from the defendants' Company Secretary and Legal Adviser addressed to the Counsellor, Economic Affairs; USSR Embassy, Lagos, dated 21st January, 1980 from the plaintiffs' Legal Adviser." b

The defence admitted that the plaintiffs were their customers and operated the said current account No: 7043 at their Branch at 97/105 Broad Street, Lagos. They however pleaded:— c

"4. (i) The defendant denies that the plaintiff deposited to its credit a total of ₦9,750 or any other sum as alleged in paragraph 4 of the statement of claim or at all. d

(ii) The defendant further avers that the said cash received stamp impression is not the impression of the defendant's stamp as alleged or at all.

(iii) The defendant denies the receipt or any other form of acknowledgment of any deposit by the plaintiff as alleged or at all." e

5. Save that the defendant denies the deposits as alleged in paragraph 4 of the statement of claim, the defendant admits paragraph 5 of the statement of claim." f

11. The defendant denies that it received or had the sum of ₦9,750 or any other sum as alleged in paragraph 11 of the statement of claim or at all.

(i) The defendant denies that it converted the sum of ₦9,750 or any other sum as alleged or at all. g

(ii) The defendant denies each of the allegations contained in (2) and (3) of paragraph 11 of the statement of claim." h

The issue therefore before the trial Court was whether the plaintiffs proved that the messenger, Christopher Onyeo-  
mani, deposited the various sums of money in cash with the defendant as pleaded in paragraph 4 of the statement of claim. It is pertinent to note that the statement of claim did not aver that any of the five disputed slips bore the initial of any of the defendant's cashiers or any initial of any person. In other words, the plaintiffs relied solely on the defendants' stamp impression as proof of the deposit of the various sums i  
j

- a* to the bank. It was not the case of the plaintiffs that the initials over the stamp impression were those of any employee of the bank.
- b* In the last paragraph of the statement of claim, the plaintiffs pleaded and tendered in evidence a letter from the defendants' company secretary and legal adviser addressed to the Counselor, Economic Affairs USSR Embassy, Lagos dated 21st January, 1980. I consider it necessary to refer to the letter (exhibit
- c* F) at this stage. The relevant portion of it reads:
- d* "I refer to your letter of 26 November, 1979 addressed to the manager, U.B.A. Lagos, and which concerned the account of Aeroflot, which is said not to reflect the ₦9,750 (nine thousand seven hundred and fifty naira) *supposed to have been paid into it by an Aeroflot cashier between the 5th and 22nd of May, 1978.*
- e* This matter has caused us as much distress as it has caused you. It is always a matter of deep regret and distress to us that our customer should be defrauded in any way. Aeroflot has therefore all our sympathy for the loss. And if we had been satisfied that the money was actually paid to any of our cashiers, we would unhesitatingly have credited Aeroflot's account with it and let the loss
- f* be on ourselves. But we do strongly believe, on the contrary, that the money was never received in our name by any of our cashiers . . . Your statement that the money 'has been really received' by us was based on the fact that the cash received stamp impressed on the teller was said to be ours, according to the police
- g* expert opinion. But, even assuming the correctness of the police opinion, you know that, in law as in the ordinary world of business, a stamp does not make a receipt. A receipt for money, being a written acknowledgment of a debt, has to be authenticated by
- h* the signature of the person giving it, otherwise it cannot legally bind him. I implore you to imagine what an intolerable burden would be cast upon a bank if every teller bearing its stamp, but without the signature of any of its cashiers or other officers duly authorised to receive deposits from customers, were to be binding
- i* on it as a receipt for any sum of money, however large, stated on such teller. The bank would soon be forced into liquidation:—
- j* We would have expected that, when the fraud was discovered, you would immediately bring your cashier to our Branch to identify the cashier to whom he claimed to have paid the money. That

would have assisted us in verifying whether the signature on the teller belonged to the cashier so identified.” (*Italics mine.*) a

In addition to this letter and other documents, the plaintiffs called three witnesses to testify in proof of their case. There was no direct evidence besides the five disputed paying in slips, to prove that Christopher paid the various sums to the bank. The finding of the trial Judge that they were paid into the bank is not supported by any evidence whatsoever. The first plaintiff’s witness, Merkoushin Vladimir, was the general manager of the plaintiff’s company. He did not pay nor did he say he saw any of the sums paid into the bank. His evidence was: b

“It was our former messenger Mr Christopher that made the payments. Christopher had been making payments into U.B.A. for the company before these payments in exhibits B-B4.” c

Under cross examination, the witness said: d

“Christopher was in our employment for 5 years, he left in June, 1978. It was Christopher who made the 5 payments in exhibits B-B4 . . . Christopher was charged to Magistrate Court and later discharged and acquitted. After the trial we obtained Certified True Copy of the judgment.” e

The Certified True Copy of the judgment was admitted in evidence, as pleaded in paragraph 9 of the statement of claim and marked exhibit B. The learned Chief Magistrate in the concluding part of his judgment after discharging and acquitting the said Christopher Onyeagani, had this to say:– f

“I regret to say that the prosecution has not investigated the case properly and the prosecution has not conducted it properly. The result is that a doubt has arisen in the mind of the Court, and I give the benefit of the doubt in my mind to the accused person.” g

At this juncture, it is pertinent to examine the question of burden of proof. h

On the pleadings, it is my respectful opinion that the burden of adducing evidence in proof of the averments in paragraphs 4 and 9 of the statement of claim was on the plaintiffs; the defence being in complete denial of the fact that no payments were actually made to any of their cashiers. In an i

*j*



- a* endeavour to discharge the onus on them the plaintiffs called evidence that:–
1. They reported the matter to the police C.I.D.
  - b* 2. The messenger who allegedly paid the sums to the defendants was prosecuted for stealing and conspiracy and was found not guilty, discharged and acquitted.
  - c* 3. Two police experts expressed opinions that the “cashier 5 received” stamp impression on the five paying in slips (exhibits B-B4) belonged to the defendants.
  - d* 4. The initials on the five disputed tellers were not the same as on the undisputed slips.

The “cashier No. 5 received” stamp appearing on the five paying in slips cannot in my view be regarded as estoppel against the defendants. It was for the plaintiffs to lead evidence that the messenger, Christopher Onyeogani, paid the various sums of money to the bank or to any other person in the normal or general course of duty. It is my view that to discharge that onus, it is not enough to prove that the five paying in slips bore the defendants “cashier No. 5 received” stamp impressions. The plaintiffs must go a step further. They must in addition adduce evidence that the stamp impression in each case was affixed by a cashier of the bank or by some other employee duly authorised to do so and in the general course of his/her duty. The mere appearance of the “cashier No. 5 received” stamp on the paying in slips, cannot be proof that the messenger paid and that it was received by a cashier or an authorised employee of the bank in the course of his duty. Mere proof that the impressions of the “cashier No. 5 received” were from a genuine rubber stamp of the bank is not the same thing that it was affixed by an authorised employee of the defendants.

The point I am making as regard’s proof is well illustrated in *African Continental Bank Ltd v. Chief Josephat Agbanyin* (1960) V.F.S.C. 18. The facts are similar to those in the present appeal. The respondent was a customer of the appellant

bank and kept a current account at its Calabar branch. A dispute arose as to two sums which the customer alleged he paid to the branch manager, one Mr Onwuteaka and which were not reflected in his statement of account.

The learned trial Judge accepted the customer's evidence, and entered judgment in his favour. The appeal of the bank was dismissed. Giving the judgment of the Federal Supreme Court, Hubbard, Ag FJ, at page 20 said:

"At the trial the respondent gave evidence that he had deposited the two sums in issue by handing them to Mr Onwuteaka, the then manager of the appellants' branch at Calabar. He said he did this on the verbal instructions of the manager, both deposits having been made after public banking hours, and, indeed, only a short while before the bank closed altogether at 5 pm. On each occasion his paying in book was returned to him by the manager, apparently duly stamped, on the following morning. It was stamped by means of a rubber stamp giving the date of the payment in, marked 'cashier No. 1', and bearing what appeared to be initials, although the initials were different in the two cases (exhibits B and C). The learned Judge, who had the opportunity of seeing the respondent in the witness box and under cross examination, found, 'that the plaintiff did pay these two sums into the bank and that he received exhibits B and C as receipts.' There was not one word in the evidence of the two witnesses for the appellants which directly contradicted the evidence of the respondent, and the learned Judge, on the evidence before him, was clearly entitled to make this finding."

The important points in that case are:

1. The respondent who actually made the two payments gave direct or circumstantial evidence of what he did and from his own personal knowledge.
2. The payments were made to the bank manager, who was held to be a general agent of the bank. In other words, receiving of money from customers was within the scope of his employment "he was their general agent in business, as the manager of a bank is."
3. The payments were made in the bank premises, during the period of banking business.

- a* 4. The paying in slips were not held to be conclusive proof of payment but accepted in support of the direct testimony of the witness who paid to and received them from the manager.
- b*

Since the payments are denied and excepting it is a matter, which the Court could take judicial notice, the general rule is that all the facts in issue or relevant to the issue in any given case must be proved by evidence. There cannot be any presumption of regularity in a case such as this that the stamp impressions were affixed by cashier of the bank in the absence of evidence of the person who actually paid or saw the payment of the various sums of money to the bank. The mere appearance of the stamp impressions of the defendants' bank "cashier No. 5 received" on each of the disputed paying in slips is not a notorious fact: see section 73 Evidence Act and *Commonwealth Shipping Representative v. P. and O. Branch Services* (1923) A.C.191, page 212 judicial notice:

*f* "involves that, at the stage when evidence of material facts can be properly received, certain facts may be deemed to be established, although not proved by sworn testimony, or by the production, out of the proper custody, of documents, which speak for themselves. Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."

*g*

*h* The Chief Magistrate's judgment in the criminal case against the messenger is not proof that the messenger actually paid any of the alleged sums to any of the defendants' employees in the ordinary or general course of the bank's duty. The evidence of first plaintiff witness and the paying in slips (exhibits B-B4) which were given to him by Christopher are not proof of the averment or that he paid the monies into the defendants' bank. Plaintiff's witness 1's evidence is at best hearsay. Exhibits B-B4 are evidence of what Christopher gave to the witness.

*i*

*j*

They are not proof of their contents. The actual payments by Christopher was not within first plaintiff's witness own personal knowledge. Neither were the paying-in slips evidence of what he saw done by Christopher. Neither is it proof that the persons who affixed the stamp were servants of the bank. Section 76 of the Evidence Act reads:

"76. Oral evidence must, in all cases whatever, be direct—

- (a) if it refers to a fact, which could be seen, it must be the evidence of a witness who says he saw that fact;
- (b) if it refers to a fact, which could be heard, it must be the evidence of a witness who says he heard that fact;
- (c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner . . ."

The other pieces of evidence were given by the two police officers, second and third plaintiff's witnesses. Patrick Nwanmana second plaintiff witness was a police handwriting expert and photographer. His evidence was to the effect that the stamp impressions on the disputed five banks paying in slips or tellers (exhibits B-B4) were compared with the standard (undisputed) impressions on counterpart of other bank paying in slips in the teller.

The learned trial Judge recorded his evidence as follows:—

"Witness identified exhibit B to B4 as the bank teller book sent to him. The stamp impressions on the teller leaves were referred to as question (d) and standard stamp impressions. pages 3, 4, 5, 7, 8, 55, 58, 59, 60 and 61 were carefully examined with the aid of Microscope and *I found all the stamp impressions to bear the same character. That is they were produced from one stamp.*" (Pages 55, 58, 59, 60 and 61 are exhibits B-B4, the disputed paying in slips.)

Further, he testified:—

"I do (*sic*) examined the initial, the initial on pages 3, 4, 7, 8, were different from the initials on pages 55, 58, 59, 60 and 61 (ie on the disputed paying- in slips)."

*a* The third plaintiff witness, Raufu Fashina, another handwriting analyst of the Force C.I.D. testified:—

*b* “On the 4/7/78 I received from the Officer in Charge Fraud Section of the Force C.I.D. a U.B.A. Limited Teller book for Aeroflot Soviet Airlines. I was requested to examine and compare the initial and stamp impressions at pages 3, 4, 7, 28 and 30 with the initials and stamp impressions at pages 55, 58, 59, 60 and 61. I carried out microscopic examination and comparison between the initials and

*c* the stamp impression on the 29 of (*sic*) documents and I found features of insameness (unsameness) on the initials and characteristic features of identity on the stamp impression on the two groups of documents. I later put up a report of my findings. I can identify the teller book if seen. exhibits B to B4 identified by the witness. Report of the witness identified tendered, admitted and Marked exhibit ‘J’.” (The word in bracket is mine.)

*d*

In exhibit J, the witness (third plaintiff witness) expressed the opinion that:

*e* “(a) the stamp impressions at pages 3, 4, 7, 8, 28 and 30 and those at pages 55, 58, 59, 60 and 61 are products on one and the same rubber stamp;

*f* (b) the initials on the stamp impressions at pages 3, 4, 7, 8, 28 and 30 . . . are same but not the same with those on the impressions at pages 55, 58, 59, 60 and 61.” (That is the disputed paying in slips) (words in bracket mine.)

*g* The sum total of the evidence of these two witnesses was that while the stamp impressions on the disputed documents (exhibits B-B4) were from the same stamp as those on the undisputed bank slips of the defendants’ bank; the initials

*h* over the stamp impressions are different. The question therefore is whether the evidence of these three plaintiff’s witnesses and the documents (exhibits B-B4), established the plaintiff’s case against the defendants. I do not think so.

*i* Evidence on behalf of the defendants was given by two of their employees. Defendant witness 1 Phillip Adekanmi Adewunmi in 1978 was the bank cashier, who used “cashier No. 5 received” stamp until he proceeded on leave between

*j* 20th March, 1978 to 15th May, 1978. During his absence on

leave, it was not assigned to any other cashier. On return <sup>a</sup>  
from leave he started using a different stamp, cashier stamp  
No. 10, because cashier 5 stamp (which he was previously  
using) could no longer be found where it was kept. He testi- <sup>b</sup>  
fied as follows:

“On the arrival (at the bank) of a customer to safe (*sic*) money on  
current account, we collect the tellers we check that in, the letter  
(teller) the account No. is written and the proper names of the <sup>c</sup>  
customers are entered in the teller. The money is then collected  
and checked against the figure written in the teller. If they are in  
agreement, the tellers are stamped and initialled. The stamping  
and initialling is evidence of receipt of money on behalf of the  
bank. <sup>d</sup>

I was a receiving cashier and I received cash only at the time. I  
received the amount as stated in pages 3, 4, 7, 8, 28, 30 of the  
teller in which exhibits B to B4 were contained. I knew that I re-  
ceived the amount through my initials and the same time I was on <sup>e</sup>  
duty during the time. I was not the person who received the  
amount in page 55 *at that time I was on leave and the initial on*  
*page 55 is not mine. I was not the person who received the*  
*amount in page 58 as that time I was on leave and the initial on*  
the page is not mine. Likewise, page 59. In respect of page 60. I <sup>f</sup>  
was on duty but I was using cashier No. 10.

The money written on that page was never received by me and  
the initial is not mine and likewise 61.... when the cashier is satis-  
fied that everything is all right the teller is stamped after receiv- <sup>g</sup>  
ing the money. cashier No. 10 is not specially made for me. Any  
staff appointed cashier as posted as cashier could be posted to  
cashier No. 10. I became cashier No. 5 during the month of No-  
vember, 1977.” (The italics and words in brackets are mine.) <sup>h</sup>

The second defendant witness, Timothy Olusegun Akanni, <sup>h</sup>  
was the Branch Accountant at 97/105 Broad Street, Lagos of  
the defendant’s bank. He testified that the cashiers of the  
branch were directly responsible to him, also the cash offi-  
cers. He further testified that:– <sup>i</sup>

“Adewunmi was on leave between 23/3/78 and 15/5/78 in the year  
1978. Adewunmi in 1978 as per our record was a receiving cash-  
ier and before his vacation leave he was cashier No. 5. On his re-  
turn from vacation leave I could not recall what cashier cage he <sup>j</sup>

- a* was posted. As cashier No. 5 he used cashier stamp 5. Mr Ade-  
wunmi should have taken back his job as cashier No. 5 on re-  
sumption of duty but unfortunately cashier stamp No. 5 was no-  
*b* where to be found in the bank and as such he could not take *be*  
*acknowledged and this acknowledgment is in the form of receipt*  
*stamp being is over as cashier No. 5. Any payment made by the*  
*c* *customer of the bank must sued to each receiving cashier. The*  
*stamp will be used by the cashier to stamp both the original and*  
*d* *duplicate copies of the teller after the cashier has satisfied that the*  
*money paid in is correct. The cashier keeps the original of the*  
*teller and hands over the duplicate copy to the customer. The*  
*payment made by the customer is recorded on the cashier paying*  
*slip. The cashier will initial both copies. This method is not pecu-*  
*liar to our bank alone, it is the method used by all banks."*

Under cross-examination, the witness said:—

- e* "When a cashier goes on vacation leave, he is replaced by a relief.  
The reliever is issued with another stamp. The stamp used by the  
cashier going on vacation leave is handed over to the cash officer.  
When Adewunmi first DW, was going on vacation leave he  
handed over his cashier stamp to cashier (*sic*) Officer. The cash  
officer cannot use the stamp he is not a cashier." (The italics are  
mine.)
- f* In this case, the messenger who allegedly made the pay-  
ments was not called as a witness and no person who had  
personal knowledge that he paid them into the bank was  
called to testify. There was no evidence that his whereabouts  
*g* was unknown. I am unable to find any presumption of fact  
or law which makes the mere appearance of the bank's cash-  
ier No. 5 stamp as proof of payment on the face of evidence  
of denial by the person (defendant witness 2) whose initials  
*h* were expected to be on them. See section 99 Evidence Act,  
*Jobi v. Oshinlaja* (1963) 1 All N.L.R. 12.

- i* The two expert witnesses called by the plaintiffs agreed  
with defendant's witness 1 that the initials on exhibits B-B4  
were different from the undisputed initials. There is there-  
fore no evidence to support the finding of the trial Judge  
when he stated:

- j* "It is abundantly clear that the monies were paid into the bank, the  
defendant bank has not called any evidence in rebuttal to say that

the monies were never received by the defendant or paid into the defendant bank. The evidence of the first PW that these monies were paid into the bank stood unchallenged.” a

He had earlier observed and equally without any evidence in support:— b

“From the evidence before me the first PW according to him *the sum of ₦9,750 was paid to the defendant bank through their messenger one Christopher as shown in their writ of summons and statement of claim (See paragraph 4) the tellers exhibit ‘B’ to ‘B4’ on which these payments were made were duly stamped with the defendant bank stamp which is cashier No. 5 stamp and were also initialled. These money were paid into the bank by Christopher Onyeagani the said Christopher Onyeagani did not give evidence as he was not called. According to the first P. W. Christopher had resigned from the plaintiff company sometime during the month of June, 1978 and his where about is not known.*” (Italics mine.) c

I am, however, unable to find any where on the record where the witness said the whereabouts of Christopher Onyeagani was not known. There was no evidence that any search was made for him or to locate his whereabouts. There was no evidence that he was dead so as to dispense with his oral evidence as required by section 90 of the Evidence Act. Further the witness gave no evidence of his own knowledge that the monies were paid into the bank. The plaintiffs’ case as pleaded and evidence of plaintiff’s witness was that the monies were paid to the bank through Christopher. The learned trial Judge had earlier found:— d

“Evidence abound that cashier stamp No. 5 was missing although it was handed over to cash officer when first DW was going on vacation leave. It would appear from the evidence above that the defendant bank was negligent.” e

Later in his judgment he observed:—

“The defendant has treated the missing cashier stamp No. 5 with great levity and they must face the consequence of such negligent act on their part.” f

Still further, the learned trial Judge found:—

“On a serious note the defendant bank should have acted swiftly on an issue of serious allegation like this and when they knew that g



*a* their cashier stamp No. 5 was missing and could not be reached by any outsider than the officials of the bank and it was this cashier No. 5 stamp that was used in carrying out this operation. I am of the view that the defendant bank was negligent.”

*b* Further still, the learned trial Judge found:

*c* “In the instance (*sic*) case the discrepancies were discovered by, the first P. W. and the G.M. of the plaintiff’s company in his letters exhibit C and C1 without any reply coming from the defendant bank. Can it not be said that defendant was negligent? My answer to this is in the positive. The plaintiff was not negligent in bringing this matter to the notice of the defendant.”

*d* In another observation made by the trial Judge, which appears to have greatly influenced him, was:

*e* “Where a bank stamps a paying slip counterfoil, it bears the onus of showing that a different sum was actually received from that acknowledged on the counterfoils. see: *M’Kenzie v. British Linen Co* (1881) 6 A.C. 82 H.L. particularly at page 92 and the case of *Jacobs v. Morries* (1902) 1 Ch. 816 at pages 830-831 C.A. The case of Christopher giving evidence is not very much important with reference to above, the onus is still on the bank and it has not been shifted. See: *Doherty v. Royal Bank of Scotland* (1963) S.L.R. (Notes) 43.”

The defendants appealed against the judgment on three grounds to the Court of Appeal. The grounds read:—

*g* “1. The learned trial Judge erred in law when he said in his judgment that the defendant was negligent in the performance of its work and so was responsible for the loss of the money, the subject matter of the claim.

*h* **PARTICULARS OF ERROR**

(i) There was no plea of negligence in the statement of claim and consequently negligence was not an issue in the suit.

*i* (ii) The learned trial Judge did not call upon any of the counsel to address him on the issue of negligence before he decided the case.

*j* 2. The learned trial Judge misdirected himself on the facts when he held that the plaintiff was entitled to judgment against the defendant.

*PARTICULARS*

There was no evidence that the teller alleged to (be) the evidence of the payment was signed by a cashier of the defendant bank.

3. The judgment is against the weight of evidence.”

Learned Counsel for the defendants/appellants did not withdraw any of the three grounds. All the three grounds including 2 and 3 were fully argued before the Court of Appeal by Mr *Nweke*, learned Counsel for the defendants/appellants. I reproduce the note of the presiding justice of the arguments of Mr *Nweke* on the two grounds before the Court below:—

“On ground 2, refer to page 50 line 31, page 21 (C) line where the PW2 testified about the examination on initials on the teller, submit that the initials on pages 3, 4, 7, 8 which were those of cashier No. 5 stamp were different from those on pages 55, 58, 59, 60 and 61, exhibits B-B4 which are the controversial initials. There was also evidence that except the payments on pages 60 and 61, cashier No. 5 was on leave and when he resumed, he was (used) stamp No. 10. There was also evidence that when cashier No. 5 was on leave, his stamp was not to be used by any other cashier and that his relief was given a different stamp. Refers to page 28 line 17 *et seq.* Refers to page 50 line 25 *et seq.* and submit that the finding of learned trial judge in that passage is contrary to the evidence of PW2 and PW3 at page 23 line 5 *et seq.* Refers also to page 49 lines 7 *et seq.* Submit that for the respondent to succeed in this case, they must prove (not only) that the stamp impression was that of the appellants but also that the initials thereon were those of the appellants cashier which they failed to do. Submit that there was no scruple (*scintilla*) of evidence that any money was paid into the bank whereas the trial Judge said that evidence abound that money was paid in. Submit that throughout, the judgment was against the weight of evidence: Urges the court to allow the appeal and set aside the judgment of the trial Court.”

Mr *Adebomi* for the plaintiffs/respondents in court in reply, argued:—

“In reply to the submission on negligence, submit that the judgment was not based on the question of negligence but on the strength and totality of the evidence before the court. *Submit that*

- a* the stamp of the appellant used on the tellers exhibits B-B4 constitute the seal of the bank and it is sufficient evidence as to the receipt of the amount paid into the bank. Submit that the trial Judge's reference to 'negligence' can be considered as merely carelessness on the part of the bank with respect to the way the cashier No. 5 stamp was kept which was later found missing. Urges the Court to dismiss the appeal." (Italics mine.)
- b*

- c* Adebomi's argument was directed only to the issue of negligence, which was raised in ground 1. He offered no argument in reply to grounds 2 and 3. These two grounds were never abandoned. But for reason given in the lead judgment of the Court below, no decisions were given on any of them.

- d* In the lead judgment, Mohammed JCA, said:
- e* "With the success of the first ground of appeal the whole judgment of the learned trial Judge could not be allowed to stand. The remaining two other grounds were not pressed for by the counsel for the appellants and in view of my finding above I do not consider it necessary to analyse them."

- f* Since these two grounds were not abandoned the court below should have proceeded to consider the other two grounds of appeal, but it never did. The question now is whether the court below was right to have allowed the appeal and dismiss the plaintiffs' claim?

- g* In the relief sought by the plaintiff/appellant from this court, apart from the reversal of the decision of the lower court, include:—

- h* "(b) Re-examination of the whole relevant and admissible evidence, both oral and documentary, that was (were) tendered at the Court of trial as well as examine the whole course of proceedings as compiled in the record of appeal."

- i* In other words, the plaintiffs, who are the appellants in this Court have asked for a re-examination of the whole case on the relevant evidence on record. Section 22 of the Supreme Court Act, No. 12 of 1960 gives this Court full jurisdiction over the whole proceedings and power to make any order necessary for determining the real question in accordance with the powers of the trial Court.
- j*

I have earlier stated that one of the three issues the appellants submitted for determination is whether:— *a*

“The judgment of the trial Court was based on the totality of the evidence and exhibits tendered.” *b*

I have also set out the evidence on which the appellants in their brief support the judgment of the trial Court. Similarly, I have observed that all the two other grounds were argued (including the ground on negligence) before the court below but were not considered. This Court has persistently warned on the need for courts below to consider all relevant issues raised in the pleadings and in cases of appeal, all the grounds of appeal properly before the Court. For parties are entitled to the decisions of the court on all issues raised and argued before it, save where any of such grounds was abandoned. In the instant appeal before the Court below, all the three grounds were argued and decisions ought to have been given on all of them and not only on one. *c*  
*d*  
*e*

The trial Judge did not express any view concerning the credibility of any of the witnesses called by the parties. He seemed to have accepted them. *f*

The two experts who examined the initials over the stamps impressions conceded that the initials on the disputed documents were not made by the same person whose initials appeared on the undisputed documents. *g*

There was no evidence given by any of the witnesses called by either the plaintiffs or the defendants, as to the person whose initials appeared on the disputed documents. The first defendant witness, Adewunmi, who was the cashier to whom the particular stamp was assigned, denied his initials on them (exhibits B-B4). Thus there was no evidence to identify the person or relate the person(s) whose initials appeared on them as an employee of the defendants, performing the duties of a cashier. *h*  
*i*

For it is not even sufficient for the plaintiffs to adduce evidence that the initials were those of a servant(s) of the defendants, it must be shown also that the particular person belonged to a class of persons like cashiers, for whose acts *j*

- a* the bank would be answerable. In *Morris v. C.W. Martin and Sons Ltd* (1966) 1 Q.B. 716 it was held that the act of the employee must be committed in the course of doing the class of acts which the company has instructed him to do, thus applying *Lloyd v. Grace Smith and Co* (1912) A.C. 716.

- b* The principle of the bank's responsibilities for the wrongful acts of their staff would depend upon whether the act can be said to be within the apparent scope of the servant's authority. Even if it is accepted that the defendants' genuine rubber stamp, "cashier 5 received" was used on the disputed documents (exhibits B-B4) to hold the defendant liable on that account, the plaintiffs must prove that the stamp was affixed, in each case, by an employee whose duty included the receiving of cash from customers. The authorities on the subject were examined in *Morris v. C.W. Martin and Sons Ltd* (1966) 1 Q.B. 716; Lord Denning MR stated at page 727.

- c* “(v) *Apparent authority of servant*: In *Lloyd v. Grace Smith and Co* (1912) A.C. 716 a Solicitors Clerk, acting within the scope of his authority from his principals, accepted Mrs Lloyd's deeds so as to sell her cottage on her behalf and to call in a mortgage. When he accepted her instruction, he intended to misappropriate the deeds for his own benefit, and he did so. His principals were held liable. The essence of that case, as stressed in all the speeches (and especially in the judgment of Scrutton J) was that the Clerk was acting within his apparent authority.

- d* (vi) *Where there is only opportunity to defraud*. There are many cases in the books where a servant takes the opportunity afforded by his service to steal or defraud another for his own benefits. It has always been held that the master is not liable to the person who has been defrauded: see *Ruben v. Corcat Fingall Consolidated* (1906) A.C. 439. If a window cleaner steals a valuable article from my flat whilst he is working there, I cannot claim against the employer unless he was negligent in employing him: see *De Parrell v. Walker* (1932) 49 T.L.R. 37.”

- e* In order for the master to be liable there must be some circumstances, imposing a duty on the master: see *Coleman vRiches* (1955) 16 C.B.104.

Diplock LJ in his judgment at page 737 said:

“The mere fact that his employment by the defendants gave him the opportunity “A theft by any servant who is not employed to do anything in relation to the goods bailed is outside the scope of his employment and cannot make his master liable. The mere fact that the master, by employing a rogue, gives him the opportunity to steal or defraud does not make his master liable for his deprecations . . .”

There was no evidence before the trial Court who was the servant or person who affixed the cashier No. 5 stamp on the five disputed paying in slips. There was no evidence of where they were affixed. There was no evidence of the nature of the duties for which that person was employed.

Apart from the foregoing, the stamp impressions on those documents could not estop the defendants from denying receipt of the said sums. It could not be estoppel in the circumstances of this case since one of the essentials of estoppel by representation is not present. The plaintiffs must prove that they have altered their position prejudicially on the faith of any of the stamp impressions on the paying in slips. See: *George Whitechurch Ltd v. Cavanagh* (1902) A.C. 117, in *Fung Kai Sun v. Chan Fui Hing* (1951) A.C. 489 it was not positively shown that the mortgagee under a forged mortgage of lands had been materially prejudiced by the failure of the owner to notify him of the fact of the forgery immediately upon its coming to his notice. There had been three weeks delay. Lord Reid at page 506 said the true test, the chance of recovery must have been prejudiced by the delay. In the present case, their Lordships are of opinion that the appellants have not shown that “he was materially prejudiced.”

The learned trial Judge referred to section 148 of the Evidence Act and observed that the cash officer of the defendant bank ought to have been called by the defendant; I am unable to agree. The evidence given by the two defence witnesses was never challenged. The plaintiffs did not impugn

*a* their evidence nor was it suggested that the system of banking operation was not correct.

*b* The trial Judge himself found that there was abundant evidence that the stamp was missing but held the defendant vicariously liable for failure to keep the stamp outside the reach of unauthorised persons. Even if this finding of fact were accepted, it will go to no issue, in the sense that that was not the basis or foundation of the plaintiffs' case. Their case was that the messenger, Christopher, actually paid the various sums of money to the defendants and that the cashiers' stamp was affixed by defendants' cashier in the ordinary course of duty.

*c* In the result, I hold the view that the lower court was right in allowing the appeal on the ground that the decision of the trial court was based mainly on an issue, namely negligence, which was extraneous to the issue before it. The issue was straightforward. It was whether the plaintiffs proved that their servant paid the sums indicated in the paying in slips (exhibits B-B4) to the defendant's bank, that is to a cashier during the ordinary course of banking transactions, the official stamp on the slips notwithstanding. They failed to prove payments to the defendants. The lower court was therefore right in dismissing their case. The appeal is therefore dismissed and the judgment of the lower court with order for costs is hereby affirmed. I will award the respondents costs of this appeal fixed at ₦300 to the respondents.

*e* **OPUTA JSC:** I have had the privilege of the preview of the lead judgment just read by my learned brother Karibi-Whyte JSC I have also read in draft the dissenting judgment of my learned brother, Coker JSC I have no doubt at all that this appeal ought to be allowed. I agree entirely with the reasoning and conclusions of my learned brother, Karibi-Whyte JSC.

*f* The issue in this case is very simple, very narrow and I may say quite straight forward. The claim is for, money had and received by the defendant/bank to the use of the plaintiff/company. It is not in dispute that there existed at all

times material to this case a relationship of customer and banker between the appellant and the respondent. It is common ground that apart from the lodgements pleaded in paragraph 4 of the statement of claim, the plaintiff had made several other payments into the defendant/bank. The only question for determination in this case is: How does a bank acknowledge receipt of money paid into his account by a customer?

There is a letter from Professor BO Nwabueze, company secretary/legal adviser, tendered as exhibit F. At page 66 of the record of proceedings, exhibit F stated *inter alia*:—

*“Aeroflot has therefore all our sympathy for the loss. And if we had been satisfied that the money was actually paid to any of our cashiers, we would unhesitatingly have credited Aeroflot’s account with it and let the loss be on ourselves.”*

Here exhibit F is apportioning blame for loss and who would bear the responsibility for such a loss. We have not reached that stage yet. The direct and primary question is: How is a customer satisfied that his money has been paid into his bank? Put in another way, what is the proof that money has been paid into and received by a bank? There may be oral evidence of the man who actually paid the money. This is the point taken up in the dissenting judgment of my learned brother Coker JSC I agree entirely that this is one way of proving that money has in fact been paid into a bank. But oral evidence, is valueless if it is not believed. It is only where and when the trial court believes the witness who testified that he paid the sum of money in dispute into a bank that his evidence may constitute proof of such payment.

In addition to the oral evidence of payment by the person who actually paid, there is another way of proving payment. This is by producing a receipt from the bank showing on the face of it that it received the payments in dispute. In this case, there was evidence (of plaintiff’s witnesses 1, 2 and 3) which was believed by the trial Judge that the “Cash Received” stamp on the tellers reflecting the payments now in



*a* dispute belongs to the defendant/bank. The argument in exhibit F (Professor Nwabueze's letter) that the "Cash Received" stamp should also be authenticated by the signature of the cashier duly authorised to receive deposits from customers does not carry this case very far. In actual fact the "Cash Received" stamp on the tellers now in issue had signatures on them. How is a customer supposed to know the signatures of all the defendant/bank's cashiers? In my view, once there is the defendant/bank's "Cash Received" stamp on a teller, the presumption is that that stamp was used in the normal course of business and that it means what it says, namely that the cash entered in the teller had been received by the bank. If it were otherwise no customer is safe. There must exist some degree of trust between a customer and his bank, which holds his money in trust for the customer.

*e* It is relevant here to have another look at the evidence of defendant's witness 1 Phillip Adewunmi at page 25, lines 5-13 of the record:—

*f* "On the arrival of a customer to safe (*sic*) money on current account we collect the tellers we check that in the letter (*sic*) the account No. is written and the proper names of the customer are entered in the teller. *"The money is then collected and checked against the figure written in the teller. If they are in agreement the tellers are stamped and initialled. The stamping and initialling is evidence of receipt of money on behalf of the bank."* (Italics are mine.)

This witness called by the defendant/bank put the issue in dispute in its proper perspective namely: *"The stamping and initialling is evidence of receipt of money on behalf of the bank."* The tellers in dispute in this case were stamped with the defendant/bank's "Cash Received" stamp. They were initialled. The contention of the defendant/bank is that it is not bound by the stamping and initialling merely because the initial on the stamp was not that of cashier No. 5. Who should bother whose initials appeared over the "Cash Received" stamp the bank or the customer? To my mind that should be the least of the worries of a customer who entrusts his money to a bank.

This naturally leads on to the relevance of the evidence of defendant's witness 2 (a Branch Accountant of the defendant/bank) Timothy Olusegun Akanni at page 29 lines 1-14 of the record:—

“Daily routine for the security of the stamp is as follows: at the close of the day the cashier will hand over their teas as well as stamp to the Cash Officers who will keep them until the suddrary (sic) when the cashiers are to resume the day's job. The Cash Officer keeps the stamps in the bank. The stamps are locked up in the strong room. It is impossible that the money in question could be stolen from the bank official. *It is impossible for any outsider to have got hold of the stamp. The tellers were stamped.* I have been working with the bank since 1969. *It has happened that bank officials have stolen money from the bank.*” (italics are mine.)

If it is impossible for an outsider to get hold of the “Cash Received” stamp and if the “Cash Received” stamp is only affixed and impressed on a teller after the money mentioned therein is checked and collected by an officer of the bank (see evidence of defendant's witness 1) then it follows that that stamp is evidence that the bank has received the money reflected therein. Secondly, if it has happened that bank officials have stolen money from the bank, then from all the surrounding circumstances of this case one can draw the only reasonable conclusion that the plaintiffs' sums of money totalling ₦9,750 (reflected on tellers bearing the stamp of the defendant/bank) were received by the bank through one or other of his officials and then stolen by one or other of the defendant/bank's officials. How does the plaintiff come in here? That has nothing to do with the plaintiff. It is in this regard that the learned trial Judge discussed the question of the defendant's negligence to show that the bank cannot shift the loss of the ₦9,750 due to its own negligence onto the plaintiff.

Exhibit F at page 66 contains this rather significant statement:—

“We have enough sense of honour not to want to shift to our customers any loss that should properly be ours.”

Oputa JSC

Aeroflot Soviet Airlines Limited v. United Bank for Africa Ltd 131

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- a* I am in full agreement with the above. Now that it is clear that the loss of plaintiff's ₦9,750 should properly and squarely be placed at the doorstep of the defendant/bank, the
- b* bank has an obligation to pay the plaintiff the amount claimed.

- In the final result and for all the reasons given above (and for the fuller reasons given in the lead judgment which I
- c* now adopt as mine), I too, will allow this appeal. I abide by all the other consequential orders made in the lead judgment.

*Appeal allowed.*

## Salawu v. Union Bank (Nigeria) Limited

COURT OF APPEAL, KADUNA DIVISION

WALI, MAIDAMA, AKPATA JCA

Date of Judgment: 19 MAY 1986

Appeal No.: CA/K/109/85

*Banking – Banker/customer relationship – Customer paying through bank official – Bank official not authorised to receive cash – Payment eventually not made – Fraud established against bank official – Liability of bank therefore*

*Tort – Vicarious liability – Fraud perpetrated by a bank official – Whether bank vicariously liable*

### Facts

The plaintiff/appellant was a customer of the defendant/respondent bank. It was the case of the appellant that he deposited a sum of ₦52,162.96 into his account with the respondent between 1st June, 1979 and 18th February, 1981. Out of this sum, he paid ₦45,000 by himself into the bank through the cashier and was duly receipted but the ₦7,000 balance he purportedly paid into the bank through one Bode Aboderin who gave him a teller with the bank stamp on it, which stamp turned out to be authentic as disclosed by evidence. Mr Aboderin, a senior official of the bank and a friend to the appellant was said to be an “A” signatory. It was also clear from evidence that he was not authorised to receive any cash items from any customer as he was not a cashier and the custom and practice of the bank is that monies are paid through the cashiers. The appellant had left the queue and delegated his friend to assist him do the payment.

The appellant withdrew a sum of ₦45,101.20 from the account and later issued another cheque for ₦6,500 but this was dishonoured to his surprise. He was informed upon being invited for a discussion with the manager that lodgement for the sum of ₦7,000 was made by a worthless Yelwa cheque.

- a* The plaintiff brought an action at the Ilorin High Court claiming damages for breach of contract, libel and declaration that he had in his account the sum of ₦7,000 standing to his credit on the 20th April, 1981 when his cheque for the sum of ₦6,500 was dishonoured.

The learned trial Judge dismissed the plaintiff's claims, whereupon the appellant appealed to the Court of Appeal.

- c* The main issue for determination was whether or not the respondent should be held liable for fraud committed by one of its employees while on duty at its premises.

**Held –**

- d* 1. That the lodgement of the ₦7,000 into the account of the appellant having not been made, it was established that there was fraud and the fraud was that of Mr Aboderin, the bank official whom the appellant delegated to make the lodgement on his behalf.
- e*
2. That Mr Aboderin having been delegated by the appellant to pay the amount in his account was for that purpose an agent of the appellant and not that of the respondent. That the act of Aboderin was not authorised by
- f* the respondent. He was on a frolic of his own and the respondent bank cannot be held liable for his act.
- g* 3. That the appellant in this case, ought to have taken reasonable and ordinary precaution against fraud by paying his deposit in accordance with the established procedure, that is through the cashier. Since he failed to do so, he is
- h* a victim of his own agent's crafty machinations and cannot recover the lost amount from the respondent bank.
4. Under the principle of vicarious liability, a corporation or a company such as the respondent in this case are in
- i* the same position as a private individual in so far as their liability for the act of their agents or servants are concerned. They are liable for the wrongful act of their agent or servants but only if the acts are committed in
- j* the course of the business of the master whether or not

- the agent or servant intended to benefit no one but himself. a
5. A customer has a duty to take reasonable and ordinary precaution against fraud and if as a direct result of the neglect of such precaution loss is sustained, he must bear the loss as between himself and the banker. b
6. For the employee to be liable the act of an employee must be committed in the course of performing the class of acts which the employer has instructed him to do or must be acting within his apparent authority. c
7. Where a bank either through its carelessness as otherwise allow its authentic rubber stamp to be applied to a teller, there is a presumption though rebuttable that it had received the amount appearing on the teller. d

### Counsel

For the appellant: *Sanni* e

For the respondent: *Akintoye*

### Cases referred to in the judgment

#### *Nigerian* f

*African Continental Bank Ltd v. Agbayin* 5 F.S.C. 19  
*Ayodele James v. Mid Motors Nigeria Ltd* (1978) 11-12 S.C. 31

*Fashanu v. Adekoya* (1974) 6 S.C. 83 at 91 g  
*George v. Dominion Flour Mills Ltd* (1963) All N.L.R. 71  
*James v. Mid-Motors Nigeria Ltd* (1978) 11-12 S.C. at 31  
*Metalimpex v. A.G. Leventis and Co (Nig.) Ltd* (1976) 2 S.C. at 102 h

*Okebola v. Molake* (1975) 5. U.I.L.R. 204

*Yesufu v. Nigeria Tobacco Co Ltd* (1977) 6 S.C. 39

#### *Foreign* i

*Harn v. Nicoles* (1701) 1 S.A.L.K. 289

*Lloyd v. Grace Smith* (1912) A.C. 716 at 725-727

*London Joint Stock Bank Ltd v. Macmillan and Arthur* (1918) A.C. 777

*Morris v. C. W. Martins and Sons Ltd* (1966) 1 Q.B. 716 j

**a Judgment**

**MAIDAMA JCA:** (*Delivering the lead judgment*) This appeal  
 b is from the judgment of the High Court of Justice Ilorin,  
 Kwara State, dismissing the plaintiffs claim for damages for  
 breach of contract; libel and a declaration that the plaintiff  
 had in his account the sum of ₦7,000 standing to his credit,  
 c on the 11th of April, 1981, when his cheque No.  
 363165/015103 for the sum of ₦6,500 was dishonoured.

The case of the plaintiff at the trial was that he operated a  
 current account with the defendant bank. Between 1st of  
 d June, 1979 and 18th of February, 1981, he made a total de-  
 posit of ₦52,162.96K into his account and out of this  
 amount he withdrew a total sum of ₦45,101.20K. His bank  
 teller, with which he made all these deposits was admitted  
 e by him as exhibit 2. According to the payment slip; exhibit  
 2A, the plaintiff went to the defendant bank on the 25<sup>th</sup> of  
 February, 1980, and deposited the sum of ₦7,000 in cash.  
 However, on the 21st of April, 1981 thinking that he still  
 f had a balance of well over ₦7,000 standing to his credit, the  
 plaintiff sent the company's Secretary (plaintiff's witness 1)  
 to cash for him a cheque (exhibit 1) for the sum of ₦6,500  
 drawn on the defendant bank but to his greatest shock, the  
 g cheque was dishonoured. Before this incident, the defendant  
 bank had notified the plaintiff in a letter dated 27th of  
 March, 1981 that they were debiting his account with the  
 sum of ₦7,000 which was paid by a Yelwa cheque, but that  
 h letter did not reach the plaintiff until the end of April. It so  
 happened that sometime in February, he sent a cheque of  
 ₦130 to be cashed for him and the manager told the driver  
 who came with the cheque that he wanted to see the plain-  
 tiff. When the plaintiff went to see the manager, the manager  
 i told him about the lodgement for the sum of ₦7,000 by a  
 Yelwa cheque. After the discussion, the plaintiff went home  
 and brought exhibit 2 to show that he never paid in any  
 cheque. The plaintiff was then told by the manager of a  
 j fraud in the bank which was under investigation. He was

also shown where his ledger account was manipulated by the cancellation of ₦7,000 in cash and substituted by a Yelwa cheque. The manager then advised him to await the outcome of the investigation and was told that he would get his money from the culprit. When the plaintiff was cross examined by the Counsel for the defendant as to how he paid the sum of ₦7,000 on the 25th of February, 1980 into his account, he stated:

“I was on the line when a friend of mine, a senior official of the bank called me and asked what I wanted and I told him I wanted to pay in. His name is Bode Abodunrin. He asked whether he could help. I said yes. He asked me to bring the money and the teller. I gave him both: He counted the money in my presence. After counting the money he stamped my teller and the duplicate. He tore the part usually retained by the bank and returned my teller to me. Mr Bode Abodunrin gave the money and the torn part of the teller to a cashier and I went away.”

The case of the defendant, on the other hand was that there was no such lodgement of ₦7,000 in cash on the 25th of February, 1980, as alleged by the plaintiff, because exhibit 4A which the plaintiff relied upon did not show such entry. The only entry which was machined and dated 25th May, 1980, shows that the amount was paid by cheque. There was another entry in respect of the same amount which was crossed and marked “n/e” meaning “no entry.” The defendant denied the plaintiff’s claim.

After a careful evaluation of the evidence adduced before him, the learned trial Judge dismissed the plaintiff’s claims.

The plaintiff, will henceforth be referred to as the appellant, while the defendant will be referred to as the respondent. In appealing against the decision, 5 grounds of appeal were filed on behalf of the appellant and for ease of reference the grounds without their particulars are reproduced as follows:—

1. The judgment is against the weight of the evidence.
2. The learned trial Judge misdirected himself and erred



- a* in law in holding that, one Bode Aboderin a senior member of staff of the respondent at the material time was an agent of the appellant at the time the appellant
- b* paid into his current account with the respondent a sum of ₦7,000 in cash.
- c* 4. The learned trial Judge misdirected himself when he held that it was only one credit out of numerous amounts that were credited to the appellant on “exhibit 4A,” the appellant’s account ledger that was not machined.
- d* 5. The learned trial Judge was in error by not making conclusive findings on the allegation of fraud which was specifically pleaded by the appellant in his amended statement of claim.
- e* 6. The learned trial Judge was in error when the Court held that the only safe procedure for paying in money in the respondent premises/offices is through the cashier’s cubicle.
- f* The argument of the learned Counsel for the appellant on these grounds, centred around 3 issues which were formulated in his brief of argument. These issues are:
- g* 1. Whether or not the findings of the trial Court are supported by the evidence adduced before it.
- h* 2. Whether or not the respondent should not be held accountable and liable for fraud perpetrated or committed by one or more of his employees while such employee or employees were on duty at the premises of the respondent at the material time as employees of the respondent.
- i* 4. Whether or not it is correct law for the trial court to have held that, one Aboderin, an employee of the respondent at the material time, was an agent of the appellant when the appellant was transacting business with the respondent simply because the said Aboderin happened to be a
- j* friend of the appellant or simply because the appellant

who is not a lawyer said, that the said Aboderin was his agent. a

It is convenient to deal with the first and second issues as the argument of the learned counsel for the appellant on these issues were covered by the appellant's grounds 1, 4, 5 and 6. The main point made by the learned Counsel for the appellant on these issues was that the finding of the learned trial Judge is not conclusive in that he did not state categorically who committed the fraud, whether the alleged fraud was committed by an official of the respondent or someone else. Learned Counsel drew our attention to the evidence relating to the payment of the amount involved and how it was deposited by him in his account. In the bank teller exhibit 2, he pointed out; the payment slip exhibit 2A showing that he paid the amount in dispute in cash himself and not by cheque as was shown by the respondent in exhibit D1. In the ledger account exhibit 4A, ₦7,000 was altered dramatically to show that the payment was made by cheque. Learned Counsel therefore submitted that, this was a clear case of fraud committed by the servant of the respondent in whose custody exhibit 4A was. The learned trial Judge was therefore wrong in not finding that the fraud was committed by the agents or servants of the respondent. Learned Counsel further submitted that the learned trial Judge, in his findings had overlooked the fact that defendant witness 1 himself had admitted in his evidence that the alterations were made by Aboderin who is their senior official. That being the case, the respondent should be held responsible for the fraud committed by Aboderin, in the course of his employment. In support of his submissions on these two issues aforesaid, learned Counsel cited the following cases: *Metalimpex v. A. G. Leventis and Co (Nig.) Ltd* (1976) 2 S.C. at 102; *George v. Dominion Flour Mills Ltd* (1963) 1 All N.L.R. 71 at 78-79; and *Okebola and others v. Molake* (1975) 5 U.I.L.R. Part III 204. b  
c  
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In his reply, learned Counsel for the respondent urged us not to disturb the findings of facts made by the trial Court. j

- a* He also cited the following cases:– *Fashanu v. Adekoya* (1974) 6 S.C. 83 at 91 and *Yesufu v. Nigeria Tobacco Co Ltd* (1977) 6 S.C. 39.
- b* The argument of the learned Counsel for the appellant on the third issue which covers ground 2 of the grounds of appeal was that, Aboderin was not his agent but that of the respondent, therefore, the trial Court was wrong to have held
- c* that he was the agent of the appellant. Counsel cited the following cases:
- Lloyd v. Grace Smith* (1912) A.C. 716 at 725 727;
- d* *Harn v. Nicoles* (1701)1 S.A.L.K page 289;
- Ayodele James v. Mid Motors Nig. Ltd* (1978)11-12 S.C. at 31;
- e* *Fashanu v. Adekoya* (1974) 6 S.C. 83 at 91;
- Yesufu v. Nigeria Tobacco Co Nig. Ltd* (1977) 6 S.C. 39 at 48, 49, and finally urged this Court to allow this appeal.
- f* Replying, Counsel for the respondent submitted that the learned trial Judge was right in holding that Aboderin was the agent of the appellant, for the purpose of paying the amount involved to the cashier. Learned Counsel further
- g* submitted that it was not the duty of Aboderin to receive any sum of money for deposit into customers' accounts on behalf of the bank; that duty is exclusively for the cashiers: Aboderin was not therefore in the course of his employment
- h* at the material time, and was not doing an act which he was employed to do. Learned Counsel therefore asked this court to dismiss this appeal.
- i* The main point for determination, which emerged from the submissions of the learned Counsel on both sides was, whether the respondent was liable for fraud committed by Aboderin or anyone of its servants with regards to the lodgement of the sum of ₦7,000 into the account of the appellant. I think the issue whether there was fraud and who
- j*

committed it can be easily disposed of. This is because the learned trial Judge, in his judgment at page 71 of the record of proceeding stated thus: *a*

“It was established that there was fraud which was detected by the defendant bank which took an appropriate step to get at the roots of the matter by duly notifying the appellant, requesting him to produce his own teller booklet for clarification, which the appellant refused to do.” *b*

Though, in this passage, the learned trial Judge did not say, in so many words who committed the fraud yet there was ample evidence on the record to show clearly that the alleged fraud was in fact committed by Bode Aboderin. Because the learned trial Judge in another passage in his judgment said thus: *c*

“The plaintiff knew that the correct procedure for paying in money was to take his stand on the line at the cashier’s cubicle but succeeded in circumventing that established safe procedure by choosing unorthodox short but risky course of paying through a friend. By conduct an agency was thus created and Bode Aboderin was for that purpose clearly an agent of the plaintiff.” *d*

The purport of this finding was that the fraud was committed by Aboderin who was the agent of the appellant. The argument of the learned Counsel that the findings of the learned trial Judge on the issue of fraud was not conclusive, cannot therefore be sustained. *e*

Now having found that the fraud was committed by Aboderin, a senior official of the respondent, the next question is whether the respondent, as the employer of Mr Aboderin, was vicariously liable for his tortuous act. *f*

Under the principle of vicarious liability a corporation or a company, such as the respondent in this case, are in the same position as a private individual in so far as their liability for the act of their agents or servants are concerned. They are liable for the wrongful acts of their agent or servants but only if the acts are committed in the course of the business of the master, whether or not the agent or servant intended to *g*

*a* benefit no one but himself, *James v. Mid Motors Nigeria Ltd* (1978) 11-12 S.C. 31.

*b* The question before this Court is whether Aboderin did the act complained of in the course of his business. There is no doubt about the fact that Aboderin was a senior official to the respondent, although, nothing was said about his functions, except that he was a staff “A” signatory, it was clear  
*c* from the evidence given on behalf of the respondent that Aboderin was not authorised to receive any cash items from any customer because he was not a cashier. On this particular occasion he did so from the appellant. It should be remembered that the appellant in his evidence before the court  
*d* stated that he came to deposit the amount involved into his account and was on the line when his friend Aboderin spotted him. Aboderin then asked him if he could help him. He agreed and handed both the teller and the money to him.  
*e* Earlier in his evidence, the appellant said he deposited the amount himself. Later on he said the money was deposited on his behalf by his friend Aboderin.

*f* I agree with the learned trial Judge that Aboderin having been delegated by appellant to pay the amount in his account was for that purpose an agent of the appellant and not that of the respondent. The act of Aboderin was not one which was authorised by the respondent. He was on a frolic of his own.  
*g* The respondent cannot therefore be held responsible for the act of Mr Aboderin.

*h* I entirely agree with the learned trial judge that the appellant himself has unwittingly encouraged and facilitated the commission of fraud by Mr Aboderin.

*i* A customer has a duty to take reasonable and ordinary precaution against fraud and if as a direct result of the neglect of such precaution loss is sustained, he must bear the loss as between himself and the banker. See: *London Joint Stock Bank Ltd v. Macmillan and Arthur* (1918) A.C. 777, where it was held that a customer of a bank owes a duty to the bank in drawing a cheque to take reasonable and ordinary precautions  
*j* against forgery, and if as the natural and direct result of

the neglect of these precautions, the amount of the cheque is increased by forgery, the customer must bear the loss, as between himself and the banker. The facts of this case are that of a firm, who were customers of a bank entrusted to a confidential clerk, whose integrity they had no reason to suspect, the duty of filling in their cheques for signature. The clerk presented to one of the partners the firm for signature, a cheque drawn in favour of the firm or bearer. There was no sum in words written on the cheque in the space provided for the writing and there were the figures “2.0.0” in the space intended for figures. The partner signed the cheque. The clerk subsequently added the words “One hundred and twenty pounds,” in the space left for words and wrote the figures “1,” “0” respectively on each side of the figures “2,” and which was so placed as to leave room for the interpolation of the added figures. The clerk presented the cheque for payment at the firm’s bank and obtained payment of £120 out of the firm’s account. It was held by the House of Lords that the firm had been guilty of a breach of the special duty arising from the relation of banker and customer to take care in the mode of drawing the cheque; that the alteration in the amount of the cheque was the direct result of that breach of duty) and that the bank was therefore entitled to debit the firm’s account with the full amount of the cheque.

The appellant, in this case, ought to have taken reasonable and ordinary precautions against fraud by paying his deposit in accordance with the established procedure, that is to say, through the cashier. All the deposits contained in exhibit 2 with the exception of exhibit 2A were paid by the appellant through the cashier. It is only on this occasion that he chose to do it through his friend, why he chose to do so is a mystery. I agree with the findings of the learned trial Judge that the appellant is a victim of his own agent’s crafty machinations and cannot recover the sum of ₦7,000 from the respondent.

In the circumstance, this appeal fails and is hereby dismissed.

- a* Costs in this appeal is assessed at ₦150 in favour of the respondent.
- b* **WALI OFR JCA:** (*Presiding*) I have read in draft the judgment just delivered by my learned brother, Maidama JCA, and I entirely agree with his reasoning and conclusions. The appeal lacks merit and is hereby dismissed. I also subscribe to the order of costs made in the lead judgment.
- c* **AKPATA JCA:** After giving much thought to this appeal I have come to the conclusion, which my learned brother Maidama, JCA has also reached, that it be dismissed.
- d* The facts of the case have been fully stated by my learned brother. It is therefore unnecessary for me to do so. The salient facts are, that Bode Aboderin who volunteered to help the appellant to pay the alleged sum of ₦7,000 into his account, though an employee of the bank, was neither a cashier nor the manager, who had the overall responsibility for the activities of the bank. Exhibit 2A; the teller with which the said amount was allegedly paid into the bank through Mr
- e* Aboderin was not stamped with the cashier stamp. The cashier, according to the manager, Alfred Adedisewu, who testified as the only defence witness, has a stamp “securely kept” and applied with “special ink which is also securely kept.”
- f* exhibit 2A was stamped with a “waste stamp” which “is not securely kept” and which “every staff has access to.” It was also not signed by a cashier. It was also not entered into the ledger on 25 February, 1980; the date the appellant claimed to have paid in the amount. Admittedly, the sum of ₦7,000
- g* was entered by hand instead of by machine in the ledger over a month later, that is on 27th March, 1980. DW 1 claimed that it was entered in error hence it was crossed as “n/e” ie “no entry.” The said false entry bore the initials of Aboderin
- h* through whom the amount was allegedly paid in. In effect the bank did not receive the money either through its cashier or its manager. It has not been established that Aboderin purportedly paid the amount to the bank. I use the word “purportedly” advisedly because if the bank teller exhibit 2A
- i*
- j*

had borne the authentic cashier impression, the bank would have been hard put to it to deny receiving the money. In effect where a bank, either through its carelessness or otherwise, allows its authentic rubber stamp to be applied to a teller there is a presumption though rebuttable, that it had received the amount appearing on the teller. The onus to establish the contrary rests on the bank.

In the case of *African Continental Bank Ltd v. Chief Josephat Agbayin* (1960) 5 F.S.C. 19, there was dispute as to whether a customer, the plaintiff in the case paid two sums of money to the manager which were not reflected in the statement of account but duly entered in tellers and stamped. The plaintiff testified that he gave two sums to the manager on the verbal instruction of the manager, both deposits having been made after public banking hours, but shortly, on each occasion, before the bank closed altogether for the day. The trial Judge believed the story and entered judgment in his favour. On appeal the Federal Supreme Court at page 20 had this to say:

“On each occasion his paying in book was returned to him by the manager, apparently duly stamped, on the following morning. It was stamped by means of rubber stamp giving the date of the payment in, marked ‘cashier No. 1’, and bearing what appeared to be initials, although the initials were different in the two cases (exhibits B and C). The learned Judge, who had the opportunity of seeing the respondent in the witness box and under cross-examination found, ‘that the plaintiff did pay these sums into the bank and that he received exhibits B and C as receipts’.”

There was not one word in the evidence of the two witnesses for the appellants which directly contradicted the evidence of the respondent, and the learned Judge, on the evidence before him, was clearly entitled to make this finding.

The general manager was held to be the “general agent” of the bank. In the case in hand Mr Aboderin was not a manager but “a signatory” that is “an un appointed accountant” who according to defendant witness 1 “cannot receive any cash item from any customer because he is not a cashier.”



- a* The learned trial Judge apparently believed the manager. It is the law that the act of an employee must be committed in the course of performing the class of acts which the employer has instructed him to do or must be acting “within his apparent authority” for the employer to be liable: see *Morris v. C.W. Martins and Sons Ltd* (1966) 1 Q.B. 716). I therefore hold that Mr Aboderin was not the agent of the bank. He acted for the appellant. The appeal therefore fails. It is dismissed. Costs assessed at ₦150.
- c*

*Appeal dismissed.*

**Attorney-General, Bendel State and others  
v. United Bank of Africa Limited**

SUPREME COURT OF NIGERIA

BELLO, ESO, UWAIS, COKER, KARIBI-WHYTE, KAWU, OPUTA JJSC

Date of Judgment: 10 JULY 1986

S.C.: 66/1985

*Banking – Irrevocable documentary credit – Duty on the issuing bank to refuse re-imbursement – The right of the confirming and the issuing banks for reimbursement – Payment made against non-confirming documents – Effect – Undue delay in rejecting payment over non-confirming documents – Effect*

**Facts**

The parties in this appeal are customers and banker. The Mid-West Mass Communication Corporation (MMCC) agreed with one Wilhelm Stiber to buy an aircraft per a pro-forma invoice dated 25th March, 1975 and 26th March, 1975. The invoice was addressed to the Government of Mid-Western State, Benin City. The Mid-West Mass Communication Corporation by an application in form D addressed a banker credit to United Bank for Africa, Benin City for two million, two hundred and fifty thousand Deutsche Mark on behalf of the Mid-West Mass Communication Corporation in favour of Wilhelm Stiber. The application was accompanied with a letter written by the Director of Finance Mid-West Mass Communication Corporation to the Manager of the United Bank for Africa, Benin City and enclosing a cheque No. BB179185 for ₦658,930 against letter of credit in favour of Stiber for the purchase of the aircraft.

The letter of credit was then opened as requested by the defendant bank (UBA) and a copy was forwarded to the finance director Mid-West Mass Communication Corporation. At the back of the letter of credit, was an endorsement “on

- a* presentation of document in strict conformity with the letter of credit, you must claim on us by tested cable.”
- b* The defendant bank wrote a letter to the Mid-West Mass Communication Corporation informing them of the expiration of the shipment date and sought for further instruction. The Director of Finance Mid-West Mass Communication Corporation on receipt of the said letter took it to the Managing Director, who informed him that the aircraft, the subject matter of the contract and the letter of credit had been sold and that the defendant should reply the letter to stop payment.
- c*
- d* The crux of the plaintiffs’ case was that the defendant was bound to comply strictly with the mandate and that payment by the BHF Bank to the beneficiary against presentation of documents (exhibits 20-20E) which did not conform to the letter of credit should have been rejected in that the defendant knew or ought to have known that the aircraft had not arrived in Benin City on 30th June, 1975 as stipulated in the letter of credit. They contend that the defendant was not obliged in law to reimburse the BHF Bank in West Germany, since the payment to Stiber was not in conformity with the terms and conditions stated in the letter of credit. They contend that the duty to reimburse the confirming bank, that is BHF Bank, was only if it paid in strict compliance with the mandate as contained in the letter of credit. It was their case that reimbursement was collusive and fraudulent, particularly when the defendant was aware that the beneficiary of the letter had committed breach of the contract and that the documents presented by him were known by the defendant to be forgeries.
- e*
- f*
- g*
- h*
- i* The defendant denied liability for the claims. It contended that the documents which the seller presented before payment by the BHF Bank on their face conformed to the credit that it was not concerned with whether or not the aircraft was despatched, its only concern was to ensure that the documents (exhibits 20-20E) were in conformity with those required under the letter of credit.
- j*

The defendant contended that the satisfaction of the documents by Stiber were matters beyond its control and disclaim liability of any losses and or damages suffered by the plaintiff. The learned trial Judge found in favour of the plaintiffs.

The defendant appealed to the Court of Appeal. Although the appeal was allowed, the Court of Appeal agreed that the documents against which payment was made to Stiber were non-conforming, and held that where the buyer fails reasonably to reject non-conforming documents, it is manifestly inequitable to permit him at a later date to update his own act to the detriment of the bank.

*The plaintiff then appealed to the Supreme Court.*

**Held –**

1. The documents with which payment was made to Stiber did not conform to the stipulation in the letter of credit. The law is clear that the confirming bank need not have personal knowledge of the departure of the aircraft. The material default is that the banker failed to detect the irregularity appearing on all the stipulated documents which cover the departure of the aircraft.
2. The right to reimbursement by the confirming bank is only on presentation of apparently conforming documents. A confirming bank is entitled to reimbursement only on the condition that it complied with the mandate of the mandatory. With the finding that it paid on documents which did not conform, the defendant as the issuing bank had the right to reject the documents provided it acted promptly and did not act in such a manner indicative of ratification.
3. Where the correspondent bank in the instant case paid the beneficiary against non-conforming documents, and the buyer does not accept the transaction on account of the breach of mandate, in that event the issuing bank cannot debit the buyer with the price paid.

- a* 4. The defendant while not capable of stopping the correspondent bank from wrongful payment to the beneficiary, had the right to reimburse the BHF Bank for reason that
- b* the document did not conform.
5. I however agree that the appellant's delay and inaction rejecting the payment for a period of thirty one months after the receipt of the documents defeats their claim in
- c* this action.

*Appeal dismissed.*

### **Case referred to in the judgment**

*d* **Foreign**

*A.M.O. Akinsanya v. U.B.A.* Suit No. S.C. 95/1985

*Bank Melli Iran v. Barclays Bank* (1951) 2 L.L. Rep. 367 at 378

*e* *Barclays Bank* (1951) 2 Lloyd's Re. 367 at 378

*Rayner and another v. Hornbros Bank* (1943) 74 Lloyd's Rep. 10 (C.A.)

*United City Merchant (Investments) Ltd v. Glass Fibres and Equipment Ltd* (1982) A.C. 168

*f* *United City Merchants (Investments) Ltd v. Royal Bank of Canada* (1983) P.C. 168

*Westminster Bank Ltd v. Banco Nasionali di Credito* (1928) 31 L.L.L. Rep. 306

*g* **Counsel**

For the appellants: *Akomolafe-Wilson*

For the respondents: *Chief Williams* (with him *Williams*)

*h* **Judgment**

**COKER JSC:** (*Delivering the lead judgment*) The parties in this appeal are customers and banker. The appellants were the plaintiffs in the High Court of Bendel State, while the respondent, the defendants. The three plaintiffs are:–

- i* 1. The Attorney-General of Bendel State, (as the legal representative of Bendel State);
2. Bendel Newspapers Corporation; and
- j* 3. Ethiope Publishing Corporation.

The last two being State Statutory Corporations. The Mid-West Mass Communication Corporation (hereinafter described as MMCC) before its dissolution was also a State Statutory Corporation and the plaintiffs are its successors as regards the transaction leading to these proceedings.

The learned trial Judge found that the three plaintiffs could in law institute the present action. The finding has not been questioned in this Court and I say no more about it. The facts of the case are as follows:

The MMCC agreed with one Wilhelm Stiber to buy an Aircraft per a proforma invoice dated 25 March, 1975 and 26 March, 1975. The invoice was addressed to the Government of Mid-Western State, Benin City, Midwestern Nigeria. The invoice was received in evidence and marked exhibit 1 and reads:—

“1. Aircraft FOKKER F.27A e

Serial No. 108

Like purchase Agreement on March 25, 1975

Price	2,250,000	<i>f</i>
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Casts C and F Benin City	50,000	
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Total	2,300,000	
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Less Special Discount	50,000	
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	2,250,000	<i>g</i>
--	-----------	----------

Wilhelm Stiber KG.

“ “

“ “

7313 WEI LHEM TEC (Sgd) Wilhelm Stiber. *h*

‘Payment’ against confirmed irrevocable Letter of Credit as declared in purchase agreement.”

At the back is a minute which reads:— *i*

“D.F.,

Please see o’leaf

2. Open a Letter of Credit in favour of Stiber through the Central Bank for the plane. *j*

*a* (Sg) T.Akpata? (Akpata was the Managing Director of MMCC) 14/5.”

*b* The next piece of evidence is an application Form D by Mid-West Mass Communication Corporation to establish a Banker’s Credit addressed to the United Bank for Africa Limited, Benin City for two million, two hundred and fifty thousand Deutsche Marks on behalf of Mid-West Mass Communication Corporation in favour of Wilhelm Stiber K.G. 7315 Wilhelm Teck.

*d* The application was also received and marked exhibit 2. It was dated 27 May, 1975. The application was accompanied with a letter bearing the same date (27 May, 1975) and written by the Director of Finance, Mid-West Mass Communication Corporation, Benin City addressed to The manager, United Bank for Africa Limited, Benin City and enclosing  
*e* “a cheque No. BB 179185 for the sum of ₦658,930 against letter of credit in favour of Stiber, on our behalf for the purchase of Aircraft Fokker F. 27.” The letter was admitted and marked “Exhibit 5.”

*f* Another application (undated) for Establishment of “Confirmed Documentary Credit by Cable” was also received in evidence and marked exhibit 4. It stated the name of customer as Mid-West Mass Communication Corporation and  
*g* addressed to the United Bank for Africa, Limited Benin City Branch requesting it to open an irrevocable Documentary Credit in favour of Wilhelm Stiber K.G. 7315 Wilhelm Teck for two million two hundred and fifty thousand Deutsche  
*h* Mark C and F accompanied by the following documents:

1. Combined Certificate of origin, Value, and invoice “Form C.”
- i* 2. Certificate of Origin.
3. Insurance Policy or Certificate covering all risks etc.
- j* 4. Full set of clean “on board” Bills of Lading, etc. covering of 30 June, 1975.

Aircraft Fokker 27 A serial No. 109 from any German Airport to Benin City” and that the credit is to be made valid until 15 July, 1975. a

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

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

The letter of credit was then opened as requested by the defendant bank and a copy of it was forwarded to the “Finance Director, Mid-West Mass Communication Corporation, Benin City.” It stated the name of the customer as Mid-West Mass Communication Corporation, Ring Road, Benin City and the beneficiary’s name as Wilhelm Stiber and the correspondent bank – BERLINER HANDELS – COSE HECHAFT FRANKFURTER BANK (otherwise described as BHF Bank). d

“Irrevocable Documentary Credit in favour of Stiber for the sum of two million, two hundred and fifty thousand Deutsche Marks C and F accompanied by the following documents: e

1. Commercial Invoice g
2. Certificate of Origin
3. Insurance covered by Consignee
4. Combined Certificate of Origin, Value and Invoice
5. Air worthiness Certificate h

*Covering Despatch latest 30 June, 1975 of one Aircraft Fokker F.27A, serial No. 108 (per proforma Invoice dated 26 March, 1975) from any German Airport to Benin City Airport, Nigeria.* i

This credit is valid in West Germany until 15th July, 1975.”

At the back of the letter of credit is an endorsement.

“On presentation of documents in strict conformity with the Letter of Credit, you must claim on us by tested cable . . .” j



- a* The letter of credit was admitted in evidence and marked exhibit 8. However, by a letter dated 7th July, 1975 (exhibit 15) was addressed to the Finance Director, Mid-West Mass  
*b* Communication Corporation, Benin City, by the defendant, it reads:

*“OUR LC. BN. 29/75/1100 for DM.2,250,000 favour WILHELM STIBER K. G., W. 1 Germany*

- c* ‘We advise that the shipment date of the above credit expired on 30th June, 1975.

Kindly instruct us further.

Yours faithfully,

- d* (Sgd) per pro: United Bank for Africa Limited.”

- The second plaintiff witness, was the Director of Finance of MMCC on the receipt of the letter (exhibit 15) took it to Mr  
*e* Tayo Akpata, Managing Director of MMCC. Mr Tayo Akpata then informed him that the aircraft subject matter of the contract and letter of credit had been sold and that the defendant should reply to the letter to stop payment pending a  
*f* new beneficiary. Exhibit 16 was the reply sent to the defendant. The letter was dated 11th July, 1975. The relevant paragraphs read:

- g* “Kindly suspend payment of the sum of DM.2,250,000 to the beneficiary. You will be informed of a new beneficiary in whose favour the credit will be established.”

It is to be observed that the letter did not disclose that the aircraft had been sold to someone else.

- h* There is a stamped impression on the letter indicating that the defendant received the letter at its Benin City branch on 11th July, 1975, the very day it was written, but the Benin City Branch only communicated this to the head office by  
*i* memorandum dated 17th July, 1975, two days after the beneficiary was paid by the confirming bank, in BHF Bank in West Germany. The payment was made on 15 July, 1975, last day of the validity of the credit against presentation of  
*j* the apparently stipulated documents (exhibits 20-20E).

Both the trial Judge and those of the Court of Appeal found they did not conform to the stipulations in the letter of credit (exhibit 8) or to the application for the credit (exhibit 4). The BHF Bank informed the defendant by a tested cable (exhibit 18) immediately when the payment was effected on 15th July, 1975, which was confirmed by a debit note (exhibit 21) of the same date. The cable was received by the defendant in Lagos on 16th July, 1975. But the documents (exhibits 20-20E) were delivered to the second plaintiff witness, the Director of Finance, MMCC on 31 July, 1975. Plaintiff's second witness took no action until after the White Paper on Odje Commission of Inquiry Report was published and that was sometime in February, 1978, when the present suit was instituted in the State High Court, Benin City.

The claims *inter alia* were for special damages of ₦658,930 for fraudulent misrepresentation, refund of the sum of ₦658,930 together with interests, ₦658,930 damages for breach of contract, rescission of the contract.

The plaintiffs called two witnesses and a number of documents, some of which I have dearly referred to in this judgment were received in evidence by consent of both Counsel.

The crux of the plaintiffs' case was that the defendant was bound to comply strictly with the mandate and that payment by the BHF Bank to the beneficiary against presentation of documents (exhibits 20-20E) which did not conform to the letter of credit should have been rejected in that the defendant knew or ought to have known that the aircraft had not arrived in Benin City on 30th June, 1975 as stipulated in the letter of credit. They contend that the defendant was not obliged in law to reimburse the BHF Bank in West Germany, since the payment to Stiber was not in conformity with the terms and conditions stated in the Letter of Credit. They contend that the duty to reimburse the confirming bank, that is BHF Bank, was only if it paid in strict compliance with the mandate as contained in the letter of credit. It was their case that the re-imbursement was collusive and fraudulent, particularly when the defendant was aware that

- a* the beneficiary of the letter had committed breach of the contract and in that the documents presented by him were known by the defendant to be forgeries.
- b* The defendant denied liability for the claims. It contended that the documents which the seller presented before payment by the BHF Bank on their face conformed to the credit that it was not concerned with whether or not the aircraft
- c* was despatched, its only concern was to ensure that the documents (exhibits 20-20E) were in conformity with those required under the Letter of Credit. The defendant further averred that the contract between the MMCC and itself was
- d* governed by the *Uniform Customs and Practice for Documentary Credit (1962) Revision*, and in particular to articles 8, 9, 12, 30, 35 thereof. Further, it pleaded that it would be relying on the exemption clause and the indemnity clause
- e* contained in the MMCC's application for the credit, that the falsification of documents by Wilhelm Stiber were matters beyond the control of BHF Bank and the payment by BHF to Wilhelm Stiber following the presentation of the documents was a matter beyond the control of the defendant, and
- f* finally it disclaimed liability of any losses and or damage suffered by the plaintiffs.

- The learned trial Judge found in favour of the plaintiffs and
- g* entered judgment for the sum of ₦586,664.83 being the proposed cost, interest, commission, rates and expenses in respect of the aircraft which was never delivered, plus the sum of ₦72,265.17 being the balance outstanding to the plaintiffs
- h* in the hands of the defendant out of the sum deposited by the plaintiff.

- The defendant appealed to the Court of Appeal. The appeal was allowed although the Court agreed that the documents against which payment was made to Stiber were non-conforming. Okagbue JCA in the lead judgment stated:
- i*

- j* “The bank is only obliged to examine the documents with care to see that on their face they appear to be what the buyer specified. However it cannot be contended in all seriousness that the documents

upon which the bank has allegedly paid in the instant case were conforming documents. On the broad assumption that the payment as been made against nonconforming documents the payment buyers have a right to reject the documents, and may refuse to reimburse the bank or if as in this case the credit has been prepaid they may recover the amount prepaid.”

I agree with him that this statement represent the finding of the trial judge and the legal effect thereof.

He however went on to say, and I agree with him, that:

“When documents that do not conform to the credit requirements are accepted by the buyer the bank is discharged from responsibility to him and he is relegated to his remedies against the seller.”

The learned Justice held that the documents (exhibits 20-20E) were tendered to the plaintiffs (ie plaintiff’s witness 2 on 31 July, 1975) and that the plaintiffs did not reject the documents or raise any query till the Odje Commission dug up the matter, about a year later. He went on to say that the delay in this case was inexcusable as an examination of documents involve none of the complexities that may be involved in an inspection of merchandise to verify quantity and quality.

“Certainly where the buyer fails reasonably to reject non-conforming documents, it is manifestly inequitable to permit him at a later date to update his own act to the detriment of the bank.”

The learned Justice also considered the plaintiffs’ contention that on the 11th July, 1975, the defendant was asked to suspend payment and that was before they received the documents, and that as far as they were concerned the matter was at an end.

He rejected the contention, holding that that view was misconceived. The principle of ratification is that it is *ex post facto*. That since the banker’s undertaking was under an irrevocable confirmed credit, the credit cannot be cancelled at the instance of the buyer without the agreement of all the parties concerned with the credit.

*a* Finally, the learned Justice held that the trump card of the defendant was the exemption clause in the agreement between the banker and the customer and also the various articles of the Uniform Customs (U.C.P.) pleaded in paragraph 33 of this statement of claim.

*b* The appeal of the defendant was allowed for these reasons, and judgment of the trial Court was set aside, and the plaintiff's case was dismissed *in toto*.

*c* The notice of appeal gave five grounds of appeal, but only four were stated in the appellant's brief. The first and second grounds were argued together and the argument in respect of the third appear to have merged into those first two grounds. The fourth which I consider to be decisive of this appeal is the "Exemption Clause" and "Indemnity Clause" in exhibit 8, the plaintiffs' application for the confirmed Irrevocable Documentary Credit.

*d* In his argument, and in appellants' brief, great stress was placed on the findings of fact and of the legal consequences attendant on them.

*e* The three questions of determination are better set out in the respondent's brief, and I reproduce them:—

- f* "1. Was it established that the correspondent bank had failed to comply with any of the terms and conditions stipulated in the letter of credit?"
- g* 2. Was there a duty on the respondents to have repudiated the contract with the correspondeng (*sic*) bank and to have refused to reimburse it?
- h* 3. Whether, having regard to the terms of the contract between the appellants and the respondents, the respondents are liable to compensate the appellants for their loss arising from the failure of the seller to supply or deliver the goods sold."
- i*

*j* It is correct as found by the learned trial Judge that the documents presented (exhibits 20-20E) against which payment was made to the beneficiary were non-conforming.

The plaintiffs called an expert witness, PW1. His evidence was unchallenged and it was that the documents did not conform. He said all the documents should bear a date 30th June, 1975 or a date prior to that day. He said that the documents should cover the despatch of the Aircraft which must leave any airport in West Germany on or before 30th June, 1975; so that any document bearing a date subsequent to 30 June, 1975 cannot be said to be a despatch of the aircraft on or before that day. None of these document bear a date on or before 30 June, 1975. I will therefore answer the first question in the affirmative. The learned Justice of appeal in the lead judgment, concurred in the finding that the documents did not conform to the stipulation in the credit. I am unable to accept the argument of Chief Williams, learned Senior Advocate. On the face of the documents, the documents could not have covered the despatch of the aircraft on the 30th June, 1975, being the latest date it was expected to depart from West Germany. The non-compliance was by the beneficiary with conditions stipulated in the letter of credit.

The law is clear that the confirming bank need not have personal knowledge of the departure of the aircraft. The material default is that the banker failed to detect the irregularity appearing on all of the stipulated documents which covered the departure of the aircraft by or on 30 June, 1975. It is question for the trial Judge to decide assisted by the evidence of an expert, plaintiff's witness 1.

The next question is whether the defendant had duty to repudiate their contract with BHF Bank in West Germany, the confirming correspondent bank. The law is clear that the right to re-imburement by the confirming bank is only on presentation of apparently conforming documents. A confirming bank is entitled to reimbursement only on the condition that it complied with the mandate of the mandatory. With the finding that it paid on documents which did not conform, the defendant, as the issuing bank had the right to reject the documents provided it acted promptly and did not

*a* act in such a manner indicative of ratification. Rather, it re-  
im-  
bursed the confirming bank on the defective and forged  
documents. Lord Diplock, in *United City Merchants (In-*  
*vestments) Ltd v. Glass Fibres and Equipments Ltd*, (1982)  
*b* A.C. 168, stated the law on the subject at page 184E-H:

“It has, so far as I know, never been disputed that as between con-  
firming bank and issuing bank and as between issuing bank and  
the buyer the contractual duty of each bank under a confirmed ir-  
*c* revocable credit is to examine with reasonable care all documents  
presented in order to ascertain that they appear on their face to be  
in accordance with the terms and conditions of the credit, and, if  
they do so appear, to pay to the seller/beneficiary by whom the  
*d* documents have been presented the sum stipulated by the credit, or  
to accept or negotiate without recourse to drawer drafts drawn by  
the seller/beneficiary if the credit so provides. It is so stated in the  
latest edition of the Uniform Customs. It is equally trite law, and is  
so provided by article of the Uniform Customs, that confirming  
*e* banks and issuing banks assume no liability or responsibility to  
one another or to the buyer ‘for the form, sufficiency, accuracy,  
genuineness, falsification or legal effect of any documents.’ This is  
well-illustrated by the Privy Council case of *Gian Singh & Co Ltd*  
*f* *v. Banque de Indochine* (1974) 1 W.L.R. 1234, where the cus-  
tomer was held liable to reimburse the issuing bank for honouring  
a documentary credit upon presentation of an apparently conform-  
ing document which was an ingenious forgery, a fact that the bank  
had not been negligent in failing to detect upon examination of the  
*g* document.”

Therefore where the correspondent bank, BHF Bank, in the  
instant case, paid the beneficiary against non conforming  
bank and the buyer does not adopt the transaction, on ac-  
*h* count of the breach of mandate, in that event the issuing  
bank cannot debit the buyer with the price paid. See: Goode  
*Commercial Law* pages 668 and 671. I will answer the sec-  
ond question in the affirmative. The defendant was perfectly  
*i* entitled to refuse reimbursement of the purchase price paid  
to the seller, Stiber, by BHF Bank. Chief *Williams* has sub-  
mitted that the trial court was in error in finding that the  
beneficiary Stiber was paid on the 11th July, 1975 whereas  
payment was on 15 July, 1975. I agree that a careful examina-  
*j* tion of the documents and the evidence of plaintiff witness 1

show clearly that the documents were presented and paid on 15 July, 1975 and not on 11 July, 1975. And that the credit remained valid until that day. *a*

From the standpoint of the concurrent finding of the two courts on the issue of non conformity of the documents, the plaintiffs would have been entitled to judgment and the judgment of the trial court would have been restored. *b*

However the decisive issue is the Exemption Clauses in UCP and the Indemnity Clause in exhibit 8, coupled with what the learned Justice of appeal described as ratification of the appellants by their inaction after the receipt of the documents. *c*  
*d*

But the Court of Appeal found that the appellant having received the document since July, 1977 and did not reject them nor disclaim the payment, until February, 1978, after the lapse of such a long time cannot protest against the payment by defendant. *e*

The appellant's brief and the oral argument, of the learned Principal State Counsel failed to advance any meaningful argument under ground 4 regarding the exemption clauses and other defences pleaded in paragraphs 33 and 34 of the statement of defence. The appellants' contention for which I cannot find any support was "that before one can claim reliance on the exemption clauses received one must first comply diligently and honestly with the terms and condition of the credit." *f*  
*g*

Not a word was said on this ground by the learned Principal State Counsel before the Court. I am unable to find any support for this proposition. *h*

I have already stated the view of the Court below of failure of the plaintiffs to reject the documents and the delay of about 31 months after plaintiffs the documents on 31 July, 1975 until February, 1978, this action was commenced. To say the least, the delay is inexcusable. *i*

I do not consider article 12 of Union Customs pertinent in his regard as submitted by Chief Williams and the Court *j*



- a* below. The fact is that the defendant, while not capable of stopping the correspondent bank from the wrongful payment to the beneficiary, had the right not to reimburse the BHF
- b* Bank for the reason that the documents did not conform. So, in my view, article 12 Universal Customs is not relevant. Also ineffective is the provision contained in exhibit 4. It states:
- c* “We agree to hold you and your correspondents harmless and indemnified in respect of any loss or damage that may arise . . . from any cause beyond your control.”
- d* I hold that the loss in this case was not beyond the control of the defendant, for it could and was at liberty to refuse to reimburse the BHF Bank as they had the right to refuse that was not a matter beyond its control. To the extent, I agree
- e* with the learned trial Judge. It is not a question of stopping payment or rescinding the contract and consent of the other party is not necessary. The point is that the BHF Bank has not made a case for reimbursement against the defendant.
- f* The plain fact is that neither Stiber, nor the BHF Bank was entitled to payment on the credit.

- I however agree that the appellants’ delay and inaction in rejecting the payment to Stiber for a period of thirty-one
- g* months after the receipt of the documents defeats their claims in this action. See: *Westminster Bank Ltd v. Banco Nasionali di Credito* (1928) 31 LL. L. Rep. 306 and *Bank Melli Iran v. Barclays Bank (D.C. and O.)* (1951) 2 Lloyd’s
- h* Rep. 367.

- It is for this reason that I will dismiss the appeal and confirm the decision of the court below. The respondent is entitled to the costs of this appeal which is fixed at ₦300.
- i*

- BELLO JSC:** (*Presiding*) I had the privilege of reading in draft the judgment just delivered by my learned brother, Coker JSC I agree with his reasoning and conclusion that the
- j* appeal should be dismissed.

I may only emphasise that one of the terms of the letter of credit reads: a

“COVERING DESPATCH Latest 30 June, 75 OF ONE AIR-CRAFT FOKKER F 27 A. SERIAL NO. 108, (as per Proforma Invoice dated 26 March, 75) from any German Airport to Benin City Airport, Nigeria.” b

The evidence shows that the paying bank in Germany paid the seller without having any document showing the despatch of the aircraft in accordance with the terms of the credit. It appears on the authority of the judgment of Parker J. in *Rayner and another v. Hornbros Bank* (1943) 74 Lloyd’s Rep. 10 (C.A.) the paying bank ought to have called for documentary evidence of despatch. Failure to do so constituted a breach of their obligation to comply strictly with the terms of the letter of credit. The respondent suffered the same fate as the paying bank. I would have found the respondent liable for breach of contract or negligence but for the fact that the appellants slept over their right for over a period of over thirty months. c  
d  
e

Undue delay by a party to a credit in the exercise of his right to reject constitutes ratification or waiver of any irregularity committed by the defaulting party. Undue delay may also amount to estoppel: see *Bank Melli Iran v. Barclays Bank* (1951) 2 Lloyd’s Rep. 367 at 378 and *Panchaud Freres S.A. Et. General Grain Co* (1970) 1 Lloyd’s Rep. 53 (C.A.). Only six weeks’ delay was involved in the *Bank Melli Iran* case. f  
g

In the present case on appeal the appellants slept over their right for over thirty months. Their claim must fail on this ground. h

**ESO JSC:** I have had a preview of the judgment which has just been delivered by my learned brother Coker JSC and I am in complete agreement. I adopt my reasoning in the case *A.M.O. Akinsanya v. U.B.A.* Suit No. S.C. 95/1985 delivered this morning in regard to the general law on international credit. i  
j

- a* I also hold that the appellants' delay in rejecting the documents, even after they had known or ought to have known that there was no plane coming forth from Stiber or ever  
*b* likely to come forth was fatal.

I will also dismiss the appeal which is hereby dismissed with ₦300 costs.

- c* **UWAIS JSC:** I agree with the judgment read by my learned brother Coker JSC and the conclusion therein that this appeal should be dismissed. The appeal is hereby dismissed with ₦300 costs to the respondent.

- d* **KARIBI-WHYTE JSC:** I have read the judgment of my learned brother Coker JSC in this appeal, I entirely agree with his conclusion that this appeal be dismissed. My  
*e* learned brother Coker JSC has dealt exhaustively with the facts and the applicable law to which I subscribe. I have also had the privilege of reading in advance the judgment of Oputa JSC in which he considered the question whether ap-  
*f* pellants have not by their behaviour been estopped bringing any claim against the respondents. I am also in entire agreement with his conclusion that they are so estopped.

- g* I therefore do not consider it necessary to express any further opinion in this appeal since my opinion agrees with the reasoning and conclusions of my learned brothers. I adopt them as mine.

- h* I also adopt all consequential orders made by my learned brother Coker JSC in his judgment.

- i* **KAWU JSC:** I entirely agree with the judgment of my brother, Coker JSC, in this appeal, the draft of which I have had the privilege of reading. In the result, I dismiss the appeal and affirm the judgment of the Court of Appeal with costs to the respondent against the appellants, assessed at  
*j* ₦300.

**OPUTA JSC:** The plaintiffs' claims against the defendant as set out fully in paragraph 26 of their Statement of Claim are as follows:

- “(a) Proposed cost of Aircraft Fokker F.27A  
Serial No. 108, interest, commission  
charges, rates and expenses ..... ₦613,368.7 b
- (b) Excess payment or balance outstanding to  
MMCC/ plaintiffs' credit approximately . ₦45,361.21 c
- Total amount paid by cheque on or about  
27/5/75 ..... ₦658,930.”

The facts of the case are in the main not in dispute and those facts have been clearly and fully set out in the lead judgment of my learned brother Coker JSC with which I am in complete agreement. I only want to emphasise two points namely:

1. That we are in this case dealing with an irrevocable credit. e
2. Whether or not the behaviour of the plaintiffs/appellants in the entire transaction had not shut all the available doors open to them to make any valid claim against the defendant/respondent. f

One does not need a magnifying glass to see that Stiber, with whom the appellants decided to deal, was an entirely dishonest man, a rogue, who purported to sell to the plaintiffs an aircraft that had already been sold by its rightful and legitimate owners. The first question that naturally follows is: Why did the plaintiffs choose Stiber of all people? That question was not answered directly. But from all the surrounding circumstances the latin maxim *pares cum paribus facillime congrigantur* (birds of the same feather flock together) seems to be at least a good guess at the answer. g

The Law Merchant does not take account of the precepts and obligations of the Sermon on the Mount. No. Mercantile genius consists mainly in knowing whom to trust and with whom to deal. Fraud and forgery are not the prior pre-occupations of the Law Merchant, rather trust is the basis of commercial intercourse. If this trust is betrayed, then someone is bound i

- a* to suffer. The question is who will suffer or bear the loss? There are four distinct though inter-related contracts involved in this case, namely:
- b* 1. The main and principal contract of the sale of an aircraft between the plaintiffs and Stiber.
2. Then the subsidiary contract between the plaintiffs and the defendant/bank (the issuing bank).
- c* 3. Then the third contract between the defendant/issuing bank and the confirming or correspondent bank in Germany, the Berliner Handels Gesskschaft Frankfur-
- d* ther Bank (BHF for short).
4. Finally there is the contract between the confirming bank (BHF) and the seller, Mr Stiber.
- e* There is no doubt that the plaintiffs' money totalling N658,930 had been paid to Stiber who issued his receipt tendered as exhibit 20. It is conceded on all sides that no aircraft was in fact delivered by Stiber before or after he got
- f* payment as per exhibit 20. Who is now to bear the loss?
- To answer this question one had to get at the root of the system of documentary credit. The purpose essentially is the protection of the seller not the buyer.
- g* Thus the contract, from that angle is so one sided that one wonders if it can ever be written on both sides of the same paper. The purpose for which the system of confirmed and
- h* irrevocable documentary credit (like exhibit 4 in this appeal) has been developed in international trade is to give the seller (here unfortunately Stiber) an assured right to be paid before he parts with control of his goods: see: *United City Merchants (Investments) Ltd v. Royal Bank of Canada* (1983)
- i* P.C. 168 at page 183. The unfortunate thing in this case is that Stiber had no aircraft to sell and none to part with. But he was paid by the confirming Bank BHF. It is true that according to the approved international practice embodied also
- j* in the Uniform Custom and Practice for Documentary

Credits all parties concerned deal in documents and not in goods (article 8). But having said that, one must also quickly add that banks (both issuing and confirming banks) must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms of the credit. They must appear to conform.

The confirming bank (BHF) had exhibit 8, an Irrevocable Confirmed Documentary Credit. exhibit 8 on its face shows that the Aircraft Fokker F. 27A Serial No. 108 was to leave “any German Airport to Benin City Airport on 30/6/75.” This was an essential term of the credit. The confirming bank should have therefore been put on notice and should have demanded documentary evidence showing that the aircraft described in the letter of credit, exhibit 8 left Germany for Benin on 30 June, 1975 before paying Stiber on exhibit 20. This was not insisted on. In fact from the evidence before the court, exhibit 20, the receipt signed by Stiber, was dated 11th July, 1975 while the documents supposed to have been presented to the confirming bank and on which the bank was to pay were in fact presented on 15th July, 1975. If this is not fraud, well I do not know what is. Chief *Williams*, SAN, in his brief and oral argument urged the court to hold “that exhibit 20 is not conclusive evidence of the date of payment.” Chief *Williams*, however, did not dispute that exhibit 20 is a receipt and that it bore the date “11th July, 1975” as date of payment. A document tendered in court is the best proof of the contents of such document and no oral evidence will be allowed to discredit or contradict the contents thereof except in cases where fraud is pleaded. There was fraud here but it will not be in the interest of the defendant/bank or its agent the confirming bank (BHF) to plead their own fraud. On the totality of the evidence, one is bound to come to the conclusion that the confirming bank (the BHF) either fraudulently paid Stiber on 11th July, 1975 without any conforming documents or that it was grossly negligent in paying Stiber without any documentary evidence that the aircraft left Germany for Benin City on 30th June, 1975,

*a* a date which appeared conspicuously on the face of the letter of credit, exhibit 8.

*b* Now since we are considering the liability of the defendant/bank, the issuing bank, it is essential to look again at exhibit 8 the Documentary Credit. Both parties agree that exhibit 8 is an irrevocable confirmed documentary credit. This means that it is a definite undertaking of the issuing

*c* bank here the defendant/bank, to pay, provided that the conditions of the credit are complied with. Under the Uniform Customs and Practice for Documentary Credits, once an irrevocable credit is established as regards a beneficiary, like

*d* Stiber in the case on appeal, it cannot be modified or revoked without the consent of the said beneficiary. The confirming bank is not usually concerned with the performance of the underlying contract of sale between the buyer and the

*e* seller. So that in this case even if the BHF paid Stiber after knowledge that Stiber had committed a breach of his contract with the plaintiff/appellant the defendant/bank will still be obliged to reimburse the BHF (the confirming bank) under

*f* the terms of the irrevocable letter of credit exhibit 4 and exhibit 8. This is so because by exhibit 8, the letter of credit, the defendant as issuing bank is left without a right of retraction or other means of avoiding its obligation. Since by exhibit

*g* 8 the defendant/bank had irrevocably committed the specified dollar value the amount stated on exhibit 8 to honour a payment generated upon the happening of a specific event the presentation of documents that appear to conform with the terms of the Credit (of course under article 8(c) of the Uniform Customs if the documents do not conform, the

*h* defendant/bank can stop payment or refuse to reimburse the Confirming bank). This is of course the general rule. There are exceptions to this rule. One of such exceptions is if the

*i* performance is a condition of the credit. In this case the letter of credit itself specifically provided for the Aircraft to leave any Airport in Germany to Benin City Airport by 30 June, 1975. There was therefore in the letter of credit exhibit 8 clear

*j* reference and clear involvement of the defendant/bank

per exhibit 8 and the BHF confirming bank per exhibit 8 in the performance of the essential and underlying contract of sale between the plaintiffs and Stiber. In fact the defendant/bank seemed to have acknowledged this fact by its letter of 7th July, 1975 namely:

“We advise that the shipment date of the above credit expired on 30th June, 1975. Kindly instruct us further.”

The above letter was tendered as exhibit 15. The appellants replied on 11th July, 1975 asking the defendant/bank to:

“Kindly suspend payment of the sum of DM.2,250,000 to beneficiary. You will be informed of a new beneficiary in whose favour the credit will be established.”

This letter from the appellants was tendered as exhibit 16. Although in documentary credit parties deal in documents and not in goods yet still where the credit itself makes the performance of the contract of sale (or documentary proof of it) a condition of payment to the seller more obligation is imposed both on the defendant/bank and on the BHF confirming bank. Both banks failed to carry out the stipulations required by the Credit exhibit 4 and exhibit 8.

Normally such failure by the defendant/bank would have made it liable to the plaintiffs. But this case was far from being normal. Firstly it was the defendant/bank in exhibit 15 that had to remind the appellants that “June 30th” has come and gone and yet no aircraft had arrived Benin Airport. One should have thought that it would have been the other way round. Secondly, when the documents on which the irregular or fraudulent payment was made to Stiber were received, the appellant had a duty to immediately accept or reject in unequivocal terms those documents. They did not do that. They conveniently forgot about their aircraft deal with Stiber for two years and 7 months. The matter should have been buried and forgotten but for the Odje Commission of Inquiry. The big question now is: Can the appellants now complain? I seriously doubt it. The plaintiffs, now appellants, by their



- a* conduct will now be deemed caught by the equitable doctrine of estoppel *in pais*. They accepted all the documents on which the irregular or fraudulent payment was made to Stiber.
- b* They did not complain. It was their duty to reject those documents immediately. Had they done this perhaps they may be heard to complain against the defendant/bank. But having waited all these years, they have put the defendant/bank in a terribly awkward and uncomfortable situation
- c* having regard to the fact that exhibit 8 on which the confirming bank paid in 1975 was an irrevocable letter of credit. By this atrocious delay or rather by this non-rejection of the documents, the defendant/bank cannot now recover anything
- d* from the German confirming bank. Why should the defendant/bank be made to suffer from the nonchalant and rather casual way the plaintiffs/appellants behaved in this whole transaction? But for the Odje Commission of Inquiry nobody might have heard about this case. Was there a conspiracy of silence between those who ordered the aircraft and Stiber? I do not know. But what I do know is that it will now be inequitable to call on the defendant/bank to bear the loss
- f* occasioned:
- i. By the plaintiffs choosing to deal with Stiber.
  - ii. By the plaintiffs not acting expeditiously when on 30 June, 1975 no aircraft arrived at Benin Airport.
  - iii. By the plaintiffs not rejecting all the documents on which the irregular (or even fraudulent) payment was made to Stiber
- g*
- h* I agree with Roche J in *Westminster Bank Ltd v. Banca Nazionale di Credito* (1928) 31 L.I.L. Rep 306 that:–
- i* “If parties keep documents which are sent to them in consequence of some mandate which they themselves have issued, and keep them for an unreasonable time that may amount to ratification of what had been done within their mandate.”
- The seemingly casual behaviour of the appellants, their inaction for over one year to complain that Stiber was paid irregularly, all these will, and should, from any dispassionate
- j*

angle, amount to ratification of what had been done. The appellants cannot now turn round and sue the defendant/bank. a

In transactions of this nature, time is of the essence. The buyer must at once accept or reject documents tendered to him. He is not allowed to delay. It follows that the appellants in this case have adopted the irregular payment made to Stiber. The appellants' inaction has greatly prejudiced the position of both the defendant issuing bank and the German confirming bank *vis-a-vis* Stiber. When the parties are in *pari delicto*, it is safer to let the loss lie where it falls. Also in *pari delicto melior est conditio defendantis* – where the parties are equally at fault, the situation of the defendant is the more favourable. b  
c  
d

In the final result, and for all the reasons given above, and for the fuller reasons given in the lead judgment of my learned brother Coker JSC which I now adopt as mine, this appeal ought to be dismissed and it is hereby dismissed. I adopt all the consequential orders made in the lead judgment. e

*a*

## Akinsanya v. United Bank for Africa Limited

*b*

SUPREME COURT OF NIGERIA

BELLO, ESO, UWAIS, COKER, KARIBI-WHYTE, KAWU, OPUTA JJSC

Date of Judgment: 10 JULY 1986

S.C.: 95/1985

*c* *Banking – Acceptance of shipping documents by customer without complaint – Where customer authorised his account to be debited – Customer’s right to subsequently complain about irregularities in shipping documents – Appropriate time to reject irregular shipping documents by customer*

*d* *Banking – Banker/customer relationship – Banker’s commercial credits – Categories of contracts involved – Obligation of parties – Duties of banker on receipt of shipping documents – Whether banker could debit customer’s account even when seller failed to ship goods to customer*

*e* *Banking – Bankers commercial credit – Irrevocable credits – Meaning of*

*f* *Banking – Transferable credits – Meaning of transferable credits – Whether banker could pay seller even when there are irregularities in the shipping documents – Whether the insertion of the name of a third party in bill of lading transfers credit*

*g* *Contract – Exemption clauses in contract between banker and customer – Scope of – How construed*

*h* *Jurisdiction – Admiralty jurisdiction of the Federal High Court – Whether extends to bankers documentary credit – Section 7(1)(d) of the Federal High Court Act*

*i* *Words and phrases – “Irrevocable credit” – Meaning of*

### Facts

*j* The appellant contracted a Swiss company (ASDECAMO) to supply him 10,000 metric tons of cement. To facilitate the

transaction, the appellant requested and the respondent *a*  
opened a confirmed and irrevocable letter of credit for the  
sum of \$570,000 in favour of ASDECAMO after the appel-  
lant completed a standard form prepared by the respondent *b*  
(exhibit B). The sum of \$570,000 was to be available to the  
Swiss bank at sight once accompanied by some specified  
documents in addition to full set of clean on board Bills of  
Lading. *c*

Exhibit B specifically provided amongst other conditions  
that, no responsibility shall attach to the respondent or cor-  
respondent as to the documents, beyond seeing that they  
purported to be in order. Thereafter, the respondent after *d*  
sending a cable dated 31st July, 1978 to the Swiss bank  
confirmed the letter of credit exhibit C. Payment of the let-  
ter of credit was subject to the following two important  
conditions. *e*

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

(ii) Shipment of the goods may be made either—

(a) by conference line vessel; or *f*

(b) by non-conference line vessel, but if by non-  
conference line vessel, the shippers must present  
with the other documents a photocopy of a cur-  
rent ship entry notice in the name of the carrying *g*  
vessel duly signed by the Nigeria Ports Authority.

Unfortunately, no cement was shipped to the appellant and  
there was no ship by name “Thomas Mann” the name of the *h*  
vessel which was inserted in exhibit D, as the ocean ship  
that carried the cement.

The main complaint of the appellant in this case was that  
the Bill of Lading was not signed by ASDEMACO but by *i*  
Bryanston Italian S.R.L. Pescara/Italy and the words “con-  
ference MED and” were typed on a “West Africa Joint Ser-  
vice” paper. The appellant claimed that the Bill of Lading  
was a forgery, and it was upon the presentation of the forged *j*

*a* documents that ASDEMACO was paid the sum of \$570,000.

*b* However, after the appellant was aware of these facts, he collected the shipping documents from the respondents on 18th October, 1978 and signed exhibit J confirming the documents to be acceptable and authorising the respondent to debit his account.

*c* Thereafter, the appellant instituted this action claiming breach of contract by the respondent and Swiss bank in respect of payment wrongfully made contrary to the terms and conditions of the letter of credit. The appellant also claimed

*d* general and special damages for negligence on the part of the respondent and Swiss bank for accepting and making payments against a forged Bill of Lading and an order directing the respondent to cancel all debit entries made on the appellant's account.

*e* The High Court dismissed the claims of the appellants. On appeal, the Court of Appeal by a majority (Nnaemeka-Agu, JCA, dissenting) dismissed the appellants' appeal and found that the matter was an admiralty matter and the High Court had no jurisdiction to try it. On further appeal to the Supreme Court, the appellant contended that:

*g* 1. The Bill of Lading, exhibit D was a forgery and the respondent would have discovered the forgery if they had checked the Lloyds Register which they were in possession of.

*h* 2. The interpretation placed by the Court of Appeal upon Clause 2 in exhibit B was not correct.

*i* 3. The Court of Appeal was wrong in rejecting the submission of counsel that the letter of credit exhibit C was used as a transferable credit and the exhibit D (Bill of Lading) exhibit E packing list bearing Bryanston instead of AS-DECAMO and exhibit F signed by Bryanston instead of ASDECAMO are *ex facie* irregular and inconsistent.

*j* The respondent also filed a cross appeal on the issue of jurisdiction. However, both the High Court and Court of

Appeal agreed that the Bill of Lading exhibit D contained no alteration. *a*

**Held –**

1. In International Commercial transactions by documentary credit:
  - (a) The contract between the buyer and the seller. *c*
  - (b) The contract between the buyer and issuing bank.
  - (c) The contract between the issuing bank and the confirming bank. *d*
  - (d) The contract between the seller and confirming bank.
2. Where the mode of payment chosen in the contract between the buyer and seller is that of documentary credit, the buyer is under a duty to the seller to ensure a credit is issued within a reasonable time or an agreed time and the credit must comply with the conditions which have been laid down by the parties to the agreement. *e*
3. Since by article 37 of the Uniform Customs and Practice all credits, whether revocable or irrevocable must stipulate an expiry date for presentation of documents for payment, a statement of the latest date for shipment is not sufficient. If the credit contains no expiry date, the seller is entitled to reject it. *f*
4. By virtue of article 41 of the Uniform Customs and Practice, credits must stipulate a specified period of time after the date of issuance of the bills of lading or other shipping documents during which presentation of documents for payment, acceptance or negotiation must be made. *g*
5. If the credit stipulates no such time, then credits must be presented to the banks for payment within 21 days after the date of issuance of bill of lading after which banks are entitled to reject it. *h*

- 
- a* 6. The acceptance of documents under a letter does not preclude the buyer from rejecting the goods subsequently if the goods on their arrival do not conform to the contract of sale.
- b*
7. Of the four contracts involved in international commercial transactions by documentary credit only documents are involved and it is only the first contract, the contract between the buyer and the seller that involves a carriage of goods.
- c*
8. An irrevocable letter of credit by virtue of article 3 is a definite undertaking by the issuing bank that the following terms and conditions of the credit would be complied with:
- d*
- e* (i) to pay, or that payment will be made if the credit provided for payment, whether against a draft or not;
- f* (ii) to accept drafts if the credits provide for acceptance by the issuing bank or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit or any other drawee specified in the credit;
- g* (iii) to purchase or negotiate, without recourse to drawers and or *bona fide* holders, drafts on the applicant for the credit or on any other drawer specified in the credit or to provide for purchase or negotiation by another bank, if the credit provides for purchase/or negotiation.”
- h*
9. The second contract in international commercial transaction by documentary credit is that between the buyer and the issuing house. In the second contract, the issuing bank has a duty to ensure that the letter of credit issued to the seller, complies strictly with the instructions of the buyer. The issuing bank must also ensure that payment, acceptance or negotiation is effected on presentation of
- i*
- j*

- documents which fully accord with the terms of the credit. a
10. Once a credit is opened by the issuing bank in substantial conformity with the terms agreed between the buyer and the issuing bank, the issuing bank is under a duty to indemnify the buyer against any liability the latter may incur to the seller if the credit fails to be honoured by the confirming bank, once the seller performed strictly its own side of the agreement. b
11. Once on the face of it, the documents presented to the Swiss bank by the Swiss company, conform with the requirements of the credit, as notified to the Swiss company, by the respondent, the Swiss bank is under a contractual obligation to the seller to honour the credit, “notwithstanding that the Swiss bank has acknowledged that the seller, at the time of presentation of the confirming documents, is alleged by the buyer to have, or, in fact, has already committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have in an ordinary contractual relationship entitled the appellant to treat the contract of sale as rescinded, the goods rejected, and the appellant would have refused to pay the seller. c
12. The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with the control of the goods that does not permit of any dispute as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment in payment. d
13. Where there is an action between the seller and the paying bank and the seller had perpetrated fraud in the documents so prescribed and so presented, then on the principle *ex turpi causa non oritur actio* the action e
- f
- g
- h
- i
- j



- a* would not be permitted by the Court to be used by the perpetrator of the fraud to avail himself of the credit.
- b* 14. As all parties to International Documentary Credits deal in documents only, and as the present action is between the buyer and the issuing bank, the Lagos High Court has jurisdiction.
- c* 15. The Federal High Court was set up for the purpose of dealing expeditiously with matters pertaining to the revenue of the Government of the Federation which were not being so handled by the State High Court.
- d* 16. A transferable letter of credit, by virtue of articles 46(a) and (d) of the Uniform Customs and Practice is a credit under which the beneficiary of the credit has the right to give instruction to the bank called upon to effect payment of acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties.
- e*
- f* 17. By virtue of article 9 of the Uniform Customs and Practice, all a confirming bank need to do is to ensure that the documents presented *ex facie* conform with the documents required to be presented before payment is made.
- g* 18. Where a buyer, with knowledge of a breach of his contract by the issuing banker, adopts his act, he will be considered as having ratified his act and will be obliged to reimburse the banker.
- h* 19. Where a buyer or the issuing bank has cause to challenge the compliance with the conditions of the letter of credit and therefore desires to repudiate the contract, then he must act quickly.

*Appeal dismissed.*

*i*

**Cases referred to in the judgment**

***Nigerian***

- j* *Adegbenro v. Akintola* (1962) 1 All N.L.R. 422

- Afuwape v. Shodipe* (1957) 2 F.S.C. 62 a
- Agbajo v. A.G. Federal Republic of Nigeria* (1986) 2 N.W.L.R. (Pt. 23) 528
- Alaye of Effon v. Fasan* 3 F.S.C. 68 b
- American International Insurance Company v. Ceekay Trader Ltd* (1981) 5 S.C. 81
- Automatic Telephone v. Federal Military Government* (1968) 1 All N.L.R. 429 c
- Bronik Motors Ltd v. Wema Bank* (1983) 6 S.C. 158
- Bucknor-Maclean v. Inlaks Ltd* (1980) 8-11 S.C. 1
- D.P.P. v. Obi* (1961) 1 All N.L.R. 458 d
- Jammal Steel Structures Ltd v. A.C.B. Ltd* (1973) 1 All N.L.R. Part 2 208
- Oduola v. Coker* (1981) 5 S.C. 197 e
- Olubadan-in-Council v. Lagunju* 12 W.A.C.A. 464
- Omonuwa v. Oshodin* (1985) 2 N.W.L.R. 938
- Surakatu v. Nigeria Housing Development Society Ltd* (1981) 4 S.C. 26 f
- U.B.A Ltd v. A.G. Bendel State* F.C.A./B/109/81 of 10/9/81
- Ude v. Agu* (1961) 1 All N.L.R. 61
- Western Steel Works v. Iron and Steel Workers Union* (1986) 3 N.W.L.R. (Part 30) 617 g
- Foreign**
- AG v. GE Railway Co.* (1879) h
- American International Insurance Co. v. Ceekay Trustees Ltd* (1981) 5 S.C. 81 *The Lade* (1976) 1 All E.R. 44
- Ardennes (Cargo owners) v. Ardennes (Owners)* (1950), 2 All E.R. 517 i
- Asburg Park and Ocean Grove Bank v. National City Bank of New York* 35 N.Y.S. 2nd 985
- Bank Metti Iran v. Barclays Bank D.C.O.* (1951) 2 L.L. Rep 367 j

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- a Banque Indochine v. J.H. Rayner Ltd* (1983) 1. Q.B. D717  
*Becker v. Marvin City Corporation PC* (1977) A.C. 271  
*Blakey v. Lathan* (1889)
- b Blay v. Solomon* 12 W.A.C.A. 177  
*Bozson v. Altrincham* (1930) 1 Q.B. 547  
*Clifford v. Parker* 113 E.R. 1012
- c Egerton v. Shirley* (1945)  
*Equitable Trust Co. of New York v. Dauson Partners Ltd*  
 (1927) 27 U.L.R. 49  
*Farnworth Finance Facilities Ltd v. Attryde* (1970) 1
- d W.L.R. 453*  
*Gatoil Inc. v. Arkwright Boston Co.* (1985) A.C. 25  
*Glynn v. Margetson and Co.* (1893) A.C. 351
- e Harbute's Plasticine Ltd v. Wayne Tank and Pump Co. Ltd*  
 (1970) 1 Q.B. 847  
*Hunt v. Allied Bakeries Ltd* (1956) 1 W.L.R. 1326  
*Isaac's and Sons v. Salbstein* (1916) 2 K.B. 139
- f Kenyson Son and Graven Ltd v. Baxter Hoare and Co. Ltd*  
 (1971) 1 W.L.R. 519  
*Midland Bank Ltd v. Seymour* (1950) 2 L.L. Rep. 147
- g Mohd v. Central Securities P.C.* (1983) 76  
*Nasarawa Enterprises Ltd v. Arab Bank Nigeria Ltd*  
*Pavia and Co. S.P.A. v. Thurmann-Nielsen* (1952) 2 Q.B. 84  
*Photo Production Ltd v. Securitor Transport Ltd* (1980)
- h A.C. 827*  
*Re page* (1910) 1 Ch. 489  
*Salaman v. Warner* (1891) 1 Q.B. 734
- i Salter Rex and Co. v. Gosh* (1971) 2 Q.B. 597.  
*Singh v. Banque de Indochine* (1974) 2 All E.R. 754  
*Societe Generale de Surveillance S.A. v. Rastico (Nigeria)*  
*Ltd* CA/L/51/84
- j Spurling Ltd v. Brandshaw* (1956) 1 W.L.R. 461

- St. Elefterio* (1957) page 179 a
- Standard Discount Co. v. Le Grange* (1876 – 1978) 3 C.P.A. 69
- Sussie Atlantique Societe d'Armement Maritime S.A.V.N v. Rottendamsale Kolar Centrale* (1967) A.C. 361 b
- Technistudy Ltd v. Killand* (1976) 3 All E.R. 632
- The Antonis P. Lemons* (1985) 1 A.C. 711 c
- Tuet v. Rodriquez* (1965) 176 S.O. 2nd 550, 552
- U.G.S. Finance Ltd v. National Mortgage United Bank of Greece* (1964) 1 L.L. Rep 446
- U.C.M v. Royal Bank of Canada H.L. (E)* (1983) A.C. 196 d
- Ude v. Agu* (1961) All N.L.R. 65
- United City (Investments) Ltd v. Royal Bank of Canada* (1983) A.C. 168
- United City Merchants (Investments) Ltd and another v. Royal Bank of Canada and others* (1983) e
- United City Merchants (Investments) Ltd v. Royal Bank of Canada* (1983) A.C. H.L. 168 f
- United City Merchants (Investments) Ltd v. Royal Bank of Canada* [1983] A.C. H.L. 168
- United City Merchants and Another v. Royal Bank of Canada* (1982) 2 W.L.R. 1039 g
- Way v. Solomon* (1947) 12 W.A.C.A. 175
- Westminster Bank Ltd v. Banco Nasionale di Credito* (1928) 81 L.L. Rep. 306
- Yeoman Credit Ltd v. Apps* (1962) 2 Q.B. 508 h

### **Nigerian statutes referred to in the judgment**

- Constitution of the Federal Republic of Nigeria, 1979, section 213(1) i
- Federal Revenue Court Act, section 7(1)
- Merchant Shipping (Amendment) Decree, 1978
- Supreme Court Act, section 31(1)(2) j

**a Foreign statutes referred to in the judgment**

Administration of Justice Act, 1956 (England), section 1  
Uniform Customs Practice for Documentary Credit, 1974

**b Books referred to in the judgment**

Chitty on *Contracts*, (25ed), Volume 1472, paragraph 884  
Cross, Rupert: *Precedent in English Law* (3ed), page 22

**c** Ellingers: *Documentary Letters of Credit*, page 155  
Gutteridge: *Law of Bankers Commercial Credits* (7ed), page 77

Sarna: *Letters of Credit*, page 121

**d** *Guaranty Trust Company of New York v. Hannay* (1918) 2 K.B. 623

**Counsel**

**e** For the appellants: *Kasunmu* (with him *Onanuga*)  
For the respondent: *Chief Williams* (with him *Akin-Olugbade*)

**Judgment**

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

**j** "The enormous volume of sales of produce by a vendor in one country to a purchaser in another has led to the creation of an equally great financial system intervening between vendor and purchaser, and designed to enable commercial transactions to be

carried out with the greatest money convenience to both parties. <sup>a</sup>  
 The vendor, to help the finance of his business, desires to get his  
 purchase price as soon as possible, after he has despatched the  
 goods to his purchaser; with this object, he draws a bill of ex- <sup>b</sup>  
 change for the price, attaches to the draft the documents of car-  
 riage and insurance of the goods sold and sometimes an invoice  
 for the price, and discounts the bill that is, sells the bill with  
 documents attached to an exchange house. The vendor thus gets  
 his money before the purchaser would, in ordinary course, pay; <sup>c</sup>  
 the exchange house duly presents the bill for acceptance, and has,  
 until the bill is accepted, the security of a pledge of the docu-  
 ments attached and the goods they represent. The buyer on the  
 other hand, may not desire to pay the price till he has sold the  
 goods. If the draft is drawn on him, the vendor or exchange house  
 may not wish to part with the documents of title till the accep- <sup>d</sup>  
 tance given by the purchase is met at maturity. *But if the pur-*  
*chaser can arrange that a bank of high standing shall accept the*  
*draft, the exchange house may be willing to part with the docu-*  
*ments on receiving the acceptance of the bank. The exchange*  
*house will then have the promise of the bank to pay, which if in* <sup>e</sup>  
*the form of a bill of exchange, is negotiable, and can be dis-*  
*counted at once.* The bank will have the documents of title as se-  
 curity for its liability on the acceptance, and the purchaser can  
 make arrangements, to sell and deliver the goods.” <sup>f</sup>

An equally clear statement of this branch of the law will be  
 found in the case of *Pavia and Co. S.P.A. v. Thurmann-*  
*Nielsen* (1952) 2 Q.B. 84 where Denning LJ, as he then was,  
 dealt with the increasing sale of goods across the world. He <sup>g</sup>  
 said:

“The sale of goods across the world is now usually arranged by  
 means of confirmed credits. The buyer requests his banker to  
 open a credit in favour of the seller, and in pursuance of that re-  
 quest the banker, or his foreign agent, issues a confirmed credit in <sup>h</sup>  
 favour of the seller. This credit is a promise by the banker to pay  
 money to the seller in return for the shipping documents. Then  
 the seller, when he presents the documents, gets paid the contract  
 price. The conditions of the credit must be strictly fulfilled, oth-  
 erwise the seller would not be entitled to draw on it.” <sup>i</sup>

However, before I discuss the law further, I would like to set  
 out the facts of this case, then deal, first with one matter  
 arising out of an application by Chief *Williams* (SAN)  
 learned Senior Advocate representing the respondents, that <sup>j</sup>

- a* is, the United Bank for Africa Limited, in this case, seeking enlargement of time within which the respondents may file their notice of appeal on the decisions by the learned Justice of the Court of Appeal on the issue of jurisdiction, of the trial court, to deal with this matter.

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

- Hereinafter, in this judgment, AMO Akinsanya, aforesaid, will be referred to as the appellant, while United Bank for Africa will be referred to as the respondent. The letter of credit was for \$570,000 and the application for the letter of credit was tendered as exhibit B. The particulars tendered are that the letter of credit was to be “irrevocable/confirmed” and the amount \$570,000 was to be available to the Swiss bank at sight once:

- “Accompanied by the following documents . . . combined certificate of origin, value and invoice ‘FORM C’ in triplicate including original.
- Commercial invoice
- Certificate of Origin.
- Insurance Covers by consignees Packing List.
- Full set of clean on board Bills of Lading issued to order and endorsed in blank marked ‘Fragile Prepared/Collected detail late September 3rd, 1978.’”

One of the very important conditions is:

- “It is understood that our engagement (that is appellant’s engagement) to pay shall continue in force notwithstanding any changes

in our and/or your constitution and that no responsibility is *to attach to yourselves or your correspondents as to the documents, beyond seeing that they purport to be in order.*" a

It was on the strength of this application, that the respondent, after sending a cable, dated 31st July, 1978, to the Banque Pour Le Commerce Int. S.A. a Swiss bank, hereinafter referred to as the Swiss bank, confirmed that letter of credit by exhibit C. Two of the important conditions for the payment of the letter of credit, which affect this case, are— b

“(i) presentation of full set of ‘clean on board’ Bill of Lading; c

(ii) shipment of the goods may be made either— d

(a) by Conference Line Vessel, or

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

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

Now, this is important; for the main complaint of the appellant in this case is that exhibit D, which is the Bill of Lading, was not signed by ASDECAMO but by Bryanston Italiana S.R.L. Pescara/Italy. And that words “Conference MED and” were typed on a “West Africa Joint Service” paper. Indeed, the sum total contention of the appellant was that exhibit D was a forgery, and it was upon the presentation of this forged document that ASDECAMO was paid the sum of \$570,000. g

In an ordinary contract action, what happened to the cement must necessarily have been of interest, but this is not necessarily relevant, here, for, in the determination of this h

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*a* type of cases, as would soon be seen, only documents are relevant. There would have been no problem however, if the appellant received the goods and ASDECAMO was paid for them, as per agreement. However, no cement was shipped.

*b* There was no ship by name “Thomas Mann” the name of the vessel which was inserted in exhibit D, as the ocean ship that carried the cement. The so called “Thomas Mann” was

*c* disclaimed by Conference Line. It did not belong to them nor, indeed, to any other line. The whole transaction was a colossal fraud on the appellant. The respondent’s enquiry yielded no useful result. On 17th October, 1978, they sent a cablegram to the Swiss bank as follows:

*d*

“Natiopar Paris

Attention Department Afrique you are advised that on 21st July, 1978 on behalf of Lagos Central Clients Rocky Merchants Company we open a letter of Credit in favour of ASDECAMO (Association Pour Le Developpement Economicque et Industriel En Afrique et Moyen Orient) 1219 Le Lignon Geneva stop the LIC covered 10,000 metric tons of cement value US\$570,000 stop PBCI

*e*

*f* BASLE Confirmed the LIC their reference 31 485/MM our LOB 0380/1433 stop PBCI negotiated documents on 12th September, 1978 stop We hold Bill of Lading issued by Black Star Line Limited (Ghana) who are part of the UK Conference Lines stating that the cement was shipped on S. S. Thomas Mann which loaded at Bari Italy on 4th September, 1978 stop The shippers are described as Bryanston Italiana of Pesdara Italy.

*g*

We now find that the UK Conference Line representatives here disclaim all knowledge of the vessel Thomas Mann stop Enquiries at BNL Bari indicate vessel never loaded at Bari stop Vessels has not arrived in Nigeria waters stop We therefore request that you urgently advise PBCI of position and request that they contact ASDECAMO who purportedly bank with Banque Populaire Swiss AIC No. 949-740/0 Geneva to obtain any information that may be available stop Would you also request BNP London to contact Black Star Line London office for any news on Thomas Mann stop They should also contact Lloyds Register of Shipping to see if they can obtain any trade on this ship’s movements stop Can you also endeavour to make enquiries on Bryanston Italiana stop We await your Telex reply regards Foulkes.

*h*

*i*

*j*

Midbank Lagos.

UBA Limited Head Office, Lagos

cc: Mr Caron

Mr Martin

Mr Perrin.”

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

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

And this was signed by the appellant. And the exhibit shows the amount involved to be \$576,653. And this of course followed a letter from the respondent to the appellant asking the latter to call for inspection and collection of the documents. The appellant’s evidence on this was:

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

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

It is from this decision that the appellant has finally appealed to this Court. In their judgment, the Court of Appeal raised for the first time the issue of jurisdiction of the trial court. They recalled learned counsel for an address on the issue as to whether or not, this was an admiralty matter, in which case, the jurisdiction would be with the Federal High

- a* Court. Both learned Counsel were under no difficulty in concluding that the issues here were not in admiralty, they are not matters of carriage of goods by sea, but one of an order for goods in a normal contract between parties dealing with international commercial credit contract.

Nnaemeka-Agu JCA dismissed this issue of lack of jurisdiction in the State High Court. He said—

- c* “The gist of the complaint against the respondent bank is that it did not properly discharge its duty with respect to those documents with which the credit was negotiated. It has never been suggested that it was their duty to see that the goods were imported. It was a straight forward banker customer relationship in international commercial credit transaction. I hold that it was not an admiralty matter but a bank transaction within the jurisdiction of a State High Court.”
- d*
- e* The other justices, Uthman Mohammed and Kutigi JJCA held to the contrary. Both learned Counsel have appealed against this majority decision on jurisdiction. I will consider the issue of jurisdiction later. What I would wish to deal with at this stage is the application by Chief *Williams* for an enlargement of time within which to file notice of appeal, against the decision of the Court of Appeal on jurisdiction.

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

- g* “1. . . .
2. The Notice of Appeal at pages 189, 190 of the Record of Appeal herein was filed in the court below on the 4th day of January, 1985.
- h* 3. I am informed by Chief Rotimi *Williams*, and I verily believe, that at the time he filed the Notice of Appeal, he took the view that the appeal herein was from a final decision of the Court of Appeal, so that it was in order to file the Notice of Appeal within three months.
- i* 4. The appellant herein has duly and punctually complied with the conditions of appeal.
- j* 5. I am informed by Chief Rotimi *Williams* and I verily believe that it was only recently that it occurred to him that in

the light of the decision of this Court in *Omonuwa v. Oshodin* S.C./51/84 delivered on 1st February, 1985 this Court is likely to regard the decision appealed from in this case as interlocutory and not final. a

6. I am informed by Chief Rotimi *Williams* and I verily believe that he intends humbly and respectfully to request this Honourable Court to reconsider its decision in the aforementioned case of *Omonuwa v. Oshodin* which is reported in (1985) 2 N.W.L.R. 924. The motion in support of which I swear to this Affidavit has been filed in case this Honourable Court is not disposed to reconsider its decision aforesaid.” b

On this issue, Chief *Williams* has filed a detailed brief, which I must say, had been of tremendous assistance in my examination of this thorny problem. c

And what learned Counsel was saying, in effect, is that the decision of this court in *Omonuwa v. Oshodin* (1985) 2 N.W.L.R. 924, made as recently as barely a year ago, would set back the movement of the law. Learned Senior Advocate argued in that brief, that “unnecessary confusion, uncertainty and anomalies, would arise if the pronouncements of this Court in *Omonuwa v. Oshodin* (*supra*) were followed.” d

In regard to proceedings and orders made by a court of first instance, it was Chief *Williams*’ submission that this Court has followed, for about 40 years, the tests laid down by Alverstone CJ in *Bozson v. Altrincham* (1903) 1 Q.B. 547. That these tests have been adopted in the decision of the West African Court of Appeal, *Blay v. Solomon* 12 W.A.C.A. 177, and confirmed by the Federal Supreme Court in *Ude v. Agu* (1961) 1 All N.L.R. 61, rejecting the tests in *Salaman v. Warner* (1891) 1 Q.B. 734. The decision in *Omonuwa v. Oshodin* (*supra*) did not apply to the court of first instance and so, learned counsel submitted, this Court should be very slow in upsetting a decision which has stood unchallenged for almost forty years. e

In regard to the Court of Appeal, Chief *Williams* submitted that whether a decision of the court of second instance is final f

- a* or interlocutory, must not be determined in relation to the proceedings before the Court or Tribunal of first instance *but of the Court of Appeal*.
- b* “The complaint by Chief *Williams* is clear, and the present appeal is a good example, for the complaint. When this case came before the Court of Appeal from the Lagos State High Court, that court, *suo motu*, raised the issue of jurisdiction. There was a split decision. The majority decided that the court of first instance, that is,
- c* the Lagos State High Court; has no jurisdiction over the matter, it being an admiralty matter which should have gone before the Federal High Court. Nnaemeka-Agu JCA took a different view and held that it was a matter for the Lagos State High Court. The
- d* decisions were given on 21st November, 1984. If the majority decision (that is that the court had no jurisdiction) was a final decision within the meaning of that expression in section 31(2) of the Supreme Court Act 1960, then the notice filed by learned Counsel on 14th January, 1985, (within the three month period) would
- e* have been within time, but would have been filed out of time if the decision were interlocutory (that is, as it was filed more than 14 day after the decision).”
- The question then is, what is it? Is the decision final or interlocutory Chief *Williams* said that our decision in *Omonuwa v. Oshodin* (*supra*) would make it interlocutory. But would it? And if it would, could this Court have been right in not following the old authorities established for upwards of forty
- g* years? In *Omonuwa v. Oshodin* (*supra*), this Court, as *per* Karibi-Whyte JSC said (and this was one of the portions relied upon by Chief *Williams*):
- h* “In my opinion, an interlocutory order on appeal ranks as an interlocutory appeal. The judgment of the Appeal Court is a judgment on an interlocutory appeal. It *can only assume the character of final judgment when it finally determines the right of the parties.*”
- i* Would the rights of the parties in the instant appeal be finally determined if the trial Court had no jurisdiction to deal with the rights? In other words, if a court is incompetent to deal with a matter before it, are the right of the parties in the matter still subsisting? As the Court of Appeal decided that
- j* the Lagos State High Court was incompetent and devoid of

jurisdiction would that be the end of the matter? But, in so far as the majority decision of the Court of Appeal was concerned, it had finally determined the suit brought *before that Court* by declaring that the court of trial had no jurisdiction. The subsequent examination of the issues by the majority of the court had the trial Court had jurisdiction should not exist to complicate matters or inhibit the conclusion that a decision by the Court of Appeal that the trial Court had no jurisdiction had finally determined the rights of the parties?

And finally, would the pronouncement of this Court in *Omonuwa v. Oshodin*, that a decision “can only assume the character of a final judgment *when it finally determines the right of the parties*” still make the decision of the Court of Appeal in the instant appeal, on jurisdiction, against which the United Bank for Africa is appealing, final, and not interlocutory, contrary to the submission of learned Counsel?

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

Let me say straight away, that I am in full agreement with Chief *Williams*, that the ratio in *Omonuwa v. Oshodin (supra)* did not touch the age-long distinction, settled in this country, between final and interlocutory decision, in courts of first instance. Let me trace the matter historically. In *Blay v. Solomon*, 12 W.A.C.A. 177 Verity CJ examined the issue briefly, but thoroughly. He said:

“In *Standard Discount Co. v. Le Grange* (2) Brett LJ said:

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

- a* In *Bozson v. Altrincham Urban District Council*, in a passage cited with approval by *Swinfen Eady LJ in Isaac's and Sons Ltd v. Salbstein and another* Alverstone LCJ, said:
- b* “It seems to me the real test for determining this question ought to be: does the judgment or order, as made, finally dispose of *the rights of the parties?*”
- c* In *Ex parte Moore, In re Faithful*, Brett MR, said:
- “If the court orders something to be done according to the answer to the enquiries, without any further reference to itself, the judgment is final.” (*Italics mine.*)
- d* We think that the application of these principles to the present case is conclusive.
- Let us then call this, the *Blay v. Solomon cum Bozson v. Altrincham* test. And the emphasis, which is placed by the
- e* test, is that the judgment or order is final *only when it finally disposes of the rights of the parties*, that is; makes an order, which would not bring the matter further back to itself.
- f* *Omonuwa v. Oshodin* recognises the good reasoning in the *Bozson v. Altrincham* test and though critical of it, as “the nature of the order made . . . test” yet, realised that *it has been approved* and applied in our courts. Karibi-Whyte JSC said:
- g*
- “In *Standard Discount Co v. La Grange and Salaman v. Warner*, the test applied was the *nature of the application* to the court, and not the nature of the order made. In *Salter Rex and Co v. Ghosh* (1971) 2 All E.R. 865. Denning M. R. considered the test of *the nature of the order*, applied in *Bozson v. Altrincham UDC* (*supra*), and observed that although Lord Alverstone CJ’s test in *Bozson’s case* may be right in logic, Lord Esher’s test of the *nature of the application in Salaman v. Warner* was right in experience. *Bozson v. Altrincham UDC* (*supra*) *has been approved and applied in our court and I think this is good reasoning.*” (*Italics mine.*)
- h*
- i*
- j* There is no doubt that there is a lot of force in the criticism, made in *Omonuwa v. Oshodin* of the “*nature of the order*”

test. It is true that “it ignores the issue or issues giving rise to the application and consequently the order.” *Omonuwa v. Oshodin*, however, recognised that: a

“All the cases agree on the proposition that a decision between the parties can only be regarded as final when the determination of the court disposes of the *rights of the parties, and not merely an issue, in the case.*” b

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

Learned Counsel for the defendants:

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

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

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



- a* In *Salaman v. Warner*, itself, Lord Esher MR, put the matter thus:
- b* “Taking into consideration all the consequences that would arise from deciding in one way and the other respectively, I think the better conclusion is that the definition which I gave in *Standard Discount Co. v. La Grange* is the right test for determining whether an order for the purpose of giving notice of appeal under the rules is final or not. The question must depend on what would be the result of the favour of either of the parties. If their decision, *whichever way it is given, will, if it stands, finally dispose of the matter in dispute*, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, *but, if given in the other, will allow the action to go on, then I think it is not final; but interlocutory*. That is the rule which I suggested in the case of *Standard Discount Co. v. La Grange*, and which on the whole I think to be the best rule for determining these questions; the rule which will be most easily understood and involves the fewest difficulties. As an example of the difficulties produced by the opposite view, take the case where an order is made staying or dismissing an action as frivolous and vexatious: if that is a final order, the period during which an appeal may be brought is a year. In this case, the Divisional Court allowed what is really equivalent to a demurrer to the statement of claim, and, as long as that decision stands, it is no doubt final in one sense; but, if they had disallowed the point taken, then the action must have gone to trial. If in such a case the order were final, there would be a year to appeal in, and the case might have to go on after that lapse of time, when there might be increased difficulty in dealing with the matter in dispute from the death or disappearance of parties or witnesses. We think that the rule I have mentioned is the best to adopt, and, applying it to this case, the result is that the order appealed against is interlocutory, not final.” (Italics mine.)
- h* And that was the situation when Verity CJ preferred in *Blay v. Solomon* the *Bozson* test to the *Salaman* test.
- i* The matter was brought to a head (for so it was thought) in *Ude v. Agu* (1961)<sup>1</sup> All N.L.R. 66. Brett, F.J. in the Federal Supreme Court emphasised the difference in the two tests and said:
- j* “In England, it appears from the notes in the Annual Practice to Order 58, rule 4 of the Rules of the Supreme Court that the *Court*

*of Appeal has at different times adopted two different tests for determining whether a decision is an interlocutory or a final one for the purposes of an appeal. One, which the editors of the Annual Practice say is generally preferred is that stated by Lord Alverstone CJ, in *Bozsson v. Altrincham U.D.C.* (1903) 1 K.B. 547:*

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

The other, as stated in *Salaman v. Warner* (1891) 1 Q.B. 734, is that an order is an interlocutory order unless it is made on an application of such a character that *whatever order* had been made thereon must finally have disposed of the matter in dispute. Thus, one test looks at the nature of the proceedings; the other (which is generally preferred) looks at the order made.

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

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

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

In the White Book, that is, the Supreme Court Practice (UK Rules), under the heading of pleading and under Order

- a* 18/11/5, is a note to the effect that an order dismissing the action under Order 33, rule 7 is a final order within Order 59, rule 4(1) if it finally disposes of the rights of the parties:
- b* if it does not, then it is an interlocutory order (*Bozson v. Altrincham U.D.C.* (1903) 1 K.B. 547 which to this extent overrules *Salaman v. Warner* (1891) 1 Q.B. page 736; *Re Grossdell* (1906) 2 K.B. 569).
- c* *Bozson v. Altrincham*, it was agreed, has overruled *Salaman v. Warner*.

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

- e* “An interlocutory order is to be contrasted with a final order section 68(2) of the J.A. (1925) Volume 2, Part 9A provides any doubt which may arise as to what decrees, orders or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal. Accordingly, its decision whether the order is final or not is not subject to appeal. The test, as stated by Lord Alverstone CJ in *Bozson v. Altrincham U.D.C.* (1903) 1 K.B. 547 page 548 is,
- f* ‘Does the . . . order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then in my opinion, an interlocutory order.’ A
- g* different test is stated in *Salaman v. Warner* (1891) 1 Q.B. 734, namely, that an order is an interlocutory order unless it is made as an application of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute. .
- h* . The latter test (*sic*) that is, the test in *Salaman v. Warner* or rather the nature of application test) regards the nature of the proceedings; the former (which is generally preferred) looks at the order made.” (Italics mine.)

- And so, it was recognised, even in the United Kingdom Practice Book, that the *Bozson v. Altrincham* is generally preferred. But notwithstanding the preference, the English
- i* Court of Appeal that has a final say in the matter, as a result of the Judicial Act (1925) section 68 refused to be glued to the preferred test. Lord Denning MR would seem to be more enamoured of the *Salaman v. Warner* test, as would be seen
- j* presently, in some of the decisions in the Court of Appeal.

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

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

“The Malaysian Courts have considered the question of whether orders are final or interlocutory in a number of cases extending over a period of 20 years and commencing with *Ratmaner Cumerasary* (1962) 28 ML.J. 330. In that case, the Malaysian Court of Appeal examines several English cases including *Salaman v. Warner* (1891) 1 Q.B. 734, 736 where Fry LJ formulated the test in these terms:

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

The Court compared this with the test advanced by Lord Alverstone CJ in *Bozson v. Altrincham U.D.C.* namely:

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

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

- a* I have said earlier that the Court of Appeal in England would appear to prefer the *Salaman v. Warner* test. For an appreciation of the difficulty in this matter and before I turn to the decision of this Court in *Omonuwa v. Oshodin* I
- b* would like to refer to a 1971 judgment of the Court of Appeal in England where Lord Denning MR in *Salter Rex and Co. v. Ghosh* (1971) 2 Q.B. 597 preferred to apply the *Salaman* test. He said it had always been applied in practice, while the *Bozson* test was right in logic. Whatever the semantics might have been, the *Bozson* test has not only always been right in logic in this country, it has also been applied in practice or rather ‘preferred’ in practice.
- c*
- d* In the English case (*supra*) Lord Denning’s application of the *Salaman* test made a difference to the case. If the *Bozson* test had been applied, the order appealed from, that is, refusing a new trial would have been final and not interlocutory as the *Salaman* test, when applied, made it. But that is England. And this is the type of problem that would arise if the two tests are kept afloat in this country. I can appreciate learned Counsel Chief *Williams*’ concern therefore for asking the courts in this country to keep to one test only and that is the one suggested in *Bozson v. Altrincham*, for as this Court said in *Omonuwa v. Oshodin* (*supra*), despite the elusive impression of decided cases, the ideal is to provide a workable test for the determination of the issue when it arises. And a workable test, to my mind, ought to be certain. I think, to leave it fluid, as it is done in England, would provoke decisions like that of Lord Denning MR in *Salter Rex and Co. v. Ghosh* (*supra*) or *Technistudy Ltd v. Killand* (1976) 3 All E.R. 632 when in the latter the Master of the Rolls suggested ‘rummaging’ through the Practice Books to see what has been done in the past! And I am of the opinion, with respect to the learned Master of the Rolls in England, that such attitude would make an already difficult problem only the more compounded. For indeed, this is what it does in England.
- g*
- h*
- i* In *Becker v. Marvin City Corp P.C.* (1977) A.C. 271 a Privy Council appeal from Australia, Lord Edmund Davies, delivering the decision of the Board, noted the frequent difficulty given rise to by the situation of enquiring whether a decision is final or interlocutory. In *Hunt v. Allied Bakeries Ltd* (1956)1 W.L.R. 1326 Lord Evershed MR had to adjourn,
- j*

make enquiries as to the practice of the court and also consult the other divisions of the Court of Appeal before deciding whether an order was final or interlocutory. *In re page* (1910) 1 Ch. 489 Buckley LJ felt some difficulty especially as the order in the case would put an end to the matter and logically, per adventure, that would have been final. He said—

‘To my mind, it would be reasonable to say that this is a final order.’ But then, he continued—

‘I am not prepared to differ from the view taken by the other members of the court. I yield my judgment to them without saying that I am completely satisfied.’ (Italics mine.)

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

Very recently, in this Court, in *Western Steel Works Ltd and another v. Iron and Steel Workers Union* (1986) 3 N.W.L.R. (Part 30) 617 at page 625 Obaseki JSC, tended to agree with the observation of Lord Denning MR as stated above in the two cases, I have referred to, when the learned Master of the Rolls said it was *impossible* to lay down any principles about what is final and what is interlocutory. Obaseki JSC went on and said:

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

It is to be observed, with all respect, that, once the *nature* of the order test is accepted, the order is final if, in the words of Brett MR, in *Ex parte Moore, In re Faithful (supra)*:

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

In other words, if the court of first instance orders that a matter before it be terminated (struck out) for it has no jurisdiction to determine the issue before it, that is the end of all

*a* the issues arising in the cause or matter and there is *no longer, any issue between the parties in that cause or matter that remains for determination in that court*. But it would be  
*b* interlocutory if its order is that it has jurisdiction for there will be reference of the remaining issues *in* the case to itself. When a Court of Appeal rules and orders that a court of first  
*c* instance had no jurisdiction in a cause which has been brought before it, that is the end of the matter in so far as *that particular litigation goes between the parties in that Court of Appeal*. There is no further reference to the court which has made the order in either case. And that has deter-  
*d* mined the rights of the parties in both cases *before the court making the order*. And applying that test to the instant case, if the order made by the majority of the Court of Appeal had been made by the trial Court itself that that trial Court had  
*e* no jurisdiction, that is final. And according to the nature of that order, there is no further reference to *that court of trial*. If the order had been by the trial Court that it had jurisdic-  
*f* tion, that is interlocutory *according to the nature of the order made as there are issues still to be determined*. The result will not be the same if the nature *of the proceedings or application test is followed*.

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

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

*j* And now to deal with the issue as the problem arises in the Court of Appeal, the decision in *Omonuwa v. Oshodin* criticised the non application of either the *Salaman v. Warner* test or the *Bozson v. Altrincham* (in what I have termed earlier

also as the *Blay v. Solomon* test), in both *D.P.P. v. Chike Obi* (1961) 1 N.L.R. 458 and *Adegbenro v. Akintola* (1962) 1 All N.L.R. 442 at 474. Karibi-Whyte JSC said :

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

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

Learned Senior Advocate, Chief Rotimi *Williams* has criticised this statement of the Court as not being correct. He said:

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

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

“Is it a final decision? The decision may not be final in the proceedings before the Chief Justice, but so far as the Federal Supreme Court is concerned it is final. The court has finally disposed of the matter referred to them, namely the question as to the interpretation of the Constitution. This Constitution accords with that adopted by Brett Ag CJF in *Dr Chike Obi v. Director of Public Prosecutions* (No. 2) F.S.C. 56 of 1961. Their Lordships have accordingly reached the conclusion that the decision of the Federal Supreme Court on the reference under section 108 was a final decision . . .” While these decisions fully support the submission of Chief *Williams* that it is the court that makes the order that matters, the Court did not *in fact* look at it from the ‘nature of the application’ or ‘nature of the order’ angle as such. I would



- a* agree, however, that *Bozson v. Altrincham U.D.C.* was *applicable* and if it had been so applied, the decision in each of the two cases would have been the same, that is, it was clearly final and not interlocutory.’
- b* And when this Court said that its approach has never been the test applicable,” all the Court was saying was that *the approach of not applying either test* but applying the test of relying “on its function of *determining a reference to it* and not *being concerned with the determination of the rights of the parties* has never been the test applicable and clearly not the laws.” (Italics mine.)
- c* I think it might all be question of semantics the difference being between, not *applying a test* and *non-applicability* of a test.
- d* Now, what is the test suggested by this Court in *Omonuwa v. Oshodin* Karibi-Whyte JSC said:
- “All the cases cited agree on the proposition that a decision between the parties can only be regarded as final when the determination of the court *disposes of the rights of the parties (and not merely an issue) in the cases*. Where only an issue is the subject matter of an order or appeal the determination of that Court which is a final decision on the issue or issues before it, which does not finally determine the rights of the parties, is in my respectful
- e* opinion interlocutory . . .”
- f*
- The learned Justice of the Supreme Court went on with full concurrence of all the other Justices:
- “In my opinion, the ideal approach is to consider both the *nature of the application, and the nature of the order* made in determining when an order or judgment is interlocutory or final in respect of the issues before it as between the parties to the litigation. . .” (Italics mine.)
- g*
- h* Apparently, that is taken as applying the *Salaman v. Warner* test, (as already discussed) as against the *Bozson v. Altrincham* test. But with respect, it cannot be taken as so applying it, that is, in *contradistinction* to the *Bozson v. Altrincham*
- i* test, as has been discussed earlier in this judgment. For the judgment under reference, *Omonuwa v. Oshodin*, classified both *Salaman v. Warner* and *Omonuwa v. Oshodin* together as belonging to one class. Karibi-Whyte JSC said:
- j* “1. It would seem clear from the cases and the dicta cited that two tests for determining what is interlocutory or what is final have

emerged from the cases. There are the cases which adopt the nature of the application to the Court as the determining factor whether the order is interlocutory or final, and there are others which consider the nature of the order made. Whereas *Gilbert v. Endean*; *Blake v. Lathern*; *Salter Rex and Co. v. Ghosh*, the *Technistudy Ltd v. Kellard* (1976); represent the first view, *Salaman v. Warner*; *Bozson v. Altrincham U.D.C*; *Blay and others v. Solomon* represent the second view.”

However, I think the important thing is how the judgment has been understood (or misunderstood). In *Agbajo v. A.G. Federal Republic of Nigeria* (1986) 2 N.W.L.R. (Pt. 23) 528, the Court of Appeal, as per Omo Eboh JCA (see also the judgments of the other justices) were in no doubt that the decision of *Omonuwa v. Oshodin* binds, the Court of Appeal, and clearly so, to, adopt the two tests, that is, the nature of the application and the nature of the order test. Incidentally, the Court of Appeal found difficulty in fitting in the *Salaman v. Warner* test into the case and so ended, and rightly, in my view, with the *Bozson v. Altrincham* test.

Obaseki JSC in *Western Steel Workers Ltd and another v. Iron and Steel Ltd and another* (*supra*) put the matter thus:

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

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

*a* in accord with the *Bozson v. Altrincham* test if applied in the Court of Appeal.

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

*b* “31(2)The periods prescribed for the giving of notice of appeal or notice of application for leave to appeal are—

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

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

And applying that test to the instant appeal, the majority in the Court of Appeal, having determined that the Court of trial had no jurisdiction, had nothing further to determine in regard to the rights of the parties, (their subsequent examination of the issues, assuming they are wrong, notwithstanding).

*f* The decision is therefore *final* as being a *final decision of the Court of Appeal*, and the appellant would need no leave of this Court to file an appeal on the grounds of jurisdiction. Their application is unnecessary and it is hereby struck out.

*g*

#### *JURISDICTION*

The next issue for consideration is jurisdiction. Uthman Mohammed JCA said pointedly that a State High Court has no jurisdiction to try any case on a matter concerning the opening of letter of credit, in which there is a collateral agreement of *carriage of goods by sea*. The learned Justice of the Court of Appeal relied upon the decision of this Court in *American International Insurance Co. v. Ceekay Trader Ltd* (1981) 5 S.C. 81, that the Administration of Justice Act of England, 1956 being the law which had given jurisdiction to the judges of the English Court of Admiralty is applicable to Nigeria, and that the Federal High Court by virtue of

*h*

*i*

*j*

section 7(1) of the Federal Revenue Court Act, 1973 has the exclusive jurisdiction to hear and determine all claims within the Admiralty jurisdiction. As the conditions for the carriage of the goods in this case, and the age of the ship which must be so used, relate to a claim arising out of an *agreement relating to the carriage of goods in a ship or to the use of hire of a ship* it is an Admiralty matter by virtue of the decision of this Court in *American International Insurance Co. v. Ceekay Trades Ltd* (*supra*) which approved the decision of the English decision in *The St. Elefferio* (1957) page 179. a  
b  
c

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

Then he concluded:

“Both Chief *Williams* and Professor *Kasunmu* argue that the matter between the appellant and the respondent involves documents only. I agree that documents were involved but in my opinion the contents of these documents is that vital issue in this case. If one is only concerned about forgery of the documents one could only concern oneself with comparison of handwriting and signature. But one goes to complain against the failure of a contracting partner to *comply with terms given in a document*, those terms have become part of the *over all agreement between the parties*. The appellant is complaining here that because the additional instructions were not complied with there is said to be a breach of the contract between the buyer and the issuing bank. It is my view that the test set out in those additional instructions are caught up by section 1(i)(h) of the Administration of Justice Act, 1956 and therefore within the Admiralty jurisdiction of the Federal High Court. If ASDECAMO applied to be made a third-party or one of the parties makes it a co-defendant to the suit, the State High Court would have to determine *on how the cement was carried in a ship to Apapa or make a ruling on the use or hire of Thomas Mann and whether it is a conference line vessel or not*. This definitely is not within its jurisdiction. f  
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*a* In addition to my opinion above I will say that the leading document which formed the bases of this case is the Bill of Lading. Contracts of carriage of goods by sea are mainly evidenced by a Bill of Lading. The contents of the bill of lading, exhibit D, are the points upon which the appellant argued that the respondents were in breach, because they failed to examine it and discover that the Bill carried details, which they did not agree upon.

*c* A Bill of Lading is not itself the contract of carriage between the shipper and the ship owner, or the shipper and the charterer, but is evidence of its terms.” (italics mine for emphasis)

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

*f* “Bearing this principle and the above definition of carriage of goods” in mind; it is difficult to say that what is in issue in this case *is a contract for carriage of goods in a ship*. It appears to me that the contract in question in this appeal is one in contemplation of an order of goods and not *one of carriage of goods in a ship*. It is a normal contract between a customer and his local bank in an international commercial contract. *It is a letter of credit transaction and in such transactions credits are by their nature separate and distinct contracts from the sale or carriage or other contracts that may emerge from such transactions: See Uniform Customs and Practice for Documentary Credit (1974) General Provisions (c).*” (italics mine)

*i* To determine the issue of jurisdiction having regard to the facts, I think it would be best to examine the nature of this type of transaction. Historically, once the notion of commercial credits was accepted as a patent factor in international trade, attempts were then made from time to time for the standardisation of the conditions on which bankers would be prepared to issue and act on commercial credits. The year 1933 saw the commencement of such standardisation. The

International Chamber of Commerce formulated a Uniform Customs and Practice for Commercial, Documentary Credits, hereinafter also referred to as Uniform Customs. The British banks had some objections to the rules at the time, and it was not until about thirty years later, that is, in 1962, when the 1962 Revision was completed, that the British and the Dominion Banks saw fit to join the operation of the rules. In 1974, the Uniform Customs were revised, and it is this revised edition that affect the instant case. Though, it was again revised in 1983, the revision of 1983 is not material to this case, thus action taken having been commenced in August, 1979 the incident itself having happened in 1978.

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

- “(b) For the purposes of such provisions, definitions and articles the expressions ‘documentary credits(s)’ and ‘credits(s)’ used therein mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance with the instructions of a customer (the applicant) for the credit),
  - (i) is to make payment to or to the order of a third party (the beneficiary) or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or
  - (ii) authorises such payments to be made or such drafts to be paid, accepted or negotiated by another bank, against stipulated documents, provided that the terms and conditions of the credit are complied with.
- (c) Credits, by their nature, are separate transactions from the sale or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.
- (d) Credit instructions and the credits themselves must be complete and precise.

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

- a* (e) The bank first entitled to exercise the option available under article 32 shall be the bank authorised to pay, accept or negotiate under a credit. The decision of such bank shall bind all parties concerned.
- b* A bank is authorised to pay or accept under a credit by being specifically nominated in the credit.
- A bank is authorised to negotiate under a credit either–
- c* (i) by being specifically nominated in the credit, or  
(ii) by the credit being freely negotiable by any bank.
- (f) A beneficiary can in no case avail himself of the contractual relationships existing between banks or between the applicant for the credit and the issuing bank.”
- d*

As Lord Denning said, in *Pavia and Co. SPA v. Thurmann Nieber* (1952) 2 Q.B. 84:

- e* “The sale of goods across the world is now usually arranged by means of confirmed credits. The buyer requests his banker to open a credit in favour of the seller and in pursuance of that request the banker, or his foreign agent, issues a confirmed credit in favour of the seller. The credit is a proviso by the banker to pay money to the seller in return for the shipping documents. Then the seller, when he presents the documents, gets paid the contract price. The conditions of the credit must be strictly fulfilled, otherwise the seller would not be entitled to draw on it.”
- f*
- g* A more authoritative statement in the matter of documentary credit is to be found in the pronouncement of Lord Diplock in *United City Merchants (Investments) Ltd v. Royal Bank of Canada* [1983] A.C. H.L. 168. As the law Lord said, for the proposition upon the documentary credit point both in the broad form or in the narrower form, there is paucity of direct authority in both the English and Privy Council cases and were in the Courts in the United States of America. That being the case, it is no wonder then, that there is no precedent in this country to turn to in this matter, the more so as this country is quite young in entering into international commercial credit, which type of transaction is based on documents.
- h*
- i*
- j*

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

### *THE FIRST CONTRACT*

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

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

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

In which case, a statement of the latest date for shipment is not even sufficient. If the credit contains no expiry date, the seller is entitled to reject it. In article 41 of the Uniform Customs; is the following provision—

“Notwithstanding the requirement of article 37 that every credit must stipulate an expiry date for presentation of documents, credits must also stipulate a specified period of time after the date of issuance of the Bills of Lading or other shipping documents during



- a* which presentation of documents for payment, acceptance or negotiation, must be made. If no such period of time is stipulated in the credit, banks will refuse documents presented to them later than 21 days after the date of issuance of Bills of Lading or other shipping documents.”
- b*

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

### *THE SECOND CONTRACT*

- d* The second contract is between the buyer and the Issuing bank. This is the contract that is material to this case; for the action is between the buyer (appellants in this case and the issuing bank (the respondent in this appeal). What are the principles involved in this second contract? For, it is after examining the principles, that one could fit the facts of this case into them.
- e*
- f* The relationship is one of a banker and customer. But not quite. In an ordinary banking transaction, a customer requiring a loan or overdraft facility enters into a simple informal contract known to the common law or, if a statutory provision is involved in the contract, known to statute. In an application for a documentary credit under discussion, there is a standard form of application the form usually incorporates the Uniform Customs and the buyer is required to fill the document where the terms of the contract are set out in detail. In the instant appeal, such application is exhibit B. Exhibit B is the form provided by the Issuing bank, the respondents, in this case, and though the Uniform Customs are not specified in exhibit B; exhibit C which the respondent issued to the Paying or Confirming bank, that is, the Swiss bank, the following is contained:
- g*
- h*
- i*
- j* “Except as otherwise stated this credit is subject to the Uniform Customs and Practice for Documentary Credits (1974 Revision) International Chamber of Commerce Brochure No. 290.”

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

At this stage, it is to be observed that in exhibit C, the documentary credit is irrevocable. Now what is an irrevocable letter of credit? The credit in exhibit C is stated to be irrevocable in compliance with article 1 of the Uniform Customs which stipulates that credits maybe either revocable or irrevocable and *that all credits should clearly indicate whether they are* revocable or irrevocable, for by virtue of article 3 an *irrevocable credit is a definite undertaking by the Issuing bank* (the respondents herein); provided that the terms and conditions of the credit are complied with:—

- i. to pay, or that payment will be made if the credit provided for payment, whether against a draft or not;
- ii. to accept drafts if the credits provide for acceptance by the issuing bank or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit or any other drawee specified in the credit.
- iii. to purchase or negotiate, without recourse to drawers and or *bona fide* holders, drafts on the applicant for the credit or on any other drawer specified in the credit, or to provide for purchase or negotiation by another bank, if the credit provides for purchase/or negotiation.

Let us see if, and how the respondents complied with the instructions contained in exhibit B. exhibit C was what followed.

- a* It was issued by the respondent to the confirming bank, that is the Swiss bank, and it is in substantial agreement with exhibit B. And that being the case, the respondent will be under duty
- b* to indemnify the buyer, that is the appellant, against any liability the latter may incur to the seller if the credit fails to be honoured by the Swiss bank, that is, the seller, the Swiss company, performed strictly its own side of the agreement.
- c* The confirming bank, Banque Pour le Commerce Int S.A. referred to as the Swiss bank, is not the buyer's (that is the appellant's) agent. It is however the respondent's (the issuing bank's) agent. The appellant (buyer) would be entitled to
- d* reject the documents even for an *apparent* defect on the face of the document and refuse to be bound by the act of the Swiss bank. If the Swiss bank had been the appellants' agent, the appellant would, of course, not have been entitled
- e* to do this. This is important, for, if the Swiss bank honoured a credit, as it is being claimed in the instant appeal, on acceptance by it of *defective documents*, and the buyer rejects the documents as he *would* have the right to do, or as he is
- f* doing in the instant case, he could proceed, as he had done in this case; against the issuing bank; the respondent, basing the action on the contract between the buyer and the issuing bank, that is, the contract between the appellant and the respondent. So it is the conforming; or not, of the documents
- g* that matter.

It is this, therefore, that leads me now to a comparison of exhibit C, which indicates the documents, which the Swiss

*h* bank must rely upon *before* honouring the credit and exhibit D, the Bill of Lading presented by the seller (the Swiss company) to the confirming bank the Swiss bank. And this is the true basis of the present action.

*i* **THE THIRD CONTRACT**

I have, earlier in this judgment referred to exhibit B (the instructions given by the appellant to the respondent). I have also referred to exhibit C and had emphasised the importance of "Conference" and "non Conference" Lines in the

*j*

latter exhibit and the complaint of the appellant about the non existence of the supposed carrying vessel “Thomas Mann” and the disclaimer of this “Vessel by Conference Line.”

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

- “(a) Banks utilising the services of another bank for the purpose of giving effect to the *instructions of the applicant* for the credit do so for the account and at the risk of the latter (that is the applicant).
- (b) Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank.
- (c) The applicant for the credit shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages.” (Italics mine.)

Though it would appear that this article particularly sub-articles (a) and (b) full agreement that the provision should not be taken to give banks a *carte* provide both the Issuing bank, the appellant, and the confirming bank (the Swiss bank) with immunity, the learned authors of *Law of Bankers’ Commercial Credits* – HC Gutteridge and Maurice Megrah are of the view and I am in *blanche* to do as they please and “if one commits a flagrant mistake, the responsibility and the loss will not be with the applicant for the credit.” Applied to this case, the appellant should not bear the

- a* responsibility and loss, if the Swiss bank pays upon defective documents. This accords with ordinary laws of the land and commonsense. A person shall not profit by his own delict.
- b*

- If the confirming bank that is the Swiss bank, as the agent of the respondent, had been held to have acted on defective documents and the appellant had as a result thereby incurred
- c* a loss, then the appellant could claim against the respondent, who could in turn refuse to reimburse the Swiss bank. But if the documents presented to the Swiss bank are *ex facie* in conformity with the relative conditions of the credit exhibit
- d* C it would not matter if there is dispute between the buyer (the appellant) and the seller (ASDECAMO). The respondent would be obliged to reimburse the Swiss bank, and debit the appellant.

*e* **THE FOURTH CONTRACT**

- A fourth contract (which does not strictly arise in this case) is between the Confirming bank and the seller that is between the Swiss bank and the Swiss company. The obligation of the Swiss bank to the seller (Swiss company) is as
- f* contained in exhibit C. And that exhibit will be the basis of the liability of the Swiss bank to the Swiss company. Important again is the fact that the Swiss company and the Swiss
- g* bank deal in documents and not in goods once on the face of it, the documents presented to the Swiss bank by the Swiss company, conform with the requirements of the credit, as notified to the Swiss company, by the respondent, the Swiss
- h* bank is under contractual obligation to the seller to honour the credit:

- i* “*notwithstanding that the Swiss bank has knowledge that the seller, at the time of presentation of the confirming documents, is alleged by the buyer to have, or, in fact, has already committed a breach of his contract with the buyer for the sale of the goods; which the documents appear on their face to relate, that would have in an ordinary contractual relationship entitled the appellant to treat the contract of sale as rescinded, the goods rejected, and*
- j* *the appellant would have refused to pay the seller.*” (Italics mine.)

See: the pronouncement of Lord Diplock in *UCM v. Royal Bank of Canada* H.L. (E) [1983] A.C. 196 at page 183. a

Again, this is important in this fourth contract. For the contract between the Swiss bank and the Swiss company does not stand exclusively for the other three contracts forming the transaction. Indeed, the four contracts are interwoven. Once the Swiss bank is not liable, or in other words once it is shown that the Swiss bank has conformed to the documents (in this fourth contract) and has paid out the necessary funds to the seller (the Swiss company in this case) even when the Swiss bank has knowledge that the Swiss company has committed a breach of contract with the buyer (the appellant), the Swiss bank as in the third contract has to be reimbursed by the respondent, who in turn would rightly debit the appellant. As Lord Diplock said in *UCM v. Royal Bank of Canada* (*supra*) case: b

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

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

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

I am not excluding vitiation by fraud completely. For, if *the action had been between the seller and the paying bank, and* f

- a* the seller had perpetrated fraud in the document so described and so presented, then, on the principle of *ex turpi causa oritur non actio*, the action would not be permitted by the court to be used by *the dishonest persons*; that is, the perpetrator of the fraud, to avail himself of the credit.

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

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

He then dealt with the 1973 Act and held:

- j* “It seems to me that the intention and overall effect of all these provisions of the 1973 Act is to oust the High Courts of the States

(including the High Court of Lagos) of their Admiralty jurisdiction after the same jurisdiction had been vested in the Federal High Court.” a

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

“The Admiralty jurisdiction of the High Court shall be as follows:— that is to say jurisdiction to hear and determine any of the following questions or claims:

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

Chief *Williams* has asked that we re-examine our approach to the interpretation of this provision of the Act. With respect, I think the important question is, whether or not the judgment of this Court in *American International Insurance Co v. Ceekay Traders Ltd* (*supra*) applies at all. Are the facts and the nature of this case, as have been stated above, wide enough to amount to *an agreement relating to the carriage of goods by sea*? Uthman Mohammed JCA took the approach by listing the claims upon which the Admiralty Jurisdiction of the English High Court could be invited as contained in Volume 3 of the Atkins’ *Court Forms*. There were eighteen in all. He then referred to the instructions contained at the back of exhibit C particularly the instruction relating to shipment being made by conference or non-conference line vessel and that Bills of Lading must state that the carrying vessel if not registered in Nigeria should not be more than fifteen years from date of first registration. The learned Justice of the Court of Appeal then held that the *contents* of the documents form the vital issue. e  
f  
g  
h  
i

I find the reasoning of the learned Justice difficult to follow, and with respect, if as the learned Justice himself had held, it is clear that the whole transaction is *documentary credit*, and that the Bill of Lading is *not itself the contract of* j



- a* carriage between the shipper and the ship owner or the shipper and the charterer, but, is merely evidence of its terms, then, again with respect, I do not see how a purely
- b* documentary contract where the confirming bank (the Swiss bank) will *only* be interested in the *ex facie* confirmation of exhibit D with the terms in exhibit C could turn metamorphoral into a carriage by sea contract between the buyer of
- c* the goods, the appellant, and the Issuing bank, the respondent, especially when the Swiss bank's *prima facie* satisfaction with the documents is the satisfaction by an Agent that it is, on behalf of its principal, the respondents.
- d* The learned Justice is therefore in serious misconception of the law of documentary credit to have concluded that the contract is concerned with the *contents, which would lead* the court to engage itself in bothering "on how the cement
- e* was carried in a ship to Apapa" *or whether* "Thomas Mann" was in fact Conference Line Vessel or not: See *UCM v. Royal Bank of Canada (supra)*.
- f* This Court in *Bronik Motors Ltd v. Wema Bank Ltd* (1983) 6 S.C. 158 has stated categorically the primary reason behind the setting up of the Federal High Court. The Court was set up for the purpose of dealing expeditiously with matters pertaining to the revenue of the Government of the Federation which it was felt at the time were not being so handled
- g* by the State High Court. The Federal High Court has come to stay, and, without any doubt, has justified its existence, but it is not for this Court to impinge upon the jurisdiction of
- h* the State High Court, conferred by section 236 of the Constitution, for the purpose of "fleshing" up the jurisdiction of the Federal High Court. To add to the jurisdiction of that court must be by legislation.
- i* From the facts of this case, which comply with the principles of law in International Documentary Credits: (see *UCM v. Royal Bank of Canada (supra)*), that all parties to a documentary credit transaction deal *in documents only*, and *not* in
- j* the goods, what has happened herein, arises from a breach of

agreement *relating not to the carriage of the goods, that is the cement in this case, but to the conforming or non conforming of the documents, produced by the seller*, the Swiss company to the Swiss bank, acting as agent of the issuing bank, the respondent: What is at issue is whether or not the conditions stipulated in exhibit C have been *prima facie* conformed with by the Swiss bank before payment of money to the seller.

I have dwelt at length on the importance of this *ex facie* conformation of the documents, presented by the seller, to the Confirming bank. I am in complete agreement with Nnaemeka-Agu JCA when he said:

“In the instant case, the appellant forwarded his claim on the letter of credit which the respondents opened for him on his application. Although one of the documents with which the credit was negotiated was the Bill of Lading, it did not convert the transaction, into a Bill of *Lading transaction* which would have succeeded in admiralty.” (Italics mine.)

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

### THE MERIT

I would now finally come to the merit of this case. I have

*a* already set out a good part of the facts. The remaining material facts will be referred to presently. But what is the claim by the plaintiff/appellant. His claim is as follows:

*b* “1. The sum of ₦553,493.74 being special and general damages for breach of contract by the defendant and its agent (The Banque Pour Le Commerce Int. S.A. Basle Switzerland) in respect of payments wrongfully made out (on) Letter of credit No. LCB 0380/78/1432 of 31/7/78 issued by the defendants on the instructions of the plaintiff, and contrary to the terms and conditions of the said Letter of Credit.

*c*

*d* 2. Alternatively, the plaintiff claims the sum of ₦553,493.74 being special and general damages for negligence on the part of the defendant and its said agents, the Banque Pour Le Commerce Int. SA Basle Switzerland, for accepting and making payments against a forged Bill of Lading issued by Bryanston. Italiana S.R.L. Pescara Italy, contrary to the aforesaid instructions of the plaintiff.

*e* 3. A declaration that as the payment of 570,000 US Dollars made by the defendants bank to ASDECAMO was made in breach of the terms and conditions of the Letters of Credit mentioned in claim 1 above, the defendant is not entitled to debit the plaintiff's Account No. 9257 with the Lagos Central Branch of the defendant/bank with that amount and or with any interest, and commissions on that amount; and an order that the defendant shall forthwith revert or cancel all debit entries so made.”

*g* From this claim, the complaint was that the confirming bank, that is, the Swiss bank, as agent of the respondent, wrongfully made out payment: on Letter of Credit exhibit C

*h* contrary to the terms and conditions of the said letter of Credit or in the alternative that the Bill of Lading in the name Oil Bryanston was forged.

*i* I would now proceed to state the case of the appellant in this Court.

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

“The Shipper’s name was put as Bryanston Italiana S.R.L. Pescara, Italy (hereinafter referred to as Bryanston *simpliciter*, and not ASDECAMO, the Swiss company or sellers of the goods,” the appellant has submitted that, even on the principle of law laid down in the judgment of Lord Diplock, in *UCM (Investments) Ltd and another v. Royal Bank of Canada and Another (supra)*, the respondent ought to have noticed the discrepancy in names, and regarded this as irregularity in the document (Bill of Lading) presented for payment to the Swiss bank.

2. The appellant also challenged the respondents reliance on article 8 of the Uniform Customs, and applying that article as a shield, without recourse to the additional instructions contained at the back of exhibit C in regard to use of conference or non-conference line vessel and the age of the vessel, if not a Nigerian Vessel. Further, that the words “Conference Med.” should have been authenticated but that they were not. It was also contended that exhibit D, being a forgery, the respondent would have discovered the irregularity if they had checked the Lloyds Register which they were in possession of.
3. The Court of Appeal’s rejection of the appellant’s contention that exhibit C (the Letter of Credit) was used as a transferable credit and also that exhibit D (Bill of Lading). Exhibit E (Packing list bearing Bryanston), exhibit F (Certificate of Value signed by Bryanston) and exhibit G are *ex facie* irregular and inconsistent.
4. (i) The interpretation placed by the Court of Appeal upon the Exclusion Clause in exhibit B, which clause provides:

“It is understood that our engagement (appellant’s) to pay shall continue in force notwithstanding any charge in our and/or your (respondent’s) Constitution and that

- a* no responsibility is to attach to yourselves or your correspondents (Swiss bank) as to the documents; beyond seeing that they purport to be in order.”
- b* That the respondent could not as a result of this Clause be held liable, even if negligence has been established against it, could not be a correct interpretation.
- c* (ii) That articles 9 and 12 of the Uniform Customs could not save the respondents, if they were negligent in regard to the forged exhibit E, having regard to article 7 of the Uniform Customs.
- d* In regard to the appearance of the name “Bryanston” on the exhibit “D,” Chief *Williams* for the respondent, contended that *credit* in this case, had not been transferred to Bryanston, as a credit is transferable only when the overseas seller of the goods assigns *his obligations* under the contract of sale to a third-party, so that the third bears the benefit or even the detriment of the original credit.

- f* In this case, under exhibit D, the Swiss company, ASDECAMO, is the original beneficiary of the credit. On exhibit D, Bryanston were merely the shippers. All the documents that had to be presented to the Swiss bank were presented by the Swiss company and not by Bryanston. More importantly is the fact that it was the Swiss company, ASDECAMO, that was paid. The appellant himself said so in his amended statement of claim.
- g*

Paragraph 6(a) of that statement of claim reads:–

- h* “The defendant (the respondent – the issuing bank) and its agents (*sic* the Swiss bank) wrongly paid out the amount covered by the letter of credit to *ASDECAMO*.”

In their statement of defence the respondent averred:

- i* 4(1) The defendants aver that on the 12th September, 1978, the agent Banque Pour Le Commerce Int. S.A. Basle Switzerland . . . paid the sum of \$570,000 to *the beneficiary of the credit (ASDECAMO)* upon presentation to it of the documents.
- j*

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

- “(a) A transferable credit is a credit under which the beneficiary has the right to give instructions to the bank called upon to effect payment of acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties (second beneficiaries) . . .
- (d) A credit can be transferred only if it is expressly designated as ‘transferable’ by the issuing bank.”

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

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

With regard to the question whether or not “Thomas Mann”

- a* belongs to Conference Line, all the Swiss bank has to demand and insist upon, and the Swiss company must present before payment is made is “reasonable documentary proof”
- b* that the ship belonged to Conference Lines and that the carrying vessel, “Thomas Mann” is not more than fifteen years from date of first registration. exhibit D has the words “CONFERENCE MED J” typed upon it. The words were
- c* not printed. Also typed upon exhibit D are the words:  
 “We hereby certify that the carrying vessel is not more than 15 years from date of First Registration.”
- d* This exhibit was signed by the Ship owners, though the words “CONFERENCE MED J” were not separately authenticated, but the whole exhibit was signed by “BLACK STAR LINE LTD WEST AFRICA SERVICE.”
- e* If forgery of this document is relied upon, surely there was no proof, as there is no evidence to suggest that the signature of the Ship owners was obtained before the words in question were added. However what is of special impression on my mind is that there is concurrent finding of two courts on
- f* the point that there was no alteration in exhibit D and no leave of this Court has been sought or obtained to upset these finding. Indeed even if leave is sought, no special circumstance has been advanced, to set aside that finding. Reference has been made to *Banque Indochine v. J.H. Rayner Ltd* (1983) 1 Q.B. 717 at page 719 per Parker J and on appeal as per Sir John Donaldson MR who had the following to say—
- g*
- h* “The letter of credit called for the presentation of documents covering shipment of 2,000 metric tons of sugar and were subject to the special condition ‘shipment to be effected on vessel belonging to shipping company that is a member of an International Shipping Conference.’”
- i* This is an unfortunate condition to include in a documentary credit, because it breaks the first rule of such a transaction, namely, that the parties are dealing in documents, not facts. The condition required a state of fact to exist. What the letter
- j* of credit should have done was to call for a specific document

which was acceptable to the buyer and his bank evidencing the fact that the vessel was owned by a member of a conference. It did not do so and as, accordingly, the confirming bank had to be satisfied of the fact, it was entitled to call for any evidence establishing that fact. All sorts of interesting questions could have arisen as to what evidence could have been called for and what would have been the position if, contrary to that evidence, the vessel was not owned by a conference member. In fact it was so owned and merchants produced the evidence required by the bank before the expiry of the credit. Accordingly no such questions arise.

Professor *Kasunmu*, in relying on this authority submitted that the “special condition” endorsed on the credit must be established as a fact, thus impressing a duty on the respondent over and above the provisions of article 8 of the Uniform Customs.

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

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



- a* notifying bank which acted as its agent, in failing to detect the forgery.”
- Chief *Williams* felt that article 9 of the Uniform Customs is
- b* an answer to the problem created by these judgments. Article 9 provides—
- “Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document . . .”
- c*
- The learned authors of *Law of Bankers Commercial Credits*, HC Gutteridge and Maurice Megrah, (7ed) said that there is some doubt as to the meaning of the interpretation In the
- d* *Banque Indochine v. Rayner (supra)* case:
- “(the) unfortunate condition to include in a credit because it breaks the first rule of (Documentary Credit) that the parties are dealing with documents not facts . . .”
- e* Article 9 of the Uniform Customs was not referred to by the Court in England in the *Banque Indochine v. Rayner Ltd* case nor by Lord Diplock in the *Singh v. Banque de Indochine (supra)* case. I am however inclined to the view that
- f* having regard to article 9 of the Uniform Customs, and the clean statement of the law by Lord Diplock in *UCM v. Royal Bank of Canada (supra)* a confirming bank, that is, the Swiss bank, in this case, would *only* be limited to the examination of the documents required to be and are, presented to
- g* it and obligation is limited to an *ex facie* conformation of the conformation of the documents presented with the documents required to be presented before payment is made.
- h* It is now pertinent to deal with the exclusion clause in exhibit B, the application of the appellant for the Letter of Credit. Let me state it again.
- “It is understood that our engagement to pay shall continue in
- i* force notwithstanding any changes in our and/or your constitution and that no responsibility is to attach to yourselves or your correspondents as to the documents beyond seeing that they purport to be in order. *We agree to hold you and your correspondents harmless and indemnified in respect of any loss or damage that may*
- j* *arise in consequence of error or delay in transmission of your*

*correspondent's messages, or misinterpretation thereof or from any cause beyond you or their control."* a

The question posed by Professor *Kasunmu*, was whether the respondent could rely upon this clause, if it is established b that they are negligent? In *Photo Production Ltd v. Securitor Transport Ltd* (1980) A.C. 827 it has been held that in so far as an Exclusion Clause is concerned, all that has to be done is now *construction of the Clause*, that is, following the Interpretation Theory, as against the Rule of Law Theory, c which was developed as far back as 1956. See: *Spurling Ltd v. Bradshaw* (1956) 1 W.L.R. 461 at 465. *Yeoman Credit Ltd v. Apps* (1962) 2 Q.B. 508. Chitty: *On Contracts* (25ed), d Volume 1, page 472 at paragraph 884 put the Rule of Law Theory as follows—

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

However in *UGS Finance Ltd v. National Mortgage Bank of Greece* (1964) 1 L.L. Rep. 446 Pearson LJ referred to an exemption clause as a rule of construction see also: *Glynn v. Margetson and Co* (1893) A.C. 351 and the 1967 case of *Suisse Atlantique Societe d'Armement Maritime SA v. NV Rottendamsale Kolar Centrale* (1967) A.C. 361. However f the rule of construction theory was finally confirmed by the House of Lords in *Photo Production Ltd v. Securitor* (*supra*). In the *Sussie Atlantique Case* (*supra*), I think, the pronouncement of Lord Wilberforce is important he said— g h

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

In construing the instant contract it seems to me that the parties intended, by the clause aforesaid in exhibit B, to relieve the respondents of liability *once the respondents see that the* j

- a documents purport to be in order*, and or where the error or delay in transmission of the Swiss bank’s “messages or mis-interpretation thereof arise from any cause beyond the respondents’ or their agents’ (the Swiss bank’s) control.

And finally, I will now refer to the appellant’s failure to reject the documents and his signature on exhibit J “accepting” the documents.

- c* Nnaemeka-Agu JCA arrived at a decision that—  
 “even if exhibit J was received by putting pressure on the appellant that would make it voidable and not void. So it would be treated as valid until it is set aside.”
- d* The appellant had explained how he came to sign exhibit J, even if the explanation is accepted, I do not think a decision on this point is necessary, any more, having regard to all my findings I have earlier made in this case for the determination of this appeal. The respondent does not need this point to succeed.

- The appellant having failed in all the grounds of appeal already discussed, and the respondent having failed in his appeal on jurisdiction, both appeals fail, and they are hereby dismissed. There will be no order as to costs.

- BELLO JSC:** I had the opportunity to read in draft the very comprehensive judgment just delivered by my learned brother, Eso JSC I agree with his reasoning and conclusions. I would only add some comments on the decision of this Court in *Omonuwa v. Oshodin* (1985) 2 N.W.L.R. (Pt. 10) 924 on the issue of “final” and “interlocutory” decisions.

- h* Now, the judgment of the Court of Appeal from which the appeal has been brought was delivered on 21st November, 1984. The notice of appeal was filed on 14th January, 1985. Section 31(2) of the Supreme Court Act, 1960 requires the notice of appeal in a civil case in an appeal against an *interlocutory* decision to be filed within fourteen days and in the case of an appeal against *final* decision within three months. The time to appeal is reckoned from the date of the judgment appealed against. The question for determination in the

application of Chief *Williams*, SAN, as to whether the decision of the Court of Appeal that the High Court of Lagos State has no jurisdiction to try the suit was an “interlocutory” or a “final” decision. If the decision was an “interlocutory decision,” then there is no proper appeal before this Court since the notice of appeal was filed out of time. So Chief *Williams* applied for extension of time within which to appeal and to deem the notice already filed as having been filed within time. However, if the decision is “final,” then there is a proper appeal before the Court because the notice of appeal was filed within three months.

The “finality” test was first established in *Salaman v. Warner* (1891) 1 Q.B. 734 at 736 where Fry LJ formulated the test in these terms:

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

Subsequently, in *Bozson v. Altricham UDC* (1903) 1 Q.B. 547 at 548 Lord Alverstone CJ advanced another test as follows:—

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

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

- a The Automatic Telephone v. Federal Military Government* (1968) 1 All N.L.R. 429.
- b* However, in *Omonuwa* case this Court appears to state that the tests in *Salaman* case and *Bozson* case should be applied jointly in determining whether an order or judgment is interlocutory or final. In his lead judgment my learned brother,
- c* Karibi-Whyte JSC, criticised the *Bozson* case test thus:–
- d* “All the cases cited agree on the proposition that a decision between the parties can only be regarded as final when the determination of the Court disposes of the rights of the parties (and not merely an issue) in the case. Where only an issue is the subject matter of an order or appeal the determination of that Court which is a final decision on the issue or issues before it, which does not finally determine the rights of the parties, is in my respectful opinion interlocutory. The issue before the Court of Appeal in this appeal arose from an interlocutory matter and not lose that character it is an appeal. The (inconvenience) and anomaly in the result of the nature of the order test (ie the *Bozson* case test) is that an otherwise interlocutory application ends up as a final decision of the Court of Appeal. If this is accepted the anomalous effect of an appeal on such a ‘decision’ is to enlarge the right of appeal of the appellant from the High Court to the Court of Appeal and to this Court. This is despite the fact that the rights of the parties have still not been finally determined as was in the *Automatic* and *Electric Co Ltd v. F.M.G.* (1968) 1 All N.L.R. 429 and *Adegbenro v. Akintola* and *Aderemi* (1962) 1 All N.L.R. 442 at page 474. In the *Automatic Telephone* and *Electric Co Ltd* case was a reference to the High Court from an arbitration. Though the
- g* High Court disposed of the issue on reference before it, it did not finally determine the rights of the parties in the arbitration; Similarly, the questions on the interpretation of the Constitution to be answered in the Federal Supreme Court in the *Adegbenro* case. The view that a judgment of the Court on an interlocutory matter on appeal before it is final as was held is clearly inconsistent with the principles enunciated in all the decided cases cited in the judgment and with common sense and experience. As I have said; the test applied in these cases relate to the function of the Court in disposing a matter before it, it was not concerned with the determination of the rights of the parties.” (Italics mine.)
- h*
- i*
- j*

My learned brother seems to distinguish *DPP v. Chike Obi* <sup>a</sup>  
(1961) All N.L.R. 458 and *Adegbenro v. Akintola* (1962)  
A.C. 614 at page 627 thus:

“In these two cases the Court has applied neither the test of the na- <sup>b</sup>  
ture of the order nor of the application in determining the applica-  
tion from which the order was made. With due respect this ap-  
proach has never been the test applicable and clearly not the laws.  
The Court relied on its function of determining a reference of it, <sup>c</sup>  
and was not concerned with the determination of the rights of the  
parties.”

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

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

See: *Isaacs and Sons v. Salbstein and another (supra)* at page  
146; *Alaye of Effon v. Fasan* (1958) 3 F.S.C. 68. However, where  
an application has the effect by the order therefore of finally de-  
termining the claim before the court, the order may properly be <sup>g</sup>  
regarded as final. See *Afuwape and others v. Shodipe* (1957) 2  
F.S.C 62 at page 68. This proposition is clearly consistent with  
the principles as enunciated in the judicial decisions and is logi-  
cal. It also accords with common sense and the practice of the  
Courts. The order appealed against in the case before us does not <sup>h</sup>  
purport and has not finally settled the rights of the parties in the  
claim before the Court, and is therefore an interlocutory order.  
The determining factor whether an order or judgment is interlocu-  
tory or final is not whether court has finally determined an issue  
before it. It is whether or not it has finally determined the rights <sup>i</sup>  
of the parties in the claim before the Court.”

In *Chief Agbajo v. Attorney-General of the Federation and  
others* (1986) 2 N.W.L.R. (Part 23) 528 the Court of Appeal <sup>j</sup>  
attempted to apply the two tests but the majority found what

*a* Eboh JCA Christened as “Test No. 1” inapplicable to the circumstances of the case.

*b* Chief *Williams*, SAN, contended that the *only issue* for determination by this Court in *Omonuwa* case was whether the judgment of the Court of Appeal was a final or an interlocutory decision: see *Omonuwa* case at page 931G of the report. He submitted that, having regard to the *only issue* before this Court, any pronouncement by this Court in that case on the question of whether the decision of the High Court was final or interlocutory was purely *obiter* and not binding. He contended that it would be retrogressive to resurrect some other test, such as the *Salaman* case test, which had been considered in the past and deliberately rejected. He urged us to interpret section 31 of the Supreme Court Act that the phrase “an interlocutory decision” or “final decision” where it occurs in the section means “an interlocutory decision of the Court of Appeal or “a final decision of the Court of Appeal.” He referred to *Olubada-in-Council v. Lagunju* (1949) 12 W.A.C.A. 464, *DPP v. Chike Obi* (1961) All N.L.R. 548 and *Adegbenro v. Akintola* (1963) A.C. 614 showing that a decision may be “final” in an appeal Court but not necessarily so in the Court of first instance.

*g* I am inclined to agree with the submission of Chief *Williams* that the pronouncements of this Court in *Omonuwa* case concerning the test applicable in deciding whether or not a decision at first instance was “final” or “interlocutory” are *obiter dicta* and not binding. I am also of the view that the pronouncements in so far as they tend to show a departure from the previous decisions of this Court or the former Federal Supreme Court or the defunct West African Court of Appeal are also *obiter dicta* because none of those previous decisions was canvassed for *reconsideration* before us in the *Omonuwa* case.

*j* On proper reflection, one may observe that the application of the joint test in effect may be tantamount to the resurrection of the *Salaman* case test which has been rejected since

*Blay v. Solomon*. It may be appreciated that the application of the *Salaman* case test involves two considerations. The first consideration is the nature of the application while the second consideration is the nature of the order made, which in effect is the application of the *Bozson* case test. It follows therefore that the test in *Salaman* case includes the test in *Bozson* case. Consequently, joint application of the two tests does not add anything new to *Salaman* case test since the latter test includes *Bozson* case test. If that had been the case, then joint application of two tests would have been tantamount to reverting to *Salaman* case test which was rejected 40 years ago when the *Bozson* case test was adopted.

It seems to me also on the authority of *DPP v. Chike Obi* (1961) All N.L.R. 458 and *Adegbenro v. Akintola* (1963) A.C. 614 at page 627 that in an appeal before a second tier appeal Court against the decision of a first tier appeal Court on the question as to whether the decision of the first tier appeal Court is “final” or “interlocutory” the second tier appeal Court is only concerned with the decision of the first tier appeal Court and not of the Court of first instance, ie the trial Court section 213(1) of the Constitution and section 31(1) and (2)(a) of the Supreme Court Act are germane to the issue. Section 213(1) reads:

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

And, section 31(1) to (2)(a) of the Act provides:

- “31(1) Where a person desires to appeal to the Supreme Court, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules, of court within the period prescribed by subsection (2) of this section that is applicable to the case.
- (2) The periods prescribed for the giving of notice of appeal or notice of application for leave to appeal are
  - (a) in an appeal in a civil case, fourteen days in an appeal against *interlocutory decision* and three months in an appeal against a final decision.” (Italics mine.)



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

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

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

- h* For the foregoing reasons, I hold the decision of the Court of Appeal on the issue of jurisdiction to be “final.” Consequently, the appeal is properly before the court and no leave is required.

- i* **UWAIS JSC:** I have had the opportunity of reading in draft the judgment read by my learned brother Eso JSC and I entirely agree with it.

- j* This appeal has three aspects. The first aspect relates to the application by the appellant for extension of time and leave

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

A. The Application.

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

“We have decided to recall counsel in this appeal to address us on one issue only ie whether the Lagos State High Court and not the Federal High Court has jurisdiction to adjudicate in this matter.”

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

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

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

*d* On the 1st February, 1985, this Court delivered judgment in *Omonuwa v. Oshodin*, which has since been reported in (1985) 2 N.W.L.R. (Part 10) 924. By reason of the decision in *Omonuwa's* case, Chief *Williams*, learned Senior Advocate, for the defendant, felt that it became necessary to apply  
*e* for the enlargement of time in order to satisfy the provisions of section 31 subsection (2) of the Supreme Court Act, 1960 which provides:

*f* “The period prescribed for the giving of notice of appeal or notice of application for leave to appeal are—

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

*g* From the foregoing, it is clear that an appeal against the final decision of the Court of Appeal must be brought within 3 months, while an appeal against its interlocutory decision ought to be filed within 14 days. If the decision of the Court  
*h* of Appeal in this case, on the issue of jurisdiction, is final, as learned Senior Advocate thought it was, the appeal he filed on 14th January, 1985 would have been filed within time. But if it is an interlocutory appeal, then, he had filed it out of  
*i* time. This state of uncertainty arose, because of our decision in *Omonuwa's* case which Chief *Williams*, interpreted as saying that the decision of the Court of Appeal in the present case, on the issue of jurisdiction, would be or is an interlocutory decision.  
*j*

In moving the application, Chief *Williams*, attacked the lead judgment in *Omonuwa*'s case by arguing that its *ratio decidendi* on the test to determine whether the appeal in the case was "interlocutory" or "final" is *obiter dicta* and therefore not binding on us. The argument was advanced on the premise that the sole question to be determined in the case was "whether the decision of the Court of Appeal dismissing the defendant's appeal to that Court was final or interlocutory." It was, he submitted, therefore unnecessary to determine the question whether the decision of the High Court in the case on appeal was interlocutory or final. a  
b  
c

Arguing further, Chief *Williams* drew attention to the decisions of the West Africa Court of Appeal in *Blay v. Solomon* 12 W.A.C.A. 177 and the Federal Supreme Court in *Ude and others v. Agu and others* (1961) 1 All N.L.R. 65 which considered the distinction between final and interlocutory decisions in courts of first instance. Those decisions he submitted were based on the test laid down by Lord Alverstone CJ in *Bozson v. Altrincham* (1903) 1 K.B. 547 and not the test laid down in *Salaman v. Warner* (1891) 1 Q.B. 734 which was considered and rejected in *Ude and others v. Agu and others* (*supra*). d  
e  
f

Learned Counsel said our decision in *Omonuwa*'s case, as reported on page 938 lines G-H and page 939 A-B of (1985) 2 N.W.L.R. (Pt. 10), is to the effect that both the principles in *Bozson*'s case and *Salaman*'s case would apply in determining whether an appeal is final or interlocutory. This, he submitted would be retrogressive since only the decision in *Bozson*'s case had been followed by the Nigerian courts with effect from 1947. g  
h

I pause here to examine the principles laid down in the cases of *Bozson* and *Salaman*. In the latter Fry LJ said at page 736 as follows: i

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

- a* fail or succeed, determine the action. Conversely, I think that an order is ‘interlocutory’ where it cannot be affirmed that in either event, the action will be determined.”
- b* In *Bozson*’s case Lord Alverstone CJ observed at pages 549-550 thus:
- “It seems to me that the real test for determining this question ought to be this: Does the judgment or order as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, interlocutory order.”
- c*
- Now it is true that Verity CJ in the West African Court of Appeal case of *Blay v. Solomon* (*supra*) preferred the test laid down by *Bozson*’s case after referring to the test in *Salaman*’s case. Again Brett FJ (as he then was) said in *Ude and others* case (*supra*) as follows:
- d*
- e* “In *Blay v. Solomon* (1947) 12 W.A.C.A. 175 the West African Court of Appeal followed the test *which looks at the order made* and in my view it is clearly the proper test for this Court to adopt . . . (Italics mine.)
- f* The question is has our decision in *Omonuwa*’s case departed from the decisions in the cases of *Blay* and *Ude* and others as argued by Chief *Williams*? Let us examine what the lead judgment (per my learned brother Karibi-Whyte JSC) says at pages 9386-9B thereof which learned Senior Advocate referred to:
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- h* “Applying the principles enunciated in both tests, ie the nature of the application, and the nature of the orders, to this appeal, it is inescapable that the judgment of the Court of Appeal, appealed against is an appeal on an interlocutory ruling before the High Court. It is also incontestable that the judgment of the Court of Appeal which remitted the case for trial in the High Court did not finally determine the issues litigated by the parties in the High Court. See: *Isaac’s and Sons v. Salbestein and another*, (1916) 2 K.B. 139 at page 146. To determine finally an issue before the Court which does not finally determine the rights of the parties, does not rank as determining the rights of the parties in the case and in my opinion is not a final appeal *inter partes* In my opinion,
- i*
- j* the ideal approach is to consider both the nature of the application

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

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

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

And again on page 937H:

“*Bozson v. Altrincham U.D.C.* (*supra*) has been approved and applied in our courts. I think *this is good reasoning.*” (Italics mine.)

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

Applying the test to the present case, the nature of the judgment given by the majority (Mohammed and Kutigi JJCA) is that the Lagos State High Court had no jurisdiction; and therefore it follows that the appeal before the Court of Appeal was incompetent. That is clearly a final decision in the Court of Appeal. Once the decision is incompetent, there

- a* is nothing left in the case to be finally determined in the Court. Consequently, by the nature of the judgment of the majority, the decision that the trial Court had no jurisdiction
- b* cannot be an interlocutory decision. Appeal therefore lies from that decision to this Court within 3 months. The respondent's appeal was filed before the expiration of the 3 months. It is for that reason unnecessary for this application
- c* to have been brought. Consequently, I agree that the application should be refused and it is hereby dismissed.

#### B. Jurisdiction

- d* As narrated under A above, Mohammed and Kutigi, JJCA held that the Lagos State High Court had no jurisdiction to try the dispute between the parties, because the contract between them involved the shipment of goods. But Nnaemeka-
- e* Agu JCA held a contrary view. As I observed in the case of *Nasarawa Enterprises Ltd v. Arab Bank Nigeria Ltd* (unreported) judgment delivered or to be delivered later today, there are four parties to a transaction concerned with the issue of a letter of credit. This gives rise to four contracts in the transaction. First between the buyer and the seller. Secondly, between the buyer and the issuing bank. Thirdly, between the issuing bank and the confirming, or correspondent bank. And fourthly, between the confirming or correspondent bank and the seller: see *United City (Investments) Ltd v. Royal Bank of Canada* [1983] A.C. 168 at pages 182-183. The dispute in the present case relates to the first contract which has nothing directly to do with the shipping of goods.
- h* The contract is only concerned with documents and not goods, as provided by article 8 of the Uniform Customs and Practice for Documentary Credits, which applies to the transaction between the parties. The majority, with respect,
- i* misunderstood the relationship between the parties, because they failed to direct their attention to the article in question. The only occasion when, perhaps, admiralty jurisdiction may be involved in a letter of credit transaction is when
- j* there is a dispute in respect of the first contract between the

seller and the buyer relating to the carriage, of the goods sold, by ship. a

I therefore hold that the Court of Appeal (per majority) was in error when it held that admiralty jurisdiction was involved and the decision of this Court in *American International Co. v. Ceekay Traders Ltd* (1981) 1 All N.L.R. (Part 1) page 58; (1981) 5 S.C. 81 applied. b

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

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

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

It is said that the words italicised in the subsection should be given narrow as opposed to wide meaning. This is so, because it was decided in the Scottish case of *The Aifanourios* (1980) S.C. 346 that the contract of marine insurance over a ship and its cargo was a claim within admiralty jurisdiction. The decision in the *Scottish* case was quoted with approval and applied to section 1(1)(h) by the House of Lord in *Gatoil Inc v. Arkwright Boston Co.* (1985) A.C. 25, which similarly involved a contract of marine insurance. The decision in the latter case was referred to by the House of Lords in *The Antonis P Lemons* (1985) 1 A.C. 711 at pages 728F-729C, where it was decided that the words “relating to” in section 1(1)(h) must be given a narrower rather than a wider construction. f

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*a* It is significant to mention that the provisions of section  
 1(1)(h) are now contained in section 20(2)(h) of the Su-  
*b* preme Court Act, 1981 in England. I have already shown  
 that the decision of the Court of Appeal, that the admiralty  
 jurisdiction applied because the dispute between the parties  
 relates to carriage of goods by ship, was misconceived.  
*c* Since that decision was wrongly based on the *ratio deci-*  
*dendi* in the case of *American International Insurance Co.*  
*Ltd (supra)*, should this Court now undertake a review of the  
 decision in the case in order to overrule it, in view of the lat-  
*d* est judgments of the House of Lords in the cases cited by  
 Counsel? The principle on which this Court will depart from  
 or overrule its decision has been well stated in a number of  
 cases. The underlying consideration being that the decision  
 has been impeding the proper development of the law or has  
*e* led to results which were unjust or which are contrary to  
 public policy. See: *Bucknor-Maclean and another v. Inlaks*  
*Ltd* (1980) 8-11 S.C. 1 at pages 23, 25; *Surakatu v. Nigeria*  
*Housing Development Society Ltd* (1981) 4 S.C. 26; *Alhaji*  
*Raji Oduola and others v. Coker and others* (1981) 5 S.C.  
*f* 197 and *Bronik Motors Ltd v. Wema Bank Ltd* (1983) 6 S.C.  
 158 at page 298; none of the criteria aforementioned has  
 been met in Counsel's submission. Apart from the House of  
 Lords decisions are merely of persuasive authority, the de-  
*g* sire to have the same common law with England, though  
 ideal, cannot be achieved. The pace at which English law  
 develops is by far faster than that at which ours develops.  
 One only needs to look at the statutes of general application  
*h* in England as at 1st January, 1900, which are still our laws,  
 to see how far the English law has left ours behind. Any  
 hope of achieving uniformity with England is now illusion.  
 As put by Rupert Cross at page 22 of the (3ed) of his book,  
*i* *Precedent in English Law*:

*j* "The desirability of having the same common law throughout the  
 Commonwealth is not as self evident as it is sometimes made to  
 appear. Much depends on the branch of the law concerned. In  
 commercial matters, for example, where members of the different

Commonwealth countries are liable to be affected by the same rule, there is much to be said for uniformity; but *the demand for uniformity in other spheres may militate against useful developments*. For historical reasons, Australian and Canadian judges may, *faute de mieux*, have to start their thinking with English law, *but there is no obvious merit in their binding themselves to adopt the English solution*. The first answer to a legal problem is not necessarily the right one, and each of two answers may be equally meritorious.” (Italics mine.)

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

#### C. The Substantive Appeal on Merit

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

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

**COKER JSC:** I agree that this appeal fails and should be dismissed for the reasons given by my learned brother Eso JSC in the lead judgment, the draft of which I have had the privilege of reading in advance.

The appeal, indeed the whole case, centred on an irrevocable confirmed non-transferable letter of credit issued by the respondent on the application of the appellant for U.S.\$570,000 to its Correspondent bank in Switzerland. The two issues in the appeal relate to jurisdiction of the trial Court and the rights and obligation between the customer and the issuing bank.

Jinadu J, in the Lagos State High Court assumed jurisdiction and dismissed the plaintiff’s case. In a majority judgment, J

- a* the Court of Appeal held that the matter was one relating to carriage of goods by sea and therefore fall within the Admiralty jurisdiction of the Federal High Court. It therefore allowed the appeal and struck out the suit for want of jurisdiction. On the merit of the case, the Court was unanimous that the plaintiffs failed to prove breach of any of the terms of the credit or negligence against the issuing bank that is, the respondent.

The essence of a letter of credit; is the four independent and interrelated contracts involve. These are:

- d* (a) the contract between the buyer and the overseas seller;  
 (b) the contract between the buyer and the local issuing bank;  
 (c) the contract between the issuing bank and its overseas confirming or correspondent bank; and  
*e* (d) the contract between the correspondent bank and the seller.

- f* The present proceedings involve the buyer and the issuing bank. article 8 of the Uniform Customs and Practice Documentary Credits (1974 Edition) which is applicable to the transaction in question, makes it clear that the parties to the transaction are concerned with documents stipulated in the credit and not goods, which involve only the buyer and the seller as in (a) above. The contract between them may invariably involve the question of delivery of the goods by sea, in which case; the admiralty jurisdiction of the Federal High Court under section 7(1)(e) of the Federal High Court Act, 1973 may be involved as was decided in *American International Insurance Co. v. Ceekay Traders Ltd* (1978) 5 S.C. 81.

- i* The second question which was raised in the application of the appellant for leave to appeal. The point was whether an appeal against an order relating to jurisdiction was a final or interlocutory appeal. Chief *Williams*, Senior Advocate, drew attention to our decision in *Omonuwa v. Oshodin* (1985) 2 N.W.L.R. (Pt. 10) 924 where the various authorities were

considered as to what constitutes a final or interlocutory decision. Eso JSC, in the lead judgment has discussed the various views of eminent judges in some local and foreign cases. I agree that for practical purposes, what should be considered is what effect the order appealed against has on the rights of the party involved. If the order determines finally the right of the party, then it is a final order, if not, it is interlocutory.

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

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

I agree with my brother Eso JSC that whatever might have been default of the respondent in debiting the appellant's account, his right of action has been defeated by the unreasonable delay, amounting to ratification, that is failure to reject the documents, exhibit J which appellant received and signed for on 18/10/78. It was wrongful payment by the respondent's agent, banque pour le commerce int. s.a. basle switzerland on the 12th September, 1978. The authorities show that the appellant if he was not consenting to the payment ought timeously to reject the non conforming documents as soon as he discovered that the payment was irregular.

For these and other reasons clearly and fully given in the lead judgment, this appeal is dismissed with costs fixed at ₦300 to the respondent.

**KARIBI-WHYTE JSC:** I have had a preview of the judgment of my learned brother Kayode Eso, JSC in this appeal. I

- a* agree with both the exhaustive reasoning, which he has given for his decision and his conclusion that the appeal be dismissed. I should point out at once that I also agree with
- b* the ruling by my learned brother Kayode Eso, JSC that this Court has not departed from the principles laid down in *Way v. Solomon* (1947)12 W.A.C.A. 175 followed in *Agu v. Ude* (1961) All N.L.R. 65 for determining whether a decision is interlocutory or final. The principles applied in *Omonuwa v. Oshodin* (1985) 2 N.W.L.R. (Pt. 10) 924 is not different. I also agree with the submission of both Counsel in this appeal, that the trial High Court had jurisdiction over the subject matter of the action, not being a matter of Admiralty.
- d* I however wish to make some comments of my own in clarification of some of the issues canvassed in the matter. I shall begin with the issue of jurisdiction. The Court of Appeal was divided on the question whether the trial High Court had jurisdiction over the subject matter of the action before it. Nnaemeka-Agu, JCA was of the view that the trial Lagos State High Court had jurisdiction, whereas Uthman Mohammed, Kutigi JCA held that the Court acted without jurisdiction.
- f* Thus it is the majority view that the trial Court acted without jurisdiction. All the justices were however unanimous in the view that the appeal ought to be dismissed on the merits and proceeded to do so. Chief *Williams*, SAN, has pointed out, and I entirely agree, that having held that the trial High Court acted without jurisdiction, it necessarily follows that the Court of Appeal was not competent to sit on appeal over such a judgment. Consequently the appeal ought to have been struck out. Their Lordships did not do so. Appellant and respondent have both appealed against that part of the judgment that the High Court acted without jurisdiction.
- h*
- i* Uthman Mohammed JCA with whom Kutigi JCA agreed saw the issue in this way. He said, at page 178:
- “... It is my view that the Lagos High Court, or in other words a State High Court has no jurisdiction to try any case on a matter concerning the opening of letter of credit in which there is no collateral agreement of carriage of goods by sea . . .”
- j*

After analysing the facts of the case and several decisions cited to the Court of Appeal by Counsel on both sides, such as *United City Merchants and Another v. Royal Bank of Canada* (1982) 2 W.L.R. 1039; *American International Insurance Co. v. Ceekay Traders Ltd* (1981) 5 S.C. 81; *Societe Generale de Surveillance S.A. v. Rastico (Nigeria) Ltd* CA/L/51/84 (unreported) and the provision of the Administration of Justice Act, 1956 (England) section 1 relating to the Admiralty jurisdiction of the High Court, it was submitted to the Court, as it was before us that the claim before the High Court was not a claim, arising out of an agreement relating to the carriage of goods by ship within the meaning of the expression in section 1(1)(h) of the Administration of Justice Act, 1956 (England).

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

The claim before the Court as endorsed on the writ of summons is for (a) breach of contract by the defendant and its Agent (The Banque pour Le Commerce Lot S.A. Basle Switzerland) in respect of payments wrongfully made out of Letter of Credit No. LCB 0380/78/1452 of 31/7/78 issued by the defendants on the instructions of the plaintiff and contrary to the terms and conditions of the said Letter of Credit.

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

(c) A declaration that as the payment of \$570,000 U.S. Dollars made by the defendant’s bank to ASDECAMO was made in breach of the terms and conditions of the Letters of Credit mentioned in claim 1 above, the defendant

- a* is not entitled to debit the plaintiff's Account No. 9257 with the Lagos, Central Branch of the defendant/bank with that amount and or with any interest, and commissions on that amount; and an order that defendant shall
- b* forthwith revert or cancel all debt entries so made.

These are the claims subject matter of the action, before the Court. They are for breach of contract in the alternative negligence, and Declaration. It is clear from the evidence and

- c* exhibits tendered, namely "exhibits B and C," that the claim is founded on the contract between appellant and the respondent for the purposes of issuing Letter of Credit (exhibit
- d* C) in respect of payments for consignment of cement being sold to the appellant by any overseas supplier, in this case ASDECAMO. It is true that the Letter of Credit "exhibit C" contained additional conditions to be observed before payment was to be made. It is however the law that it is sufficient for the purposes of payment if the documents are *ex facie* regular. Thus the contract in issue before the Court is exhibit B, the application for the Letter of Credit made by
- e* the appellant, and exhibit C the Letter of Credit issued on behalf of appellant by respondent to the Banque Pour Le Commerce Int. Basle, Switzerland for payment to ASDECAMO.

- g* Again, the alternative claim on negligence is based on the failure of the respondent and its Agent in not discovering that exhibit D the Bill of Lading is a forgery. There is no claim for loss arising out of or during or from the shipment
- h* of goods, even though there were averments in the pleading about Bill of Lading, shipment, foreign exchange payment. In fact this is not a transaction between appellant and the issuer of the Bill of Lading, exhibit D, Bryanston Italian
- i* S.R.L. Finally, the Declaration relates to the payment to the supplier of the goods and the consequential debiting of appellant's account by the respondent.

- j* It will be helpful at this stage to state in summary form the facts of this case. Appellant desirous of importing 10,000

metric tons of cement met and arranged with a seller who gave his name as ASDECAMO. To facilitate the transaction appellant by exhibit B applied to the respondent to open an irrevocable non transferable confirmed Letter of Credit for U.S. \$570,000 to pay for the cost of the cement. The respondent then issued exhibit C for the same amount to its corresponding bank in Switzerland ie Banque Pour Le Commerce Int. SA Basle Switzerland who then informed the supplier that the payment for the cement was available to him on his presentation of the documents stated in exhibit C. In this arrangement, there are four parties and four contracts, namely:

- (a) The contract between the buyer and his local bank, the issuing bank which does not involve any transaction for the carriage of goods;
- (b) the contract between the issuing bank and the confirming bank, which is founded on document;
- (c) there is the contract between the confirming bank and the overseas supplier-seller also founded on documents;
- (d) there is the contract between the buyer and the seller.

It is only (d) that generally involves a carriage of goods transaction. Where the Bill of Lading is required in (b), (c), they are merely evidence necessary and requisite for effecting payment. The very and essential nature of a letter of credit transaction is that parties deal only in documents and not in goods see article 8, Uniform Customs and Practice Documentary Credits (1974 Edition). Again credits are separate transactions from the sales or other contracts on which they may be based. Banks are not in any way bound by such other contracts.

In his judgment Uthman Mohammed JCA referred to the additional instructions in the Letter of Credit exhibit C, particularly conditions 2 and 3, and held that they are a term of contract, and therefore relate to “any *claim arising out of*



*a* any agreement relating to the carriage of goods in a ship of to the use or hire of a ship” and said:

*b* “It is my view that if any part of this claim is caught up by the provisions of section 1(1)(h) of the Act of 1956, the State High Court would have no jurisdiction to try this action. The first issue to determine therefore is whether conditions 2 and 3 of the Additional Instructions relate to carriage of goods by ship or the use or hire of a ship.”

*c* The learned Justice of the Court of Appeal referred to the *Queen of South* [1968] 1 All E.R. 1169 for the meaning of “an agreement relating to the use, or hire of a ship” and to the *St. Elefteric* (1957) page 179 referred to in *American Insurance Co. v. Ceekay Traders* (*supra*) and held that the words of section 1(1)(h) of the Administration of Justice Act, 1956 (England) were wide enough to cover claims in contract or tort arising out of any agreement relating to the carriage of goods in a ship.

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

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

*g* He went on to say that the contracts were inter connected and concluded:

*h* “From the facts of this case ASCEDAMO were the sellers and Bryanston Italiana of Italy were mentioned in exhibit D to be shippers. Therefore there was a contract between ASCEDAMO and Bryanston Italitana for the carriage of the cement to Lagos. This contract is within the overall contract between the buyer and seller.”

*i* Surely the learned Justice of the Court of Appeal cannot be taken for granted for suggesting that either Bryanston Italians or ASCEDAMO was a party to the action before the Court. Not being parties to the contract in which the appellant was suing, it is difficult to conceive how a condition,

*j*

even if acceptable although denied, could affect the contract between appellant and respondent. The learned Justice of the Court of Appeal went on to hold that:

“... the terms set out in those additional instructions are caught up in section 1(i)(h) of the Administration of Justice Act, 1956 and therefore within the Admiralty jurisdiction of the Federal High Court.”

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

“The terms so stated in the Bill of Lading are admiralty issues and any litigation about them must be in an admiralty Court.”

The learned majority Justices of the Court of Appeal would appear to have misunderstood the nature of the case before the court, and the issues they were expected to determine. As I have already indicated, the action was between the buyer and the issuing banker with respect to claims for breach of contract and in the alternative damages for negligence. The issue of carriage of goods as an additional condition is not a term between the buyer and the issuing banker. It is a condition which the seller is expected to observe in presenting documents for payment. As was pointed out in *Ardenes (Cargo Owners) v. Ardenes (Owners)* (1950) 2 All E.R. 517, that a Bill of Lading is not in itself the contract of

- a* carriage between the shippers and the ship owner, or the shipper and the charterer, it is evidence of its terms. In this case the contract between the appellant and respondent is evidenced by exhibits B and C, and do not involve any of the obligations under section 1(1)(h) of the Administration of Justice Act, 1956 (England). Exhibit D, the Bill of Lading was issued by Bryanston Italians, who is not a party to the contract. The competing claims for the exercise of jurisdiction between the State High Courts and the Federal High Court started early in the establishment of the latter. *Jammal Steel Structures Ltd v. A.C.B. Ltd* (1973) 1 All N.L.R. (Part 2) 208 appeared to have been the genesis of the definition of the scope of its banking jurisdiction. The more recent case of *Bronik Motors Ltd v. Wema Bank Ltd* (1983) 6 S.C. 158 would appear to have placed for the time being the issue beyond controversy that all claims to banking transactions between a bank and its customers as distinguished from banking measures are by virtue of section 7(1)(b)(iii) of the Federal High Court Act, 1973 not within the jurisdiction of the Federal High Court, but within the jurisdiction of State High Courts.

- g* In *American International Insurance Co v. Ceekay Traders Ltd* (1981) 5 S.C. 81, this Court defined the Admiralty jurisdiction of the Federal High Court vested in that court by virtue of section 7(1)(e) of the Federal High Court Act, 1973 to cover “any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.”

- h* Thus to fall within the purview of this definition, the contract, in this case between the appellant and the respondent, from which the claim before this Court is founded should be (i) an agreement relating to the carriage of goods in a ship, or (ii) an agreement relating to the use or hire of a ship. Where the claim is founded on a contract, subject matter of the action does not fall within either category, as in this case, it appears to me obvious that the action cannot conceivably fall within the Admiralty jurisdiction of the Federal High

Court. It is therefore not necessary for me to consider and express any opinion on the extremely erudite disquisition on the construction of section 1(1)(h) of the Administration of Justice Act, 1956 put before us by Chief *Williams* S.A.N. in his very helpful brief on this point. I am adopting this course not for lack of appreciation for the industry of counsel, but because it is not relevant to the determination of this ruling. Again it is consistent with the age old tradition in the administration of justice to limit as much as possible the decision to the established facts of the case before the court. It has never been of any assistance, and is indeed a practice more likely to lead to confusion to make judicial pronouncements on matters not actually before the Court. It is clearly not enough that the issue sought to be settled is on the grounds of expediency deserving of being quickly settled. I consider it unsafe to take one step more than it is necessary for the determination of the issue.

The claims before the Court are founded on a simple customer and banker relationship in a Letter of Credit. This is not within the Admiralty jurisdiction. The majority Justices of the Court of Appeal were wrong. The view of Nnaemeka-Agu JCA, is the correct one. The trial Judge had jurisdiction.

The next invitation to us was again by Chief *Williams* SAN who is urging this Court to overrule its recent decision in *Omonuwa v. Oshodin* (1985) 2 N.W.L.R. (Part 10) 924. In his brief in support of the motion and in his oral argument before us Chief *Williams* complained that the *ratio decidendi* of *Omonuwa v. Oshodi* suggests the application of two inconsistent tests for the determination of whether an order was interlocutory or final. He pointed out that the tests in *Salamans v. Warner* (1891) 1 Q.B. 734 which has been rejected in *Ude v. Agu* (1961) 1 All N.L.R. 65 and that in *Bozson v. Altrincham Urban District Council* (1903) 1 K.B. 547, which has been accepted and applied by this Court in *Blay v. Solomon* 12 W.A.C.A. 177 appeared to have, been combined for the purposes of determining whether an order

- a* is interlocutory or final. The passage in *Omonuwa v. Oshodin* (*supra*) complained of states:
- b* “In my opinion, an interlocutory order on appeal ranks as an interlocutory appeal. The judgment of the Appeal Court is a judgment on an interlocutory appeal. It can only assume the character of a final judgment when it finally determines the rights of the parties . . . the order appealed against in the case before us does not pur-
- c* port (to have) and has not finally settled the rights of the parties in the claim before the Court (below) and is therefore an interlocutory order.” (The words in bracket were supplied by Chief *Williams*.)
- d* Counsel contended that the issue for determination before this Court in *Omonuwa v. Oshodin* was whether the decision of the Court of Appeal dismissing the defendant’s appeal to that court was final or interlocutory. It was not whether the
- e* decision of the High Court on appeal to the Court of Appeal was interlocutory or final. It was accordingly submitted that any pronouncement of this Court on the latter question must be regarded as obiter. The main complaint of Chief *Williams*
- f* is the combination of the two different tests which he regards as both inconsistent, irreconcilable and contradictory. He pointed out that the right exercised by the Court of Appeal is derived from the provisions of section 31(2)(a) of the Supreme Court Act, 1960, and the expression “interlocutory” or “final” decision must be construed as referring to
- g* such a decision of the Court. There is considerable force and common sense in this contention. Accordingly he submitted that whether or not a decision of the Court of Appeal or any
- h* intermediate court is final or interlocutory must be determined in relation to the proceedings in that court, and not as to whether the rights of the parties has been finally determined. To Counsel it is sufficient if the Court has disposed
- i* of the case between the parties before it.

*j* It is generally accepted that two tests have existed for determining whether an order is interlocutory or final. This view is polarised between the cases which have applied. The

less acceptable test formulated by Lord Esher in *Salaman v. Warner* (1891) 1 Q.B. 734, and those which have applied the more widely accepted view formulated by Lord Alverstone CJ *Bozson v. Altrincham Urban District Council* (1903) 1 K.B. 547. As I have already stated the courts of this country have consistently rejected the former and have adopted and followed the latter: see *Blay and others v. Solomon* 12 W.A.C.A. 177; *Ude v. Agu* (1961) 1 All N.L.R. 65.

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

This decision arose from the defence of a point of law that the statement of claim did not disclose a cause of action. After argument the Divisional Court ordered that, the action should be dismissed with costs. Plaintiff against who the decision was given gave a four days notice of appeal as from an interlocutory order. At the hearing of the appeal, Counsel for the respondents/defendants, took a preliminary objection contending that the notice should have been for fourteen days, the order being final, and the rights of the parties having been determined with costs. The appellant/plaintiff submitted that the order was not final. Relying on *Standard Discount Co. v. La Grange* (1876 – 1878) 3 C.P.A. 69 submitted that the order was not final since if defendant's application was dismissed the rights of the parties would not have been determined by the order.

It is significant to observe that Lord Esher as Brett L.J. was one of their Lordships in *Standard Discount Co. v. La Grange*, and also wrote one of the judgments in *Salaman v. Warner*. He seized the opportunity to explain what he said in *Standard Discount Co. v. La Grange*, and adopted the test he laid down in that case. In *Standard Discount Co. v. La Grange*, the issue was whether an order to sign final judgment was interlocutory or final. It was held to be interlocutory. Brett LJ, said, at page 71:

“My reason for so holding is, that the order is not the last step which must be taken in order to fro the status of the parties wide

- a* respect to the matter in dispute; it is in itself ineffectual, and until a further proceeding has been taken, the plaintiffs cannot recover the debt sued for. Another step must be taken before the status of the parties can be fixed, and that step is the entry of the judgment.
- b* The order is not the final step in the action, and therefore it is interlocutory.”

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

- d* “I think our decision may be founded upon another ground, namely, that no order, judgment or other proceeding can be final which does not at once effect the status of the parties, which ever side the decision may be given; so that if it is, given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff . . .”

*e* There is no doubt from the above cited *dicta*, that Brett LJ’s test for determining whether an order is interlocutory is whether the order is the last step which must be taken in order to fix the status of the parties with respect to the matter on dispute, if it is not, it is interlocutory. On the other hand,

*f* it is final when the order is conclusive in determining the rights of the parties whether it is in favour or against. He concluded the judgment by declaring at page 72:

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

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

*i*

- j* “I think the better conclusion is that the definition which I gave in *Standard Discount Co. v. La Grange* is the right test for determining whether an order for the purpose of giving notice of appeal under the rules is final or not. *The question must depend on*

*what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other will allow the action to go on, then I think it is not final, but interlocutory. That is the rule which I suggested in the case of Standard Discount Co. v. La Grange . . .”* (Italics mine.)

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

The relevance of considering the application is because a final order may be based on an interlocutory application. See: *AG v. GE Railway Co.* (1879) 27 W.R. 759. It is conceded that not every order which affects the status of the parties is final: see *Blakey v. Lathan* (1889) 43 ChD 25, but it, is unarguable every order which finally determines the claim of the parties in dispute is a final order.

The view that the test in *Salaman v. Warner* was based on the nature of the application to the Court, and not on the nature of the order which the Court eventually made stems from the note in the Supreme Court Practice (1979) under RSC Order 59, rule 4, citing *Egerton v. Shirley* (1945) K.B. at page 110 per du Pareq LJ as was stated by du Pareq it is an interpretation given to the words “final order” in *Salaman v. Warner*. In *Salaman v. Warner* Fry LJ, agreeing with Lord Esher, said, at page 736.

“I think that the true definition is this. I conceive that an order is ‘final’ only where it is made upon an application or other



- a* proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, I think that an order is interlocutory ‘where it cannot be affirmed that in either event the action will be determined.’”
- b*

- Lopes LJ agreed with the definition suggested by Lord Esher, MR. Thus the nature of the application test was introduced in Fry LJ’s judgment. It however cannot stand alone. It must stand or fall with the nature of the order made as can be discerned from the test itself. In *Salter Rex and Co. v. Ghosh* (1971) 2 Q.B. as page 601, Lord Denning MR preferred the test of the nature of the application in *Salaman v. Warner* to determine whether an order for a new trial was a final or an interlocutory. It is too plain to state that an order refusing or granting an application for a new trial does not determine the rights of the parties and is necessarily interlocutory. So whatever test is applied in *Salter Rex and Co. v. Ghosh* (*supra*) the result will be the same. The test is *Salaman v. Warner* is now regarded as based on the nature of the proceedings see *Denning MR in Salter Rex and Co. v. Ghosh* (*supra*); Romer LJ, in *Re Herbert Reeves and Co.* (1902) 1 Ch. 33. *Bozson v. Altrincham Urban District Council*.
- c*
- d*
- e*
- f*

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

with Sir FH Jeune P concurring without expressing any opinion, the Court following *Shubbrook v. Tufnell* 9 QBD 621, overruled the objection. a

Lord Alverstone CJ said: b

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

Here Lord Alverstone, CJ was concerned only with the nature of the order made, and whether it finally disposed of the rights of the parties. Thus the main difference between the two tests is the introduction of the nature of the application in *Salaman v. Warner* by Fry LJ Otherwise the rule that an order is final or interlocutory is determined by whether it determined the rights of the parties is common to both formulations. I do not think that the introduction of the nature of the application makes any substantial difference to the result of the applicable rule. So long as the test applied is founded on the nature of the order made, it seems to me irrelevant what the nature of the application is. This is because what makes the difference to the status of the parties is the order and not the application. d  
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Chief *Williams* has referred to the genesis of section 31(2) of the Supreme Court Act, 1960 and to the fact that the provision was made before this Court had an intermediate Court of Appeal. Accordingly the section should now be construed with the intention of the legislation in mind in accordance with the present judicial arrangement. It was submitted that if so construed, final or interlocutory decisions must be determined in relation to the proceedings in that court. He relied on the provision of section 213 of the Constitution. This he said will make for simplicity and avoid unnecessary difficulties in classification. h  
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- a* I think what renders an order of a court interlocutory or final with respect to a matter before it is its effect on the rights of the parties to the litigation. In all the cases, the test and
- b* dominant consideration has been whether the rights of the parties have been finally determined or not. It has never been whether the Court has disposed of the application or matter before it: The courts may and usually do dispose of
- c* an application before it without finally determining the rights of the parties. It is for this reason that an order of the Court can only be regarded as a final decision of such Court if in the disposal of the case before it, the rights of the parties in the case have been entirely and finally determined.
- d* An order is interlocutory where this is not the case. But there are circumstances on appeal when only a point is in issue before the Court. The dictum in *Adegbenro v. Akintola* [1963] A.C. 614 at page 627, the Privy Council recognised this distinction when it said, “The decision may not be final in the proceedings before the Chief Justice, but so far as the Federal Supreme Court is concerned, it is final. The Court has finally disposed of the matter referred to them, namely,
- e* the question as to the interpretation of the Constitution...” The Privy Council did not say that the Court had disposed of the rights of the parties in the action before them. This is because they were not in a position to do so. They were dealing with a reference from the Court below. The Privy Council went further to say:
- g*

- “... Their Lordships have accordingly reached the conclusion that the decision of the Federal Supreme Court on the reference under section 108 was a final decision and that an appeal lies as of right to Her Majesty in Council under section 114.”
- h*

- This passage suggests that the decision of the Federal Supreme Court on a reference to it which is not a final determination of the rights of the parties was nevertheless regarded as a final decision of the Court because it was a final determination on the question of the interpretation of a provision of the Constitution referred to the Court. There is no
- i*
- j* doubt that its decision is a final determination on the issues

referred to it. The decision did not finally decide the rights of the parties before the Court. This being the relief before the Court it is clearly consistent with the rule laid down in the test both in *Salaman v. Warner (supra)* and *Bozson v. Altrincham UDC (supra)*.

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

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

On the other hand where an application is made with the intention of finally determining the right of the parties if successful will obviously be a final order. Again where the order is one which finally determines the rights of the parties, there is no doubt it is a final order. The position taken

a by Counsel is not one of deliberate misreading of the judgment, but stems from the assumption that the alternative nature of application test is a wholesale adoption of the interpretation given to the test in *Salaman v. Warner* as formulated by Fry LJ in that judgment. This is not so. What this court has endeavoured to do in *Omonuwa v. Oshodin* is to recognise the realities of the effect of the nature of the orders made on the application in an action, and to avoid the inconvenient anomaly where an interlocutory order graduates into a final order on appeal because it is the only issue before the Appeal Court. This would seem to be the position in *Olubadan-in-Council v. Lagunju* 12 W.A.C.A. 464; *D.P.P. v. Chike Obi* (1961)

All N.L.R. 458; *Adegbenro v. Akintola* (1963) A.C. 614, where appeals on interlocutory matters by way of reference were regarded as final decisions of the appellate Courts.

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

I think it is pertinent to mention here that *Omonuwa v. Oshodin* has not formulated any new test, and has not advocated a combination of the nature of application test and the

nature of the order test as was formulated in *Salaman v. Warner*, and *Bozson v. Altrincham UDC*. What the Court did was to simplify the test already applicable by considering the nature of the application, and the nature of the order made in determining whether an order or judgment is interlocutory or final in respect of the issues before it as between the parties to the litigation. This Court then said:

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

The principles as enunciated agrees with the test laid down in *Blay and others v. Solomon* (1947) 12 W.A.C.A. 167 which this court has followed ever since. *Omonuwa v. Oshodin*, is by no means a departure from that test and is indeed a veritable re enforcement of its effect if properly understood. I do not therefore see any need to interfere with the decision. I have already set out the nature of the transaction which has given rise to this action. The recapitulation of the salient facts of this case is necessary for a proper understanding and appreciation of the issues involved. Concisely stated, appellant is a Lagos-based company. It entered into an agreement with Association for Economical and Industrial Development in Middle East and African countries, hereafter referred to as ASDECAMO, a company based in Geneva for the purchase of 10,000 metric tons of cement. Appellant pursuant to this transaction applied to its bankers (The respondents) by exhibit B for the issuance of an irrevocable and non transferable letter of credit in favour of ASDECAMO in respect of the order. A Letter of Credit exhibit

- a* C was duly issued in favour of ASDECAMO with the Banque Pour Le Commerce International S.A. hereafter referred to as Swiss bank as the Agent for the defendants. “exhibit C” was made subject to the provisions of the 1974 Uniform Customs Practice for Documentary Credit (UCP) (exhibit T) and sets out the terms and conditions for negotiating the credit. On the due date for the payment of exhibit C, AS-
- b* DECAMO presented to the Swiss bank exhibits D, E, F, and G, which the Swiss bank accepted as in compliance with the terms and conditions set out in exhibit C Payment was accordingly made to ASDECAMO in accordance with exhibit C and the rules governing documentary letters of credit. No
- c* cement was in fact shipped to the appellant. The Bill of Lading exhibit D one of the documents relied upon by the Swiss bank for paying ASDECAMO was a forged document, having not been issued by the Black Star Line. In fact there was
- d* no such vessel as the “Thomas Mann” claimed to be the carrier of the consignment of cement. The respondents duly received exhibits D, E, F, and G from the Swiss bank and accepted them as complying with the terms of the credit in
- e* exhibit C. Respondents accordingly reimbursed the Swiss Bank and debited the account of the appellant to the amount on the credit. Appellants’ case is that respondents are not entitled to debit his account as they and their Agent, the Swiss bank,
- f* have not complied with the conditions set out in exhibit C before paying ASDECAMO.
- g*
- h* It was and still is the contention of the respondents that the terms of exhibit C were complied with; and that even if they were not complied with (which was denied) they were still not liable by virtue of articles 9 and 12 of UCP and the express exclusion of liability in exhibit B. Appellant then
- i* brought an action against the respondents claiming damages for breach of contract, and in the alternative negligence in the failure to discover the forgery. They also claimed a declaration that respondents were not entitled to debit their account with it in the amount paid out to ASDECAMO. Both
- j*

the High Court and the Court of Appeal had found in favour of the respondent. In this Court, Professor Kasunmu SAN for the appellant had raised all the issues again which were canvassed in the courts below. The issues for determination in this Court have been very concisely stated in the briefs filed by Professor Kasunmu SAN for the appellants at page 5, and by Chief *Williams* SAN at page 6 of this brief. The relevant questions are those concerning the transaction subject matter of the action. The questions formulated are as follows:

1. Whether the Court of Appeal was right in holding that the additional conditions in exhibit C was not binding on respondent and its Agents, the Swiss bank;
2. Whether the Court of Appeal was right in holding that the respondent and its Agent the Swiss bank were not liable for negligence in not discovering that exhibit D was a forgery, and that the words “Conference MED and M” was authenticated;
3. Whether the Court of Appeal was right in holding that exhibit C was not used as a transferable credit, and that exhibits D, E, and G, used to negotiate C were *ex facie* regular, and consistent;
4. Whether the Court of Appeal was right in holding that respondent’s liability was excluded by the clause in exhibit B, and that articles 7, 9 and 12 of UCP protected respondents from any liability arising from exhibit D or any other documents.

These being the questions for determination, it is therefore necessary to consider the facts of this case in the light of the issues involved. The crux of the case lies in the nature of the contracts, which have given rise to this action. . . sale of goods transaction with international connotations involves more than the primary parties to the transaction. Thus the local buyer who enters into a contract with an overseas seller on the faith that the overseas seller will perform enters into (a) contract with his bankers to enable him pay for the



*a* goods. This primary arrangement leads into other contracts, namely (*b*) contract between the buyer's bank and its agent which is another bank in the seller's country for the purpose of paying the seller, (*c*) contract between the bank in the country of the seller, and the seller, thus there are four independent contracts in respect of the single transaction. See: Lord Diplock in *United City Merchants (Investments) Ltd and another v. Royal Bank of Canada and others* [1983] A.C. 168, at page 183. There is (*i*) the contract between the buyer and the seller (*ii*) the contract between the buyer and his bank known as the, issuing bank (*iii*) if required there will also be a contract between the buyer's bank (the issuing bank) and a bank (the correspondent or confirming bank) in the country of the seller to confirm the credit and ensure payment; (*iv*) the contract between the overseas bank, and the seller.

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

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

*i* There is evidence that appellant by virtue of exhibit B, applied to respondents for an irrevocable non transferable letter of credit for US\$570,000 in favour of ASDECAMO. In compliance with this request, respondents in exhibit C, duly opened the letter of credit. It is pertinent to mention here that

*j* exhibit B contains an Indemnity Clause in favour of the

respondents from any loss or damage that may arise in consequence of error or delay in transmission of messages or misinterpretation or from any cause beyond control. Exhibit C the letter of credit provides that it is except as otherwise stated, subject to the Uniform Customs and Practice for Documentary Credits (1974 Revision). a  
b

The obligation of the respondents who is the issuing bank is to ensure the observance of the terms and conditions of exhibit C the letter of credit. The legal relationship between appellants and the respondents depends solely on the terms of exhibit B and is not affected by any other contractual relationships in the overall transaction. But the respondents are required strictly to adhere to the instructions contained in exhibit B. Where the documents against which payment is to be made are stipulated, the respondent banker is required at his peril to insist on complete compliance. The banker's only concern is to carry out the instructions of the buyer. c  
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Although Counsel for the appellants accepts the general rule in documentary credit transactions that documentary credit operations deal only in documents and not in goods: see article 8 UCP, and that banks are obliged to pay on the basis of documents which *ex facie* are in accordance with the terms and conditions of the credit, item 2 of the additional instruction in exhibit C it was submitted, imposed a duty on the respondent beyond being satisfied that the documents tendered are *ex facie* regular. It was argued that respondent must look outside the documents to check the accuracy of what was being claimed. It was contended that the *ex facie* rule with respect to documents is subject to exception where the parties are agreed that a particular fact exists. The agreement takes the matter outside the general rule. The tender of the Bill of Lading exhibit D is itself no proof that the fact exists. Respondents have denied the existence of any such obligation, and rely on article 8(b) of the UCP for their defence. f  
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This contention puts into issue the legal obligation of the respondent banker to the appellant buyer with respect to the j

- a* transaction culminating in the opening of the Letter of Credit exhibits B and C. Professor *Kasunmu*'s argument suggests that the obligation extends to the Swiss bank the Agents of the respondents. For this Counsel relied on item 8 of the additional conditions to contend that before payment was to be made on the documents, respondents were obliged and bound through their agent, the Swiss bank, to ascertain that the carrying vessel indicated in exhibit D is a conference or non conference line vessel, and if the latter a photocopy of a current ship entry notice issued by the Nigerian Ports Authority was submitted to the bank along with the other relevant documents. Counsel relied on the recent decision of the English Court in *Banque De l'Indochine Et De Suez SA v. JH Rayner (Mirteing Lane) Ltd* (1983) 1 Q.B. 711.
- e* The question for consideration is whether as the respondents contend, they are protected by article 8 of UCP and are not required to look outside the documents presented to them, or is it as the appellants contend, the additional condition required an ascertainment of fact, which takes the matter outside the protection of UCP and that respondents are bound to ascertain not only on the basis of the documents tendered, but on other facts establishing the fact. The complaint of appellant on this issue is that the use of the vessel "Thomas Mann" a non conference line ship was not in compliance with the condition precedent stated in the letter of credit. Accordingly the respondents have not fulfilled one of the conditions of the Letter of Credit.
- h*
- I think Chief *Williams* is absolutely right when he submitted that appellant not being a party to the contract between the respondent and the Swiss bank in exhibit C cannot validly complain about any breach (if at all, which is however denied) relating to it. Appellants relationship with the respondents is evidenced only in exhibit B, his application for credit. Exhibit B does not contain any of these conditions. It is clearly in article 8(g) of the UCP, that the contract of the
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issuing banker, in this case the appellant, and the correspondent banker, here the respondent, is independent of any other contractual relationship of the documentary credit transaction. There are American cases in support of this position. See: *Asburg Park and Ocean Grove Bank v. National City Bank of New York* 35 N.Y.S. 2nd 935, 989. *Tuet v. Rodrique* (1965), 176 SO 2nd 550, 552 (1965) both cases cited in support of the proposition in Benjamin's *Sale of Goods* (2ed) paragraph 2215. Thus the contract between the issuing banker, the respondent, and the Swiss bank, evidenced in exhibit C, is independent of and unrelated to the contract between appellant and the respondent in exhibit B. There is therefore no privity of contract between appellant and respondent in respect of exhibit C.

Counsel for the appellant is right in his contention that the Swiss bank is bound by the terms of exhibit C, exhibit C being a contract between respondents and the Swiss bank. As between them there exists the relationship of principal and agent: see *Equitable Trust Co. of New York v. Dauso Partners Ltd* (1927) 27 U.L.R. 49, 52, followed in *Bank Metti Iran v. Barclays Bank D.C.O.* (1951) 2 LL. Rep. 367, 376. The obligations of the correspondent bank to the issuing bank are clearly spelt out in clause (b) of article 8 UCP as follows:

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

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

- a* On the facts established before the learned trial Judge and accepted by the Court below, there was no doubt that exhibit D, the Bill of Lading impugned as a forgery, *ex facie* states that the document was issued by the Black Star Line Limited. The condition sought to be established provided as follows:
- b*
- c* “Shipment may be made by conference or non conference line vessel. If shipment is made by a non conference line vessel, the shipper must present with the other documents called for in the credit photocopy of a current ship Entry Notice of the carrying vessel duly signed by the Nigerian Ports Authority.”
- d* Thus it is only where the shipment is made by a non conference line vessel that the alternative is to be resorted to. How then is the confirming or correspondent banker required to establish that shipment is made by a conference or non conference line vessel. Appellant’s Counsel has suggested a search in the Lloyd’s Register of Ships, and his witness agreed that it was possible on checking the Lloyd’s Register, or reference to the National Shipping Line to know whether a particular ship belongs to a Conference Shipping Line.
- e*
- f* Under cross examination, this witness admitted that the Black Star Line Limited is a member of the Conference Shipping Line. The contention of appellant is not only that the ship was not indicated as a conference line vessel, but that no such ship as “Thomas Mann,” indicated existed, and that this fact should have been checked by the paying banker.
- g*
- h* There was evidence before the trial Judge and accepted by the court below that Black Star Line Limited which was indicated as owner of the vessel “Thomas Mann” is a member of the Conference Line. It therefore shows *ex facie* from exhibit D that such a ship exists, and that there was compliance with the condition in “exhibit C.”
- i*

*j* But counsel cited *Banque De La Indochine El De Suez SA v. JH Rayner (Mincing Lane) Ltd (supra)* in support of the contention that the special conditions endorsed on the credit

must be established as a fact, thus imposing a duty on the respondents over and above the provisions of article 8 of the UCP. It is pertinent to mention that the additional conditions requiring a conference line vessel did not impose any documentary proof as with the case of a non conference line vessel. Accordingly it seems to me that relying on exhibit D alone was sufficient for this purpose. This has been very well expressed in an identical situation by Sir John Donaldson MR in *Banque Indochine v. JH Rayer (Mincing Lane) Ltd (supra)* at page 728 as follows:

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

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

“Besides, assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents. . .”

Respondents were therefore not negligent in, regard to the question of whether or not the goods were shipped on a conference line vessel. Respondents have no responsibility beyond being satisfied that the information *ex facie* in the documents presented for payment are correct. The case of *Singh v. Banque de L’Indochine* (1974) 2 All E.R. 754 referred to by counsel to the appellants is completely different and is distinguishable. In that case the issue of forgery which was not apparent on the face of the document was established, and the bank observed the specific preconditions for

*a* payment in the Letter of Credit, and this was stated clearly by Lord Diplock when he said:

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

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

The issue of the authentication of the words “Conference Med stet” exhibit D is the subject matter of one of the questions for determination before us. The two Courts below have found as a fact that there was no alteration in exhibit D, and that the words were typed in at the time of the making of the document. These are concurrent findings of fact which this court will not lightly interfere with. It is therefore for appellant to adduce substantial reason why these findings

should be disturbed. I have found no such reasons either in <sup>a</sup>  
the brief of argument or in its oral expatiation before us. It  
seems that the real reason for this contention is to show that  
respondents should have been put on enquiry by the non- <sup>b</sup>  
authentication of the words “Conference Med. and” typed  
into exhibit D. The contention of appellants is that the words  
so typed in is a material alteration of exhibit D and, that in  
fact exhibit D is a forged document purported to have been <sup>c</sup>  
issued by the Black Star Line which it was shown by evi-  
dence did not issue it. Counsel for the respondents has sub-  
mitted, and I entirely agree with the submission that the onus  
was on the appellant who alleges an alteration of exhibit D <sup>d</sup>  
after it had been made to establish that fact. Where an altera-  
tion is disclosed there is no presumption that it was made  
after and not before the execution of the Bill of Lading. The  
presumption is that the alteration was made in a manner <sup>e</sup>  
which did not constitute an offence: see section 127(4) of  
the Evidence Act, and *Clifford v. Parker* 113 E.R. 1012. All  
the Courts below have found that there was no alteration.  
This court cannot without good and substantial reasons ig- <sup>f</sup>  
nore such finding.

Appellant has also contended that respondent by accepting  
exhibits D, E, F and G and negotiating the payment of the  
Letter of Credit on the basis of these documents which were <sup>g</sup>  
in the names of a person other than ASDECAMO, used “ex-  
hibit C” which is an irrevocable, non transferable letter of  
credit as a transferable credit contrary to its terms. article 46  
of the UCP defines a transferable credit as “a credit under <sup>h</sup>  
which the beneficiary has the right to give instructions to the  
bank called upon to effect payment or acceptance or to any  
bank entitled to effect negotiation to make the credit avail-  
able in whole or in part to one or more third-parties (second <sup>i</sup>  
beneficiaries). A credit can only be transferred if it is so ex-  
pressly designed. I have already outlined in this judgment  
the primary parties to the contract and the four contracts  
which arise from that transaction. Again on examination of  
exhibit C that is the letter of credit, it is immediately obvious <sup>j</sup>



- a* that it is an irrevocable documentary credit in favour of AS-  
DECAMO, CASE POSTAL 176, CH. 1219 Le  
Lignon/Geneva, Switzerland, exhibit C is not designated as  
*b* transferable, and therefore is a non transferable irrevocable  
letter of credit in favour of ASDECAMO, the beneficiary.  
The Letter of Credit is issued by the respondent bank, at the  
instance of the appellant, who is the buyer, to B.C. 1, the  
Swiss bank, as the confirming bank for payment to ASDE-  
*c* CAMO, the seller on the presentation of the documents  
specified in exhibit C.

- Counsel to the appellants contends that where names other  
*d* than that in the Letter of Credit appear in the documents re-  
lied upon for the negotiation of the Letter of Credit and pay-  
ment is made in respect of such documents this is in effect a  
use of non transferable Letter of Credit as transferable. It is  
*e* argued that exhibit C being non transferable, it is inconsistent  
and irregular with its terms to accept exhibits D, E and F,  
which contain names extraneous to exhibit C exhibit G is the  
only document issued by ASDECAMO, the seller. It was  
*f* submitted that appellant never contracted to accept title from  
any person other than ASDECAMO: exhibits D, E, F issued  
by Bryanston Italians is inconsistent when read with exhibit  
G. Exhibits D, E, F are the Bill of Lading Packing List, and  
certificate of value, required in exhibit C. It was urged that  
*g* this was a breach of exhibit C. The main argument of respon-  
dent was reliance on section 46(x) of UCP and that since the  
invoice was in the name of ASDECAMO and that the pro-  
ceeds of the transaction were paid to ASDECAMO, the issue  
*h* of transfer of credit did not arise. The second argument was  
that Bryanston Italians whose name appears on exhibits D, E,  
and F was *an exporter* or manufacturer who undertakes to  
play the role of a middleman in the transaction. No credit was  
*i* transferred to him because all payments were made to the  
seller ASDECAMO. Counsel for the appellant in answer to  
this argument, draw the distinction between assigning the  
proceeds of credit and the assignment of the credit itself. He  
*j* argued that merely because ASDECAMO collected the

proceeds of the credit did not mean that exhibit C has been used as a transferable credit. *a*

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

Finally, appellant has contended that respondent cannot rely on the Exclusion Clause in exhibit B. It is accepted that the contract between appellant and respondent is in exhibit B. The relevant clauses excluding liability in exhibit B are as follows: *f*

- “(i) It is understood that our engagement to pay shall continue in force notwithstanding any changes in our and/or your constitution and that no responsibility is to attach to yourselves or your correspondents as to the documents, beyond seeing that they purport to be in order. *g*
- (ii) “We agree to hold you and your correspondents hunk and indemnified in respect of any loss or damage that may arise in consequence of error or delay in transmission of your correspondents messages or misinterpretations therefore or from any cause beyond your or their control.” *h*

Counsel for the appellants’ contention is that the Court of Appeal did not rely on exhibit B, for the exclusion of respondent liability. They relied on articles 9 and 12 of the UCP respondent, it is further argued, has not cross appealed that the appeal should be dismissed on that ground. For the *i j*

- a* application of the above Exclusion Clause Counsel submitted that, where respondents are found to be negligent they are not entitled to the protection of the Exclusion Clauses.
- b* Professor *Kasunmu* referred to the recent decision of the House of Lords in *Photo Productions Ltd v. Securicor Transport Ltd* (1980) A.C. 827 and submitted that that case has affected the law on Exclusion Clauses in contract only to
- c* the extent that it is now a matter of construction of the terms of the contract rather than as a rule of law. The above being the submission, what is to be construed here is the exclusion of liability as provided by the Clauses in exhibit B, and the
- d* provisions of articles 9 and 12 of UCP. I think article 12, which is particularly relevant provides as follows:—
- “12(a) Banks utilising the services of another bank for the purposes of giving effect to the instructions of the applicant for the credit do, so for the account and at the risk of the
- e* latter.
- (b) Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such
- f* other bank.
- (c) The applicant for the credit shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages.”
- g* Now, then, how do the Exemption Clauses in exhibit B apply to exclude the liability of the respondents? Professor *Kasunmu* submits in this case they do not operate to exclude respondent’s liability because they are matters in respect of
- h* which they were negligent and could have with reasonable diligence avoided. He relies for this proposition on *The Law of Bankers Commercial Credits*, Gutteridge and Megrah (7ed), page 77, and Sarna, *Letters of Credit* at page 121. On
- i* the other hand Chief *Williams* relies on the opinion of Professor EP Ellingers, *Documentary: Letters of Credit* at page 155 and submits that liability is excluded.

*j* The general rule until the doubt created by *Photo Productions Ltd v. Securicor Transport Ltd* (1980) A.C. 827 was

that a party to a contract may be precluded from relying on the provisions of an Exemption Clause contained in such contract if he is guilty of the breach of a fundamental term or breach of the contract. According to this rule a fundamental term of the contract or breach of contract cannot be excluded by any clauses however favourably formulated. The terms so protected, are those conditions which are so vital to the continuance of the contract so that their breach will be totally destructive of the obligations of the party in default. This principle was regarded as a rule of substantive law: see *Spurling Ltd v. Bradshaw* (1956) 1 W.L.R. 461, 465. The view that this was a rule of law suffered a reverse in 1964 in *UGS Finance Ltd v. National Mortgages Bank of Greece* (1964) 1 L.L. Rep 446, 450. It was in this last mentioned case, regarded as a rule of construction based on the presumed intention of the contracting parties. The view was adopted in *Suisse Adantique Societe d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361. It was here stated that any statement of the principle of fundamental breach as a rule of substantive law could not be supported in principle in the light of previous authority. Although the rule of law doctrine of fundamental breach appeared to have surfaced again in *Harbutes Plasticine Ltd v. Wayne Tank and Pump Co. Ltd* (1970) 1 Q.B. 847 and was applied in subsequent cases during the next few years see *Kenyon, Son and Graven Ltd v. Baxter Hoare and Co. Ltd* (1971) 1 W.L.R. 519 and *Farnworth Finance Facilities Ltd v. Attryde* (1970) 1 W.L.R. 453 suggesting that in certain circumstances it could be applied as a rule of law. In 1980, the House of Lords had the opportunity to and did declare again that the applicability of exclusion clauses is in all cases not a rule of law but one of construction. It was held that whether an Exemption Clause protected a party to a contract in the event of a breach on what would have been a breach, depended upon the proper construction of the exemption clause of the contract. This was in *Photo Production Ltd v. Securicor Transport Ltd* (1980) A.C. 827. This is the applicable decision now.

*a* The liability of the defendants/respondents will have to be considered in the light of the present state of the law and the exclusion clause in “exhibit B” and exemption clause in exhibit T. I have already reproduced the applicable provisions.

*b* A careful reading of the provisions demonstrates that they were intended to protect the banker from liability arising from error, committed by agents in the discharge of the obligations under the transactions. Thus where the banker has complied with the instructions of the buyer, the nature of the obligations and its manner of discharge expects that he should be protected from liability arising from errors by others. Hence; it is expedient and commercially justifiable to protect the banker from liability, for the consequences of events beyond the banker’s control. On the whole, the exemption and indemnity clauses in “exhibit B” can only in my opinion be regarded as subject to and ordinarily qualified by the banker’s contractual duty of strict compliance. See: the *Suisse Atlantique etc v. NU Rotterdamsche Kohlen Centrale* (1967) A.C. 361.

*f* The finding of the courts has been that respondents did not commit in breach of any of the conditions in exhibit C, and have performed the obligations under the contract with the appellant. Respondents are therefore entitled to the benefit of the Exclusion Clauses in exhibits B and T.

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

Counsel for the respondent is now raising the question:

*j* “Whether, having arrived at the conclusion that ‘even if exhibit J was received by putting pressure on the appellant . . . it would be

treated as valid until set aside' the Court of Appeal ought to have considered that it would not have treated the said exhibit as sufficient authority to debit the appellant's account." a

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

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

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

Appellant has not rejected the documents presented in respect of the Letters of Credit. He had not done so up to the j

*a* time he brought this action. It is fairly well settled that where the buyer or the issuing banker has cause to challenge the compliance with the conditions of the letter of credit and  
*b* desires therefore to repudiate the contract he must act quickly. In *Westminster Bank Ltd v. Banca Nazionale di Credito* (1928) 81 L.L. Rep. 306 at page 312, Roche J said:

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

See also: *Bank Melli Iran v. Barclays Bank (DCO)* (1951) 2 L.L. Rep. 367, *UBA Ltd v. AG Bendel State* FCA/B/109/81 (Unreported decision of Court of Appeal, 10/9/81). Where the delay is normal, the attitude would not be regarded as ratification. In the instant case appellant received the documents and never challenged them even after he discovered the breach. His conduct undoubtedly amounts to a ratification of respondents earlier act of 19/9/78 of debiting his account. I shall conclude this judgment by citing what Lord Diplock said recently, in *UCM v. Royal Bank of Canada* [1983] A.C. at page 183. He said:

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

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

*i* **KAWU JSC:** My Lords, I am in entire agreement with the judgment just delivered by my learned brother, Eso JSC, a draft of which I had the advantage of reading. I am also of the view that the appeal lacks merit and should be dismissed. It is accordingly dismissed with ₦309 costs to the respondent.  
*j*

**OPUTA JSC:** I have had the privilege of a preview of the *a*  
marathon judgment just delivered by my learned brother Eso  
JSC His statement of facts is lucid, accurate and exhaustive.  
His exposition of the law (on interlocutory and final deci- *b*  
sions) is presented with remarkable precision and succinct-  
ness. I am in complete agreement with his reasoning and  
conclusions, and I hereby adopt these as mine. I, too, will  
dismiss this appeal. I abide by the other orders made in the *c*  
lead judgment.

*Appeal dismissed.*



*a*

## Nasaralai Enterprises Limited v. Arab Bank Nigeria Limited

*b*

SUPREME COURT OF NIGERIA

BELLO, ESO, UWAI, COKER, KARIBI-WHITE, KAWU, OPUTA JJSC

Date of Judgment: 10 JULY 1986

S.C.: 138/1985

*c*

*Banking – Letter of credit – Transaction between the parties involved – Nature of*

*Letters of credit – Buyer authorising payment on defective documents – Whether a waiver is thereby created which disentitles buyer from refusing payment thereafter*

*d*

*Letters of credit – Doctrine of estoppel-in-pais applicable*

*e*

*Letters of credit – Inspection of documents – Duties of bank*

*Letters of credit – Sale of goods by documentary credit – Nature of contract created therein*

*f*

*Jurisdiction – Letter of credit – Principles governing*

### Facts

*g*

The plaintiff now appellant requested the defendant bank, now respondent to finance the purchase of 100,000 bags of rice at the price of \$2.2 million from Thailand *vide* documentary letter of credit. Sequel to the application of the appellant

*h*

as the buyer in Nigeria, and consequent upon the grant of the appellants' request by the respondent bank, the respondent issued an irrevocable letter of credit on 15th September, 1978 to Bank of Tokyo in Thailand wherein the respondent instructed the Bank of Tokyo to pay the said price to World

*i*

Grain Company Limited, which was the seller, on receiving from the seller documents drawn in conformity with the terms and conditions of the letter of credit. The rice was first shipped on board a vessel MV Lucky Dragon on 15th November, 1978. On 15th December, 1978, the Managing

*j*

Director of the appellants Alhaji Lamidi Popoola accepted the necessary documents relating to the letter of credit on behalf of the appellant and authorised the respondent to debit the purchase price to the appellants' account at its Isolo Branch.

On the aforementioned documents accepted by the appellants the following observations were discovered:

- (a) That the letter of credit did not contain the provision of the Merchant Shipping (Amendment) Decree No. 9 of 1978. That no ship other than a Nigerian ship shall carry the appellants' rice unless that ship is not more than 15 years old since the date of first registration.
- (b) That Bill of Lading permitted transshipment while letter of credit did not permit transshipment.
- (c) While the Bill of Lading showed that rice had been loaded on board the "Lucky Dragon" on 15th November, 1978, the Hatch Report and Loading Report showed that loading commenced on 22nd November, 1978.

The MV "Lucky Dragon" was most unlucky on its Voyage. It sailed from Bangkok in Thailand at the end of November, 1978 with the consignment of the rice and it arrived in Singapore in early December, 1978 where it broke down and was ultimately sold as scrap. The rice was discharged from the vessel and stored at the Singapore Port Authority "Go-Downs." The appellants Managing Director consequent upon this problem travelled to Singapore and made private arrangement to ship the rice to Nigeria. The second ship on which the rice was loaded broke again in South Africa. Part of the consignment of rice was finally shipped from South Africa but not a single bag got to the appellant.

The appellant then instituted the present action against the respondent for ₦1,231,807 special and general damages for breach of contract and relied on the conditions of the contract breached. The High Court of Lagos State gave judgment in favour of the appellant, the respondent being dissatisfied

*a* with the High Court judgment consequently appealed against same to the Court of Appeal.

*b* The Court of Appeal reversed the High Court decision on the ground that the appellant by their conduct had waived whatever breach the respondent committed.

*c* The appellant being dissatisfied with the Court of Appeal decision, appealed to the Supreme Court against the Court of Appeal decision.

**Held—**

- d* 1. When a letter of credit is issued and confirmed by a bank, the bank is duty bound to pay it if the documents are in order and the terms of credit are satisfied irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not.
- e* 2. The fact that a document presented by the beneficiary under a documentary credit which otherwise conforms to the requirement of the credit is in fact a forgery does not of itself prevent the issuing bank from recovering from its customers moneys paid under the credit.
- f* 3. Thus, banks are not entitled to overlook any document, which in its face appears inconsistent with the term of the letter of credit merely because that document was not a document required or called for by the bank.
- g* 4. In international commercial transactions by documentary credit, parties to such transaction by virtue of article 8(a) of Uniform Customs and Practice deal in documents and not in goods or ships. The only thing a bank is required to do is to examine documents and to treat them on their face value.
- h* 5. There are five contractual relationships involved in this sale of goods by documentary credit:
  - i* (a) The underlying contract for sale of goods between the buyer and the seller.
  - j* (b) The contract between the buyer and the issuing bank for the opening of letter of credit.

- (c) The contract between the issuing bank and the confirming bank if payment is to be made through a confirming bank. *a*
- (d) The contract between the confirming bank and the seller. *b*
- (e) Where the letter of credit requires a Bill of Lading, the contract of affreightment between a ship owner and a shipper. *c*
- 6. Subject to the law relating to acceptance, estoppels and waiver, all the parties ie the buyer, issuing bank or confirming bank, have the right to reject documents which do not comply with the terms and conditions of the letter of credit and in the case of a buyer, if the documents do not also comply with his mandate to the issuing bank for the opening of the letter of credit. *d*  
*e*
- 7. Where a buyer, after collecting all the documents relating to a letter of credit and seeing that the documents do not conform to his instructions nevertheless goes on to accept the documents and to authorise the issuing bank to debit the amount payable on the letter of credit to his account, his conduct constitutes both estoppel and waiver and he cannot thereafter turn round to deny liability by relying on defects in the documents which he accepted and on which he authorised payment. *f*  
*g*
- 8. Where a document is dated a particular day, it is presumed in the absence of contrary evidence that it was signed on that date. *h*
- 9. Since commercial transactions by documentary credit are done only in reliance on documents and are not concerned with seaworthiness of ship, or whether or not goods were in fact supplied, matters relating to such transactions have nothing to do with maritime law and thus should be tried in the State High Court and not the Federal High Court. *i*  
*j*

- a* 10. By the provisions of Act 7 of the Uniform Custom and Practice for Documentary Credits, in business transaction financed by documentary credits, banks must be able to act promptly on presentation of documents. In the ordinary sense visual inspection of the actual documents presented is all that is called for. The bank is under no duty to take any further step to investigate the genuineness of a signature which on the face of it, purportedly to be the signature of the person named or described in the letter of credit.
- b*
- c*
- d* 11. The issuing bank has a contractual duty to write in the letter of credit all the terms and conditions the buyer as its customer instructed it to open the credit. If a bank fails to comply with the mandate of the buyer, then the bank is in breach of contract and the buyer has the right to reject documents for non-compliance with his mandate and is not liable to reimburse the bank for any payment made by it irrespective of whether the goods have been shipped to the country of buyer or not.
- e*
- f* 12. Where the letter of credit complies with the mandate of the buyer, but the documents with which the letter of credit was negotiated do not comply with the terms and conditions of the letter of credit, the buyer has the same right of rejection and non-liability for reimbursement.
- g*
- h* 13. An issuing bank has also the right to reject documents accepted by its correspondent bank and to refuse to reimburse the latter bank for any payment made to the seller by the correspondent bank if the documents do not comply with the terms and conditions of the letter of credit. For in such a situation, the correspondent bank will be in breach of its contract with the issuing bank in failing to comply with the instructions contained in the letter of credit.
- i*
- j* 14. The correspondent bank has also the right to reject documents and refuse paying the seller, if the documents presented to it by the seller do not comply with the terms

and conditions of the letter of credit even if seller has shipped the goods to the buyer. The breach by the seller for non-compliance with the credit has nothing to do with goods.

*Appeal dismissed.*

### Cases referred to in the judgment

#### *Nigerian*

*Akinsanya v. United Bank for Africa.* (1986) 4 N.W.L.R. (Part 35) 273

*American International Insurance Co. Ltd v. Ceekay Traders Ltd* (1985) 5 S.C. 81

*Jamal Steel Structure Co Ltd v. African Continental Bank* (1973) 1 All N.L.R. (Part 2) 208

#### *Foreign*

*Bank Metti Iran v. Barclays Dominion, Colonial and Overseas* (1951) 2 Lloyd's Rep. 367

*Central Newbury Motors Car Auctions Ltd v. Unity Finance Ltd and another Mercury Motors, Third Parties* (1957) 1 Q.B. 371 at 380

*Edward Owen Engineering Ltd v. Barclays Bank International Ltd and Umma Bank* (1978) 1 Lloyd's Rep. 166 at 170

*Equitable Trust Company of New York v. Dawson Partners Ltd* (1927) 27 L.L.L. Rep 49 at 52

*Greer v. Down Supply Co.* (1927) 2 K.B. 28 at 36

*Hamzeth Malas and Sons v. British Imex Industries Ltd* (1958) 2 Q.B. 127 at 129

*J.H. Rayner and Co. and The Oilseeds Trading Co. v. Hambros Bank Ltd* (1943) Lloyds Rep 10 (CA)

*Kwei Tek Chao and others (Trading as Zung Fu Co.) v. British Traders and Shippers Ltd NV Handelsmaateshappij J Smits Import-Export, Third Party* (1954) 2 Q.B. 459 at 480 and 481; (1954) 1 Lloyd's Rep. 16 at 48 and 49

- a* *Manchester Trust v. Furness* (1895) 2 Q.B. 539 at 545  
*Matthews v. Smallwood* (1910) 1 Ch. 777
- b* *Midland Bank v. Seymour* (1955) 2 Lloyd's Rep. 53 at 57  
*Panchaud Freres S.A. v. Et General Grain* (1970) Lloyd's Rep. 53 at 57  
*Singh and Co. v. Banque de, L'Indochine* (1974) 2 Lloyd's Rep. 1 at 11
- c* *Soproma SPA v. Marie and Animal By-Products Corporation* (1966) 1 Lloyd's Rep. 367
- d* *Sztejn v. J Henry Schroeder* (1941) 31 N.Y.S. 2nd 631  
*The Eschesheim Case* [1974] 3 All E.R. 307  
*United City (Investments) Ltd v. Royal Bank of Canada* [1983] A.C. 168 at 182-183
- e* *Westminster Bank Ltd v. Banco National Credito* (1928) 31 L.I.L. Rep. 306 at 312

**Nigerian statute referred to in the judgment**

- f* Merchant Shipping (Amendment) Decree No. 9 of 1978, section 5

**Foreign statutes referred to in the judgment**

- g* Administration of Justice Act of England 1956, section 1(g) and (h)
- h* Uniform Customs and Practices for Documentary Credits, 1974, article 7, 8(a)

**Book referred to in the judgment**

- i* Halsbury's *Laws of England*, (3ed), paragraph 138

**Judgment**

- j* **BELLO JSC:** (*Presiding and delivering the lead judgment*)  
The dispute between the parties in this appeal had its root

embedded in the use of a letter of credit issued to facilitate international trade for the purchase of 100,000 bags of rice at the price of (US)\$2,200,000 by a buyer in Nigeria from a seller in Thailand. On the application of Nasaralai Enterprises Limited which was the buyer and is hereinafter referred to as the appellant, the Arab Bank (hereinafter referred to as the respondent) issued on 15th September, 1978 an irrevocable letter of credit to Bank of Tokyo in Thailand wherein the respondent instructed the Bank of Tokyo to pay the said price to World Grain Company Limited, which was the seller, on receiving from the seller documents drawn in conformity with the terms and conditions of the letter of credit. One of the terms of the letter of credit was the rice should be put on board a vessel on or before 15th October, 1978 but the date was later extended by the parties to 15th November, 1978.

It appears that toward the end of November, 1978 because 30th November, 1978 was the expiry date for negotiating the letter of credit, the seller presented to the Bank of Tokyo a Bill of Lading and other documents showing that the rice had been loaded on board a vessel called MV “Lucky Dragon” at Port of Thailand on 15th November, 1978. Relying on the documents the Bank of Tokyo paid the purchase price to the seller and advised the respondent of the payment. It also remitted the documents to the respondent. On the 15th December, 1978 the Managing Director of appellant, Aihaji Lamidi Popoola, accepted the documents on behalf of the appellant and authorised the respondent to debit the purchase price to the appellant’s account. Accordingly, the respondent debited the appellant’s account at its Isolo Branch with the sum of ₦778,607.97 in partial satisfaction of the purchase price.

The MV “Lucky Dragon” was most unlucky on its voyage. It sailed from Bangkok in Thailand at the end of November, 1978 with the consignment of the rice and it arrived at Singapore in early December, 1978 where it broke down and



*a* was ultimately sold as a scrap. The rice was discharged from the vessel and stored at the Singapore Port Authority “Go-Downs.”

*b* The rice was expected to arrive in Lagos by 27th December, 1978 but it did not do so up to March, 1979. On 3rd March, 1979 the Managing Director of the appellant, Alhaji Popoola, went to Bangkok to investigate and from there he  
*c* proceeded to Singapore where he found the consignment of the rice stored. By an agreement dated 10th March, 1979 between Alhaji Popoola on behalf of the appellant and Hong Choon Hing Enterprises S.A., the latter agreed to tranship  
*d* the rice to Lagos on board MV the “African Phoenix.” The rice was loaded on the vessel which sailed from Singapore on 8th April, 1979 bound direct for Lagos.

*e* On its voyage, the “African Phoenix” also suffered misfortune, became unseaworthy and flooded. She was diverted to Port Elizabeth in South Africa where the rice was offloaded because the vessel was so badly damaged that she could not continue with the voyage. Some of the rice was so badly  
*f* damaged that it was unfit for human consumption and was condemned by the South African Health Authority. It was conveyed outside of Port Elizabeth where it was dumped. The sound rice was stored in a warehouse. Although the  
*g* documentary evidence shows that a vessel, “Mount Rainer,” retranshipped the sound rice from Port Elizabeth for West African Ports, there is no evidence that any bag arrived in Nigeria. Alhaji Popoola testified that not a bag had been  
*h* delivered to the appellant.

*i* It was on account of the foregoing transactions that the appellant as plaintiff caused a writ of summons to be issued against the respondent as defendant by the High Court of Lagos State claiming:

*j* “1. The plaintiffs claim is for the sum of ₦1,231,807.97k being special and general damages for breach of contract by the defendants by its failure to endorse the provisions of section 5 of the Merchant Shipping (Amendment) Decree No. 9 of

1978 on Letter of Credit. No. LS 24278 of 15th September, 1978 contrary to the intention of both the plaintiff and the defendant and also for breach of contract by the defendant's agent (The Bank of Tokyo, Muang Thai Life, Building 335 New Road, Thailand) in respect of payment wrongfully made out on Letter of Credit No. LS24278 of 15th September, 1978 issued by the defendants on the instructions of the plaintiff and contrary to the terms and conditions of the said letter of credit.

2. Alternatively the plaintiff claims the sum of ₦1,231,807.97 being special and general damages for negligence on the part of the defendants and its said agents Bank of Tokyo in:

(a) The defendants issuing Letter of Credit No. LS24278 of 15/9/78 without endorsing on it the mandatory provisions of section 5 of the Merchant Shipping (Amendment) Decree No. 9 of 1978.

(b) The defendants' agents accepting and making payments on a forged Bill of Lading issued by Shun Shing Shipping Company limited which said Bill of Lading also contained terms contrary to the instructions of the plaintiff."

A Declaration that in view of the above, the defendant is not entitled to debit the plaintiffs account No. 012107 with the Isolo Branch of the defendants' bank with any sum and or interest and commission arising from the above transaction and an Order that the defendant should forthwith revert or cancel all debit entries so made.

The facts averred in the Statement of Claim as constituting the alleged breach of contract and/or negligence by the respondent may be summarised as follows:

- "1. It was agreed at the time of the issuance of the letter of credit that the respondent should endorse on the letter of credit all statutory regulations governing the importation of goods into Nigeria including the provisions of the Merchant Shipping (Amendment) Decree No. 9 of 1978 that 'no ship other than a Nigerian ship shall trade in or from the waters of Nigeria unless not more than 15 years have elapsed since the date of the first registration of such ship' and the respondent failed to endorse the said provision contrary to the

- a* agreement and the practice of other commercial banks:
2. The respondent's 'breach' and/or 'negligence' had resulted in the use of 'Lucky Dragon' which was first registered in 1947 and was old and unseaworthy and in causing the financial loss suffered by the appellant;
- b*
3. The Bank of Tokyo as agent of the respondent accepted documents which on their face were not in accordance with the terms of the letter of credit, to wit:
- c*
- (a) By the terms of the letter of credit as amended the rice must be loaded on board a vessel on or before 15th November, 1978. While the Bill of Lading presented to the Bank of Tokyo showed the rice had been loaded on board the 'Lucky Dragon' on 15th November, 1978, the Loading Report accompanying the Bill of Lading showed the vessel had arrived at the port of loading on 21st November, 1978 and the loading had commenced on 22nd November, 1978,
- d*
- e*
- (b) The letter of credit did not permit transshipment but the Bill of Lading permitted transshipment and
- (c) That the Bank of Tokyo should have detected that the Bill of Lading was a forgery."
- f*
- In their pleadings, the respondent denied having agreed to endorse the provision of the Decree on the letter of credit and also denied the Bill of Lading to be a forgery. The respondent averred that the loading was an error.
- g*
- With regard to transshipment the respondent stated that the rice was shipped direct from Thailand to Lagos and that the printed form "Direct" or with "Transshipment" on the Bill of Lading only referred to the services provided by the Line. The main defence of the respondent was:
- h*
1. If the acceptance of the documents relating to the transaction by the Banks of Tokyo was irregular, the appellant subsequently accepted and confirmed the documents and authorised the respondent to debit its (appellant's) account, and
- i*
2. That the issuance of the letter of credit was subject to the General Conditions for opening of documentary
- j*

credits by the respondent which the appellant agreed to  
and executed and that by virtue of the said General  
Conditions the respondent was not liable to the appel-  
lant in the claim. a  
b

After having considered the evidence adduced by the parties, the trial Judge in his judgment found:

- “1. that on the face of the documents on which the Bank of Tokyo negotiated the letter of credit there was inconsistency as to the date of loading. While the Bill of Lading (exhibit . G5), the Packing List (exhibit G), the Certificate of Origin (exhibit G1) and the Certificate of Weight (exhibit G3) stated the date of loading on board the ‘Lucky Dragon’ to be 15th November, 1978, the Hatch Report (exhibit G6) and the Loading Report (exhibit G10) showed the vessel had not arrived at the Port of Bangkok until on 21st November, 1978 and the loading commenced on 22nd November, 1978 and completed on 24th November, 1978; c  
d  
e
2. that from the premise the respondent was in breach of the duty imposed on it by article 7 of the Uniform Customs and Practice for Documentary Credit, 1974 to examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms of the credit; f
3. that contrary to the express term of the letter of credit, the Bill of Lading permitted transshipment;
4. that the respondent had a duty to endorse the provisions of the Decree on the letter of credit and that its failure to do so resulted in the shipment of the rice on board ‘Lucky Dragon’ which was a ship more than 15 years old and in consequence thereof the appellant suffered financial loss.” g

The learned trial Judge concluded his judgment thus: h

“As a result of the use of an unseaworthy vessel, the consignment of rice was imperilled in Singapore. Surely, the plaintiff cannot be blamed for taking steps, reasonable steps for that matter, to minimise loss. He had to go to Singapore to arrange transshipment of the rice.” i

In any case whether or not it was unreasonable for the plaintiff to, take the steps that he took, that fact should not discharge the negligence of the defendants. j

- a* Other defences raised were exhibit P the general conditions, governing the opening of letters of credit the Exclusion Clause, and estoppel or waiver.
- b* I do not think that having regard to the general law on Exclusion Clauses, that exhibit P could exclude the negligence on the part of, the defendant. An Exclusion Clause cannot, in my view, override the fundamental terms of a contract.
- c* Finally, the defendants rely on exhibit O as estopping the plaintiff from challenging the conduct of the bank in this transaction. exhibit O is a three (*sic*) letter which says “we accept the documents pertaining to the above mentioned Bill
- d* XXX” and signed by the plaintiff’s representative. Exhibit O is of doubtful value. There must be strong evidence to infer waiver or estoppel. The plaintiff could have written “we have seen them” instead of the use of the words “we accept.”
- e* On the evidence which I have accepted, I find negligence proved against the defendants. They are therefore liable in damages to the plaintiff for the loss sustained by him and for all the direct consequences of their negligence.” He assessed
- f* damages in the sum of ₦1,181,807.97 and ordered the reversal of the debit entry of ₦778,607.97 in the appellant’s account. Judgment was entered for the appellant accordingly.
- g* The respondent was not satisfied with the decision of the trial Court. So he appealed to the Court of Appeal. Among the several grounds of appeal canvassed in the Court of Appeal was the issue as to whether the High Court of Lagos State has jurisdiction to entertain the claim. A full court
- h* unanimously held that the High Court of Lagos has no jurisdiction. In a very thorough and comprehensive reasoned judgment Nasir, P (Ademola, Nnaemeka-Agu, Mohammed and Kutigi, JJCA concurring), having referred to the decision of this Court in *American International Insurance Co. Ltd v. Ceekay Traders Ltd* (1981) 5 S.C. 81 which firmly laid down that Admiralty jurisdiction is vested in the Federal High Court, applied the test stated in *Eschershain* [1974] 3
- i* All E.R. 307 at page 318 and approved by this Court in
- j*

*Ceekay* case for determining Admiralty jurisdiction, in other words for determining whether a particular agreement is an “agreement relating to the use or hire of a ship” within the meaning of section 1(*h*) of the Administration of Justice Act, 1956 of England. The test was stated in these terms:

“It seems to be that the court, in deciding whether a particular agreement is an agreement relating to the use of a ship or not, should look at the substance of the matter.”

The learned President then proceeded to examine the appellant’s pleadings and the findings of the trial Court. He highlighted his conclusion that the matter is within the Admiralty jurisdiction as follows:–

“It is pertinent in this case to bear in mind that the main cause giving rise to the claim was the breaking down of the ship ‘LUCKY DRAGON’ which this time was not so lucky as it broke down seven days after leaving the port of shipment. It was also part of the respondent’s case that when the ship did not arrive the respondent (the plaintiff) with the permission of the appellant (defendant) went to Singapore and arranged for a new ship to carry the goods to Lagos. It was the failure of this second ship to reach Lagos which gave rise to the claim as framed by the respondent. *On the whole I am satisfied that the agreement between the parties in respect of the issuance of the Letter of Credit also substantially covered the provisions of the Merchant Shipping (Amendment) Act, 1978, the seaworthiness of the ship to be used and the supervision of the loading and monitoring of the ship used.* In my opinion the substance of the agreement related to shipping and statutory provision relating to ships. I have therefore come to the conclusion that the issue before the trial court related to Admiralty jurisdiction. This is exclusively within the jurisdiction of the Federal High Court in view of the provisions of section 1(*g*) and (*h*) of the Administration of Justice Act, 1956 of England which applies in this case.” (Italics are mine.)

It is apparent that the decision of the Court of Appeal was predicated on the premises that the letter of credit substantially covered the provisions of the Merchant Shipping (Amendment) Act, 1978, the seaworthiness of the ship to be used and the supervision of the loading and monitoring of

- a* the ship used and that the substance of the agreement related to shipping and statutory provisions relating to ships: It appears that the claim in the trial court was also based on these  
*b* bases.

With all due respect, I think the decision of the Court of Appeal was founded on misconception of the law and practice relating to commercial letter of credit in international  
*c* trade. It is pertinent to state the law and practice at this stage.

The basic tenor of the law and practice relating to commercial letter of credit is that parties deal in documents not  
*d* in goods or ships article 8(a) of the Uniform Customs and Practice for Documentary Credits 1974, which apply to the letter of credit (exhibit C) in this appeal, provides:

- e* “In documentary credit operations all parties deal in documents and not goods.”

The only thing a bank is required to do is to examine documents and to treat them on their face value. There is a plethora of authorities on the matter. I need to mention a few only.  
*f*

In the recent case of *United City (Investments) Ltd v. Royal Bank of Canada* (1983) A.C.168 at 182-183, Lord Diplock explained that four contracts are involved in a commercial  
*g* letter of credit. He said—

- h* “It is trite law that there are four autonomous though interconnected contractual relationships involved. (1) the underlying contract for the sale of goods, to which the only parties are the buyer and the seller; (2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to  
*i* pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. For such reimbursement the stipulated documents, if  
*j* they include a document of title such as a Bill of Lading, constitute a security available to the issuing bank; (3) if payment is to be

made through a confirming bank the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit; (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents.”

At page 183 of the Report, Lord Diplock said:

“Again, it is trite law that in contract (4), with which alone the instant appeal is directly concerned, the parties to it, the seller and the confirming bank, ‘deal in documents and not in goods,’ as article 8 of the Uniform Customs puts it. If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, the bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the confirming documents alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sales as rescinded and to reject the goods and refuse to pay the seller the purchase price.” (Italics are mine.)

I may add that in respect of letter of credit requiring a Bill of Lading, there is the fifth contract, which is the contract of affreightment between a ship owner and a shipper, ie the seller or his agent, by which a ship owner agrees to carry in his ship for reward the goods for which the letter of credit was issued and to deliver the goods to the buyer or his agent.

It is pertinent to emphasise that although the five contracts are interrelated, a bank whether the issuing bank or correspondent bank had nothing to do with the execution or performance of the contract of sale between the buyer and the seller or the contract of affreightment. The law has been aptly



- a* stated by Lord Denning MR in *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* and *Umma Bank* (1978) 1 Lloyd's Rep. 166 at 170 thus:
- b* “It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit. That was clearly stated in
- c* *Hamzeh Malas and Sons v. British Imex Industries Ltd* (1958) 2 Q.B. 127 at page 129. Lord Justice Jenkins, giving the judgment of this Court, said:
- d* ‘... it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be. between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers’ confirmed credits are of that character, and,
- e* in my judgment, it would be wrong for this court in the present case to interfere with that established practice.”
- f* In *Singh and Co. v. Banque de L’Indochine* (1974) 2 Lloyd’s Rep. 1 at 11 in clear terms Lord Diplock stated the duty of a banker thus:
- g* “The fact that a document presented by the beneficiary under a documentary credit, which otherwise conforms to the requirements of the credit, is in fact a forgery does not, of itself, prevent the issuing bank from recovering from its customer moneys paid under the credit. The duty of the issuing bank, which it may perform either by itself, or by its agent, the notifying bank, is to examine documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. The express provision to this effect in article 7 of the Uniform Customs and Practice for Documentary Credits does no more than restate the duty of the bank at common law. In business transactions financed by documentary credits banks
- h* must be able to act promptly on presentation of the documents. In the ordinary case visual inspection of the actual documents presented is all that is called for. The bank is under no duty to take any further steps to investigate the genuineness of a signature which, on the face of it, purports to be the signature of the person
- i* named or described in the letter of credit.”
- j*

In the same case, Lord Diplock reiterated the statement of the law by Viscount Sumner as follows: a

“So this appeal ultimately turns upon the only question on which there was a difference of opinion in the Court of Appeal, viz, whether the certificate, on the face of it, conformed with the requirements of the documentary credit. b

The law to be applied in answering this question is clear and simple. It was stated succinctly by Viscount Sumner in *Equitable Trust Company of New York v. Dawson Partners Ltd* (1927) 27 L.L.L. Rep. 49 at page 52 in the following passage from his speech. c

It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk. d

This oft-cited passage has never been questioned or improved upon.” e

Again in the American case of *Sztejn v. J Henry Schroeder* (1941) 31 N.Y.S. 2nd 631 which was cited with approval by Lord Denning MR in *Owen v. Barclays Bank (supra)* Judge Shientag said: f

“It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade.” g

Finally, it must be appreciated that subject to the law relating to acceptance, estoppel and waiver, all the parties, ie the buyer, the issuing bank and the correspondent or confirming bank, have the right to reject documents which do not comply with the terms and conditions of the letter of credit and in the case of a buyer if the documents do not also comply h

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- a* with his mandate to the issuing bank for the opening of the letter of credit: *JH Rayner and Co. Ltd, and the Oilseeds Trading Co. Ltd v. Hambros Bank Ltd* (1943) Lloyd's Rep. 10 (CA); *Bank Metti Iran v. Barclays Dominion, Colonial and Overseas* (1951) 2 Lloyd's Rep. 367; *Panchaud Freres S.A. v. Et General Grain Co.* (1970) 1 Lloyd's Rep. 53 at 57. I shall amplify the law relating to the right to reject later in this judgment.

*c* It is clear from the foregoing that it is trite law that all parties to documentary credits must accept and pay for documents which appear on their face to be in accordance with the terms and conditions of the credit. Subject to acceptance, estoppel and waiver, the rights and liabilities of the parties may be summarised:

- e* 1. the issuing bank has contractual duty to write in the letter of credit all the terms and conditions the buyer as its customer instructed it to open the credit. If a bank fails to comply with the mandate of the buyer, then the bank is in breach of contract and the buyer has the right to reject documents for non compliance with his mandate and is not liable to reimburse the bank for any payment made by it irrespective of whether the goods have been shipped to the country of the buyer or not;
- f*
- g* 2. where the letter of credit complies with the mandate of the buyer but the documents with which the letter of credit was negotiated do not comply with the terms and conditions of the letter of credit, the buyer has the same right of rejection and non liability for reimbursement;
- h*
- i* 3. an issuing bank has also the right to reject documents accepted by its correspondent bank and to refuse to reimburse the latter bank for any payment made to the seller by the correspondent bank if the documents do not comply with the terms and conditions of the letter of credit. For in such a situation the correspondent bank will be in breach of its contract with the issuing bank in failing to comply with the instructions contained in the letter of credit; and
- j*

4. the correspondent bank has also the right to reject documents and refuse paying the seller if the documents presented to it by the seller do not comply with the terms and conditions of the letter of credit even if the seller has shipped the goods to the buyer. The breach by the seller for non compliance with the credit has nothing to do with goods.

I may now revert to the judgment of the Court of Appeal, which, after having stated that the break down of the two ships, the “Lucky Dragon” and the “African Phoenix” gave rise to the claim as framed by the appellant, thought the provisions of the Merchant Shipping (Amendment) Act, 1978, the seaworthiness of the two ships and the supervision of the loading and monitoring of the two ships were all relevant in the determination of the appellant’s claim in the trial Court. The judgment of the Court of Appeal was unequivocal on this aspect. The learned President said:

“For the plaintiff/respondent to succeed they had to prove as alleged in the statement of claim (1) that the defendant/appellant had failed to insert the provisions of the Merchant Shipping (Amendment) Act on the letter of credit and the effect of the Act on the agreement (2) that the ship was not seaworthy and that it was the responsibility of the appellant to see that it was seaworthy (3) that the appellant authorised the use of the second ship (4) that the loss of the goods arose out of the appellant’s negligence (5) that the documents relied upon as to the date of shipment were forged and (6) that the appellant or their agents had failed to take due care and attention in detecting the forgery. I fail to see how all the above could be tried without direct recourse to the Admiralty jurisdiction of the High Court.”

If this had been the case, the matters would have been governed by maritime law which is within the exclusive Admiralty jurisdiction. Having regard to the decision of this Court in *American International Insurance Co. v. Ceekay Traders Ltd (supra)*, the Court of Appeal would have been right that the High Court of Lagos State has no jurisdiction. But this was certainly a misconception of the law and practice of commercial credits.

- a* Now, in the business world of documentary credits, parties are not factually concerned with the seaworthiness of a ship or loading it or monitoring its voyage or ensuring its compliance with the maritime law of the country of the discharge of its cargo. They are not concerned with actual delivery or non delivery of goods. The whole transaction may in reality be a fraud or forgery. There may be no ship and
- c* there may be no goods at all. Parties are only concerned to ensure compliance on papers with the relevant terms of their respective contracts. It is all essentially a matter of documentary contract between a banker and his customer, which has nothing to do with maritime law. It is a matter within the
- d* jurisdiction of the High Court of Lagos State and not of the Federal High Court: *Jammal Steel Structure Co. Ltd v. African Continental Bank* (1973)1 All N.L.R. (Part 2) 208.
- e* For the aforesaid reasons and the reasons stated by my learned brother, Eso JSC, in *AMO Akinsanya v. United Bank for Africa* (1985) S.C. 95, delivered this morning, I hold that the matter in dispute does not fall within the Admiralty jurisdiction. The High Court of Lagos State rightly exercised
- f* jurisdiction in the matter.

- Although the Court of Appeal held that the trial Court had no jurisdiction, nevertheless and quite appropriately, it considered the respondent's appeal before it on the merits. It allowed the appeal and set aside the decision of the trial Court.
- g*

- I now proceed to reiterate the salient relevant facts and issues, in so far as they relate to the credit canvassed in the trial court and in the Court of Appeal.
- h*

The appellant's case was that the respondent was in breach of contract or negligent in that:

- i* “(1) the respondent failed to insert in the letter of credit as its terms and conditions the appellant's instructions that the provision of the Decree that the ship, if not a Nigerian ship, should not be more than 15 years old, and
- j* (2) the respondent accepted documents which on their face were inconsistent with one another and with the letter of credit.”

Apart from general denial, the main defence of the respondent was that the appellant had accepted the documents and thereby waived any breach or negligence of the respondent. The respondent also pleaded estoppel and Exception Clause.

I have earlier shown in this judgment that the trial Court accepted the case of the appellant that it had instructed the respondent to endorse the provision of the Decree and “no transshipment” in the letter of credit. The respondent endorsed the non transshipment condition but not the provision of the Decree. The trial Court also found the documents accepted by the Bank of Tokyo and the respondent were inconsistent on their face in that the Bill of Lading, exhibit C, permitted transshipment. It also showed the date of loading on the “Lucky Dragon” as 15th November, 1978 while the Hatch Report and Loading Report state the date to be 21st November, 1978. With a cursory observation, the trial Court dismissed the defences of acceptance, estoppel and Exception Clause. It found The respondent liable for negligence.

In their judgments, the Court of Appeal observed that the trial Judge did not find that there was an agreement between the parties to incorporate in the letter of credit the provision of the Decree. The learned President had this to say:

“In any event if the only ground for negligence was based on the provision of the law it was in fact clear from the statutory provisions that the law had never come into force. It is, in my view, too remote to hinge the negligence of the appellant to a law which had not come into force. Furthermore it had not been alleged that it was the responsibility of the appellant Bank to hire the ship to be used for the carriage of the rice. In my opinion there is no justification to hinge liability for negligence on the appellant on the basis of the provisions of Act No. 9 of 1978 whether as a matter of statute law or on the basis of contractual obligation which has not been established.”

The reversal of the trial Court’s finding of fact on the agreement to incorporate the provision of the Decree and the passage of the judgment of Nasir P above quoted are the subjects of the complaint in Ground of Appeal No. 2.

- a* Learned Counsel for the appellant, Professor *Kasunmu*, SAN, submitted that the Court of Appeal misdirected itself in reversing the finding of fact by the trial Court, which finding was amply supported by the evidence. He argued that the
- b* Court of Appeal misconceived the appellant's case in that the liability of the respondent was not, as the Court of Appeal thought, based on the allegation that it was the responsibility of the respondent to hire the ship for the consignment of the
- c* rice but that the appellant's case was that it was the failure of the respondent to endorse the provision of the Decree which made the use of the "Lucky Dragon" possible and that the direct consequence of the breach was, as the trial Judge found,
- d* the cause of the loss sustained by the appellant.

- Responding, learned Counsel for the respondent submitted that there was no specific finding by the trial Court as to the request to endorse the provision of the Decree but that the
- e* trial Court held as a matter of law that the respondent had a duty to endorse the provision of the Decree. He contended that the Decree did not impose such duty on bankers.

- I think there is substance in the complaint in so far as it relates to the reversal of finding of fact. The evidence shows that the Managing Director of the appellant, PW2, testified that he had instructed the respondent to endorse the provision of the Decree while PW3, a banker, stated that it had been the practice of bankers to do so. The trial Judge accepted the evidence of both witnesses. He stated:
- f*
- g*

- "There is the evidence of PW3 a banker of many years of experience, whose evidence I accept. I accept also the evidence of the second PW. Now, having regard to the Financial involvement of
- h* bank, the admission by the only witness for the defence that he knew of the existence of the said law and the consequences of not complying with it, and also having regard to the mandatory provisions of that law, it becomes clear to my mind that it was the duty of the bank to endorse the provisions of this Law on the letter of credit."
- i*

- In my view, the matter being in a civil proceeding wherein proof of a fact is only required within the balance of probability, the evidence appears to be more probable than not
- j* that PW2 so instructed the respondent. The Court of Appeal

erred in its assessment of the evidence to reverse the finding <sup>a</sup>  
of fact. I am satisfied there is sufficient evidence to support  
the finding of the trial Court that PW2 instructed the respon-  
dent to incorporate the provision of the Decree and the ap- <sup>b</sup>  
pellant failed to do so.

Now, a lot of unnecessary heat was generated in respect of  
the retracted operations of the Decree. I consider all the  
lengthy submissions, to wit, concerning the enactment of the <sup>c</sup>  
Decree on 15th May, 1978, its coming into force on 13th  
August, 1978, its suspension with retrospective effect from  
13th August, 1978 by the Merchant Shipping (Amendment)  
(No. 2) Decree, 1978 of 2nd October, 1978 and the question <sup>d</sup>  
as to whether having regard to its suspension it had ever  
been in force as being academic. *In my opinion the*  
*gravamen of the issue was that the respondent failed to in-*  
*corporate in the letter of credit, as instructed by the appel-* <sup>e</sup>  
*lant non user of a ship more than 15 years old.* So far as  
strict compliance with the terms and conditions of the letter  
of credit is concerned, it is irrelevant whether the Decree has  
been in force, suspended or repealed. <sup>f</sup>

The law is well settled that in opening a letter of credit, a  
bank has a duty to comply with the instructions of its cus-  
tomer: *Midland Bank v. Seymour* (1955) 2 Lloyd's Rep. 147.  
I hold that the failure of the respondent to endorse the provi- <sup>g</sup>  
sion of the Decree in the letter of credit, exhibit C, consti-  
tuted a breach of its obligation to the appellant.

In its consideration of the inconsistency between the Bill <sup>h</sup>  
of Lading and the Hatch Report as regards the date of load-  
ing which the Bill of Lading shows to be 15th November,  
1978 whereas the Hatch Report shows the ship' did not ar-  
rive at the port until on 21st November, 1978 and was in- <sup>i</sup>  
spected for loading on 22nd November, 1978, the Court of  
Appeal stated that it was impossible from the evidence to  
determine the accuracy of one or the other document as to  
the actual date but found solace on the fact that by their let-  
ter of 23rd November, 1978, exhibit W2, the authors of the <sup>j</sup>



- a* Hatch Report intimated the dates in the Report were errors and corrected both to 12th and 13th November, 1978 respectively. The Court concluded its consideration with this observation:
- b*
- c* “In the present appeal the Bill of Lading had the date of 12th November, 1978 as the date of loading and the Hatch Survey Report had the date of loading 21st November, 1978, as the date of loading. One of them could not be correct. The problem in this appeal is minimised as there is in evidence exhibit W2 a letter from the authors of the Hatch Survey Report, which was admitted in evidence without any objection which corrected the date of 21st November, 1978 on the Hatch Survey Report to read 12th November, 1978. Ibis letter also explained the cause of the delay. In my opinion the Hatch Survey Report must either be accepted together with the letter correcting the date or both of them must be disregarded as contradictory: The letter, exhibit W2, had not been considered by the learned trial judge in his assessment of the falsity of the Bill of Lading. I think this is a serious omission. In addition the learned trial Judge did not give reasons as to why he thought the Bank of Tokyo received all the documents in exhibit G7 on the same date. Assuming however that all documents in exhibit G7 were received on the same date by bank, the obligation of the bank (the appellant) was to consider all documents listed in the letter of credit. The Hatch Survey Report was not one of them.”
- d*
- e*
- f*
- g* In parenthesis, it may be observed that the Court of Appeal mistakenly stated the loading date on the Bill of Lading, exhibit C, as 12th November, 1978. In fact it is 15th November, 1978. The Court also mixed the Hatch Report, exhibit G6, which stated the date of arrival of the ship at the port and its fitness for loading with the Loading Report, exhibit G8, which stated loading had started on 21st November, 1978. The Court did not advert its mind to the Lading Report.
- h*
- i* Grounds of appeals No. 3 and No. 4 complain against the decision of the Court of Appeal on the issue of the date of loading. The grounds read:
- j* “3. Having held that the date of the Loading Report and Hatch Report differed from that in Bill of Lading. The learned

Judges of the Court of Appeal erred in law in exonerating the respondent bank from liability on the basis of the clarification contained in exhibit W2.

#### *PARTICULARS OF ERROR*

(a) The duty of the respondent bank is to check documents used to negotiate the credit at the time of negotiation and the clarification contained in exhibit W2 coming months after payment by the respondent bank cannot exonerate them from liability for negligence at the time of negotiation.

4. The learned trial Judges of the Court of Appeal erred in law in holding that no reason was given by the trial judge for holding that the Bank of Tokyo received all the documents listed in exhibit G7 on the same date, and that even if it did, it was not obliged to consider the Hatch Report as this was not one of the documents listed in the Letter of Credit.

#### *PARTICULARS OF ERROR*

(a) There was clear evidence before the trial Court that all the documents on exhibit G7 were received by the Bank of Tokyo on the same date.

(b) The obligation of the respondent bank under the Uniform Custom and Practice is to examine all documents with care, and also to see that the documents tendered are not inconsistent with one another.”

Learned Counsel for the appellant argued that even though some of the documents sent to the Bank of Tokyo were not called for under the credit in as much as they were presented to the bank and were inconsistent with the documents called for the Bank of Tokyo and the respondent were negligent in not discovering the inconsistency as is required of both banks by article 7 of the Uniform Customs and Practice for Documentary Credits, 1974 hereinafter referred to as the rules. He further contended that in its Defence the respondent did not join issue with the appellant as to the non

- a* receipt by the Bank of Tokyo of any document said by the appellant to be among the documents with which the credit was negotiated; that there is sufficient evidence to support
- b* the finding of the trial Court that the Hatch and Loading reports were sent to the Bank of Tokyo when credit was being negotiated and, consequently, the bank had notice of their inconsistency as to the date of loading. If the two banks
- c* failed to notice the inconsistency both were in breach of their obligation under the said article 7.

Finally, learned Counsel contended that it was not the function of the Court of Appeal nor of the trial Court to resolve which of the two dates of loading was correct. The function of both courts is to find whether the documents were consistent or not. On their face, the documents presented by the seller to the Bank of Tokyo are undoubtedly inconsistent as to the date of loading according to learned Counsel.

The response of learned Counsel for the respondent to the foregoing submission was short, cursory and in accordance with view of the Court of Appeal. He simply argued that the Hatch Report was not among the documents called for by the credit and that there is no evidence that it was presented to the Bank of Tokyo.

*g* It seems to me the Court of Appeal was right that the Hatch Report was not among the documents called by the credit but was wrong in its finding that there is no evidence the Hatch Report was presented to the Bank of Tokyo together with the documents called for PW2 gave evidence of the documents which were presented to the bank thus:

“I see exhibits C, G and H. exhibits G and H are the documents used to negotiate the Letter of credit for the Bank of Tokyo.”

*i* It may be noted that exhibit G is a bundle of documents admitted in evidence by consent and marked exhibits G-G10 which included the Hatch Report and the Loading Report, exhibits G6 and G8 respectively. Furthermore, PW2 had

*j* personal knowledge of the documents for which payment

was made by the Bank of Tokyo when the documents were presented to him by the respondent at the time he signed the document of acceptance, exhibit O. a

That being the case, the finding of the trial Court that the Hatch and Loading Reports were among the documents presented to the Bank of Tokyo cannot be faulted. b

The documents called by the letter of credit, exhibit C, may be stated. They are: Commercial Invoice, Bills of Lading, Certificate of Weight, Packing List and Certificate of Origin and are exhibits D, G5, G3, G and G1 respectively. The credit did not call for Hatch and Loading Reports. c

The next question for consideration is: Is a bank entitled to overlook an uncalled document which on its face is inconsistent with documents that are called for if all the documents have been presented to the bank? The Court of Appeal appears to think the answer to the question to be in the affirmative. The case of *Soproma SPA v. Marie and Animal By-Products Corporation* (1966) 1 Lloyd's Rep. 367 seems to furnish the correct answer to the question. In that case an uncalled document mistakenly put with the documents called was taken into account in the examination of document for consistency with the credit. The facts of the case relevant to this appeal may be summarised: An Italian buyer agreed to purchase from an American seller fish fullmeal of "Protein, 70% min." and a letter of credit was established for the purpose. The seller presented the documents specified in the credit showing "fishmeal protein 70%" but by inadvertence there had been enclosed an invoice from the seller's supplier showing that the fishmeal had a minimum protein content of 67%. The buyer advised his issuing bank he would not accept the documents as they showed that the product was 67% protein. The rejection by the buyer was upheld. d

Although the Soproma case was a decision of the High Court, I think it correctly states the law and is in accordance with article 7 of the rules which reads: e

"Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms f

Although the Soproma case was a decision of the High Court, I think it correctly states the law and is in accordance with article 7 of the rules which reads: i

"Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms j

*a* and conditions of the credit. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit.”

*b* The rule says “all documents.” It does not qualify nor restrict the documents. Had the Bank of Tokyo examined all the documents with reasonable care the bank would have  
*c* noticed that the documents appeared on their face to be inconsistent with one another. The Bill of Lading and other documents showing 15th November, 1978 as the loading date on the one hand while on the other hand the Hatch and  
*d* Loading Reports showed the date to be 21st November, 1978. Consequently, the bank would have discovered if it had examined the documents with reasonable care that the documents did not appear on their face to be in accordance with the terms and condition of the letter of credit, exhibit C,  
*e* which required the date of loading to be 15th November, 1978.

*f* Again, as regards the condition of the letter of credit against transshipment, it is incontrovertible that the Bill of Lading, exhibit G5, on its face permitted transshipment. Had both banks, the Bank of Tokyo and the respondent, exercised reasonable care both would have noticed the inconsistency.  
*g*

It is trite law that an advising bank, the Bank of Tokyo in this appeal, must act strictly in accordance with the mandate as contained in the letter of credit of the issuing bank, the  
*h* respondent in this appeal, and should not effect payment against documents which do not fully comply with the terms of the letter of credit: *Bank Metti Iran v. Barclays Bank* (1951) 2 Lloyd’s Report 367. Since the documents appeared  
*i* on their face inconsistent, the Tokyo Bank should have rejected them and refused payment: *Panchaud Freres SA v. Et General Grain Co.* (1970)1 Lloyd’s Rep. 53 at 57. For the same reasons, the respondent should also have rejected the  
*j* same and refuse to reimburse the Bank of Tokyo.

It follows from the foregoing that the Bank of Tokyo has broken its obligation to the respondent and the respondent has also broken its obligation to the appellant by making payments against documents which did not comply with the terms of their respective contract. The trial Court was therefore right, in my view, in its finding that both the Bank of Tokyo and the respondent were negligent with regard to the date of shipment and transshipment.

To summarise, I find the respondent was in breach of its obligations to the appellant, to wit:

1. to insert the provision of the Decree on the letter of credit,
2. for accepting inconsistent documents.

Now, on account of the respondent's default, the appellant had the right to reject the documents presented to it by the respondent on the two grounds of breaches of obligations or on either ground. On their rejection; the appellant would not have lost a kobo from the transaction other than the profit it would have earned if the transaction had not been aborted. The loss now suffered by the appellant would have been in the courts of the banks. However, the appellant did not reject the documents. He accepted them as per exhibit O. The trial Court said exhibit O was not effective acceptance. The Court of Appeal disagreed with the trial Court in these words:

“Furthermore, in exhibit O, the respondent had signified his acceptance of the documents pertaining to the Bill of Lading without any objection. The learned trial Judge had explained exhibit O as a three line letter where the learned trial Judge said:

‘Finally, the defendants rely on exhibit O as estopping the plaintiff from challenging the conduct of the bank in this transaction. exhibit O is a three (sic) letter which says ‘we accept the documents pertaining to the above mentioned bill XXX’ and signed by the plaintiff's representative. Exhibit O is of doubtful value. There must be strong evidence to infer waiver or estoppel. The plaintiff could have written ‘we have seen them’ instead of the use of the words ‘we accept’.”

*a* It is difficult to understand the reasoning of the learned trial Judge,; The plaintiff/respondent was a company with immense experience of international trade and in the use of letter of credit in such trade (see evidence of PW2 at page 25 of record). The respondent chose to write “we accept” and concluded the passage referred to above by the learned Judge as follows:

*c* “and authorise you to debit the amount to our account with you including your charges.”

Reading the letter, exhibit O as a whole, I cannot accept the conclusion by the learned trial Judge that the respondent could have written “we have seen them” only as this would not have justified the concluding part of the letter which authorised the debiting of the respondents’ account. Whether this was *estoppel in pais* or not, it does show that the respondent was given opportunity to object to the document, but there was approval instead of objection. Whether (*sic*) the argument as to when the respondents’ account was debited this letter, exhibit O, had normalised the position.”

*f* Ground of appeal No. 5 challenges the decision of the Court of Appeal in the afore-quoted passage of the judgment of the Court of Appeal. The Ground reads:

*g* “The learned Justices of the Court of Appeal erred in law in holding that in exhibit O the appellants ‘had signified its acceptance of the documents pertaining to the Bill of Lading without objection’ when on the finding of the trial Court there was no strong evidence from which the Court could infer waiver or estoppel having regard to evidence on the date and circumstances surrounding the execution of exhibit O, the date on which the appellants’ account was in fact debited by the respondent bank and including the Bill of Lading are in spite of the wording of exhibit O, still in the possession of the respondent bank and have not been accepted or handed over to the appellants.”

In his brief and oral argument, learned Counsel for the appellant contended that the evidence of PW2 showed exhibit O was prepared undated by the respondent when the letter of credit was opened, that exhibit O dated 15th December,

1978 could not be the authority for debiting the account of the appellant since the account had in fact been debited on 15th September, 1978; that the documents used to negotiate the credit were never shown to the appellant and that having regard to the evidence the Court of Appeal erred in law in reversing the decision of the trial court that exhibit O could not operate as a waiver or estoppel.

Mr Akinrele, SAN, for the respondent submitted that there is no evidence exhibit O was prepared by the respondent and handed over to the appellant at the issuance of the letter of credit. Relying on *Panchaud Freres SA v. Et General Grain Co.* (*supra*) he urged us to hold exhibit O as constituting estoppel *in pais* against the appellant.

I accept the contention of learned Counsel for the respondent that there is no evidence exhibit O was executed at the time of the opening of the credit. PW2 admitted having signed the document but did not say he had signed it undated as contended by learned counsel for the appellant. The document was dated 15th December, 1978. In the absence of admissible evidence to the contrary, the document speaks for itself and the PW2 is presumed to have signed it on the said date.

Furthermore, the respondent's witness, who was the manager of the respondent at the material time, testified that the appellant accepted the documents and signed exhibit O. He said the respondent kept the documents because the appellant had not paid the balance to its debit. I am satisfied the from decision of the Court of Appeal that the appellant accepted the documents against which the credit was negotiated is supported by the evidence.

The effect of acceptance of documents under the commercial law of documentary credits may now be considered. Acceptance may amount to waiver or estoppel or both depending on the circumstances of each case. Waiver, in its legal sense, takes place when a person, with knowledge of a breach, does an unequivocal act which shows that he has



*a* elected to affirm the contract as still existing, instead of disaffirming it. On the other hand, the basis of estoppel by conduct is that a person has so conducted himself that it would  
*b* be unfair or unjust to allow him to depart from a particular state of affairs which another person, who will be affected by the departure, has taken to be settled or correct. The law was succinctly stated by Lord Denning, M.R., in *Panchaud Freres SA v. Et General Grain Co. (supra)* at page 57. I consider the dictum very crucial to the issue that I quote it extensively. He said:

*d* “This doctrine of estoppel by conduct underlies the dictum of Mr Justice Devlin (as he then was) in *Kwei Tek Chao and others (Trading as Zung Fu Co.) v. British Traders and Shippers Ltd N.V. Handelsmaatschappij J. Smiths Import Export, Third Part* (1954) 2 Q.B. 459, at pages 480 and 481; (1954)1 Lloyd’s Rep. 16 at pages 48 and 49. It is so very apposite that I will read it in full:  
*e*

*f* If there is a late shipment, as there was in this case, the date of the shipment being part of the description of the goods, the seller has not put on board goods which conform to the contract description, and therefore he has broken that obligation. He has also made it impossible to send forward a bill of lading, which at once conforms to the contract and states accurately the date of shipment. Thus the same act can cause two breaches of two independent obligations.

*g* However that may be, they are distinct obligations, and the right to reject the documents arises when the documents are tendered, and the right to reject the goods arises when they are landed and when after examination they are found not to be in conformity with the contract. There are many cases, of course, where the documents are accepted but the goods are, subsequently rejected. It may be that if the actual date of shipment is not in conformity with the contract, and the error appears from the documents, the buyer, by accepting the documents, not only loses his right to reject the documents, but also his right to reject the goods, but that would be because he had *waived* in advance reliance on the date of shipment.” (Emphasis added.)

*j* Mr Justice Devlin used the word “waived.” But he used it in its popular sense. Not in its legal sense. When “waiver” is

used in its legal sense, it only takes place when a man, with knowledge of a breach, does an unequivocal act which shows that he has elected to affirm the contract as still existing instead of disaffirming it as, for instance, in waiver of forfeiture: see *Matthews v. Smallwood* (1910) 1 Ch. 777. In the present case Mr Justice Roskill thought that Mr Justice Devlin had used “waived” in that sense: and he held that these buyers had not waived the right to reject for late shipment be, cause they had not got actual knowledge of that breach. At most they had constructive notice of it: and our commercial law sets its face resolutely against any doctrine of constructive notice: see *Manchester Trust v. Furness* (1895) 2 Q.B. 539 at page 545, by Lord Justice Lindley, and *Greer v. Downs Supply Company* (1927) 2 K.B. 28 at page 36, by Lord Justice Scrutton:

“The present case is not a case of “waiver” strictly so called. It is a case of estoppel by conduct. The basis of it is that a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken to be settled or correct, see the cases I referred to in *Central Newbury Car Auctions Ltd v. Unity Finance Ltd and another Mercury Motors, Third Parties* (1957) 1 Q.B. 371 at page 380. Applied to the rejection of goods, the principle may be stated thus: If a man, who is entitled to reject goods on a certain ground, so conducts himself as to lead the other to believe that he is not relying on that ground, then he cannot afterwards set it up as a ground of rejection, when it would be unfair or unjust to allow him so to do. Mr Lloyd gave good illustration. Suppose, he said, in this case the Bill of Lading had contained the true date of shipment. August 12 (whereas the last date under the contract was July 31): so that, when the buyer took up the documents, he could have seen, if he had read it, that the date of shipment was August 12. If he did not trouble to read it, but instead took up the documents and paid for them, he could not afterwards reject the goods on the ground of late shipment. Even though he had not read the bill of lading and so was ignorant of the late shipment, he could not afterwards reject the goods on that ground: for the simple reason that he had the full opportunity of finding out from the contract documents what the real date of shipment was: and yet he did not trouble to do so. It would not be fair or just to allow him afterwards to reject the goods. Mr Evans was inclined to

- a* accept this illustration as correct. Another instance can be given from the ordinary sale of goods. If a buyer does not choose to examine the goods when they arrive, and puts it off beyond a reasonable time, he loses his right to reject: see section 35 of the
- b* Sale of Goods Act, 1893. Although he did not know they were not in conformity with the contract, nevertheless, by letting reasonable time to go by, he loses his right to reject.”

- c* In the case on appeal, the Managing Director of the appellant accepted on behalf of the appellant the documents as per exhibit O, which reads:

- d* “We accept the documents to the above mentioned bill, and authorise you to debit the amount to our account with you including your charges” (the particulars of the letter of credit were written on top of the document).”

- e* The Director did not stop there. He went to Singapore where he took delivery of the rice and arranged for its transshipment to Nigeria. In my view the conduct of the appellant constituted both estoppel and waiver either which was a bar to any claim the appellant might have against the respondent. Accordingly, the decision of the Court of Appeal on the issue
- f* of estoppel is right and impeccable.

- g* The appeal should and is hereby dismissed. The decision of the Court of Appeal is affirmed. ₦300 costs to the respondent.

- h* **ESO JSC:** I am in agreement with judgment which has been delivered by my learned brother Bello JSC and will also dismiss the appeal. Having regard to the reasons which I have given in my judgment delivered this morning in *AMO Akinsanya v. UBA S.C. 95/1985* with regard to the law on documentary credits, I can only dismiss the appeal on the issue of waiver which has been well treated in the judgment
- i* of my learned brother Bello JSC to which I intend to add nothing. As regards jurisdiction, I adopt the views I expressed in *AMO Akinsanya v. UBA* aforesaid.

- j* I abide by all the orders contained in the judgment of my learned Brother Bello JSC.

**UWAIS JSC:** I have read in advance the judgment read by my learned brother Bello JSC I entirely agree with the reasons and conclusion therein. a

There is no doubt that the Court of Appeal was in error when it decided that the High Court of Lagos State had no jurisdiction to determine the dispute in this case, because admiralty is involved. The error came about, in my opinion, because the Court failed to advert to the nature of the transaction pertaining to commercial letter of credit. There are usually four parties to the transaction. These are the buyer, the seller, the issuing bank and the confirming bank. The transaction between these parties usually involves four contracts, that is— b

1. the sale of goods to the buyer by the seller;
2. the contract between the buyer and the issuing bank for the opening of the letter of credit; c
3. the contract between the issuing bank and the confirming bank for making payment to the seller; and d
4. the contract between the confirming bank and seller concerning the payment to the seller on presentation of the document mentioned in the letter of credit. e

See: *United City (Investments) Ltd v. Royal Bank of Canada* [1983] A.C. 168 at pages 182-183. The dispute in this case concerns (2) above. Exhibit C, which is the Uniform Customs and Practice for Documentary Credits, 1974, provides in its article 8(a) that “in documentary credit operations all parties deal in documents and not goods.” Neither the respondent nor the confirming bank were involved in the shipping of the rice, purchased by the buyer, from Bangkok in Thailand to Lagos. Therefore the dispute between the parties in this appeal pertains to banking and not admiralty. Consequently, the jurisdiction to determine the dispute rests with the High Court of Lagos State and not the Federal High Court as was held by the Court of Appeal see *Jammal Steel Structure Co. Ltd v. African Continental Bank Ltd* (1973) 1 All N.L.R. (Part 2) 208. f

g

h

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j

- a* It is clear from the facts of this case and the finding of the learned trial Judge that the confirming bank – the Bank of Tokyo – was negligent in failing to examine with care the documents presented to it by the seller. If it had done so it would have discovered the inconsistency between the letter of credit and the Bill of Lading, exhibit G. Similarly if the respondent had exercised care, as it is obliged to do, in examining the documents it too would have discovered the inconsistency and thereby refused re-imbursing the confirming bank. The Court of Appeal was therefore in error in reversing the finding by the learned trial Judge. The negligence notwithstanding, the appellant is not entitled to judgment because, it had waived the negligence when its Managing Director, executed exhibit O in favour of the respondent. The exhibit states that the appellant–
- e* “accept the documents to the above mentioned bill, and authorise you to debit the amount to our account with you including your charges.”

- For these and the reasons given in the lead judgment I agree that the appeal should be dismissed and it is hereby dismissed with ₦300 costs to the respondent.
- f*

- COKER JSC:** I entirely agree with the lead judgment just delivered by Bello JSC, the draft of which I had the privilege of reading before now.
- g*

- I agree with his reasons and conclusions and have nothing which can be usefully added. I will dismiss the appeal. I also agree with the orders made by him.

- h* **KARIBI WHYTE JSC:** I have had the privilege of reading before now the judgment just delivered by my learned brother Bello JSC I agree with the reasoning and conclusion that the appeal ought to be dismissed. I also will dismiss the appeal. Appellant shall pay ₦300 as costs to the respondents.
- i*

- KAWU JSC:** I have had a preview of the lead judgment of my learned brother, Bello JSC, which has just been delivered. I agree entirely with his reasons and conclusions, and
- j*

for the reasons expressed in the said judgment which I respectfully adopt, I too would dismiss the appeal. *a*

There are three main issues in this appeal which call for determination. The first is whether, as alleged by the appellant, the respondent was negligent in its failure to endorse the mandatory provisions of the Merchant (Amendment) Decree No. 9 of 1978 on the Letter of Credit (exhibit C). The second issue is whether both the respondent and its agent, the Bank of Tokyo, were negligent in not discovering that the documents presented by the World Grain Company limited to negotiate the Credit, did not conform with the instructions in the Letter of Credit. The third issue is whether the High Court of Lagos State, which was the trial Court, had jurisdiction to hear the case. *b*  
*c*  
*d*

With regard to the first issue, it was the appellant's case that at the time of its application to the respondent for the Letter of Credit, one of the terms of the agreement was that the provisions of Decree No. 9 should be endorsed on the Letter of Credit. This was pleaded in paragraphs 5 and 6 of the appellant's Statement of Claim. These averments, were, however denied by the respondent in paragraph 4 and 5 of its Statement of Defence. *e*  
*f*

At the trial, the Managing Director of the appellant Alhaji Lamidi Popoola gave evidence for the appellant. He testified that at the time of the opening of the Letter of Credit, he gave three specific instructions to the respondent. The first was that there should be no transshipment. The second was that the date of shipment originally fixed for 15th October, 1978, should be extended to 15th November, 1978, and the third instruction was that the age of the vessel which was to carry the rice should not be more than 15 years. He continued as follows: *g*  
*h*  
*i*

“I gave the last condition because I understand that the Nigeria Government will not allow a vessel 15 years old to enter Nigerian Ports Decree 9. I read this in the papers.” *j*

*a* He then identified exhibit C and concluded that while his instruction that there should be no transshipment was endorsed on exhibit C, that relating to the age of the vessel was not so endorsed. He, however, admitted under cross-examination  
*b* that his application for the Letter of Credit (exhibit N) addressed to the respondent, did not stipulate that the age of the vessel should be endorsed on the Letter of Credit.

*c* The only witness who gave evidence for the defence categorically denied any agreement between the parties relating to the age of the carrying vessel.

The learned trial Judge considered the issue and resolved it  
*d* in favour of the appellant. It was the view of the Judge that since there was evidence that the respondent was aware of the existence of Decree No. 9, it was its duty to endorse its provisions on exhibit C so as to comply with the law of the land. In this regard, he said:

*e* “The only witness for the defence, first DW admitted under cross-examination that he knew that law in question was in existence at the time the letter of credit was opened, but added that it was not being followed. He agreed, however, that a vessel like ‘Lucky  
*f* Dragon’ would not be allowed to berth in Nigeria.

It would appear that the argument of the defendant in this connection is that it is for the plaintiff so to stipulate, if he wants the said law to operate. This argument overlooks the role and the position of the defendant bank.

*g* It should be inferred that in any contract the parties should operate within the law.

There is evidence of PW3 a banker of many years of experience, whose evidence I accept. I accept also the evidence of the second  
*h* PW. Now, having regard to the Financial involvement of the bank, the admission by the only witness for the defence that he knew of the existence of the said law and the consequences of not complying with it, and also having regard to the mandatory provisions of that law, it becomes clear to my mind that it was the duty of the  
*i* bank to endorse the provisions of this law on the letter of credit.”

It was on this ground that the trial Court held that it was the failure of the respondent to comply with the appellant’s instructions that resulted in the use of an unseaworthy vessel  
*j* like the “Lucky Dragon.”

It is trite law that in a transaction of this nature a banker is obliged to comply strictly with the instructions of its customer: *Equitable Trusts Co. of New York v. Dawson Partners Ltd* (1926) 27 L.L. Rep. 49. In this case the learned trial judge found as a fact, on the evidence before him, that the respondent failed to comply with the appellant's instructions in that it failed to endorse the provisions of Decree No. 9 on the letter of Credit. That failure, in my view, amounted to a breach of the respondent's contractual obligation to the appellant.

The next issue that calls for determination is whether or not the respondent's agent, the Bank of Tokyo, was negligent in that before payment was made to the World Grain Company Limited, the beneficiary of the credit, it accepted the documents which, in their face, were inconsistent with one another.

It was the case of the appellant that the World Grain Company Limited negotiated the credit on the presentation to the correspondent bank, the Bank of Tokyo, the documents listed in exhibits J-J10. It was alleged that while the Bill of Lading (exhibit 5), the Packing List (exhibit G), the Certificate of origin (exhibit G1) and the Certificate of Weight (exhibit G3) showed that the vessel the "Lucky Dragon" loaded the rice on 15th November, 1978, the Hatch Survey Report (exhibit G10) stated that it was in fact on 21st November, 1978, that the vessel arrived at the Port of Bangkok. It was the appellant's contention that since the documents presented were on their face, inconsistent with one another, they should not have been accepted by the Bank of Tokyo, and later by the respondent. Reliance was placed on the provisions of article 7 of the Uniform Customs and Practice for Documentary Credit (1974 Revision) which applied to the Letter of Credit. That article reads as follows:

"Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. Documents which appear on their face to be inconsistent with one another will be considered



- a* as not appearing on their face to be in accordance with the terms and conditions of the credit.”

- The respondent’s answer to this was that the apparent conflict in the dates in the Bill of Lading and the Hatch Survey Report was due to a typographical error which was subsequently corrected by exhibit W. I find no merit in the respondent’s submission on this point. It is plain that exhibit
- c* W came into existence months after the credit had been negotiated. I agree with the submission of the appellant’s Counsel that the obligation imposed on banks to examine documents for compliance is at the time when the credit is being negotiated, in the case of a paying bank, or when the documents are received from the paying bank, in case of an issuing bank. Now in exhibit C, 15th November, 1978 was stipulated date of loading and this was the only date which the correspondent bank, the Bank of Tokyo, should have accepted. A correspondent bank has a right to reject documents and refuse to pay the seller if the documents presented do not comply with the terms and conditions of the Letter of Credit, and this is because it is under a legal obligation to follow strictly the instructions of its Principal, the Issuing bank. The relationship, duties and obligations of an Issuing bank and a Paying bank are set out by the learned authors of the 3ed of Halsbury’s *Laws of England*, at paragraph 138 as follows:
- g*

- “The contract between the issuing or opening banker and the paying or negotiating (intermediary) banker partakes of a dual nature. The relationship is partly that of principal and principal, partly of principal and agent, mandator and mandatory. It depends too, in some measure, on the nature of the credit, whether it be revocable or irrevocable. In order that he may claim to be reimbursed for any payment he makes under the credit, the banker paying must obey strictly the instructions he receives, for by acting on them he accepts them and thus enters into contractual relations with the opening or issuing banker.”
- h*
- i*

- In this case I am satisfied that the Bank of Tokyo was in breach of its contractual obligation to the respondent, as a result of which, the respondent was in similar breach of its
- j*

obligation to the appellant, in making payment on the presentation of documents which, if they had examined with reasonable care, they would have discovered were inconsistent with one another. a  
b

Now the respondent, both in the pleadings and at the trial contended that the appellant was estopped from raising any objection to the Letters of Credit, having accepted same as correct, and having in fact, authorised payment, before the commencement of his action. In this regard reliance was placed on exhibit O, a letter dated 15th December, 1978. c

In his judgment, the learned trial Judge considered this aspect of the respondent's defence and rejected it outright, as follows: d

“Finally, the defendants rely on exhibit O as estopping the plaintiff from challenging the conduct of the bank in this transaction. exhibit O is a three (*sic*) letter, which says, ‘we accept the documents pertaining to the above mentioned bill XXX’ and signed by the plaintiff's representative. exhibit O is of doubtful value. There must be strong evidence to infer waiver or estoppel. The plaintiff could have written ‘we have seen them’ instead of the use of the words ‘we accept’.” e  
f

With respect, I am unable to accept the learned trial Judge's conjecture that exhibit O was capable of bearing any other meaning than that which it clearly stated – namely that the appellant accepted the documents pertaining to the Letters of Credit and authorised the respondent to debit its account. g

The letter reads:-

“Sir,

We accept the documents pertaining to the above mentioned bill, and authorise you to debit our account with you including your charges.” h  
i

Here I agree entirely with the Court of Appeal that exhibit O effectively constituted an estoppel which precluded the appellant from making any claim against the respondent or its agent, the Bank of Tokyo. j

*a* With regard to the question of jurisdiction of the High Court, having carefully studied the writ of summons in this case, the parties' pleadings and the totality of the evidence adduced at the trial, I am left in no doubt that the dispute in this case is between a buyer and his issuing bank in a business transaction financed by documentary credits. In such transactions, all parties deal in documents and not in goods.

*b*

*c* The real dispute has nothing to do with the hire of a ship. So in my view, it is the High Court of Lagos that has jurisdiction to entertain the action and not the Federal High Court: see *Jammal Steel Structure Co Ltd v. African Continental Bank Ltd* (1973)1 All N.L.R. (Part 2) 208.

*d*

It is for the above reasons and for the fuller reasons given in the lead judgment of my Lord, Bello JSC, that I have come to the conclusion that this appeal should be dismissed and it is hereby dismissed with ₦300 costs to the respondent.

*e*

**OPUTA JSC:-** The plaintiff's claim in the trial Court was:

- f* “1. For ₦1,231,807.97k being special and general damages for breach of contract by the defendant by its failure to endorse the provisions of section 5 of the Merchant Shipping (Amendment) Decree No. 9 of 1978 on the Letter of Credit No. LS.24278 of 15th September, 1978 contrary to the intention of both the plaintiff and the defendant and also for
- g* breach of contract by the defendant's agent (The Bank of Tokyo, Muang Thai Life Building 335 New Road Thailand) in respect of payments wrongly made out on Letter of Credit No. LS.24278 of 15/9/78 issued by the defendants on
- h* the instructions of the plaintiff and contrary to the terms and conditions of the said Letter of Credit.
2. Alternatively the plaintiff claims the sum of ₦1,231,807.97k being special and general damages for negligence on the part of the defendants and its said agents, the
- i* Bank of Tokyo in:-
- (a) The defendants issuing Letter of Credit No. LS.24278 of 15/9/78 without endorsing on it the Mandatory provisions of section 5 of the Merchant Shipping
- j* (Amendment) Decree No. 9 of 1978.

- (b) The defendant's agents accepting and making payments on a forged Bill of Lading issued by Shun Shing." a

Pleadings were ordered, filed and duly exchanged. The learned trial Judge Savage J heard evidence, made significant findings of fact and in the end entered judgment in favour of the plaintiffs in the sum of ₦1,231,807.97K. *Ex facie* the plaintiff's claims above sounded in contract and alternatively on the tort of negligence and the learned trial Judge, rightly in my view treated the case as a case of contract founded on Documentary Credit. b  
c

The defendant appealed to the Court of Appeal, Lagos Division. A full court of 5 Justices namely, Nasir P, Ademola, Nnaemeka-Agu, Mohammed and Kutigi, JJCA. sat before the Court of Appeal it was argued by learned Counsel for the appellant/bank that the State High Court had no jurisdiction and that the matter related to the Admiralty jurisdiction of the Federal High Court. Professor *Kasumu* S.A.N. contended that the defendant (appellant in the Court below) misunderstood the plaintiff's claim which was based on an agreement between the bank (the appellant) and its customer (the respondent). The initial claim was based on contract while the alternative claim was based on the tort of negligence. The Court of Appeal by a unanimous decision upheld the submission of Chief *Akinrele*, S.A.N. that case fell within the Admiralty jurisdiction of the Federal High Court. Having said so the court below went on to consider the appeal on its merits. Nasir, P at page 156 stated:- d  
e  
f  
g

"But assuming that I am wrong in the above conclusions, I shall now deal. With the issue of damages." This is the proper and commendable thing to do in cases of this nature. In the final result; the appeal was allowed and the judgment of the Lagos High Court was set aside and the judgment was entered for the defendant." h  
i

The plaintiff has now appealed against the judgment of the Court of Appeal to this Court. I have had the privilege of a preview of the lead judgment of my learned brother Bello JSC and I am in complete and entire agreement with his j

- a* reasoning and conclusions. Three issues or questions call, each for a decision in this appeal:
- b* 1. Was the Court of Appeal right in holding that the State High Court had no jurisdiction in this matter and that it was a matter touching the Admiralty jurisdiction of the Federal High Court?
- c* 2. Did the defendant/Issuing bank in issuing the Letter of Credit No. LS.24278 fail to include any material term or condition of the Credit as advised by the plaintiff? Alternatively, was the Bank of Tokyo the Confirming bank and agent of the defendant/Issuing bank guilty of
- d* negligence in making payment upon documents which on their face were contradictory, inconsistent and therefore not conforming documents?
- e* 3. Is there anything in the behaviour of the appellant (the plaintiff/company) throughout the entire transaction that amounted to Estoppel or Waiver?

The outcome of this appeal will depend on the answers to the above questions.

- f* On the issue of jurisdiction, the lead judgment of Nasir, P at page 145 of the record indicated the way the mind of the Court was working:

- g* “It is pertinent in this case to bear in mind that the main cause giving rise to the claim was the breakdown of the ship the ‘Lucky Dragon,’ which this time was not so lucky as it broke down seven days after leaving the port of shipment.”

- h* With the greatest respect to the learned President of the Court of Appeal, the cause of action as clearly expressed in the plaintiff’s claim is the failure of the defendant bank to endorse the provisions of section 5 of the Merchant Shipping (Amendment) Decree No. 9 of 1978 on the Letter of Credit
- i* No. LS.24278 of 15/9/78 and failure of the defendant/bank’s agent – the Bank of Tokyo Thailand – to scrutinise the documents presented to it which on their face were contradictory and therefore did not conform with the terms and conditions
- j* of the Credit.

In the system of documentary credits as the name implies the parties. deal in documents not in goods. There usually exist four autonomous though interconnected contracts. In this case those four contracts were as follows:-

1. The first contract is the underlying contract of Sale between the Nigerian buyer Nasaralai Enterprises Limited and a foreign seller the World Grain Company Limited of Thailand. Under this contract the Thai Company – the Vendor was to sell to the Nigerian Company – Vendee 100,000 bags of Thailand Long Grain Parboiled rice. The Nigerian Company cannot pay with Nigerian currency hence the need for the second contract.
2. The second contract was between the Nigerian buyer – the plaintiff/company and his bank – the defendant. Under this contract, the Nigerian buyer instructs his bank to open a Letter of Credit in favour of the World Grain Company Limited of Thailand. Under this second contract the Nigerian Bank – the defendant was under a contractual obligation to issue the Credit in strict conformity and compliance with all the instructions of the plaintiff and the prevailing law in that regard. Here it is part of the plaintiff's case that the defendant was in breach of the obligations imposed on it by the express mandate and stipulations of the plaintiff and the existing law when the defendant failed to endorse on the Credit the requirements of the Merchant Shipping (Amendment) Decree No. 9 of 1978, section 5 thereof.
3. The third contract was between the defendant bank known as the Issuing bank and a foreign bank where the seller or Vendor resides in this case the Bank of Tokyo Thailand. This second bank is the confirming bank. Under this third contract the Nigerian Bank, the defendant in this case, undertakes to reimburse the Bank of Tokyo Thailand all payments it made to the

- a* World Grain Company on presentation by the World Grain Company documents which *ex facie* conform with the terms and conditions of the Credit. The plaintiff's case here is that the Bank of Tokyo Thailand was grossly negligent in failing to detect obvious inconsistencies and contradictions apparent on the face of the documents presented to it. It is also the plaintiff's case that the defendant was negligent in not detecting the irregularities on these documents and in not stopping payment.
- b*
- c*
- d* 4. The fourth contract was between the Bank of Tokyo Thailand and the World Grain Company Limited of Thailand. Under this contract the Bank of Tokyo Thailand undertook to pay World Grain Company Limited of Thailand the amount on the credit against the presentation of stipulated documents.
- e*

*f* In this case also from the analysis above, it is quite clear that the plaintiff/appellant's claim sounded and still sounds in contract and tort. Whether the "Lucky Dragon" was lucky or unlucky, whether it floated or sank – these were irrelevant to the breach of contract and the tort of negligence which constituted the crux of the plaintiff/appellant's Claim. I am satisfied that the Court below, with the greatest respect, was wrong in holding that the Lagos State High Court had no jurisdiction to adjudicate upon this case: It had and still has that jurisdiction.

*g*

*h* The second issue is – Did the plaintiff now appellant establish in the trial Court a case for breach of contract and the tort of negligence? The learned trial Judge answered that question in the affirmative and gave judgment for the plaintiff. Was the Court of Appeal right in reversing the findings of fact of the trial court where, as in this case, there was sufficient evidence to support and sustain such finding? This has been discussed in details in the lead judgment. I agree with my learned brother Bello JSC that the defendant was under legal and contractual obligation to endorse on the

*i*

*j*

Credit exhibit C the provisions of section 5 of the Merchant Shipping (Amendment) Decree No. 9 of 1978 and that the Bank of Tokyo was grossly negligent in paying the amount on exhibit C on presentation of the documents listed in exhibits J-J10. For instance one of the documents called for was the Bill of Lading. This indicated that the consignment of rice was loaded on the “Lucky Dragon” on 15th November, 1978 where as the Hatch Report exhibit G showed that the “Lucky Dragon” itself did not arrive at the port of loading until 21st November, 1978. This should have put any prudent bank on an inquiry. Any average reasonable man will definitely smell rat and suspect something fishy on seeing the inconsistencies in the dates on the Bill of Lading and the Hatch Report. The trial Court was right in finding that the Bank of Tokyo was negligent and that defendant/bank was in breach of its contract with the plaintiff.

If this were the end of the story, I would find no difficulty in reversing the judgment of the Court of Appeal and in restoring the judgment of the trial Court for the plaintiff. But that was not the end of the story. The documents with which the Credit was negotiated and on which the Bank of Tokyo paid were sent to the Managing Director of the plaintiff/company on 15/12/78. It was his duty to accept or to reject those documents as soon as possible. By exhibit O Alhaji Lamidu Popoola accepted those documents for and on behalf of the plaintiff/company. He did not stop there. He further authorised the defendant/bank to debit his company’s account with the amount of ₦778,607.08. This was done. In import/export, trade letters of credit had become the traditional method of financing foreign trade transactions. According to the Law Merchant and the Uniform Customs, if parties keep documents which are sent to them in consequence of some mandate which they themselves have issued and keep them for an unreasonable time, their action in so keeping the documents may amount to a ratification of what has been done as being done with their mandate: *Westminster Bank Ltd v. Banco Nazionale di Credito* (1928) 31 L.L.L Rep. 306 at page 312.



*a* See also: *Bank Melli Iran v. Barclays Bank (Dominion, Colonial and Overseas)* (1951) 2 T.L.R. 1057: (1951) 2 Lloyd's Rep 367.

*b* Now the Managing Director of the plaintiff/company did not merely, delay the documents, he accepted and therefore ratified what was wrongly done by both the defendant/Issuing bank and the Bank of Tokyo, Confirming Bank.

*c* In the surrounding circumstances the plaintiff/company will be estopped by conduct from asserting the contrary even if that contrary happens to be the true situation. The object of

*d* estoppel *in pais* is to prevent an, unjust departure by one person from an assumption adopted by another as the basis of some act or omission which unless the assumption is adhered to would operate to that other's detriment. Now, in

*e* documentary credits acceptance or rejection must be made as soon as documents are presented. Even mere delay may be interpreted as acceptance *a fortiori* express acceptance as in exhibit O cannot be defended at all.

*f* As if exhibit O was not enough, Alhaji Lamidu Popoola after 3rd March, 1979 travelled to Bangkok and from there to Singapore where he found his company's consignment of

*g* rice off loaded from the "Lucky Dragon", and stocked in a warehouse. He then, as it were took delivery of the rice, personally made arrangements for the transshipment of the rice on board the "African Phoenix" which sailed from Singapore on 8th April, 1979 bound for Lagos. If the "African

*h* Phoenix" landed safely in Lagos the present case would not probably be brought before the courts. The trouble seems to be that that consignment was ill fated. The "Lucky Dragon" proved unlucky and the "African Phoenix" did not fare better

*i* either. She too got into trouble in South Africa and the consignment of rice she carried was alleged lost during the transshipment arranged by Alhaji Popoola the Managing Director of the plaintiff/company. I agree with my learned brother

*j* Bello JSC in his lead judgment that Popoola's acceptance

of the nonconforming documents amounted to ratification *a*  
and that his travelling to Singapore where he sort of took de-  
livery of the rice and arranged for its transshipment amounted  
to a waiver, so that, from whatever angle one chooses to *b*  
look at it, the appellant's case is doomed to fail. The Court  
of Appeal was right in dismissing the plaintiff's case but for  
the wrong reasons.

In the final result and for the reasons given above and the *c*  
fuller reasons in the lead judgment of my learned brother  
Bello JSC, which I now adopt as mine, I, too, will dismiss  
this appeal. I adopt all the consequential orders made in the  
lead judgment. *d*

*Appeal dismissed.*

*a*

## Union Bank (Nigeria) Limited v. Adediran

*b*

COURT OF APPEAL, KADUNA DIVISION

WALI, AKPATA, OGUNDARE JJCA

Date of Judgment: 30 OCTOBER 1986

C.A.K.: 23/86

*c*

*Banking – Cheques – Unauthorised signature on a cheque – Payment thereof after notification of withdrawal of mandate – Effect – Payment of cheque without authorised signature – Whether payment made in due course of bank’s business – Section 24 Bill of Exchange Act, Cap 20, Law of the Federation of Nigeria, 1958*

*d*

### Facts

*e*

The appellant is an incorporated company that undertakes the business of banking in Nigeria with Branches all over the Federation. The respondent is the Peoples warden of the Church Bethel, Kaduna and a customer of the appellant and operates a Current Account at the appellant’s Branch at Ahmadu Bello Way, Kaduna.

*f*

*g*

On or about the 14th June, 1982 a cheque for the sum of ₦6,800 drawn on the respondent’s account was presented for cashment at the Ahmadu Bello Way, Branch of the appellant. The cheque leaf was one from the cheque book duly issued to the respondent by the appellant. The cheque was paid to the presenter and the respondent’s account was debited with the amount.

*h*

Before 14th June, 1982, the respondent had replaced one of its three authorised signatories, that is brother F.A. Onatola by Mr J. Kolawole and the appellant was notified of such change on 7th June, 1982.

*i*

Then in a letter written by the respondent to the appellant dated 21st June, 1982, the former notified the latter that its account was wrongly debited with the amount drawn on the said cheque and demanded amendment by crediting its account with the amount debited. The appellant refused to do

*j*

so, since before the notification to stop the payment on the cheque on which it was drawn, it had already been cashed by the drawee. a

After taking evidence, the trial Judge entered judgment for the plaintiff in the sum of ₦6,800. Dissatisfied with this judgment, the appellant appealed on grounds *inter alia* that the trial Judge erred in law in the interpretation of sections 24, 60 and 90(1) of the Bills of Exchange Act, 1958. b

Section 24 of the Bills of Exchange Act, 1958 provides: c

“24. Subject to the provisions of this Act where a signature on a bill is forged or placed therein without the authority of the person whose signature is purported to be, the forged or unauthorised signature is wholly inoperative and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up forgery or want of authority: provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.” d

Section 60 of the Bills of Exchange Act, 1958 provides: e

“60. When a bill payable to order on demand on a banker, and the banker on whom it is drawn pays the Bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the Bill in due course, although such endorsement has been forged or made without authority.” f

The appellant contended that had the trial Judge interpreted the provisions of sections 24 and 60 in conjunction with section 90(1), he would have arrived at the correct conclusion that the cheque paid by the appellant was paid in good faith and in the course of the bank's business. g

The respondent's contention was that since the appellant honoured the cheque bearing the unauthorised signature, that section 24 of Bills of Exchange is applicable. h

i

j

*a* The respondent's Counsel further argued that section 60(1) affords protection to the banker only in respect of forged endorsement of payee and not in respect of the forged signature of the drawer. He submitted that section 90(1) cannot in any way assist the appellant. Since the question of good faith can only arise where section 60 is applicable, he urged the Court to dismiss the appeal.

*c* **Held –**

- d* 1. Section 24 of the Bills of Exchange Act, Cap 20, Laws of the Federation of Nigeria, 1958, lays down the general principle that a banker who honoured a document purporting to be a cheque but on which the customer's signature as drawer has been forged is not entitled in the absence of estoppel to debit his customer with the money that he has paid away.
- e* 2. A holder of a forged cheque will never have title to the amount stated therein, even though he gave value to it in good faith since he cannot be described as a holder in due course as such holding is based on a forged signature.
- f* 3. It is not normal course of bank's business to pay without verification of the signature or signatories on it, particularly when they are put on notice of the change of the drawer's signatories. Both section 60 and 90 of the Bills of Exchange Act cannot therefore cover the appellant when such gross negligence was displayed by them.

*h* *Appeal dismissed.*

### **Cases referred to in the judgment**

*i* ***Nigerian***

*Ajani v. Giwa* (1986) 3 N.W.L.R. (Part 32) 796 at 804

*Adetutu v. Aderohunmu* (1974) 6 S.C. 108

*j* *Amadi v. Apphu* (1972) 1 All N.L.R. 409

*Bank of America v. Nigeria Travel Agencies* (1967) All N.L.R. 156 a

*Commerce Assurance Ltd v. Alli* (1986) 3 N.W.L.R (Part 29) 404 b

*Dabiri v. Gbajumo* (1961) 1 All N.L.R. 225 at 228

*Ibanga v. Usanga* (1972) E.C.S.L.R. 150 at 152-153

*Job Okorie Iroegbu v. Benjamin Ochiobi and others* (1972)

*Mobil Oil (Nigeria) Ltd v. Coker* (1971) 1 N.M.L.R. 58 c

*Oguntimeyin v. Gubere* (1964) 1 All N.L.R. 176

*Oja v. Ogboni* (1976) 4 S.C. 69 at 76

*Omonua v. Oshodin and Ehanire* (1985) N.W.L.R. (Part 10) 924 d

*Oyenuga v. Provisional Council of University of Ife* (1965) N.M.L.R. 9

*Taiwo v. Ajani* (1986) 3 N.W.L.R. (Part 32) 796 e

### ***Foreign***

*Tildesley v. Harper* (1878) 10 Ch. 293 at 396

### **Nigerian statute referred to in the judgment f**

Bills of Exchange Act, Cap 20, Laws of the Federation of Nigeria, 1958, sections 24, 60 and 90(1)

### **Books referred to in the judgment g**

Achike: *Commercial Law in Nigeria*, page 158

Chalmers on *Bills of Exchange* (13ed), page 24 and 72

Orojo: *Nigeria Commercial Law and Practice* Volume 1, page 316, paragraph 6.3 h

Paget's *Law of Banking*, (8ed), page 33

### **Counsel**

For the appellant: *Babadiya* i

For the respondent: *Aluko-Olokun*

### **Judgment**

**WALI JCA:** (*Presiding and delivering the lead judgment*) j

*a* The respondent sued the appellant in the Kaduna High Court claiming as follows—

*b* “On 14/6/82, the defendant, without any lawful justification debited the account of the Church with the sum of ₦6,800 by way of payment on cheque No. 363467/126847 . . . ”

The claim was denied by the appellant. Pleadings were ordered, filed and exchanged, and the case was finally set down for hearing on 12/9/86 by the Chief Judge, SU Mohammed.

*c* The facts of the case as they appear from the pleadings are as follows:

*d* “The appellant is an incorporated company that undertakes the business of banking in Nigeria with branches all over the Federation. The respondent is the Peoples Warden of the Church Bethel, Kaduna and a customer of the appellant and operates a current account at the appellant’s branch at Ahmadu Bello Way, Kaduna.”

*e* On or about the 14th June, 1982 a cheque for the sum of ₦6,800 drawn on the respondent’s account was presented for cashment at the Ahmadu Bello Way Branch of the appellant. The cheque leaf was one from the cheque book duly issued to the respondent by the appellant. The cheque was paid to the presenter and the respondent’s account was debited with the amount.

*f* Before 14 June, 1982, the respondent had replaced one of its three authorised signatories, that is brother FA Onatola by Mr J Kolawale and the appellant was notified of such change on 7 June, 1982.

*g* Then in a letter written by the respondent to the appellant dated 21 June, 1982 the former notified the latter that its account was wrongly debited with the amount drawn on the said cheque and demanded amendment by crediting its account with the amount debited. The appellant refused to do so, since before the notification to stop the payment on the cheque on which it was drawn, it had already been cashed by the drawee.

*h*

*i*

*j*

After taking the evidence of PW1 learned Counsel for the appellant then in the person of *Egware* Esq. applied for an adjournment to enable him advise his client to settle the matter out of court. This was on 13 September, 1985 and the case was adjourned to 18 September, 1985. When the case eventually came up on 17 December, 1985, Mr *Egware* the learned Counsel applied to withdraw from the case as a result of what appeared to be the appellant's rejection of his advice to settle the matter out of court. Permission was accordingly granted and he withdrew from the case.

On the same date, that is 17 December, 1985, another Counsel *Babadiya* announced his appearance for the appellants and made oral application for an adjournment to enable him file a motion for leave to amend the Statement of Defence filed by his predecessor. The application was not opposed to by the learned Counsel to the respondent Mr *Aluko Olokun*. The case was then adjourned to 31 December, 1985 for hearing with ₦25 costs to the respondent.

On 31 December, 1985 Mr *Babadiya* moved an application for leave to file an amended Statement of Defence. After some preliminary objections on the competency of the motion by Mr *Aluko Olokun*, learned Counsel for the appellant conceded and sought Court's permission to withdraw the motion and to bring another one.

Again Mr *Aluko-Olokun* did not oppose the oral application to withdraw the motion but opposed any further adjournment as this as he put it would be about the 6th adjournment.

The motion was struck out, further adjournment refused and the taking of the respondent's evidence was also resumed. The evidence of the two remaining witnesses called by the respondent was taken. Counsel for the appellant then asked for an adjournment to enable him call one witness for his defence. Here again Mr *Olokun* opposed the application which was however, eventually granted and the hearing was adjourned to 21 January, 1986 with ₦100 costs to the respondent.



- a* On the resumed date, the appellant's Counsel moved an application he filed on 23 January, 1986 to amend the Statement of Defence. As before it was opposed to by the
- b* respondent's counsel on the ground that the amendment sought was a complete departure from the earlier defence and that substantial injustice would be caused to the plaintiff if the motion is allowed at this stage of the case. In a short
- c* ruling delivered on the same date by the learned Chief Judge the application was refused.

- The appellant opened its defence, and called one witness and addressed the court. The respondent also addressed the
- d* court in reply and the case was adjourned to 4 February, 1986 for judgment. In the judgment handed down on 4 February, 1986, the learned Chief Judge concluded that—

- e* “All these facts lead to the inevitable conclusion that the defendants are liable and I so find them. I enter judgment for the plaintiff in the sum of ₦6,800 as claimed and assessed costs at ₦350 against the defendants.”

- f* Dissatisfied with the judgment of the trial Court, the appellant has appealed against it to this Court on the following grounds—

“GROUND 1.

- g* The judgment is against the weight of evidence.

GROUND 2.

- h* That the Honourable trial Judge erred in law and misdirected himself as to the provisions of sections 60(1) and 90 of the Bills of Exchange Act, Cap 21, 1958 Laws of the Federation of Nigeria and thereby came to the wrong conclusion that the law is an unjust law which he may avoid or even change so as to do justice.

*PARTICULARS OF ERROR*

- i* (i) Section 60(1) provides a protection to the banker provided the action complained of was done in good faith and in the ordinary course of business.
- j* (ii) Section 90 defines good faith as being where an act is in fact done honestly whether it is done negligently or not.

- (iii) The portion of evidence relied upon by the Honourable Trial Judge to the effect–
  - (a) that the bank did not perform its fundamental duty to the plaintiff; and
  - (b) that the defendants did not even bother to compare the signatures on exhibit 4 both actually portray negligence and not an absence of good faith as envisaged by the law.
- (iv) To be deprived of the protection of section 60(1) the defendant must have been shown to do more than be negligent like say to have been fraudulent.
- (v) The provisions of section 60(1) are mandatory and may be conditioned only by the definition in section 90.

#### *PARTICULARS OF MISDIRECTION*

- (i) The trial Judge in his deduction confused the concept of application of what he called a RULE OF LAW as distinct from the application of a STATUTORY PROVISION and in any case both being different from mere RULE OF PRACTICE.
- (ii) In the cases of rule of law and statutory provisions the Court is bound without an option as against the case of rule of practice where the Court may use its discretion to do justice even then in compliance with the LAW.
- (iii) It amounts to a misdirection for the trial Judge to assume that he can legitimately avoid or even change a provision of statute as if it were a mere practice.

#### *GROUND 3*

Honourable trial Judge erred in law when he refused upon application by Counsel to the defendant to allow the defendant to amend their statement of defence and thereby occasioned a miscarriage of justice.

#### *PARTICULARS*

- (i) The application for leave to amend Statement of Defence was filed by a Counsel different from Counsel who filed the Statement to be amended.
- (ii) The amendment was to plead new facts which were not contained in the first statement of defence, BUT were essential for the purpose of determining the real issues in controversy.

- a* (iii) The motion to amend statement of defence was brought at the earliest possible time when the new counsel took up the case.”
- b* Briefs of argument were filed by the appellant in support of his grounds of appeal. The respondent also filed his brief of argument in opposition. Both made oral submissions in support of their respective briefs; and from that the following
- c* issues arose for determination:
1. Had the learned trial Chief Judge done adequate justice to both sides when, at the stage the case had reached during the trial, he refused to allow the appellant to amend his Statement of Defence?
- d*
2. Was the learned trial Chief Judge correct in his interpretation of sections 24, 60 and 90(1) of the Bills of Exchange Act, 1917?
- e* Ground 3 of the grounds of appeal was canvassed under issue No. 2. In his submission, learned Counsel for the appellant contended that since the application to amend the Statement of Defence was made before the plaintiff closed
- f* his case, no injustice would have been caused to him if leave to amend as prayed was granted at that stage. He cited the case of: *Job Okorie Iroegbu v. Benjamin Ochiobi and others* (1972) L.R.E.C.S.N., Volume 2150 at 152 and 153 to buttress his submission.
- g*
- In reply to the submission above, learned Counsel for the respondent, while conceding that an amendment of pleadings can be granted at any stage of the proceedings, submitted that it will only be granted when doing so, will not cause injustice to the opposite party. He further submitted that not only had the respondent closed his case when the amendment was sought for, but it was also a complete departure
- i* from the Statement of Defence and none of the matters in the amendment ever came up as an issue before the respondent closed his case and therefore he “would not be opportuned to debunk the allegation of negligence (on his part) the
- j* appellant was seeking leave to introduce.” He also submitted

that even if the amendment had been allowed as prayed, it would not provide the appellant with a defence having regard to section 24 of the Bills of Exchange Act, 1917. He cited the following cases in support of his submissions (*supra*) *Oja v. Ogboni* (1976) 4 S.C. 69 at 76; *H Tildesley v. Harper* (1878) 10 Ch. 393 at 396; *Mobil Oil Nigeria Ltd v. Coker* (1971) 1 N.M.L.R. 58 and *Oyenuga v. Provisional Council of University of Ife* (1965) N.M.L.R. 9 at 12.

Learned Counsel for the respondent further complained that the ground was *per se* incompetent since it was based on an interlocutory decision of the trial Court. He submitted that without leave of the trial Court or the Court of Appeal as the case may be the ground of appeal cannot be filed and contested.

He referred this Court to the decision of the Supreme Court in *Taiwo Ajani (for himself and on behalf of Agbaruru family) v. Situ Giwa* (1986) 3 N.W.L.R. (Part 32) 796 at 804 and the decision of this Court in *Commerce Assurance Ltd v. Alli* (1986) 3 N.W.L.R. (Part 29) page 404 at 414.

There is considerable force in this submission. Section 220(1) of the 1979 Constitution has set out when an appeal can be made to the Court of Appeal as of right. It states:

“Section 220 subsection (1) is relevant and section 221 subsection (1) of the Constitution provides—

An appeal shall lie from decisions of a High Court to the Court of Appeal as of right in the following cases—

- (a) final decision in any civil or criminal proceedings before the High Court sitting at first instance;
- (b) where the grounds of appeal involves questions of law alone, decisions in civil or criminal proceedings;
- (c) decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution;
- (d) decisions in any civil or criminal proceedings on questions as to whether any provisions of Chapter IV of this Constitution has been is being or likely to be contravened in relation to any person.”

*a* In cases other than those above stated section 221 provides that—

*b* “221(1) Subject to the provisions of section 220 of this Constitution, an appeal shall lie from the decisions of a High Court to the Court of Appeal with leave of that High Court or Court of Appeal.”

*c* Also section 15(1) of the Court of Appeal Act, 1976 makes similar provision in line with section 221(1) of the Constitution. It reads—

*d* “Where in the exercise by the High Court of a State, or as the case may be, by the Federal High Court of its original jurisdiction an interlocutory order or decision is made in the course of any suit or matter, an appeal shall, by leave of that Court or of the Court of Appeal, lie at the Court of Appeal; but no appeal shall lie from any order made *ex parte* or by consent of the parties, or relating only to costs.”

*e* In the light of the Supreme Court decision in: *Ajani v. Giwa* (1986) N.W.L.R. (Part 32) 796 and *Omonuwa v. Oshodin and Ehanire* (1985) N.W.L.R. (Part 10) 924, the ruling given by the learned Chief Judge on 8th February, 1985 refusing leave to amend the Statement of Defence, is interlocutory as it did not finally dispose of the rights of the parties in the substantive suit. The fact that the appellant had to obtain the court’s leave to file additional grounds, ground 3 inclusive, would not cover his failure to obtain leave to appeal against an interlocutory decision, and failure to do so is fatal to the said ground 3. And since neither leave of the trial Court nor of this Court was obtained, ground 3 is incompetent and is accordingly struck out. See: *Ajani v. Giwa (supra)*.

*i* All the same it is relevant to state that the correct principle to guide a Court in the exercise of its discretionary power to allow or refuse an amendment of pleadings has been stated by the Supreme Court in several cases. This principle was restated by Bello JSC in: *Adetutu v. Aderohumu and others* (1974) 6 S.C. at 1089 as—

*j* “Generally an amendment of pleading for the purpose of determining the real questions in controversy between the parties ought to

be allowed at any stage of the proceedings unless such an amendment will entail injustice or surprise or embarrassment to the other party or the applicant is acting *mala fide* or by his blunder the applicant has done some injury to the respondent which cannot be compensated by costs or otherwise. In other words, the discretion ought to be exercised so as to do what justice and fair play may require in the particular case. See: *Oguntimeyin v. Gubere and another* (1964) 1 All N.L.R. 176, *Amadi v. Thomas Apphu Ltd* (1972) 1 All N.L.R. 409, *Ojah and others v. Ogboni and others* (1976) 4 S.C. 69; *Okafor v. Ikeanyi and others* (1979) 3 S.C. 99 and *Ibanga and others v. Chief Usanga* (1982) 5 S.C. 103.”

I now move to ground 2. Under this ground the interpretation by the trial Court of the provisions of sections 24, 60 and 90(1) of the Bills of Exchange Act, 1917 came under severe criticism by the Counsel for the appellant. Speaking on section 60(1) of the Act, he submitted that the learned trial Chief Judge misdirected himself in law when he said—

“Even if it can be said that section 60 of Bills of Exchange Act provides protection to the defendant I would in the circumstances have no hesitation in saying it is an unjust law.”

He said that the proper approach to arrive at the correct interpretation of the provision is to read the section together with section 90 of the Act. This would enable the learned trial Judge to arrive at the conclusion that the cheque paid by the appellant was paid out in good faith and in the normal course of the appellant’s business.

On section 24 of the Act Counsel submitted that it was totally irrelevant as question of forgery was never raised in the pleadings.

In reply to above, learned Counsel for the respondent referred to paragraph 6 of his statement of claim where he said forgery, though not specifically mentioned as such was pleaded. He submitted that since the appellant honoured exhibit 4, which was the cheque bearing unauthorised signature of the respondents’ signatories, section 24 of the Bills of Exchange Act was applicable. In support of this submission he referred to the following authorities Chalmers on: *Bills*

*a* of Exchange, (13ed), page 72; and *Bank of America v. Nigeria Travel Agencies* (1967) All N.L.R. 156.

*b* On section 60(1) he submitted that it only provides protection to a bank when it relate to an endorsement on a cheque; that is the section affords protection to the banker only in respect of forged endorsement of a payee and not in respect of the forged signature of the drawer. He further submitted  
*c* that section 90(1) of the Act would not be of any assistance to the appellant since question of good faith could only arise when section 60 is applicable; and that in as much as the appellant did not perform its duty as it ought to do, the appellant could not be said to have acted in the ordinary course of  
*d* business when it paid out the unauthorised exhibit 4. He referred to: Paget's *Law of Banking*, (8ed), page 33. He urged the court to dismiss the appeal.

*e* Learned Counsel for the appellant was of the view that forgery was not part of the respondent's pleadings and therefore section 24 of the Bills of Exchange Act, 1917 did not apply. I think this view is misconceived as forgery has been  
*f* pleaded in paragraph 6 of the Statement of Claim. At the expense of repetition I reproduce paragraph 6. It reads—

*g* “The plaintiff avers that the payment upon the said cheque was without lawful justification because the cheque leaf was not signed by the authorised signatories of the church in accordance with and as required by the then current mandate given by the Church to the bank.”

*h* It is abundantly clear from the pleadings (*supra*) that falsification of the cheque ie exhibit 4 was pleaded, although, the technical word “forgery” was not mentioned therein. Where the wording of a pleading is sufficiently clear to describe a technical word meant to be pleaded, the mere fact that such technical word was not used shall not render the pleading bad  
*i* and ineffective. See: *Dabiri and others v. Gbajumo* (1961) All N.L.R. 225, particularly at 228 where Taylor FJ said—

*j* “In my view the mere absence of the technical word forfeiture from the pleadings cannot be fatal in the circumstances where, as it is here, the nature of the claim is abundantly clear . . .”

It is therefore my view that section 24 of the Bills of Exchange Act is apposite and applicable to the case. a

Section 24 reads: b

“24. Subject to the provisions of this Act where a signature on a bill is forged or placed therein without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative and no right to retain the Bill or to give a discharge therefore or to enforce payment thereof against any part thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up forgery or want of authority: provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.” c  
d

Commenting upon this section the learned Author of Chalmers on: *Bills of Exchange* (13ed) said at page 24: e

“This section relates to a forged or an unauthorised signature . . . It lays down the general principle that a banker who honours a document purporting to be a cheque but on which the customer’s signature as drawer has been forged is not entitled in the absence of estoppel to debit his customer with the money that he has paid away.” f

It is to be noted that section 24 of the Bills of Exchange Act, 1917 contained in the Laws of the Federation of Nigeria, 1958, Volume 1, (Cap 20) is a carbon copy of the English Bills of Exchange Act, 1882. g  
h

Also writing on the same section the learned Author Orojo in his book: *Nigeria Commercial Law and Practice*, Volume 1 said by way of illustration, in paragraph 6.3 at page 316– i

“Suppose X steals Y’s cheque book and draws a cheque on A in favour of himself forging Y’s signature. If the cheque is paid, Y cannot be debited with the amount. What purports to be his (Y’s) signature is inoperative; indeed it is no more than a blank and therefore. there is no bill for the instrument is not signed.” j



*a* See Achike: *Commercial Law in Nigeria*, page 158 where the following comments on section 24 appear—

*b* “Where a signature on a bill is forged or placed without authority of the person whose signature it purports to be, the forged unauthorised signature is wholly inoperative . . .”

*c* A holder of a forged cheque will never have title to the amount stated therein, even though he gave value to it in good faith since he cannot be described as a holder in due course as such holding is based on a forged signature. The evidence, adduced by the respondent which was further confirmed by the appellant’s only witness clearly showed that *d* the appellant received notification of the respondent’s change of signatories dated 7 June, 1982 while the forged cheque exhibit 4 was cashed on 14 June, 1982. Under cross examination, the appellant’s witness said:

*e* “I see exhibit 2, as at 7/6/82 the authorised signatories of the plaintiff account were MO Jawolusi – Chairman, FO Onatola – treasurer and Kola Williams – member. By exhibit 2 the plaintiff church was changing the list of its authorised signatories . . . I agree that after 7 June, 1982 it would be wrong for us to pay any of the Church’s cheques which was not signed by FO Onatola.” *f*

He further testified:

*g* “exhibit 4 is dated 13 June, 1982. Onatola was not an authorised signatory of the plaintiff’s cheque on that date. No signature on exhibit 4 purports to be that of Kolawole. On the day exhibit 4 was presented ie 14 June, 1982 we did not check the signature with the signatures on exhibit 2. It is true that the bank has a duty to ensure that the signature on any cheque is that of the authorised signatory of that cheque. If we had compared the signatures on exhibit 4 with those on exhibit 2 we would not have paid exhibit 4.” *h*

*i* With the type of evidence adduced by the appellant himself his contention that at the time he paid out exhibit 4 he did it in the normal course of business cannot be sustained. It is not normal course of a bank’s business to pay out a cheque without verification of the signature or signatures on it, particularly when they are put on notice of the change of the *j*

drawer's signatories. Both sections 60 and 90 of the Bills of Exchange Act cannot therefore cover the appellant when such gross negligence was displayed by them. Moreover, section 60 cannot apply since the drawer's signatures on exhibit 4 are forged. Exhibit 4 is also not a document to the validity of which estoppel under sections 54 and 55 of the Act can apply; nor is there evidence that the respondent on previous occasions had condoned the forging of his signatories signatures.

Learned Counsel for the appellant's criticism of the learned trial Judge's interpretation of sections 60 and 90 of the Act was done out of context. It is wrong of him to quote the judge only where he said—

“Even if it can properly be said section 60 Bills of Exchange Act provides protection to the defendant I would in the circumstances have no hesitation in saying it is an unjust law.”

This does not mean that had he found the provision applicable he would not apply it. Happily however he continued, “... however, I do not think it provides the kind of protection which the learned counsel seems to think it does.”

A court has every right to comment on any law or any decision which seems to it unfair notwithstanding that such law or decision is binding on it. What it cannot do is to ignore the law or the decision.

I therefore find nothing wrong in the learned Chief Judge's approach to sections 60 and 90 of the Act *vis-a-vis* the facts of the case before him. The judgment is not unreasonable and is justified going by the evidence adduced.

The grounds filed and argued fail *in toto* and the appeal is accordingly dismissed with ₦250 costs to the respondent.

**AKPATA JCA:** I have been privileged to read in draft the judgment of my learned brother, Wali, JCA. I agree with his reasoning and conclusions. I therefore dismiss the appeal with ₦250 costs to the respondent.

- a* **OGUNDARE JCA:** I had the privilege to read in advance the judgment just delivered by my learned brother Wali, OFR, JCA. I am in complete agreement with him in his reasoning,
- b* conclusions and orders made therein.

*Appeal dismissed.*

## Central Bank of Nigeria v. Manexport SA and others

COURT OF APPEAL, LAGOS DIVISION  
NNAEMEKA-AGU, KUTIGI, KOLAWOLE JJCA

Date of Judgment: 27 NOVEMBER 1986

C.A.L.: 153/85

*Banking – Central bank – Whether under a duty to furnish  
foreign exchange to any person*

*Banking – Foreign exchange – Whether the central bank  
obliged to furnish foreign exchange to any person*

*Jurisdiction – Fiscal foreign exchange measures – Action  
involving foreign exchange measures – Jurisdiction of court  
– Where lies – Whether with the State High Court or Fed-  
eral High Court*

### Facts

The plaintiffs in the lower court sued the defendants, of whom the present appellant was the third defendant. The plaintiffs claimed against the defendants jointly and severally the sum of 1,676,061.10 (US\$2,233,579.11) against the defendants and each of them being the amount due from the defendants to the plaintiffs by way of twenty-seven instalment payments due under a contract of sale between the plaintiffs and the first defendants in respect of five fishing trawlers approved by the third defendants under registered Form ‘M’ No. 064583 and being withheld by the second defendants.

The Central bank of Nigeria, the appellant was not a party to the contract but was dragged in because the plaintiffs alleged that third defendant was obliged to provide the foreign exchange necessary to remit the proceeds of payment made in foreign exchange in furtherance of the said Form ‘M’ and had failed or declined to do so.

The plaintiffs obtained judgment under Order 10 of Lagos State High Court (Civil Procedure) Rules. The third defendant without filing an affidavit to show cause under Order 10,

*a* rule 3 filed a Statement of Defence in which they raised the issues of jurisdiction and the fact that no cause of action was disclosed against them, but the lower court discountenanced the defence on the ground that it was not brought in the right way.

*b* Dissatisfied, the third defendant appealed to the Court of Appeal contending *inter alia* that the lower court had no jurisdiction, the matter being in respect of foreign exchange remittance, a matter touching the revenue of the Federal Government, and that the plaintiff's Writ did not disclose a cause of action.

*c* **Held –**

*d* 1. There is no law which makes it obligatory for the central bank to furnish foreign exchange to any person, corporate or incorporate.

*e* 2. A State High Court has no jurisdiction as the plaintiff did not base their action on any contract between them and the appellant but on the appellant's said obligation to pay for the instalment due under Form "M". This clearly involves foreign exchange measures and is therefore cognisable by the Federal High Court under section 7(1)(b)(iii) of the Federal High Court Act No. 13 of 1973.

*f* 3. A defendant under an Order 10 procedure need not file an affidavit to show cause under Order 10, rule 3 of the Statement of Claim upon which the plaintiff relies discloses no reasonable cause of action. The duty of a plaintiff who is applying for summary judgment under the Order 10 procedure is first, to ensure that the Statement of Claim must be complete and good in itself and second that there is no substantial defect in the Statement of Claim. In the instant case since the third defendant/appellant is not a party to the contract, it could not acquire rights or incur obligations arising under the contract. Hence no cause of action had been disclosed against the third defendant/appellant.

*g* *h* *i* *j* *Appeal allowed.*

**Cases referred to in the judgment**

*a*

***Nigerian***

*American International Insurance Co. v. Ceekay Traders Ltd* (1981) 5 S.C. 81 at 82 *b*

*Bronik Motors Ltd v. Wema Bank Ltd* (1985) 6 N.C.L.R. 1

*Hispanic Construction (Nig.) Ltd v. Odogiyan* (1986) 4 N.W.L.R. 248 at 258 *c*

*Jamal Steel Structures Ltd v. African Continental Bank* (1973) 1 All N.L.R (Part II) 208

*Nislrinzawa Ltd v. Jethurani* (1984) 12 S.C. 13

*d*

*Societe Generale De Surveillance SA v. Rastico Nigeria Ltd* CA/L/57/84 (unreported)

***Foreign***

*e*

*Barraclough v. Brown* (1857) A.C. 615

*Dunlop Pneumatic Tyre Co. Ltd v. Selfridge and Co. Ltd* (1915) A.C. 847, 853

*f*

*Garthwaiter v. Garthwaiter* (1964)

*Guarantee Trust Co. of New York v. Hannay and Co.* (1915) 2 K.B. 536 at 563

*Lectang v. Cooper* (1965) 1 Q.B. 229 at 242

*g*

*Read v. Brown* (1888) 22 Q.B.D. 128 at 131

*Skenconsult (Nig) Ltd v. Godwin Ukey* (1981) 1 S.C. 6

**Nigerian statutes referred to in the judgment**

*h*

Exchange Control Act, No. 36, 1978, section 1, section 9(2)

Federal High Court Act, 1973, section 7(i)(b)(iii), section 8, section 24 *i*

**Nigerian rule of court referred to in the judgment**

High Court of Lagos State (Civil Procedure) Rules, 1972, Order 10, rule 1, Order 10, rule 3 *j*

*a* **Foreign rule of court referred to in the judgment**

Supreme Court Practice, 1985, Order 14

*b* **Books referred to in the judgment**

Chitty on *Contracts*, 24ed (Part 1), paragraph 1784 and 1785

*c* Halsbury's *Laws of England* (3ed) Volume 9, paragraph 350-351

**Counsel**

*d* For the appellant: *Kasunmu* (with him *Okunnu*)

For the second and third respondents: *Sofola* (with him *Nwosu* and *Ekpe*)

For the fourth respondent: *Odojin*

*e* **Judgment**

*f* **NNAEMEKA-AGU JCA:** (*Presiding and delivering the lead judgment*) This is an appeal by the central bank of Nigeria who were third defendants in the Court below against the decision of Bamgboye J, sitting in a Lagos High Court on the 31st of May, 1985. In that Court, Manexport SA, were the first plaintiffs; Financial Agencies Limited, the second

*g* plaintiffs; Scott Fishing Industries (Nig.) Limited were the first defendants; and the Bank of Credit and Commerce International (Nig.) Limited, second defendants.

*h* By a Writ of Summons, the plaintiffs claimed against the defendants jointly and severally:

*i* “The sum of ₦1,676,061.10 (U.S.\$2,233,519.11) against the defendants and each of them being the amount due from the defendants to the plaintiffs by way of twenty-seven instalment payments (from 16th April, 1982 to 16th June, 1984) due under a contract of sale entered into on the 14th of August, 1980) between the plaintiffs and the first defendants in respect of five fishing trawlers . . . approved by

*j* the third defendants under registered Form ‘M’ No. 064583 and being withheld by the second defendants.”

They also claimed possession of the fishing trawlers. The writ was accompanied with a Statement of Claim of 14 paragraphs. I shall reproduce paragraphs 4 and 12 which alone are relevant in this appeal later in this judgment, as the rest of the pleading deals with the transaction between the plaintiffs and the other defendants. The defendants entered appearance after which the first and second defendants filed their statements of defence. Then by a summons dated the 26th day of November, 1984, the plaintiffs applied under Order 10, rule 1 of the High Court of Lagos (Civil Procedure) Rules, 1972, to enter final judgment against the third defendants. Paragraph 8 of the affidavit in support of the application deposed to the following fact:

“2(8) The first defendants instead sent copies of approval slips issued by the third defendants following deposit made to it by first defendants through the second defendants.”

I should also mention that in paragraph 5, 6 and 7 of the Statement of Defence of the second defendant it was pleaded as follows:

- “5. The second defendant in the normal course of its banking business received a total sum of ₦1,676,061.10k from the first defendant, one of its customers, for transfer to the first plaintiff abroad through the third defendant.
6. All authorised dealers are required to deposit the proceeds to be transferred abroad with the third defendant who will later give cover for such amount to be transferred.
7. In compliance with the provisions of the Exchange Control Act, all subsidiary Legislations and instructions thereto, the second defendant deposited ₦1,676,061.10k with the third defendant.”

I must pause here to observe that as no evidence was called in the case, this pleading and that of the first defendant in similar terms are irrelevant to the issues in this appeal. I should also mention that as at the date when the learned Judge had to give a ruling on the summons, the third defendants without filing an affidavit to show cause under Order 10, rule 3 had already filed his statement of defence in which they raised the issues of (i) the jurisdiction of the



- a* Court to try the action and (ii) that the claim and the statement of claim do not disclose a cause of action against the third defendants. Also, on the 22nd of September, 1984 the
- b* third defendants had filed a counter affidavit in answer to the affidavit filed by the plaintiff on the 26th of September, 1984; but, as it turned out, the learned Judge held the view that as the counter affidavit was filed in a different motion, it
- c* was irrelevant to the proceedings under Order 10, rule 1. The learned Judge however, held that the third defendants' filing of the Statement of Defence out of time and without leave is not a proper way of showing cause under Order 10, rule 1 and that in any event the Statement of Defence so
- d* filed cannot to all intents and purposes be regarded as a good and sufficient defence. Thereafter, he entered judgment for the plaintiffs in terms of their claims.
- e* Against this judgment the third defendants (hereinafter called the appellant) have appealed. The first plaintiff shall be referred to as the first respondent, the second plaintiffs as the second respondent, the first defendant as the third respondent and the second defendants as the fourth respondent. The appellant filed its brief of argument through its counsel; the first and second respondents also filed their
- f* briefs of argument. Mr *Odojin* who appeared for the fourth respondent filed no brief and before us informed us that his
- g* client was hanging its fortunes on those of the first and second respondents. The learned senior advocate for the appellant and that for the first and second respondents addressed us orally.
- h* From the briefs of both Counsel, it appears that the issues for the determination are:
1. What is the nature of the plaintiffs claim against the third
  - i* defendants as disclosed in the Writ and Statement of Claim?
  2. Have the plaintiffs disclosed a cause of action against the
  - j* third defendants on the Writ and Statement of Claim; should the court take any other materials into account in

deciding whether or not plaintiffs' claim disclosed a cause of action against the third defendants? *a*

3. If a cause of action has been disclosed and granted that the third defendant has not filed an affidavit pursuant to Order 10, rule 3(a) but has instead filed a defence, was the trial judge right in saying that "the defence filed cannot be regarded as a good and sufficient defence on the merit"? *b*

4. What are the duties of the plaintiffs and defendants in Order 10 procedure for summary judgment? *c*

5. If the plaintiffs' claim against the third defendants is for its failure to release foreign exchange for the transaction having issued a Form M approval, has the trial Court jurisdiction to adjudicate on this issue? *d*

I must confess that I had to marry the issues for determination as framed by both Senior Advocates as well as the tenor of their arguments in their briefs. *e*

In order to ascertain the nature of the plaintiffs' claim against the appellant, it is necessary to take a close look at the Writ and the Statement of Claim. It is not correct, as learned counsel has suggested, that I should look at the affidavit of the parties also. For it is not intended that the affidavit supplements the Statement of Claim or proves the case for the appellant. In particular, I should consider the claim, set out above, and paragraphs 4 and 12 of the Statement of Claim to give the best to the averments contained therein. Now it was averred in paragraphs 4 and 12 of the Statement of Claim thus: *f*

- "4. The third defendants are a statutory body charged, *inter alia*, with providing foreign exchange for the discharge of an approved obligations owed by institutions or individual resident in Nigeria. *g*
12. The third defendants are obliged to provide the foreign exchanged necessary to remit the proceeds of payment made in foreign exchange in furtherance of the said Form M and have failed or declined to do so." *h*

*j*

- a* It is clear that the first respondent, as plaintiffs, is saying that the appellant is obliged to provide the foreign exchange necessary for the transaction between them and the second and third respondents and claiming the amount due as already approved for the appellants under Form M. It is exhibited as exhibit B. exhibit B (Form M) shows that the approval is for a total of \$3,471,000 of which \$92,974 is the first instalment and the balance was to be paid in 36 instalments of
- c* ₦82,722.93 each month. The claim is said to be for 27 instalments of the foreign exchange due from 18th April, 1982, to the 15th of June, 1984. It appears pretty clear from these averments in the Statement of Claim that the gist of the
- d* respondents' claim against the appellant is a claim for foreign exchange which the appellants, in respondents' contention, were supposed to furnish to them on the basis of the appellant's approval of the Form M. Paragraph 8 of the
- e* Statement of Claim avers that a sum of ₦316,009 had already been transferred, and paragraph 10 complains that no further transfers have been made. It is not averred anywhere that there was any contract between the appellant and the
- f* first and second respondents for furnishing the foreign exchange or that the respondents made any payment to the appellant. Rather it appears to be the contention of the first respondent that the appellant was obliged to furnish the foreign exchange. We were however not referred to any statute
- g* which makes it obligatory for the Central Bank of Nigeria to furnish foreign exchange to any person, corporate or incorporate, and I could find none. For one to be able to decide
- h* whether or not the appellant become obliged to furnish the foreign exchange to the first and second respondents by the mere fact that they had approved their Form M (exhibit B) it would be necessary to delve into the fiscal policies of the
- i* government and the appellant with respect to foreign exchange.

- j* This brings me to issue No. 5 – the question of jurisdiction. When this question was raised in the Court below, the

learned trial Judge held *inter alia* as follows:

“I think this is a case in respect of which this Court or any other State High Court can exercise jurisdiction having regard to the nature of the transaction which seem clearly local and within the local jurisdiction of the Court itself; and does not *prima facie* involve any matter of transaction done in connection with carriage of goods by sea or any or any dealing with Public Revenue so as to bring the action within the ambit of the provision of sections 7 and 8 of the Federal High Court Act or indeed in the contemplation of section 1(1)(h) of the Administration of Justice Act of 1956 which as stated above is by section 24 of the said Federal High Court Act of 1973 applicable.”

In my view this conclusion is erroneous. For I cannot think of a better case which raises a question of the fiscal foreign exchange measures of the Government than the instant case. The respondents did not base their claims against the appellant on any contract between them and the appellant but on the appellant’s said obligation to pay for the instalment due under Form M approval. In my view this clearly involves foreign exchange measure and is therefore cognisable by the Federal High Court under section 7(1)(b)(iii) of the Federal High Court Act, No.13 of 1973 which says:

“The Federal High Court shall have and exercise jurisdiction in civil cause and matters – Connected with or pertaining to–

(iii) banking, foreign exchange, currency or other fiscal measures.”

It is now beyond question that the purpose and legislative intention of section 7(1)(b)(iii) of the Federal High Court Act, 1973, is essentially revenue protection functions cognisable by the Federal High Court whereas ordinary transactions such as that between a banker and its customer are within the jurisdiction of the High Court of States. See on this: *Bronik Motors Ltd and another v. Wema Bank Ltd* (1985) 6 N.C.L.R. 1 at page 16; *American International Insurance Co. v. Ceekay Traders Ltd* (1981) 5 S.C. 81 at page 82; and the majority decision in *Jammal Steel Structures Ltd v. African Continental Bank* (1973) 1 All N.L.R. (Part II)

*a* 208. As I have stated, it has not been argued on behalf of the respondents that there is any contract between the appellant and any of the respondents. So, there is no basis in this case  
*b* to argue that what is involved is foreign exchange transaction and not foreign exchange measures. The pleading in paragraph 12 of the Statement of Claim simply avers that the appellant are “obliged” to furnish the foreign exchange. As I  
*c* see it, in the absence of any duty under contract or by statute, it appears that the appellant’s liability, if at all, will be as a result of the fiscal policy of the government and the appellants. This is a matter that can only be investigated in the  
*d* Federal High Court. I therefore agree with Professor *Kasumu* that although paragraph 12 of the Statement of Claim stated that the appellant has failed to provide the foreign exchange necessary for remittance to the first respondent, the claim as disclosed in the Writ and the Statement of Claim  
*e* falls short of one designed to compel the appellant to perform its statutory duties.

I also agree that it is clearly obvious from the Writ and the  
*f* Statement of Claim that the only reason for joining the appellant is to compel it to provide foreign exchange, having approved Form M. But it is expressly provided in section 9(2) of the Pre-Shipment Inspection of Imports Act (No. 36)  
*g* of 1978 that every proceeding under that Act shall be commenced and prosecuted in the Federal High Court. See on this the decision of this Court in: *Societe De Surveillance SA v. Rastico Nigeria Ltd and others* C.A.L. 57/84 of section 1  
*h* of Act No. 36 of 1978 incorporate imports involving transactions under the Exchange Control Act, No.16 of 1962 by reference. Therefore, no matter how we look at it the action against the appellant is one within the jurisdiction of the  
*i* Federal High Court, either because of section 7 of the Federal High Court Act or section 9(2) of the Pre-Shipment Inspection Act or both.

*j* Some aspects of Mr Sofola’s submission in his brief on behalf of the first and second respondents deserve special

consideration, as they raise rather fundamental issues. The learned senior advocate pointed out at page 12 of his brief that “the second and third defendants (ie Scotts Fishing Industries (Nig.) Limited and appellants) came into the transaction because of the circumstances and the manner in which the proceeds of the said sale of the 5 fishing trawlers sold by the plaintiffs to the first defendants would be transferred to the plaintiffs, Limited Liability Companies outside Nigeria.” This, in my view, is a clear confirmation that there was no privity contract between the appellant (third defendants) and the first and second respondents (plaintiffs). But he contended that the appellants were joined, rightly in his view, because it was through them that money for the trawlers would reach the first and second respondents overseas. He argued that this was permissible under Order 13, rule 1 of the High Court of Lagos (Civil Procedure) Rules, 1972. He further submitted that as the appellant did not take an objection to the proceedings in the under Order 25, rule 4, Order 16, rule 1 and Order 22, rule 4 of the Rules of the High Court they cannot now do so and cannot complain.

The fundamental questions which these submissions raise could be summarised as follows:

1. Do the rules contemplate joinder of parties and claim of an individual sum in a case such as this in which part of the cause of action is rooted in contract and the other part, that is the case against the appellant, is beyond the scope of contractual liability altogether?
2. Do they permit the joinder of the appellant as a party in the High Court of Lagos State in a case such as this in which the gist of the action against them is, as I have shown outside the jurisdiction of the High Court of Lagos State and within the purview of the jurisdiction of the Federal High Court.
3. Is the objection which the appellant now raises to the proceedings such that they could waive.

To be able to answer these questions properly, it is necessary to advert to the nature and import of jurisdiction of a court of law. It has been laid down by the highest authority that a

- a* court must have jurisdiction in a matter before it can exercise any judicial power in it (for which: see *Bronik Motors Ltd and another v. Wema Bank Ltd* (1983) 1 S.C.N.L.R. 298); see also: Volume 9 *Halsbury's Laws of England* (3ed)
- b* 350-351. The word "jurisdiction" is normally used in two senses – the strict sense and the wider sense – their first dealing with the power of a court to deal with and decide the matter as to the subject matter before it; and the latter being
- c* one in which although the Court has power to decide the question before it, will not, according to its settled practice, do so, except in a certain way or in accordance with settled rules or in certain circumstances. See on this: *Guarantee*
- d* *Trust Co. of New York v. Hanay and Co.* (1915) 2 K.B. 536 at P.563; *Barracrough v. Brown* (1857) A.C. 615; *Skenconsult (Nig.) Ltd v. Godwin Ukey* (1981) 1 S.C. 6 at page 25-27. It is the jurisdiction of the first class that is involved in this case. The gist of the action against the appellants is just
- e* not one which is justiciable in a State High Court. Once the constitutional provisions and the laws which confer jurisdiction on the High Courts of States, on the one hand, and the Federal High Court, on the other, have done so, there can be
- f* no question of the State High Court by its rules conferring the jurisdiction, which rightly belongs to the Federal High Court, upon itself. It is also noteworthy that this jurisdiction of the first class also connotes the limits which are imposed upon the power of the Court to hear and determine issues
- g* between parties seeking to avail themselves of its processes by references to: the subject matter in issue, the parties before the court, the kind of relief sought, or any combination of them. See: *Garthwaiter v. Garthwaiter* (1964) 2 All 6 R. at
- h* page 233. So the rules of the High Court of Lagos State permitting of joinder of parties or issues cannot be invoked in aid of the respondents so as to have the effect of circumventing the provisions of substantive enactments. It is also settled that
- i* proceedings before a court which has no jurisdiction on the matter is a nullity and cannot be regularised by waiver.

Having reached these conclusions, it is scarcely necessary for me to consider whether the claim and the statement of

*j* claim disclose any cause of action against the appellants. I

shall, however, deal with it rather briefly. The learned senior advocate for the respondents has based his contention that it discloses a cause of action against them not on contract nor on breach of any statutory duty by the appellants but on quasi contract – on the old “*debitatus assumpsit*” and the right of joinder of parties under Order 13, rules 4-7. The fact which he relies upon to sustain this submission is the pleading by the second defendants (fourth respondent) that in compliance with the provisions of the Exchange Control Act of 1962 as well as all subsidiary legislations and instructions relating thereto they deposited the sum of ₦1,676,061.10k with the appellant. Assuming, but not agreeing, that this averment, on which there was yet no evidence – was correct, it is difficult to see how the sum could be recovered from the appellant by the first and second respondents who never claimed to have paid any money to the appellant. I believe that it was in realisation of this difficult situation that the learned senior advocate for the first and second respondents sought subterfuge under the old form of action of *debitatus assumpsit*. In fairness to the very respected senior advocate for the first and second respondents, he did not act for the party in the court below. In my respectful view *assumpsit* was consensuality: see Chitty on *Contracts* (24ed) Part 1, paragraphs 1784 and 1785. Even the modern development of *debitatus assumpsit* in quasi contract would, in this case, have required some payment by the first and second respondents to the appellant in circumstances not amounting to a contract but in which the court impute a promise to pay. It is only the fourth respondent who could have sued the appellants, if it could prove payment.

I have here to ask myself the question: What is a cause of action? I would be guided here by the definition of the words by Diplock LJ, in *Lectang v. Cooper* (1965) Q.B. 229, at 242 where he defined the words as meaning:

“a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”



- a* The point to note about this definition is that it impliedly emphasises the bipartite element in the decision whether or not there is a cause of action. In any given case, the issue is
- b* settled as between the plaintiff on one hand and the defendant on the other. On this principle, I believe that Professor Kasumu was right when he submitted that we cannot look at the defence of one of the defendants to decide whether or
- c* not a cause of action was disclosed against the appellant who was the third defendant. In my view, a cause of action is a set of facts, as distinct from the evidence, averred in the Statement of Claim which it would be necessary for the
- d* plaintiff to prove, if traversed, to support his right to the judgment of the Court. See on this: *Read v. Brown* (1888) 22 Q.B.D. 128 at page 131 per Lord Esher. First and second respondents submit that the averments in paragraphs 4 and 12 of the statement of claim set out above disclose a cause of
- e* action against the appellants. In my view, without saying that they made any payment to the appellant or otherwise showing why and how the appellant was obliged to pay the money, the averments do not disclose any cause of action by
- f* the first and second respondent against the appellant. I therefore agree that the first and second respondents pleading do not disclose a cause of action against the appellant.
- g* Next, I shall deal with the issues raised under Order 10 procedure, which because of other views I have expressed is an alternative consideration. I shall begin my consideration of this issue by agreeing with Mr Sofola as did the Learned
- h* Judge, that merely filing a Statement of Defence rather than an affidavit is not a correct way of disclosing that a defendant has a good defence to the action under rule 3. The rule allows only two ways of showing cause under the rule namely (i) by affidavit or (ii) by examination of the defendant
- i* on oath, with or without production of documents, as provided by the rule. That was the decision of the majority in the case of: *Nishizawa Ltd v. Jethwani* (1984) 12 S.C. 13. If, on the other hand, the statement of defence was properly before
- j* the court for consideration, I would have found it difficult to

agree with the Learned Judge that the Statement of Defence of the appellant does not disclose a good defence: it clearly does. For it joins important issues with the respondents and raises the important question of jurisdiction and absence of any agreement between the parties, among others.

But, with greatest respects, I do not, however, agree that under the rule, the only duty of a plaintiff is to file a claim and a statement of claim, no matter their contents, and then it would be the duty of the defendants to show cause, failing which judgment could be entered against him. In my view, before the duty of the defendant to show cause arises, the plaintiff must have filed a Writ of Summons specially endorsed with or accompanied by a statement of claim and must, by himself or by someone else who can swear *positively* to the facts, swear to an affidavit verifying the cause, of action, except as to damages. But Professor Kasunmu has submitted further that (i) where the defendant relies upon a point of law constituting a good defence, or (ii) where the plaintiffs' statement of claim does not disclose a cause of action, the defendant need not show any cause by way of an affidavit. He can either rely on the point of law to show cause or in other cases contend that his duty to show cause has not arisen. In my view this is a correct statement of the law. I do not agree that the rule was designed to enable the plaintiff get final judgment on whatever is the nature and content of the statement of claim he files, as the argument of the Learned Senior Advocate for the reclaim he files, as the argument of the Learned Senior Advocate for the respondents postulates. With respect, I shall adopt what I said recently in: *Hispanic Construction (Nig.) Ltd v. Oba Adegbere Odogiyan* (1986) 4 N.W.L.R. 248 at page 258 where I said:

"It is, I believe, the law that a defendant in an Order 10 procedure need not file an affidavit to show cause under Order 10, rule 3 if the statement of claim upon which the plaintiff relies discloses no reasonable cause of action. This point was conceded in *Nishizawa Ltd v. Strichand N Jethwani* (1984) 1 S.C. 234 at page 252. See also: *Sheba Gold Mining Co. v. Ttrubshawe* (1982) 1.Q.B. 674.

- a* So, if at the hearing of the proposed appealed, the Applicants can show that the respondent's statements of claim does not disclose a cause of action the appeal is bound to succeed. For this purpose
- b* the statement of claim must be complete and good by itself: any substantial defect in it cannot be supplemented by what is deposed in the affidavit, as the argument of Chief Mayaki postulates: See *Gold Ores Reduction Co. v. Pain* (1892) 2 Q.B. 14. By
- c* the very words of the rule what the plaintiff's affidavit should do is to verify the cause of action and the amount claimed, if a liquidated sum is claimed, and to state that in plaintiff's belief there is no defence to the action except as to the amount claimed."

- See also Supreme Court Practice, 1985, Order 14 paragraph
- d* 14/1/2 – 12/1/3. In the instant case as the statement of claim shows that the matter is outside the jurisdiction of the court and does not disclose a cause of action against the appellant, the appellant can rely on these even though it has not complied with the procedure to show cause under Order 10,
- e* rule 3.

- For all I have said, the appeal succeeds and is allowed. The judgment of Bamgboye J, in favour of the respondents in the
- f* High Court is set aside. As the High Court of Lagos State has no jurisdiction to entertain the suit against the appellant, I hereby strike out the claim against them.

- I assess costs in favour of the appellant and against the first
- g* and second respondents in the sum of ₦750.

- KUTIGI JCA:** I read draft the judgment of my brother Nnaemeka-Agu JCA just delivered. I agree with it and have nothing to add.

- h* **KOLAWOLE JCA:** I have had the privilege of reading in advance the judgment of my learned brother Nnaemeka-Agu JCA just delivered. My learned brother has stated the facts which led to the judgment of Bamgboye, J and so I shall not
- i* repeat them here. I wish, if I may, to recommend briefly on the vexed questions of the jurisdiction of the Lagos State High Court and whether the Writ and the Statement of Claim disclose any cause of action against the Central Bank
- j* of Nigeria the third defendant/appellant in this case.

By the plaintiffs' Writ of Summons the sum of one million six hundred and seventy-six thousand and sixty-one naira ten kobo (US\$2,233,519.11k) was being claimed from the defendants due under a contract of sale entered into on the 14th August, 1980 between the plaintiffs and the first defendants approved by the third defendants. And an order directing that the first defendants' possession of the said trawlers be determined and the same be redelivered of the plaintiffs.

On the face of the writ there is no privity of contract between the plaintiffs and the Central Bank of Nigeria. The cause of action arose *under a contract of sale entered into on the 14th of August, 1980 between the plaintiffs and the first defendant in respect of five fishing trawlers*. The connection of the third defendants is that the Central Bank of Nigeria approved the transaction. The question that arises is this: under the contract is a third-party liable for the breach of it? I do not think so. In the plaintiffs' Statement of Claim they repeated what they have alleged in their Writ of Summons in paragraphs 5 thereof. In paragraph 7, 9 and 10 the plaintiffs averred as follows:-

“7. Under the said agreement the first defendants undertook to pay for the fishing trawlers by initial payment of ₦316,009 (US\$492,974.04) and thirty-six monthly instalment payments of ₦69,444.44k (US\$82,722.93) each.

9. The first defendants did not make the first transfer of ₦316,009 until sometime in April 1982 although all the fishing trawlers had previously been delivered to the first defendants and had been deployed by them in furtherance of their trade or business.

10. Since the payment of the amount stated in paragraph 9 of this Statement of Claim, no other payment has been received from the first defendants who are now in arrears of payment for the period April, 1982 to the period June, 1984.”

As can be seen in the above averments there is a purely contractual transaction between the plaintiffs and the first defendants to the tune of ₦1,676,061.10k. There has been a breach of the contract by the first defendants. Who is to be

- a* called upon to answer for the breach of the contract? In what capacity is this amount being claimed from the Central Bank of Nigeria the appellants? Is it in contract or in tort; for all
- b* the appellant did from paragraph 8 of the statement of claim is that the agreement between the contracting parties was approved under Form M No. 0645.83. The appellant did not induce the breach of the contract. The appellant is therefore
- c* not liable, on the face of the Statement of Claim and the Writ of Summons, for the payment of the sum claimed.

Mr *Kehinde Sofola*, learned Senior Advocate for the respondents has contended in the respondents' brief that the

*d* effect of an application by summons for summary judgment under Order 10, rule 1 is to require the defendant to attend and show, if he can, that there is a triable defence to the plaintiffs' claim. Learned senior advocate further contended

*e* that what the plaintiff who is applying for summary judgment under Order 10, rule 1 needs to do are that:-

- (1) the writ must be specially indorsed with a statement of claim or accompanied by a statement of claim, and
- f* (2) appearance must have been entered by the defendant.

It cannot be correct to say that a plaintiff is automatically entitled to judgment in a claim for liquidated sum where:-

- g* (1) the defendant has entered an appearance, and
- (2) there is also a verifying affidavit stating that there is no defence to the action.

*h* The primary duty of a plaintiff who is applying for summary judgment under the Order 10 procedure is first, to ensure that the Statement of Claim must be complete and good in itself and second that there is no substantial defect in the

*i* Statement of Claim (see: Order 14 of the Rules of the Supreme Court of England, 1985, Annual Practice, page 131). There are many instances where the Statement of Claim is not complete and good. I do not oppose to put down a list of

*j* such cases but a statement of claim will not meet Order 10

procedure where the court before which the action is constituted lacks jurisdiction, or if a defendant who is not privy to a contract is sued for a liquidated sum under a contract between A and B or where the action is founded on illegality or where the liquidated sum claimed is shown in the Statement of Claim to be statute barred.

I will take the example of the doctrine of privity of contract. It is the law, I believe, that the doctrine of privity of contract means, and means only, that a stranger cannot acquire rights or incur obligations *arising under* the contract. Thus, if A promises B to pay a sum of money to C the doctrine prevents C from suing A for that sum. The doctrine of privity of contract has been firmly established that it cannot be sidetracked by employing Order 10 procedure. In: *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge and Co. Ltd* (1915) A.C. 847, 853 Lord Haldane LC said:-

“In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract.”

In this appeal the Central Bank of Nigeria the appellants cannot incur obligations arising under the contract between the plaintiffs and the first defendants. I am therefore of the view that under an Order 10 procedure the defendant need not file any affidavit cases where the affidavit of the plaintiff is insufficient to verify that cause or the statement of claim itself discloses no reasonable cause of action.

The conclusion which I have reached is that in so far as the Central Bank of Nigeria is not a party to the contract exhibit A the plaintiffs’ statement of claim has disclosed no reasonable cause of action against the appellants. I adopt the reasoning of my learned brother as to lack of jurisdiction by the Lagos State High Court. In the circumstance I allow the appeal and I hereby set aside the judgment of Bamgboye J dated 31st May, 1985. I strike out the action against the appellants with costs at ₦500 against the first defendant in the

*a* court below and ₦300 against the plaintiffs and ₦150 against the first defendant in this Court.

*Appeal allowed.*

**National Bank of Nigeria Limited v. Guthrie  
(Nigeria) Limited and another**

COURT OF APPEAL, LAGOS DIVISION

MOHAMMED, NNAEMEKA-AGU, KUTIGI JJCA

Date of Judgment: 12 JANUARY 1987

C.A.L.: 168/86

*Banking – Loans and advances – Guarantee – Admission by  
principal debtor – Whether necessarily admission by guar-  
antor*

**Facts**

The plaintiff/appellant claimed for a declaration that the first and second respondents were jointly and severally liable to pay the appellant the overdraft facility with interest granted the first respondent by the appellant and which the second respondent guaranteed to the tune of ₦500,000.

Whilst the second respondent was served with the processes, and filed defence the first respondent was not served but nevertheless entered appearance.

The plaintiff/appellant consequently filed an application seeking judgment on admission on the basis of exhibits PA8 and PA9. Exhibit PA8 was a guarantee by the second respondent to be responsible for the advances to the first respondent up to the tune of ₦500,000 which guarantee however expired on 30th August, 1984. Exhibits PA9 is a letter by the first respondent asking the appellant, in effect to offset part of the ₦1,000,000 (one million naira) facility with the sum of ₦527,000 which the appellant holds in fixed deposit for the first respondent.

The trial Judge held that the motion for judgment was premature whereupon appellants appealed to the Court of Appeal.

**Held –**

1. An admission of liability by a principal debtor in an action for recovery of debt is not necessarily an admission of liability by the guarantor of the debt.



- a* 2. In the instant case, it is clear that an admission of liability on the part of the first respondent, if any, cannot be an admission of the debt by the second respondent. The trial Judge was therefore right in refusing to enter judgment on admission.
- b*

### **Cases referred to in the judgment**

*c* ***Nigerian***

*Adejumo v. Governor of Lagos State* (1970) 1 All N.L.R. 183

*d* *Eweka v. Amadasum* (1983) 8 S.C. 87

*Nishizawa Ltd v. Jethwani* (1984) 12 S.C. 234

*Obimonure v. Erinoshio* (1966) 1 All N.L.R. 250

*Skenconsult (Nig) Ltd v. Ukey* (1981) 1 S.C. 6

*e* *Sonuga v. Anadein* (1967) 1 All N.L.R. 91

### ***Foreign***

*f* *Ash and another v. Hutchinson and Co. (Publishers) Ltd and others* (1936) 1 Ch. 489

*Blundel v. Rimmer* (1971) 1 W.L.R. 125

*Craig v. Kanseen* (1943) 1 K.B. 262

*g* *Ellis v. Allen* 1 Ch.D. 904

*Hampdon v. Wallis* (1884) 27 Ch.D. 251

*Lancashire Wekders Ltd v. Harland and Wold Ltd* [1950] 2 All E.R. 1096

*h* *Landergan v. Feast* (1886) 55 L.T. 42

*Phares v. Abdalah* (1914) W.A.C.A. 15

*Porselt v. White* (1885) 31 Ch.D. 52 C.A.

*i* *Smith v. Davies* (1884) 27 Ch.D. 251

### **Nigerian rule of court referred to in the judgment**

*j* High Court of Lagos (Civil Procedure) Rules, 1972, Order 22, rules 1, 5, Order 28, rules 1-6, Order 35, rule 1

### **Books referred to in the judgment**

*Supreme Court Practice*, 1979, paragraph 13/3 4/3

*Supreme Court Practice*, 1982, paragraph 27/2/1, paragraph 2/1, 2/2

*Supreme Court Practice*, 1985, paragraph 27/3/2

### **Counsel**

For the appellant: *Oriade*

For the first respondent: *Okeke*

For the second respondent: *Adegbite*

### **Judgment**

**NNAEMEKA-AGU JCA:** (*Presiding and delivering the lead judgment*) This is an appeal against the decision of Fafiade J, who, sitting in a Lagos High Court on the 27th of May, 1985, upheld the preliminary objection of the learned counsel for the defence to the plaintiffs' motion for judgment on admissions alleged made by the defendants. She held that the application was premature.

The facts leading up to the decision are brief. In an action commenced by a writ of summons, the plaintiff claimed for a declaration that both defendants were liable jointly and severally to pay to the plaintiff the overdraft of ₦512,534.75 with interest thereon at the rate of 13% per annum from 1st September, 1984, until the whole debt with interest was settled. The plaintiff and the second defendant filed their pleadings; but for reasons which will become clearer soon the first defendant did not file their Statement of Defence.

After the pleadings of the plaintiff and the second defendant, the plaintiffs filed a motion asking for judgment against the two defendants under Order 28, rule 6 and Order 35, rule 1 on the ground that on the basis of the admissions made by the second defendant they were entitled to judgment against both defendants jointly and severally. It must be mentioned that as at the date when the plaintiff filed the

*a* application for judgment, and the date of the ruling on the 27th day of May, 1985, there was nothing before the Court to show that the first defendant, the principal debtors, had  
*b* been served with the writ of summons. The affidavit of service was sworn to on the 5th of June, 1985, after the ruling. In a considered ruling the learned Judge held that the application for judgment was premature and dismissed it.

*c* The plaintiff (appellant hereinafter) have appealed. The defendants shall hereinafter be referred to as the respondents.

The parties filed their briefs through their counsel who also  
*d* addressed us orally. The questions for determination in the appeal as framed by the learned counsel for the first respondent and which I believe represent the issues canvassed before us are as follows:

*e* “(a) Whether or not the learned trial Judge was right in holding that the motion for judgment under Order 28, rule 6 was premature having regard to all the circumstances including exhibits PA8 and PA9.

*f* (b) Whether the oral objection raised by the first defendant/respondent is such an irregularity as to warrant a reversal of the learned trial Judge’s exercise of her discretionary powers under Order 28, rule 6.

*g* (c) Whether or not exhibit PA3 at page 9 of the record which was not before the Court below nor part of the proceedings thereat, nor among records settled for purposes of this appeal, could be relied upon to prove a fact which was never put before the trial Judge.”

*h* The first question raises the issue as to when a judgment could be given on admissions under Order 28, rule 6 of the High Court of Lagos (Civil Procedure) Rules, 1972, and whether, having regard to the rule and the facts before the

*i* court, the learned Judge was right to have held that at the time the appellant sought to get judgment it was premature. The learned Counsel for the appellant contends that Order 28, rule 6 of the rule provides that such application could be

*j* brought at any stage of the proceedings where admissions

are made on the pleadings or otherwise. He submitted that the first appellant entered appearance to the writ but failed or refused to file any pleading and that exhibits PA8 and PA9 are an admission of liability to the debt by the second respondent. This would entitle the appellant to judgment against both respondents. He relied upon the following cases, namely: *Ellis v. Allen* (1914) 1 Ch.D. 904; *Lancashire Welders Ltd v. Herland and Wolff Ltd* [1950] 2 All E.R. 1096, 1097 and 1099. *Phares v. Abdalah* (1941) 7 W.A.C.A 15, page 16; *Nishizawa Ltd v. Jethwani* (1984) 12 S.C. 234. He further submitted that failure of the first respondent to file their pleading was an admission of liability. The learned Counsel for the first respondent submitted that although the respondents bound themselves in a bond (exhibit PA8) to be indebted to the appellant to the tune of ₦500,000 with interest in the event of the appellant granting to the first respondents an overdraft, there was no admission or evidence that any over draft had been made, or, if made, how the alleged debt of ₦512,534.75 was made up. This would at least entail the parties going into an account. It was further submitted that for a Court to invoke its powers and enter judgment under the rule, the admission must be clear, unambiguous and unequivocal. So, whenever a purported admission is unclear, the courts have always rejected them. The case of *Blundel v. Rimmer* (1971) 1 W.L.R. at page 125 was relied upon; also *Smith v. Davies* (1884) 28 Ch.D. 650. In the further submission on behalf of the first respondent, the whole of Order 28 of the rules must be read together; and if that is done, it will be clear that the admission contemplated by the rule is an admission of specific and incontrovertible facts. He referred to rule 7 in support. There is none in the instant case; and the cases cited by the appellant are inapplicable, he submitted.

On behalf of the second respondent, Counsel submitted that there was no admission on their part; that although an application under Order 28, rule 6 could be brought at any stage of the proceedings, that could only be done after all the parties have been served with the writ of summons and other

*a* necessary processes. As the second respondent had not been  
served and there was no admission by them, no judgment  
*b* under Order 28, rule 6 could have been entered against  
them, he submitted. Citing the case of: *Landergan v. Feast*  
(1886) 55 L.T.42, he submitted that judgment could not be  
entered for a debt under the rule unless there was a clear  
*c* admission that the debt was due and recoverable. counsel  
further submitted that as difficult points of law were raised  
in the Statement of Defence of the second respondent and  
there was a real dispute about the amount of the debt, if any,  
a judgment on admission was inappropriate. He referred to  
*d* paragraph 13/3 – 4/3 of the *Supreme Court Practice*, 1979.

I shall begin my consideration of the points raised in the  
above submissions by setting out the rule – Order 28, rule 6.  
It provides:

*e* “6. Any party may at any stage of a cause or matter, where ad-  
missions of fact have been made, either on the pleadings, or  
otherwise, apply to the court or a Judge in Chambers for  
*f* such judgment or order as upon such admissions he may be  
entitled to, without waiting for the determination of any  
other question between the parties; and the Court or Judge  
in Chambers may upon such application make such order,  
or give such judgment, as the court or Judge in Chambers  
*g* may think just.”

My first observation on the above provision is that the appli-  
cation may on the *ipissima verba* of the rule, be made “at  
*h* any stage of the proceedings,” provided that “admissions of  
facts have been made.” I do not however, think that when  
the learned trial Judge stated that the application was prema-  
ture, she meant that it could not be made in a proper case un-  
*i* til any particular stage was reached in the proceedings. Nei-  
ther she nor any of the Counsel for the respondents said any  
such thing. What I understand them to have been saying is  
that in the context of this case, a stage had not been reached  
for entering judgment on admission as the first respondent  
*j* had not been served and there was not an admission, if any,

of such a quality to entitle the appellants to a judgment under the rule. So, while it is true that a judgment would be entered under the rule at any stage of the proceedings, the question is whether such a stage had been reached in the circumstances of this case. a  
b

One other aspect of the argument of the learned Counsel for the first respondent needs to be considered next. He submitted that rule 6 of Order 28 should not be read in isolation; but be read and construed together with the other provisions of the Order; and that if that is done it will be seen that the admission contemplated by the rule is one made after notice to admit has been served as required by rules 1-4. c  
d

Now rule 1 deals generally with notice to admit facts; rule 2 with notice to admit documents; rule 4 with notice to admit facts; and rules 3 and 5 forms of notice and admissions. Forms 14 and 15 of Appendix B in fact relate to admissions under rules 4 and 5. Form 13 relates to an admission under rule 3. Significantly, there is no form prescribed by the Order for admission under rule 6. For this reason, one may, in my opinion, invoke the maxim: *expressio unius exclusio alterius*. In other words, the legislator having prescribed specific forms for admissions and notices thereof under rules 3, 4, and 5, and having failed to make such a provision under rule 6, must be deemed not to have intended either that rule 6 must be read together with the other rules or that any form used for the other rules must be used. In fact, if counsel for the appellant were right in his submission that the rules should be read together, the question would have arisen: which of the forms is applicable? I am of the view that it was never intended that rule 6 should be given any restrictive interpretation or read and construed together with the other rules of the Order. Any lingering doubt I may have had of this view of the rule is completely dispelled by the wording of the rule itself. It relates to “where admissions of fact have been made; either on the pleadings, or otherwise.” In view of the use of the words “or otherwise,” it is my view that it is wide enough to e  
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- a* cover admissions made on the pleadings, after a notice to admit, or by any of the recognised methods of admitting facts such as by a letter. I am reinforced in this view by the
- b* opinion of Sarjant J; on a similar provision in the Rules of the Supreme Court, 1888, Rule 6, in the case of *Ellis v. Allen* (1914) 1 Ch.D. 904 where he stated at pages 908-909:
- c* “In *Landergan v. Feast* 55 L.T. 42, the Court of Appeal apparently thought that the point was a nice one, which might some day have to be decided: and it has not for the first time arisen for actual decision. I should be unduly narrowing the meaning of the rule if I did not hold that the admission in this case (ie by a Solicitor’s letter)
- d* was within it. The object of the rule was to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. I do not think rule 6 should be confined as suggested. In my judgment it applies wherever there is a clear admission of facts in the face of which it is
- e* impossible for the party making it to succeed.”

- I entirely agree with this statement of the law. So, if the documents relied upon in this case made a clear admission
- f* of liability, I would agree with Chief Oriade that his clients would be entitled to judgment. I believe it to be the intentment of Order 28, rule 6 of the High Court of Lagos (Civil Procedure) Rules that where there is a clear and unambiguous admission by a defendant whether on the pleading, or by
- g* letter, or upon a notice to admit, the plaintiff is entitled to a decision in his favour on the admitted fact. See: *Hampdon v. Wallis* (1884) 27 Ch.D. 251 at page 257; *Porsett v. White* (1885) 31 Ch.D. 52, CA.
- h*

- But then what is the admission being relied upon in this case? The learned Counsel for the appellant is relying on exhibits PA8 and PA9 as constituting the admission. Now
- i* exhibit PA8 is a guarantee by the second respondents to be responsible for the advances to be made by the appellants to the first respondents to the tune of ₦500,000. It made no admission that any such advance had been made. Also that
- j* guarantee by its terms, expired on the 30th of August, 1984,

and there is nothing from the second respondent to show that it was renewed. There is no evidence as to what part of the amount claimed accrued before the expiring date. Although there is a statement by the first respondent in exhibit PA9, a letter dated 30th May, 1984, that the second respondent had agreed to renew it, it does not appear to have been confirmed by the second respondent. I must therefore hold that at the time the appellant went to Court on the 7th of December, 1984, the guarantee by the second respondent was already dead and not resurrected and there is nothing to show what part of the debt fell due within the period of the guarantee. I shall come back to this later.

Now the letter exhibit PA9 is at page 19 to 20 of the record. While it could be said that the first part of the letter was explaining why the first respondent were in default and asking for time, the most relevant portion states:

“If however you find all the above not acceptable, we shall have no choice than to ask you to offset part of the ₦1 million facility with the ₦527,000 you are holding in fixed deposit for us plus the accrued interest.”

Now giving an interpretation most favourable to the appellant to the above words, it can be said that the first respondent admitted a total indebtedness of one million Naira as at the date of the letter and offered to offset part of that with their fixed deposit of ₦527,000. This would leave a balance of ₦473,000 with interest not ₦512,534.75k as claimed. A sum of ₦39,463.25k of the amount claimed still remains unaccounted for. Of course, the appellant might have been entitled to apply for judgment for the lesser sum of ₦473,000. See: *Supreme Court Practice*, 1985, paragraph 27/3/2; but they have not done so here and I do not feel that I am entitled to consider it on my own, particularly as I have a hunch that it may not meet the justice of the case. Also, the pleading in paragraph 10 of the Statement of Claim is general in terms and does not show how the sum of ₦512,534.75k claimed was arrived at. I should here recall the dicta of Lord



*a* Greene in: *Ash and another v. Hutchinson and Co. (Publishers) Ltd and others* (1936) 1 Ch. 489 at page 502:

*b* “A plaintiff who relies for the proof of a substantial part of his case upon admissions in the defence must, in my judgment, show that the matters in question are clearly pleaded as clearly admitted; he is not entitled to ask the Court to read meanings into his pleading which upon a fair construction do not clearly appear in order to fix the defendants with an admission.”

*c* I adopt this opinion. I am of the view that although a court can give to a plaintiff judgment of whatever part of his claim which he proves or is admitted, the claim and pleading in the  
*d* Statement of Claim in the instant case do not justify such a course. The case of: *Lancashire Welders Ltd v. Harland and Wolff Ltd* [1950] 1 All E.R. 1096 which was cited by the learned Counsel for the appellant is not in point. That case  
*e* rather set about to answer the question whether a plaintiff who had not asked for judgment in proceedings under Order 14 of the R.S.C. could consequently apply for judgment on an admission. Upon a calm view of exhibits P8 and PA8 and  
*f* for what I have said above, I am satisfied that they did not constitute a clear and unambiguous admission by the first respondent of liability for the amount claimed by the appellant. At best it could be said that the first respondent admitted owing the appellant a certain sum which could not yet be  
*g* determined from the materials before the Court.

The case against the first respondent has yet another serious difficulty: there was no proof of service of the writ on  
*h* the first respondent as at the date when the ruling appealed against was handed down. This was the third issue in the appeal. It is useful to set out paragraphs 5-8 of the counter affidavit of Sebastian Ozoana sworn to in this Court on the  
*i* 22nd of November, 1985.

He deposed *inter alia*, as follows:

*j* “5. That I have further been informed by the said Simon Okeke, Esq. that he has repeatedly complained in court about the non-service of the writ of summons on the first defendant.

6. That I was further informed by the said Simon *Okeke*, Esq. that on the 27th of May, 1985 when the application of the plaintiff was dismissed, the learned trial Judge, Justice Moni Fafiade, had in response to the remark of Counsel to the first defendant observed that there was no record of service on the first defendant in the Court file.
7. That on the 6th of September, 1985 when the record of appeal was settled at the Lagos High Court Registry, the affidavit of service in respect of the first defendant was not one of the documents settled.
8. That on the 21st of October, 1985, when the plaintiffs motion seeking for departure from the rules came up at the Court of Appeal, Lagos, the affidavit of service in respect of the first defendant was not one of the documents before the Court.”

The reaction of the learned counsel for the appellant to the remarks of the learned Counsel for the respondents about non-service of the writ of summons was to procure and exhibit exhibit PA3, a purported affidavit of service of the writ of summons on the first respondent, exhibit PA3 was *ex facie*, sworn to on the 5th of June, 1985 – some nine days after the ruling in question. As it was not in existence on the date of the ruling, it is mystery how it came to form a part of the record of this appeal. There was no application or leave to call further evidence in the appeal. I have therefore no alternative but to ignore the affidavit of service, exhibit PA3, in coming to a conclusion in the matter: See *Eweka v. Amadasun* (1983) 8 S.C. 87. Although there was an entry of appearance on their behalf as shown by exhibit PA4, it does appear from the above affidavit that as at that date there was no service of the writ of summons on them: at least there was no proof of that. If therefore, as the affidavit of counsel set out above shows, they had not been served with the writ of summons, the proceedings is a nullity: See *Craig v. Kanseen* (1943) 1 K.B. 262; *Skenconsult (Nigeria) Ltd v. Ukey* (1981) 1 S.C. 6; *Obimonure v. Erinosh* (1966) 1 All N.L.R. 250 at page 252. If, as it appears from the affidavit of their

- a* Counsel set out above, the first respondent heard of the institution of the action against them and entered appearance to enable them to appear in Court to inform the Court of non-service of the writ and the Statement of Claim, that will not
- b* clothe the non-service with legality. Failure to file a defence by a party not served with the writ and the Statement of Claim cannot be an admission of liability.
- c* The case against the second respondent is even more tenuous. There is no suggestion that they themselves made any admission. It appears clear to me that an admission under the
- d* rule which could entitle a plaintiff to judgment against a defendant is an admission made by the defendant himself: See *Supreme Court Practice* 1982 – paragraph 27/2/1. True the second respondent were used as guarantors to the first respondent; yet it does not mean that an admission of liability,
- e* if any, by the first respondent was necessarily an admission of liability by the second respondents. Indeed the second respondent in their statement of defence, exhibit PA5, and in argument before us have tried to show that they have prima
- f* facie a number of defences to the action, quite independent of whatever defences the first respondent may have. They include:
- g* i. That the guarantee which they signed exhibit PA8 expired on 30th August, 1984 and there was no evidence either of its renewal by them or of what portion of the debt, if any, became due during the period of
- h* guarantee;
- ii. That the parties were not ad idem as to the conditions of the guarantee;
- i* iii. That the guarantee was conditional upon the fixed deposit of the first respondent with the appellant and the domiciliation of the proceeds of the contract due to the first respondent being paid to the second respondent;
- j*

- iv. That the appellant failed to comply with the conditions precedent to the guarantee. a

At least some of these are triable issues and far from showing that the second respondents were prepared to admit liability for the amount claimed by the appellant. b

I do not regard the manner in which the objection to the motion for judgment on admission was raised as a serious issue. The learned Counsel for the appellant himself agreed in his brief that even if the manner of raising it was wrong, it was an irregularity under paragraph 2/1 and 2/2 of the Supreme Court Practice, 1982. This will not have the effect of nullifying the proceedings. The objection was not a demurrer under Order 22, rule 1 of the High Court of Lagos State (Civil Procedure) Rules, 1972; nor is Order 22, rule 5 applicable. I am also of the view that the case of: *Adejumo v. Governor of Lagos State* (1970) 1 All N.L.R. 183, pages 185 and 187 is inapplicable in that the preliminary objection to the motion for judgment was not an application to set aside for irregularity nor do I see how the principle in: *Sonuga v. Anadein* (1967) 1 All N.L.R. 91 could be invoked to bar the second respondent from raising an objection to the prematurity of the motion simply because they filed a counter affidavit. I see no substance in this issue. c  
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For all I have said above about the cases against each of the respondents, I am of the view that the learned trial Judge was right to have held that the application for judgment on admission was premature. g

This appeal fails and is dismissed with costs of ₦250 against the appellant and in favour of each of the two respondents. h

*Appeal dismissed.* i

**MOHAMMED JCA:** I also agree that the learned trial Judge was quite right to say that the application for judgment was premature since there was nothing to show that the first respondent had been served with a writ of summons before the j

- a* filing of the application for judgment. I also agree with the judgment of my learned brother Nnaemeka-Agu, JCA, that the statement of defence filed by the second respondent had
- b* established a defence to the action instituted by the applicants. Accordingly this appeal is dismissed with costs as assessed and awarded by my learned brother in the lead judgment.
- c* **KUTIGI JCA:** I concur.

## Adedeji v. National Bank of Nigeria Limited and another

COURT OF APPEAL, LAGOS DIVISION

AKPATA, BABALAKIN, AWOGU JJCA

Date of Judgment: MONDAY 7 MARCH 1988

C.A.L.: 112/86

*Banking – Security for banker’s advances – Governor’s consent as mandatory requirement for a valid mortgage – Mortgagor relying on his failure to obtain Governor’s consent to invalidate the mortgage – Whether transaction can be declared null and void at his instance – Where customer defaults in repayment of loan – Whether banker can rely on a mortgage to which Governor’s consent has not been obtained – Whether such mortgage is illegal or voidable – Mortgage of land under the Land Use Act, 1978 – Requirement of Governor’s consent – Whether the requirement also applies to deemed holder of right of occupancy*

### Facts

The appellant mortgaged his landed property by a Deed of Mortgage dated 7th March, 1980 to the first respondent for a building loan of ₦200,000 to enable him complete his building at Opebi Village, Ikeja.

When the appellant defaulted in repayment of the loan the first respondent gave notice to exercise its statutory power of sale, and instructed the second respondent, an auctioneer, to carry out the sale. The appellant as plaintiff instituted an action at the Lagos High Court claiming to be granted his right of equity of redemption of the mortgaged property and an injunction to restrain the defendants/respondents from interfering with the land or taking any step to sell it until the final determination of the suit.

The trial Judge dismissed the action on the ground that it was not brought in good faith and therefore was an abuse of court process.

*a* On appeal to the Court of Appeal, the appellant argued a point of law which was not raised at the High Court. He contended that the Deed of Legal Mortgage was null and void  
*b* and could not be relied upon because the consent of the Military Governor was not obtained thereto, as required by section 22 of the Land Use Act.

The respondents raised a preliminary objection to the only  
*c* ground of appeal because the issue of Governor's consent was never raised by the appellant in the High Court. The Court of Appeal decided to consider the arguments on the preliminary objection and the appeal together.

*d* **Held –**

1. That the appellant cannot rely upon his own wrongful act of not obtaining Governor's consent to the mortgage to allege that the Deed of Legal Mortgage was null and void and unenforceable under section 22 of the Land Use Act.  
*e*
2. The Deed of Legal Mortgage was not illegal because the Land Use Act did not provide any penalty for the breach of the provisions of sections 22 thereof and it would not be necessary to call in aid public policy to treat an agreement of alienation without the Governor's consent as illegal; public policy can be adequately safe-guarded by the Governor's power of revocation and right of re-entry.  
*f*  
*g*
3. Every holder of a Right of Occupancy under the Land Use Act, 1978 including a person deemed by sections 34 and 36 of the Act to hold a Right of Occupancy requires the consent of the Military Governor before he could transfer, mortgage or otherwise dispose of his interest in the Right of Occupancy and the provisions of sections 21 and 22 applied to the mortgage property.  
*h*  
*i*

*Appeal dismissed.*

***Per Curiam***

*j* "It cannot reasonably be supposed to have been intended by those

who promulgated the Land Use Act that a holder who, without *a*  
obtaining the consent of the Governor, mortgage his property for  
a handsome amount and after collecting the money can say to the  
bank, ‘the Mortgage is null and void, you cannot have my prop-  
erty’ and get away with it.” *b*

### Cases referred to in the judgment

#### *Nigerian*

- Adeleke v. Yerokun* (1965) N.M.L.R. 291 *c*  
*Alhaji Baba Baki Saleti v. Alhaji Talle Shehu* (1986) 1 S.C.  
332  
*Akpene v. Barclays Bank (Nig) Ltd* (1977) 1 S.C. 47 *d*  
*Enang v. Adu* (1981) 11-12 S.C. 2 at 45-46  
*Duramani Ngekgla v. Tribal Authority Nongowa Chiefdom*  
(1953) 14 W.A.C.A. 325  
*Fadare v. A G Oyo State* (1982) 4 S.C. 1 at 16 and 17 *e*  
*Mandilas Ltd v. Anyanru* (unreported) CA/L/140/86 deliv-  
ered on 26/2/87  
*Mogaji v. Cadbury (Nig.) Ltd* (1985) 7 S.C 59; (1985) 2 *f*  
N.W.L.R. (Part 7) 393  
*Oilfield Supply Centre Ltd v. Johnson* (1987) 2 N.W.L.R.  
(Part 58) 625  
*Quo Vadis Hotels and Restaurant Ltd v. Commissioner of g*  
*Lands (Mid West)* (1973) 6 S.C. 71  
*Savannah Bank (Nig.) Ltd v. Ajilo* (1987) 2 N.W.L.R. (Part  
57) 421  
*Shonekan v. Smith* (1964) 1 All N.L.R. 168 *h*  
*Solanke v. Abed* (1962) 1 All N.L.R. 230

#### *Foreign*

- Buswell v. Goodwin* [1971] 1 All E.R. 418 at 421 *i*  
*Archbold v. Spanglett* [1961] 1 All E.R. 417

### Nigerian statute referred to in the judgment

- Land Use Act, 1978, sections 21, 22, 34(1) and (2) and 36 *j*



**a Nigerian rule of court referred to in the judgment**

Court Appeal Rules, 1981, Order 6, rule 3(a)

**b Book referred to in the judgment**

Maxwell on *Interpretation of Statutes* (10ed), page 213

**c Counsel**

For the appellant: *Fadahunsi*

For the respondents: *Eyitayo*

**d Judgment**

**AKPATA JCA:** (*Delivering the lead judgment*) This appeal has brought to sharp focus the legal principle that no one should be allowed to benefit from his own wrong. It also raises the settled law that a Court of Appeal will allow a party to raise a point not raised in the Court below if it is a point of substantive or procedural law in order to avoid a miscarriage of justice; but leave has to be sought to raise it.

**f** The simple fact of this appeal is that by a Deed of Mortgage dated 7th March, 1980, the appellant mortgaged his landed property with the buildings thereon at Opebi Village, Ikeja, Lagos State to the first respondent, National Bank of Nigeria  
**g** Limited, for a building loan of ₦200,000 to enable him complete the buildings on the land. When the appellant defaulted in repayment of the loan and the first respondent, gave notice to exercise its statutory power of sale, and instructed the second respondent, an auctioneer, to carry out the sale, the appellant as plaintiff instituted an action at the Lagos High Court claiming (a) for an order granting the plaintiff his right of equity of redemption in respect of the landed property and (b) an order of injunction to restrain the defendants, now the respondents, from interfering with the possession of the plaintiff in respect of the landed property or taking any step to sell it until the final determination of the suit.

**j** In his judgment delivered on 17th December, 1985, the learned trial Judge, Segun J, held that the action was not

brought in good faith and that it was an abuse of the process of the court and accordingly dismissed it. Against the judgment, the appellant filed four grounds of appeal the following day 18th December, 1985. On 25th February, 1987, the appellant was granted leave by this Court to substitute for all the original grounds, a ground of appeal on point of law which was not taken in the High Court. The ground reads:

“The whole judgment is erroneous in that the Deed of Legal Mortgage dated 7th March, 1980 and registered as No. 28 at page 28 in Volume, 1995 in the Lands Registry Lagos is void and could not be relied upon.

#### PARTICULARS

- (a) The alleged Deed of Legal Mortgage in which the respondent relied for its power of sale is void in law in that it contravenes the provisions of section 22 of the Land Use Act 1978 and by virtue of section 34(1) and (2) the appellant is deemed the holder of a Statutory Right of Occupancy, hence, the consent of the Military Governor of Lagos State is mandatory and a condition precedent to make the alleged Deed of Legal Mortgage a legal transaction. The respondent seem not and in fact did not obtain the consent of the Military Governor of Lagos State for the mortgage.
- (b) By virtue of section 26 of the Land Use Decree of 1978, all such mortgage which contravenes the Decree is null and void hence, the respondent could not have exercised any right of sale from the deed of legal mortgage.”

When this appeal came up for hearing on 2nd February, 1988, Mr *Eyitayo*, learned Counsel for the respondents, drew our attention to the notice dated 12 March 1987, filed on 17 March 1987, of the intention of the respondents to raise a preliminary objection to the only ground of appeal. The grounds of objection are:—

- (1) The issue of consent to mortgage was never raised in his pleadings or evidence in the High Court.
- (2) The ground does not form an exception to the rule enunciated in the Supreme Court judgment: *Mogaji v. Cadbury Nigeria Ltd* (1985) 2 N.W.L.R. (Part 7) 393, pages 409 and 433.

- a* Arguments in respect of the preliminary objection and the appeal were taken together on the understanding that the objection in respect of the preliminary objection would be resolved in the judgment.

- b*
- It was the contention of Mr *Fadahunsi*, learned Counsel for the appellant, in the appellant's brief that if a new point of law to be raised on appeal is of substantive or procedural law, it could be raised but with leave of Court.

- c*
- He relied on: *Lasisi Fadare and others v. Attorney-General of Oyo State* (1982) 4 S.C. 1 and *K Akpene v. Barclays Bank of Nigeria Ltd and others* (1977) 1 S.C. 47. In the case of *Lasisi Fadare*, the Supreme Court held at pages 16 and 17 that, "It is settled law that this Court will allow a party to raise a point not raised in the Court below if it is a point of substantive or procedural law which needs to be allowed to avoid miscarriage of justice but leave has to be sought to raise it."

- e*
- In: *Akpene v. Barclays Bank (supra)* at page 47, the Supreme Court had this to say:

- f* "The general rule adopted in this Court is that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial Court (*Shonekan v. Smith* (1964) All N.L.R. 168 and 173) but where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision of them, the Court will allow the question to be raised and the points taken *Shonekan v. Smith (supra)*, stool of *Abinabina v. Chief Kojo Enyinadu* (1953) A.C. 207 at 215) and prevent an obvious miscarriage of justice."

- g*
- Learned Counsel in his oral submission cited: *Alhaji Baba Baki Saleti v. Alhaji Talle Shehu* (1986) 1 S.C. 332 at page 336 and *Mogaji v. Cadbury Nigeria Ltd and others* (1985) 7 S.C. (Part 1) 59 at page 60 in which the attitude of the Supreme Court relating to a new question or new grounds not raised in the lower Court was restated.

- i*
- In raising a preliminary objection to the appellant arguing the only ground of appeal, Mr *Eyitayo*, learned Counsel for

*j*

the respondents, submitted that the subject matter of the ground of appeal was never pleaded, raised or considered in the lower Court and that the ground does not conform with any of the exceptions recognised by the Supreme Court in the case of *Mogaji v. Cadbury (Nig.) Ltd (supra)*. It is not necessary for me to reproduce the ratios at pages 409 and 433 except to say that they are akin to those in *Lasisi Fadare's* case (*supra*) and *Akpene v. Barclays Bank (supra)*.

In his oral submission, learned Counsel for the respondents referred to a judgment of this Court, *Mandilas Ltd v. Ekhatator Anyanru* CA/L/140/86 (unreported) delivered on 26 February, 1987, in which this Court refused leave on the ground that the lower Court had not the opportunity to pronounce on the new points of law sought to be argued.

The true position, however, is that the objection of learned Counsel has been taken too late in the proceedings. The objection to my mind ought to have been taken before the appellant was granted leave to substitute the new ground of appeal for all the original grounds of appeal. In the case of: *Lasisi Fadare v. Attorney-General of Oyo State (supra)* at page 16, the Supreme Court observed thus:

“The respondent has in his brief of argument objected to the appellants arguing grounds 3(a) – (f) on the grounds that these matters were not canvassed before the Federal Court of Appeal. It is settled law that the proper time for such an objection is at the time the appellants apply to this Court for leave to argue the new points. But no such application was made to this Court although these grounds were exhibited on the application for leave granted by the Court of Appeal.”

See also the case of: *Etowa Enang and others v. Fidelis Ikor Adu* (1981) 11-12 S.C. 25 at pages 45-46.

If, however, an appellant raised a new question not raised or canvassed in the trial Court in his original grounds of appeal and had not sought leave to argue it before the appeal comes up for hearing, it should be indicated in the appellant's

- a* brief of argument that leave to argue it will be sought at the hearing of the appeal. (See: Order 6, rule 3(*a*) of the Court of Appeal Rules, 1981, as amended by the Court of Appeal
- b* (Amendment) Rules, 1984). Granted that the appellant has not been granted leave to argue the new ground, I am satisfied that the only ground for consideration in this appeal
- c* raises a substantial point of law which should be looked into in the interest of justice. A question of illegality or of a Deed of Legal Mortgage which was the subject matter of an action being void *ab initio* or not is, to my mind very substantial. The objection is therefore overruled.
- d* The issues for determination as formulated by learned Counsel for the appellant are:—
- “1. Whether the Deed of Legal Mortgage dated 7th March, 1980 between the appellant and the respondent bank is valid
- e* in law by not applying for and obtain the required Governor’s consent for the mortgage, thus contravening the statutory provision of section 22 of the Land Use Decree, 1978 with reads thus:
- f* ‘It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of, occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Military Governor first had and obtained.’
- g* 2. Whether in view of the question above what is the effect of section 26 of the Land Use Decree where the consent of the Military Governor is not had and obtained for any mortgage transaction. Section 26:
- h* ‘Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provision of this Decree shall be null and void’.”
- i* In my view, while the issues canvassed by learned Counsel may have a bearing on the appeal, there is however the main issue, regardless of the invalidity or otherwise of the Deed of Legal Mortgage whether the learned trial Judge was right in
- j* dismissing the action of the appellant having regard to the

claim before him. There is also the question whether the appellant can be heard to put forward his own failure to get the necessary consent to say that the Mortgage is unenforceable. a

Mr *Fadahunsi* in arguing the appeal, drew our attention to the letter exhibit D dated 23 June, 1983 at page 164 of the records where the respondent bank gave notice to the appellant that unless he paid the sum of ₦290,277.34 to the bank within one clear month, the bank would have no option but to proceed to exercise its power of sale under the Deed of Legal Mortgage. He contended that by section 22 of the Land Use Act, 1978, any transaction and in respect of any land by assignment, mortgage or otherwise by a holder of a Statutory Right of Occupancy under the Land Use Act is not lawful unless the consent of the Military Governor is first had and obtained. This being a statutory provision, he submitted, that no court can exercise any discretionary power in favour of the respondent bank the mortgage being invalid, null and void. The use of the word “SHALL”, he argued, makes the provision of section 22 mandatory. He cited: (1) *Archbold v. Spanglett* [1961] 1 All E.R. 417 at page 424; (2) *Adeleke v. Yerokun* (1965) N.M.L.R. 291 at 292; (3) *Duramani Ngekgla v. Tribal Authority Nongowa Chieftdom* (1953) 14 W.A.C.A. 325 at 327 to show that it was obligatory on the courts to uphold statutory provisions. b  
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In his oral submission, the learned Counsel cited the case of *Savannah Bank of Nigeria Ltd and another v. Ajilo* (1987) 2 N.W.L.R. (Part 57) 421 delivered by this division of the Court of Appeal on 10 March, 1987 wherein this Court unanimously held that every holder of a right of occupancy, including the person deemed by the Act to hold a right of occupancy, requires the consent of the Military Governor before he can transfer, mortgage or otherwise dispose of his interest in the right of occupancy. In his contribution, Ademola JCA at page 22 of the cyclostyled copy of the judgment commented that: g  
h  
i

“The consequence of this Court’s decision may be delayed and may bring frustration in the commercial circles, that very fact j

*a* may call the attention to some form of amelioration of the position under the Act.”

*b* Mr *Eyitayo*, for the respondent argued that the decision of the High Court would not be different, assuming that the Mortgaged Deed is null and void and unenforceable. The action of the appellant which was for an order of Equity of Redemption and Injunction would still have been dismissed  
*c* because there would be no basis for his claim. Counsel submitted further that consent, when obtained is normally given in a letter from the Military Governor’s Office. Nothing in the Land Use Act, 1978 or any law directs that such consent  
*d* when obtained must be registered along with the Deed of Mortgage. He contended that for the appellant to succeed in this appeal it would be necessary for him to amend his pleadings and also seek leave to give fresh evidence which  
*e* he has not done.

Counsel further submitted that equity will not favour the appellant as he has not done equity. By section 22 of the Land Use Act, it is the holder of the right of occupancy that  
*f* should apply for consent. He argued that the appellant cannot succeed on the basis of his own illegal act. Learned Counsel, however, cited no authority in support of his contention on this point.

*g* I must begin by saying that generally the courts are bound to enforce the mandatory provisions of a substantive law and that it is the duty of all courts to give effect to legislation and  
*h* that the parties cannot by consent or acquiescence or failure to object, nullify the effect of a statute.

I also like to start off by assuming that no consent was obtained. On this basis, the decision in *Akpene v. Barclays Bank of Nigeria and others* (1977) 1 S.C. 47 is relevant and has to be delved into in detail. In that case, Mr J.E. Akpene, a customer of the bank applied for an overdraft to the limit of £1,000 from the Barclays Bank, an alien banking company  
*i* registered in Nigeria. The plaintiff, Mr K Akpene, a  
*j*

brother of the customer was the surety who offered his landed property as security for the overdraft, and a legal Mortgage Deed in respect of the property was drawn. *a*

The Deed was not presented for approval by the governor in the then Mid-Western Region (now Bendel State) in accordance with section 3 of the Native Lands Acquisition Law (Cap 80) Laws of Western Region of Nigeria, 1959, then applicable in Mid-Western Region, which declared any transaction or instrument under which an alien purported to acquire any interest in or right over any land requiring approval of the Governor null and void and of no effect if such approval was not given. The bank erroneously sought and obtained approval from the then Western Region after the geographic mass of land known as Mid-Western Region was no longer part of the Western Region. When the customer defaulted in repayment the plaintiff's landed property was sold to the second defendant. *b c d e*

The plaintiff instituted an action for:

- (1) a declaration that the property sold was invalid for want of the proper exercise of the power of sale and the absence of good faith, *f*
- (2) an order setting aside the sale for invalidity, and
- (3) an order of injunction to restrain the bank from taking steps to convert plaintiff's premises to second defendant in pursuance of the purported sale and granting leave to the plaintiff to redeem his premises upon paying the bank the amount due under the mortgage. *g*

The plaintiff did not specifically plead that the Mortgage Deed was void for failure to obtain approval. The claim of the plaintiff was dismissed in the High Court. *h*

On appeal to the Supreme Court, the point that the Mortgage Deed was void was raised for the first time with leave of the Supreme Court. It was argued by the plaintiff/appellant's Counsel that the bank did not comply with section 3 of the Law and as such acquired no interest of right in the landed property. The respondent's Counsel conceded that the document required approval under the Native Land Acquisition Law but contended that whether there is approval *i j*



*a* or no approval was a triable issue and that it should have been raised on the pleadings and not having been so raised, it was incompetent of the appellant to raise it on appeal. At  
*b* page 58 of the judgment the Supreme Court observed thus:

*c* “We observed from the pleading that the plaintiff/appellant made the Mortgage Deed exhibit 1 the basis of his claim while the first defendant/respondent founded his defence on it. The Deed was therefore continuously under the searchlight at all material times since the institution of this action and whatever opinion as to its validity the parties may have held, we are unable to accept the proposition that the founding of the plaintiff’s/appellant’s case and the defendants’/respondents’ case on the Deed exhibit 1 conferred on the Deed the validity it did not have under the law;  
*d* more so as the law declares it null and void and of no effect.”

The Court then held that the point of objection had been made out and that the Mortgage Deed on which the sale of  
*e* the premises to the second defendant was made was null and void and of no effect and consequently, the sale transaction founded on it could not stand as there would have been no power to sell.  
*f*

Setting this appeal against: *Akpene v. Barclay Bank of Nigeria Ltd (supra) ex facie*, one would say that, to a large extent, the appellant in this appeal has made out a good case and that the respondent’s contention has, been demolished,  
*g* also to a large measure. I shall later in this judgment point out the actual effect, if any, of *Akpene’s* case on this appeal.

*h* I now turn to another decision of the then Federal Supreme Court which is on the other side of the legal argument. It is the case of *Solanke v. Abed and another* (1962) 1 All N.L.R. 230. In that case the plaintiff entered into possession of certain parcels of land as tenant to the first defendant under a  
*i* Tenancy Agreement. The parcels of land were subject to the provisions of the Land and Native Rights Act. The first defendant failed to obtain the consent of the Governor to his transfer of possession of the parcels of land as required by  
*j* section 11 of the Act. Later the first and second defendants

committed acts of trespass upon the parcels of land for which the plaintiff brought proceedings for damages, pleading the Tenancy Agreement as the basis for his right of possession. Before the trial Court the defendants contended that since the first defendant failed to obtain the required consent of the Governor, under section 11 of the Land and Native Rights Act the alleged Tenancy Agreement was null and void; that being so, the alleged tenancy thereunder was unenforceable, or, alternatively illegal, and an action for trespass could not be maintained thereon. The trial Court upheld the defendants' contention and dismissed the action.

The plaintiff appealed to the Federal Supreme Court. The questions which arose from the appeal were (1) whether a contract declared void by statute was necessarily illegal and (2) whether a person could rely on his own wrongful act and allege that the agreement was null and void. At page 233 Unsworth, FJ, delivering the judgment of the Court, with which Ademola, CJF and Taylor FJ concurred, held that the first defendant could not be heard as against the plaintiff to put forward his own wrongful act and say that the agreement was unenforceable because he himself had failed to get the necessary consent under section 11 of the Land and Native Rights Act. He then referred to Maxwell on the: *Interpretation of Statutes* (10ed) at page 212 where the position is set out thus:

“It may probably be said that where a statute not only declares a contract void, but imposes a penalty for making it, it is not voidable merely. The penalty makes it illegal. In general, however, it would seem that where the enactment has relation only to the benefit of particular persons, the word ‘void’ would be understood as ‘voidable’ only at the election of the persons for whose protection the enactment was made and who are capable of protecting themselves or when it has some object of public policy in view which requires the strict construction, the word receives its natural full force and effect.”

Unsworth FJ went on to say that although the Act provided that it shall be unlawful for the occupier to alienate his right

- a* of occupancy, it did not provide any penalty (just as the Land Use Act does not provide any penalty) for breach of the provision. He then added that it would not appear necessary in the interest of public policy for an agreement of alienation to be treated as illegal and that public policy can be adequately safe guarded by the Government's power of revocation and right of re-entry.
- b*
- c* Applying the totality of the reasoning in the case under reference to this appeal, it follows that the appellant cannot rely upon his own wrongful act so as to allege that the deed of legal mortgage was null and void and unenforceable under section 22 of the Land Use Act.
- d*

- In my view, going by the case of *Solanke v. Abed (supra)*, if the Government is not happy with the situation, it can exercise its statutory power of revocation and right of re-entry.
- e* However, in circumstances such as this, it may not be advisable for the Government on ground of public policy to take steps which may tantamount to protecting acts of bad faith or dishonesty by a holder. It cannot reasonably be supposed to have been intended by those who promulgated the Land Use Act that a holder who, without obtaining the consent of the Governor, mortgaged his property for a handsome amount and after collecting the money can say to the bank,
- f*
- g* "the mortgage is null and void, you cannot have my property" and get away with it.

- In: *Akpene v. Barclays Bank of Nigeria Ltd (supra)* the Supreme Court not doubt did not advert to the decision of the Federal Supreme Court in: *Solanke v. Abed* because the plaintiff in that case was not guilty of any wrongful act. It was the bank, an alien company, that failed to seek and obtain the consent of the Government. The mortgage was declared null and void at the instance of the plaintiff who was faultless in the sense that the responsibility to seek and obtain leave did not lie with him. It was not a case of a party relying upon his own wrongful act to avoid the contract. In effect, a transaction will not be declared null and void for failure to obtain
- h*
- i*
- j*

approval at the instance of the party, be he the plaintiff or defendant, whose responsibility it is to seek and obtain the approval. a

Another point to note is that in *Akpene's* case; the plaintiff's claim was for a declaration that the sale of his property by virtue of the Mortgage Deed was invalid. Therefore declaring the Mortgage Deed invalid had also the effect of declaring the sale invalid. In the instant case, however, declaring the Mortgage Deed null and void would not make the plaintiff/appellant succeed in his claim for equity of redemption. For him to succeed at all in his claim for equity of redemption there must first be a valid Deed of Mortgage. b  
c  
d

In the case of *Savannah Bank of Nigeria Ltd v. Ammel Ajilo (supra)*, the only issue which called for consideration by this Court was whether a person who is deemed to be a holder of a right of occupancy pursuant to section 34 or 36 of the Land Use Act requires the consent of the Military Governor before he can transfer, mortgage, or otherwise dispose of his interest in the right of occupancy pursuant to section 34 of the Act. Since the plaintiff in that case, as in this case, did not seek and obtain the consent of the Military Governor, the Mortgage Deed was declared null and void. Fortunately for the plaintiff in that case the issue as to his competence or otherwise to rely upon his own wrongful act to avoid the contract was not canvassed. e  
f  
g

There is also another case in which the landlord apparently got the Commissioner of Lands to institute an action against himself, the landlord and his alien tenants on the basis that no consent had been sought and obtained from the Military Governor before the Deed of Lease was entered into by him and his tenants. It is the case of: *Quo Vadis Hotels and Restaurant Ltd v. Commissioner of Lands, Mid-Western State and others* (1973) 6 S.C. 71. The Commissioner succeeded in the Benin High Court but on appeal to the Supreme Court the decision was reversed on the ground, amongst others, that the Commissioner of Lands was not competent to institute h  
i  
j

- a* the action. It ought to have been instituted by the Attorney-General of the State. This is what the Supreme Court had to say at pages 97-98 about the conduct of the landlord who
- b* was the first defendant and who agreed with the Commissioner of Lands that the Deed of Lease was null and void.

- c* “There are, however, some unsavoury aspects of this case to which we propose to make a short reference and observation. We point out that the participation of the first defendant in this action, whilst not illegal, leaves quite a great deal to be desired in view of the way and manner in which his case had been framed. He was the landlord of the second defendants and it is surprising that he has fought this case throughout on the basis that his own acts
- d* were illegal and void and in absolute disregard of the established principle of law that he might not derogate from his own grant. The high watermark of the questionability of his mode of participation is reflected in paragraphs 4 and 5 of his statement of defence (which we have set out earlier on in this judgment) and the
- e* evidence he gave in support of them; and any fair appraisal of his manner of participation in the case must leave room for considerable, doubts about the honesty of any purpose which he had set out to achieve.”

- f* Also the case of *Oilfield Supply Centre Ltd v. Johnson* (1986) 5 S.C. 310 is relevant. In that case, the appellant company questioned the right of the respondent, an expatriate member of the company, to initiate winding-up proceedings on the ground that his membership of the company had
- g* not received the consent of the Minister of Internal Affairs pursuant to section 8(1) of the Immigration Act. At pages 339-340, Eso JSC observed thus:

- h* “It is the appellant who should have applied for a permit for him and failed to, before he helped them found the company, that now intends to meet him with illegality perpetrated by the same company. Certainly, equity will not permit the company to benefit
- i* from their own illegality.”

- Apart from the principle of law involved in this case, it is morally despicable for a person who has benefited from an agreement to turn round and say that the agreement is null
- j* and void.

In pursuance of the principle that law should serve public interest, the courts have evolved the technique of construction in *bonam partem*. One of the principles evolved from such construction in the interpretation of statutes is that no one should be allowed to benefit from his own wrong (*Nolus commodum capere postest de jura sua propria*). As Widgery LJ, said in: *Buswell v. Goodwin* [1971] 1 All E.R. 418 at page 421, “the proposition that a man will not be allowed to take advantage of his own wrong is no doubt a very salutary one and one which the court would wish to endorse.” The effect is usually that the literal meaning of the enactment is departed from where it would result in wrongful self-benefit.

There is also the well known principle of the law of evidence that everything is presumed right until the contrary is proved. In effect there is the presumption of regularity. It was not apparent in the pleadings or evidence adduced before the learned trial Judge that the appellant did not obtain the consent of the Governor before the execution of the Deed of Legal Mortgage. Admittedly, there is the school of thought that where consent is statutory requirement before a transaction of sale or mortgage can be entered into, the fact that consent was obtained should be stated in the Deed of Conveyance or Mortgage. Nonetheless, it is also true that failure to state in the Deed that consent was obtained would not render the Deed invalid if in fact consent was obtained. I hold the view that the presumption of regularity is in favour of the respondent.

The position therefore is that, from whatever angle one looks at this appeal, it is bound to fail. I hold that it fails. It is dismissed. The judgment of Segun J, dated 17th December, 1985 is affirmed. I assess costs of the appeal at ₦250 in favour of the respondents.

**BABALAKIN JCA:** I agree with the reasoning and conclusions reached in the judgment just delivered by my learned brother, Akpata JCA.

*a* This is a glaring case of an appellant seeking to benefit from his own wrong.

*b* He who comes to equity must come with a clean hand. The appellant's hand is not only unclean in this matter but his action also borders on unconscionable conduct.

I too dismiss the appeal.

*c* I make similar orders contained in the judgment.

*d* **AWOGU JCA:** I have had a preview of the judgment just delivered by my brother, Akpata JCA I agree with it. The plaintiff appears to seek equity without obeying the rules of equity. His claim is as follows:

- e* “1. For an order granting to the plaintiff his right to equity of redemption on the plaintiff's house and landed property, situate, lying and being at Plot 22, Adedeji Close, Opebi, Ikeja, Lagos State.
- f* 2. The plaintiff also seeks an order of court by way of an injunction to restrain the defendants their agents and or servants from interfering with the possession of the plaintiff in respect of the said house or taking any step to sell the plaintiff's property until the final determination of this suit.”

*g* In his pleading, he did not plead any mortgage deed which he was seeking to redeem nor did he tender it in evidence at the trial. The defendants put in the mortgage deed under cross-examination and the claim was dismissed.

*h* Having lost, he obtained leave to argue an additional ground to the effect that the mortgage deed was a nullity because of lack of consent which he ought to have obtained.

*i* As my brother, Akpata JCA has pointed out, he cannot be allowed to benefit from his own wrong. I agree that the appeal be dismissed, with costs assessed at ₦250 in favour of the respondents.

*i* *Appeal dismissed.*

## Uzuegbu v. Progress Bank of Nigeria Limited

COURT OF APPEAL, KADUNA DIVISION

AIKAWA, OGUNDERE, ACHIKE JJCA

Date of Judgment: 19 MAY 1988

C.A.K.: 119/87

*Banking – Banker/customer relationship – Bank granting overdraft to customer – Dishonour of cheques drawn there on – Breach of banker/customer relationship*

### Facts

The appellant, a legal practitioner and plaintiff at the lower court brought an action at the High Court claiming a sum of ₦50,000 as damages for injury done to his credit by the respondent (bank) then defendant in the lower court, when the respondent dishonoured his cheques and marked it “Return to Drawer.”

The appellant operated a current account with the defendant on the 30th March, 1984 with ₦30 in June of the same year, he applied for an overdraft of ₦2,000 orally for two years, and the bank manager with whom he discussed granted him ₦1,000 overdraft which he withdrew twice in the amount of ₦500 each within the month of June. On 27th September, 1984, he issued another cheque for ₦261.26k in favour of African Alliance Co Limited. When he had ₦97 in his credit, which cheque was dishonoured and marked “refer to drawer.” He wrote the respondent for an apology, the respondent refused to apologise.

The learned trial Judge found on the totality of the evidence adduced before him that the plaintiff had failed to prove his case on balance of probabilities. He therefore dismissed the appellant’s suit.

The appellant being dissatisfied has brought this appeal and filed 5 grounds of appeal contending that the trial Judge did not properly review, appraise, possessed and evaluate the totality of the evidence adduced by both sides.



*a* **Held –**

- b* 1. The relationship of banker and customer is fundamentally that of an implied contract of loan, that of debtor and creditor.
2. When a bank credits the current account of its customer with a certain sum, the bank becomes a debtor to the customer in the sum.
- c* 3. Arising from the banker-customer relationship and the customs of bankers is the obligation to honour the customer's cheque if an adequate credit balance is available.
- d* 4. A refusal by the bank to honour a customer's cheque when he holds the customer's funds in hand equivalent to that endorsed on the cheque, amounts to a breach of contract for which the bankers is liable in damages.
- e* 5. The Appeal Court has a duty to disregard a finding of fact, which is not supported by the evidence.
6. The ascription whether a certain set of facts given in evidence by one party in a civil case before court in which both parties appear is preferable to another set of facts given in evidence by the other party, the Judge after a summary of all the facts, must put the two sets of facts in an imaginary scale, weigh against the other, then decide upon the preponderance of credible evidence which weighs more accept it in preference to the other and then apply the appropriate law to it, if that Law supports it bearing in mind the cause of action, he will then find for the plaintiff, if not the plaintiff case is dismissed.
- f*
- g*
- h* 7. There cannot be valid findings of fact without proper ascription of probative values to evidence adduced.
- i* *Appeal allowed by majority.*

**Cases referred to in the judgment**

***Nigerian***

- j* *Abubakar v. Nana* (1974) 5 S.C. 83

<i>Adereti v. AG Western Nigeria</i> (1965) 1 All N.L.R. 254	<i>a</i>
<i>Adeyemi v. Bamidele</i> (1968) 1 All N.L.R. 31	
<i>Akinwunmi v. Idewu</i> (1969) 1 All N.L.R. 319	
<i>Anukanti v. Ekwonyeaso</i> (1978) 1 S.C. 37	<i>b</i>
<i>Armels Transport v. Martins</i> (1970) 1 All N.L.R. 27	
<i>Aromire v. Awoyemi</i> (1972) N.L.R. 101	
<i>Balogun v. Agboola</i> (1974) 1 and S.C. 111	<i>c</i>
<i>Balogun v. National Bank</i> (1978) 3 S.C. 155	
<i>Iwenofu v. Iwenofu</i> (1975) 9-11 S.C. 79	
<i>Lawal v. Dawodu</i> (1972) 8-9 S.C. 83	
<i>Mogaji v. Odojin</i> (1978) 3 S.C. 91	<i>d</i>
<i>Obisanya v. Nwoko</i> (1974) 6 S.C. 69	
<i>Queen v. Ogodo</i> (1961) N.L.R. 700	
<i>Okolo v. Uzoka</i> (1978) 4 S.C. 77	<i>e</i>
<i>Okuwobi v. Sishola</i> (1973) 3 S.C. 43	
<i>R v. Ogodo</i> (1961) All N.L.R. 700	
<i>Rosenje v. Bakare</i> (1973) 3 S.C. 131	
<i>Shell B.P. v. Cole</i> (1978) 3 S.C. 183	<i>f</i>
<i>Woluchem v. Gudi</i> (1981) 5 S.C. 291	
<i>Yesufu v. A.C.B.</i> (1981) 1 S.C. 74	
<b>Foreign</b>	<i>g</i>
<i>Allen v. London Country and Westminster Bank</i> (1915) 31 T.L.R. 210	
<i>Cuthbert v. Roberts, Lubbock and Co</i> (1909) 2 Ch. 226	<i>h</i>
<i>Davidson v. Barclays Bank</i> (1940) 56 T.L.R. 343	
<i>Flash v. London and South Western Bank</i> (1915) 31 T.L.R. 344	
<i>Foley v. Hill</i> (1848) 2 H.L.C. 28	<i>i</i>
<i>Frost v. London Joint Stock Bank</i> (1906) 22 T.L.R. 760	
<i>Hirschorn v. Evans Barclays Bank Ltd, Garnishee</i> (1938) 3 All E.R. 491	
<i>Joachimson v. Swiss Bank Corporation</i> (1921) 3 K.B. 110	<i>j</i>

- a Julia, The* (1860) 14 MO.O. P. C.C. 210  
*London Joint Stock Bank v. Macmillan and Authur* (1918) A.C. 777
- b Paying II v. Anguandah* 12 W.A.C.A. 284  
*Plunkett v. Barclays Bank* (1906) 22 T.L.R. 171  
*R. v. Prince* 11 Cox C.C. 193
- c Counsel*  
For the appellant: *Anigbogu*  
For the respondent: *Nnadi*
- d Judgment*
- e ACHIKE JCA: (Delivering the lead judgment)* The appellant, a legal practitioner, opened a current account with the respondent bank about 30th March, 1984. Sometime in June, 1984, the appellant applied for an overdraft facility which was granted to the tune of ₦1,000. While the appellant maintained that the overdraft was operational for twelve months period, the respondent contended that it was a short term overdraft limited to 30 days. It was further contended on behalf of the appellant that he was entitled to notice before the respondent could validly withdraw this facility but the respondent thought otherwise. It was, however, common ground that the overdraft transaction was oral. On 27th September, 1984 the appellant drew a cheque in favour of Messrs African Alliance Insurance Company Limited for the sum of ₦261.26k, and on presentation for payment, it was returned unpaid and marked “return to drawer.” In consequence, the
- f* appellant sued the respondent claiming damages for the injury to his credit occasioned by the dishonoured cheque. Both parties exchanged pleadings and after hearing, the learned trial Judge, in a reserved judgment handed down on the 17th December, 1986 (per Umaru Alkali J); found for the respondent, and dismissed the claim with ₦100 costs. It is against that judgment that the appellant has appealed to this Court.
- g*
- h*
- i*
- j* The issues in controversy between the parties that went, to trial are discernible from their pleadings. From the viewpoint

of the appellant, these were the relevant portions of his *a*  
Statement of Claim:

- “3. At all material times, the plaintiff kept a Current Account No. 00164 with the defendants at their said Branch which, *b*  
as the defendants well knew, he operated for the purposes of and in connection with his said trade or business.
4. Sometime in June, 1984, the plaintiff applied for and was *c*  
granted by the defendants, an overdraft facility for the sum of ₦1,000 for a period of one year.
5. On the 27th of September, 1984, during the currency of the *d*  
said overdraft facility and while the same was still in operation, the plaintiff drew a cheque No. 002708 upon the defendants as his bankers for the sum of ₦261.26 which sum was within the limit of the overdraft facility payable to African Alliance Insurance Co. Limited.
6. The plaintiff will at the trial of this suit rely on the said *e*  
cheque No. 002708.
7. Sometime between September and October, 1984, the said *f*  
African Alliance Insurance Co. Limited being the person entitled to receive the amount of the said cheque duly presented the said cheque for payment at the defendants’ said branch, but in breach of contract and of their duty to the plaintiff as his bankers, the defendants wrongfully did not honour the said cheque and did not pay the amount thereof out of the moneys of the plaintiff in their hands, applicable for that purpose, by virtue of the aforesaid overdraft facility, *g*  
but they wrongfully marked the said cheque ‘R/D’ (Refer to Drawer) and returned the same to the said African Alliance Insurance Co. Limited.
8. The defendants did not at anytime material to this suit give *h*  
the plaintiff any notice that the aforesaid overdraft facility has been withdrawn and were therefore bound to honour the said plaintiff’s cheque.
9. On 17 October, 1984, the plaintiff made an oral representation to the manager of the defendant bank demanding an *i*  
apology and pro-testing against the injury to his reputation, credit and integrity as legal practitioner caused by the defendants wrongful act in refusing to honour his said cheque.
10. ... *j*

- a* 11. On 27 October, 1984, the plaintiff received two letters from the defendant, dated, 17 October, 1984 and 24 October, 1984 respectively.
- b* 12. In their letter dated 17 October, 1984, the defendants for the first time evinced an intention to withdraw the aforesaid overdraft facility.
- c* 13. In their letter dated 24 October, 1984, the defendant challenged the plaintiff to go to court and expose his ‘ignorance on bank overdraft in court of law.’
- d* 14. The plaintiff will at the trial rely on the defendant’s said letters of 17 October, 1984 and 24 October, 1984 respectively in proof of his case, and his statement of account for the period June – September, 1984.

The appellant in the last paragraph of his Statement of Claim averred that he had suffered injury to his credit and legal profession wherefore he claimed ₦50,000 damages.”
- e* The respondent answered these material paragraphs of the Statement of Claim in these salient paragraphs of the Statement of Defence reproduced hereunder, after formally admitting paragraphs 1 and 2:
- f* “2. Paragraph 3 of the Statement of Claim is admitted to the extent that the plaintiff opened an account at the defendants bank with the sum of ₦30 (thirty naira) on 30th March, 1984 and denied to the extent that the said account was for the plaintiff’s manager and begged to be allowed to overdraw his account temporarily to pay for a new office accommodation and promised to put his account into credit within 30 days from June, 1984, when the request was made.
- g*
- h*
- i* 3. With regards to paragraph 4 of the statement of claim the defendant admits that there was oral agreement between the parties for the granting to the plaintiff of a temporary overdraft facility for the sum of ₦1,000 (one thousand naira). The defendant however, denies that the said facility was for one year and put the plaintiff to the strictest proof of the said allegation.
- j* 4. The defendant avers that the overdraft facility was for a period of 30 days only. An internal memorandum of the

defendants evidencing this transaction, a copy which was sent to the headquarters in Owerri is hereby pleaded. *a*

5. The defendant avers further that the said overdraft facility of ₦1,000 was to be cleared by July 18th, 1984 but it was not until July 31st, 1984 that the plaintiff's said account came to a balance of ₦97.94k (ninety-seven naira ninety-four kobo). The plaintiff's statement of Account is hereby pleaded. *b*

6. Paragraph 5 of the statement of claim is admitted in so far as it states that the plaintiff drew a cheque No. 002798 for ₦261.26k (two hundred and sixty-one naira twenty-six kobo) on the defendants. The defendant denies however that the said sum of ₦261.26k was within the limit of the overdraft facility which had expired on July 18th, 1984. *c*

7. With regards to paragraph 7 of the statement of claim the defendant admit that they did not honour the cheque referred to in the statement of claim and did not pay the amount thereof, but they deny that they acted wrongfully or in breach of duty as alleged at all. *d*

8. The defendants deny that at the time of the presentation of the said cheque they had in their hand any moneys of the plaintiff out of which to pay the said cheque. The defendants aver that on the 24th day of August, 1984 the defendants, in their discretion as the plaintiffs bankers, honoured a cheque of ₦200 (two hundred naira) drawn on them by the plaintiff which had overdrawn his said account by ₦102.310k which said account was by the 27th day of September, 1984 overdrawn by ₦107.47k. *e*

9. In answer to paragraph 8 of the statement of claim the defendant avers that the overdraft facility was not withdrawn but had expired on July 18th, 1984 and it was at the defendant's discretion as the plaintiff's bankers, to honour or dishonour any cheque drawn on the plaintiff's said account where there were no sufficient funds to his credit to cover the cheques. *f*

10. Paragraphs 9 of the statement of claim is admitted. The defendant avers further that on the said date its branch manager had to explain to the plaintiff that no bank could grant an overdraft lasting up to 12 months without a formal application in writing and the deposit of some security. *g*

- a* 11. In view of the plaintiffs attitude and deliberate misunderstanding of the whole transaction the defendants were forced to remind the plaintiff in a letter dated 17th October, 1984 that his said account was still overdrawn even though
- b* the overdraft facility had since expired.
12. Paragraph 10 of the statement of claim is admitted only in so far as it states that the plaintiff wrote a letter to the defendants dated 19 October, 1984 but the defendants deny that this was done on the advice of its manager.”
- c*

And by paragraph 16 of the Statement of Defence, the appellant’s claim for damages was denied and the Court was urged to dismiss same as being frivolous and speculative.

- d* The appellant filed five grounds of appeal which, for ease of reference, are reproduced hereunder:

- “1. The Judgment is against the weight of evidence.
- e* 2. The learned trial Judge erred in law and misdirected himself on the facts when he found as follows:
- ‘I am satisfied from the evidence of the 2 defence witnesses called by the defendants that the facility granted to the plaintiff was a temporary one and a personal agreement between him and the then branch manager of the defendant’s bank, which was never documented’.
- f*

#### *PARTICULARS*

- g* (a) Such a finding was made without any consideration of or reference to the plaintiff/appellant’s evidence on the issue in question and they occasioned a grave miscarriage of justice.
- h* (b) The learned trial Judge failed to evaluate properly the evidence before him and also failed to give any reasons why he preferred the evidence of the two defence witnesses to that of the plaintiff/appellant.
- i* (c) The learned trial Judge failed to direct his mind to the unchallenged evidence on the printed record, that the defendant bank charged and collected interest from the plaintiff for the overdraft on the defendant bank the facility in question, thus confirming the plaintiff’s claim that the transaction was a matter between him and the then branch manager as found by the Court.
- j*

3. The learned trial Judge misdirected himself in law and fact and thus came to a wrong conclusion and judgment when he found thus: a

‘I am satisfied that to be granted a facility for one year as the plaintiff is alleging it has to be supported by a security or collateral to be binding on the bank’. b

#### PARTICULARS

- (a) The learned trial Judge failed to consider the contention of the plaintiff, based on the evidence before the court, that parties can by their conduct create a contract and that the act or conduct of the defendant/respondent in honouring and giving effect to his cheque drawn and issued after 30 days of the contract, supported his claim that the facility was for an agreed period of one year and not 30 days as claimed by the defendant. c
- (b) In arriving at such a finding the learned trial Judge misdirected himself in his erroneous belief that the principles of law enunciated in some of the legal authorities cited by counsel to the plaintiff/ appellant applied only to written agreements. d
- (c) Such a finding is not supported by the totality of the evidence before the trial Court or inferences. e
4. The learned trial Judge erred in law and misdirected himself on the facts, when he omitted to make findings on all the important and material issues raised by the parties at the trial and also failed to give proper appraisal to the totality and contentions of the plaintiff but only based his judgment on the evidence adduced by the defendant. f

#### PARTICULARS

- (a) The learned trial Judge failed to make any findings on some important issues canvassed by the parties at the trial especially on the issue of failure of the defendant/respondent to give any notice to the plaintiff before his cheque in question was dishonoured. g
- (b) It is the legal duty of a trial Court to properly evaluate evidence led and contentions made on both sides of a case and to consider and make findings on all material issues raised at the trial before coming to a decision judgment. h



- a* (c) The failure of the trial Court to properly evaluate or assess or appraise the evidence led by the plaintiff and the contentions made on his behalf occasioned a grave miscarriage of justice, which rendered the entire trial and judgment of the lower Court a nullity.
- b*
5. The learned trial Judge misdirected himself in both law and fact when he found as follows:–
- c* ‘(i) This case is for the plaintiff to prove by balance of probabilities . . .
- (ii) I am satisfied that the plaintiff has not proved its case by balance of probabilities to the defendant’s evidence and I therefore hold that the defendants are not liable to the plaintiff. The action is therefore dismissed’.
- d*

#### *PARTICULARS*

- e* In dismissing the case of the plaintiff based on such a finding, the learned trial Judge failed to realise and appreciate the fact that the burden of proof on the plaintiff does not discharge the trial Judge from his legal duty to consider the evidence of both plaintiff and the defendant and ascribe relative weight to each of them.”
- f*
- In their briefs of arguments each party set out four issues for determination; the first two issues in the appellant’s brief are substantially similar to those set out in the respondent’s brief: They seem to me to represent the kernel of complaint in this appeal. I prefer to adopt the first two issues formulated by the appellant:
- g*
- “(i) Whether the learned trial Judge properly reviewed, appraised, assessed and evaluated the totality of the evidence adduced by both sides at the trial before him.
- h*
- (ii) Whether he considered and made findings on all the relevant and material issues canvassed and raised by the parties both in their pleadings and in their evidence adduced at the trial.”
- i*
- The bone of contention in this appeal, from the pleadings, evidence, judgment, grounds of appeal and the exchanged briefs is narrow and can be subsumed under two arms, to wit,
- j* whether the learned trial Judge made a proper evaluation

of the entire evidence placed before it at the trial, and also whether he made the necessary findings of fact on material and relevant issues raised or canvassed by both parties at the trial. It may be observed that after a review of the entire evidence led at the trial, including the addresses by Counsel which spanned from page 22 to part of page 28 – the rest of the judgment, which clearly encompasses all the findings made by the Court and evaluation of evidence, if any, is exceptionally brief and runs to only 13 (thirteen) lines, at pages 28 to 29. For ease of reference and fuller appreciation, I reproduce hereunder these 13 lines of the judgment verbatim:

“I have carefully gone through the various authorities cited by both parties in this case. This case is for the plaintiff to prove by balance of probabilities. As it is a civil case the proof is not beyond all reasonable doubts but by preponderance of evidence. I am satisfied from the evidence of the 2 defence witnesses called by the defendants that the facilities granted to the plaintiff was a temporary one and a personal agreement between him and the branch manager of the defendants bank which was never documented. I am satisfied that to be granted a facility for one year as the plaintiff is alleging it has to be supported by a security or collateral to be binding on the bank.

I am satisfied that the plaintiff has not proved its case by balance of probabilities to the defendant's evidence and I therefore hold that the defendants are not liable to the plaintiff. The action is therefore dismissed.”

Now that the issues before the trial Court are reasonably discernible, our next inquiry is to identify and consider the findings made by the court. These may be itemised thus:

- (1) The facilities granted to the plaintiff (appellant herein) was a temporary one.
- (2) It was a personal agreement between him and the then branch manager of the defendant bank (ie DW1).
- (3) It was never documented.
- (4) To grant a facility for one year, it has to be supported by a security or collateral.

- a* We shall hasten to examine them seriatim and in the above order. Undoubtedly, (1) above is the main hub of this appeal. For the appellant, the facility was for one year certain while
- b* for the respondent it was for 30 days. Evidence was given on each side along that line. The need for specificity in terms of the duration of the overdraft was crucial to enable the learned trial Judge to find either for the appellant or the re-
- c* spondent. DW1 testified that it was a temporary facility for 30 days. DW2 identified two types of facilities in terms of loans and overdrafts. He further identified five conditions for granting overdrafts, to wit, (*a*) written application, (*b*) statement of purpose of the facility; (*c*) duration of the fac-
- d* ility (*d*) repayment and (*e*) security. He further said that:

- “when the customer has not fulfilled these conditions, we still have what *we call temporary overdraft usually granted for only one month. After one month has expired we write him requesting him to pay us the interest of the loan . . . . A temporary overdraft cannot be given for more than one month.*” (Italics supplied.)
- e*

- DW2 also said that in case of temporary overdraft (see pages
- f* 14 and 15 of the record) the bank, after one month has expired, would write the borrower requesting him to pay the interest on the loan. No such letter was written by the respondent. It is thus clear that what constitutes a temporary
- g* facility is a flexible arrangement, and usually, according to DW2, it is granted for only one month. The testimony of DW2 was quite fluid. It does not appear to be a statutory provision. At best, it is possibly either a common law rule or
- h* a rule of banking practice, varying from one bank to the other, exhibiting the characteristic of flexibility that maybe dictated by the prevailing circumstances. My understanding of the import of his testimony is that there is no hard and fast rule about temporary facilities. It is also worthy of note that
- i* the respondent who had hammered on the overdraft being for a period of 30 days only had averred in its pleadings that “an internal memorandum of the defendants evidencing this transaction, a copy which was sent to the headquarters in
- j* Owerri is hereby pleaded” (see paragraph 4 of Statement of

Defence) yet the pleaded internal memorandum was conspicuously omitted in evidence. The effect of section 148(d) of the Evidence Act in the circumstances is quite clear. a

Be that as it may, having regard to the need for a specific finding on this point, it was material, in my view, to make a positive or definitive finding on the duration of the facility granted to the appellant by the respondent. In my judgment, the learned trial Judge abdicated the legal obligation, when he simply said, “The facilities granted to the plaintiff (ie the appellant herein) were a temporary one.” This finding is elusive and grossly falls short of all expectations having regard to the issues joined by the parties. This court has a duty to disregard a finding of fact which is not supported by the evidence, *vide: R v. Ogodo* (1961) All N.L.R. 700. b  
c  
d

The second finding is that the facility “was a personal agreement between him and the then branch manager of the defendant bank.” To accede to that assertion and finding would lead to gross misconception of the capacity in which DW1 related to the appellant. The contextual meaning of the word “personal” herein is “private”. Surely, the arrangement between the appellant and DW1 was done in his official capacity as servant of the respondent albeit that DW1 had discretionary powers to refuse or grant the solicited facility. After all, this action was instituted, tightly in my view, against the respondent as the master of DW1, whereas if the deal was on personal relationship between the appellant and DW1, appellant’s action would have been misconceived. The vicarious liability of the respondent for the action of DW1, done in the course of his employment, easily debunks the second finding by the learned trial Judge. e  
f  
g  
h

The third finding is unimpeachable. Not only was the oral arrangement for the overdraft pleaded by both parties, it was also a point of common ground in their evidence. i

The learned trial Judge seems to have been driven to the fourth finding primarily by the evidence of DW2. With due respect to the learned trial Judge, this fourth finding, in my j

- a* opinion, is not supported by any evidence before the Court. DW2, in his enumeration of “canons of lending” mentioned “security” as number 5 (see page 14 of record) but did not
- b* go as far as the learned trial Judge did in asserting that furnishing of security was mandatory for granting of a facility for a year. As a matter of fact, the canons set out by DW2 (at page 14) appear to be of general application to all overdraft transactions. Nowhere was it expressly linked with an over-
- c* draft for a stipulated period. Furthermore, no where in the parties’ pleadings was the content of the fourth finding made an issue for trial. In any event, this finding is clearly disparaging to the appellant’s case who had consistently main-
- d* tained that the financial accommodation was for a duration of one year. If this finding were allowed to stand unquestioned, it would surreptitiously knock off the bottom of the applicant’s case.
- e*

- What generally should be the attitude of an Appellate Court to findings made by the lower Court, and in the instant
- f* case, with particular reference to the above analysis of findings of the learned trial Judge? But before embarking on this exercise, the Appellate Court must be satisfied that the lower court made a proper evaluation of the totality of the evidence adduced at the trial before he ascribed probative values to the evidence tendered. In this regard, it must be noted
- g* that the ascription of probative values to the evidence tendered by both parties must be done simultaneously, ie in the sense that the trial Judge is not expected to consider, believe
- h* and accept the evidence of the plaintiff before considering, and perhaps disbelieving and rejecting the case of the defendant. That is a perilous course to pursue by the trial Court because such an approach subordinates the defendant’s case
- i* to that of the plaintiff. It will, without gainsay, be a vulnerable ground for setting aside the judgment of the lower court: *vide*, *Aromire* and *Ors v. Awoyemi* (1972) A.N.L.R. 101. The proper guideline for evaluation of evidence tendered in a trial of a civil suit has been lucidly enunciated by
- j*

Fatayi Williams JSC in *AR Mogaji and others v. Madam Rabiatsu Odofin and others* (1978) 3 S.C. 91. Said he: (at page 93 *et seq*). a

“In other words, the totality of evidence should be considered in order to determine which has weight and which has no weight. Therefore, in deciding whether a certain set of facts given in evidence by one party in a civil case before a court in which both parties appear is preferable to another set of facts given in evidence by the other party, the trial Judge, after a summary of all the facts, must put the two sets of facts in an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, accept it in preference to the other, and then apply the appropriate law to it; if that law supports it bearing in mind the cause of action, he will then find for the plaintiff. If not, the plaintiffs case is dismissed.” b  
c  
d

In the instant case, one would commend the learned Judge’s summary of the evidence given at the trial; it was impeccably impressive. However, there was no iota of pretence that he concerned himself whatsoever, with the slightest attempt to evaluate the evidence tendered by the appellant and weighed it against that given by the respondent. On the contrary, immediately after a comprehensive summary of the evidence and addresses by counsel on both sides, the learned trial Judge strangely and abruptly proceeded to make some findings (earlier set out). This is clearly a glaring violation of the principle of ascription of probative values to the two sets of facts adduced in evidence by the opposing parties to the appeal. Nowhere did the learned trial Judge evaluate or demonstrate a semblance to evaluate the evidence proffered by the parties let alone finding time to traditionally “believe” or “disbelieve” either party: But despite these unpardonable short comings, he found himself able to make some findings of fact. With respect, the learned trial Judge was incompetent to make those findings. If he was in competent in the circumstances, the findings themselves were equally tainted and therefore incompetent. Our case law is replete with legal authorities that there cannot be valid findings of fact without proper ascription of probative values to evidence adduced: e  
f  
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- a vide: Lawal v. Dawodu* (1972) 8-9 S.C. 83 at pages 114-115, *Paying II v. Anguandah* 12 W.A.C.A. 294 at 290, *Balogun v. Agboola* (1974) 10 S.C. 111, and in particular *Shell BP v. Cole* (1978) 3 S.C. 183 and *Okolo v. Uzoka* (1978) 4 S.C.77.

While it is conceded that the ascription of probative values to evidence is a matter primarily within the preserve of the trial Court, the appellate court will however interfere where such findings are wrong or not supported by evidence: *c vide, Obisanya v. Nwoko* (1974) 6 S.C. 69, *Abubakar v. Nana* (1974) 5 S.C. 83 and *Iwenofu v. Iwenofu* (1975) 9-11 S.C. 79. As had been noted earlier, not only did the learned trial Judge fail to ascribe probative value to the evidence placed at his disposal at trial, but in some respect, he made a finding which was not borne out from the evidence. Although the attitude of the Court of Appeal is one of great caution and reluctance in interfering with facts found by the trial Court, the Court of Appeal, however, cannot abdicate its legal obligation to set aside any judgment in circumstances where it is glaring that the trial Court has operated in misconception of the facts in evidence or has failed to evaluate the evidence, or had made a finding on an issue not supported by the evidence: *f vide, Rosenje v. Bakare* (1973) 5 S.C. 131, *Adeyemi v. Bamidele* (1968) 1 All N.L.R. 31 and *Akinwunmi v. Idewu* (1969) 1 All N.L.R. 319. In the instant case, I am satisfied that the learned trial Judge woefully failed to appraise or evaluate the evidence before him before embarking on a sloppy exercise of findings of fact. Although there is always a presumption that the findings of fact of a trial Court are right and ought not to be disturbed, the party challenging the findings, as in the instant case, has a duty to displace such presumption. The submissions on behalf of the appellant, which have been canvassed together in relation to grounds 1, 2, and 3 clearly support the appellant's complaints that neither was there proper evaluation of the evidence presented at the trial nor were the scanty findings of fact supported by evidence. That presumption, in my view, *g has been satisfactorily displaced by the appellant. Therefore,*

my answer to question No. 1 for determination is in the negative. In other words, the submissions on behalf of the appellant, which have been canvassed together in relation to grounds 1, 2 and 3 clearly support the appellant's complaints that neither was there proper appraisal or evaluation of the evidence placed at the Court's disposal nor were all the scanty findings of fact supported by evidence. Accordingly, grounds 1, 2 and 3 succeed.

Question No. 1 for determination clearly encompasses the substance of ground 5. This could have been conveniently taken together along with grounds 1, 2 and 3. Their common factor is a complaint against the handling of the evidence before the trial Court. For example, the learned trial Judge, having stated the firmly established principle of law in relation to burden of proof in civil matters, proceeded immediately to say:

"I am satisfied that the plaintiff has not proved its case by balance of probabilities to the defendant's evidence and I therefore hold that the defendants are not liable to the plaintiff. The action is therefore dismissed."

While it is now trite law that the burden of proof on the plaintiff generally is, in order to succeed, to establish his case on balance of probabilities ie on preponderance of evidence, I am clearly of the view that the learned trial Judge, having abdicated his primary responsibility of evaluating the evidence placed before him and ascribing probative values to the said evidence, was not competent to express himself as being satisfied "that the plaintiff has not proved its case by balance of probabilities to the defendant's evidence." With respect, that conclusion is only permissible after a proper evaluation and proper ascription of probative values to the totality of the evidence tendered in court, for there is no magic in the Court's arrogation to itself of being "satisfied" on the evidence which it did not appraise. The Court has never and cannot today reach its conclusion *in vacuo*, but has always done so only after a proper evaluation of the



*a* evidence proffered at the trial. Any contrary approach in the present state of our law, would be illusory and insupportable. I would further reiterate that no where in his judgment

*b* did the learned trial Judge consider the two versions of the case, side by side, nor weigh the probative values of one set of facts against the other set, in order to be enabled therefrom to say that the appellant's case must fail because the evidence against it tipped the balance in that imaginary scale

*c* in favour of the respondent, *vide: Woluchem v. Gudi* (1981) 5 S.C. 291 at pages 306 and 309. It is for these reasons that I hold that ground 5 of the grounds of appeal also succeeds. The success of grounds 1, 2, 3 and 5 would have been ample

*d* to dispose of this appeal, but out of the abundance of caution, and ours not being a court of last resort, I hasten to consider the fourth ground of appeal.

*e* The fourth ground of appeal relates to question No. 2 for determination, namely, whether the learned trial Judge considered and made findings on all the relevant and material issues raised and canvassed by the parties, both in their pleadings and in their evidence adduced at the trial. As we noted

*f* earlier, the tough kernel the trial Court had to crack – a matter pleaded and on which evidence was led – was whether the facility granted to the appellant was for one year duration, as asserted by the appellant, or for 30 days, as contended by the respondent. I think that the trial Court was

*g* obliged to make a specific finding of fact on this matter. No doubt it was an onerous and invidious assignment, nevertheless, it was a task to be performed. The learned trial Judge regrettably abandoned this responsibility and simply made a

*h* finding that “the facilities granted to the plaintiff (appellant herein) was a temporary one.” The phrase “temporary one” is not a legal term of art. It is evasive, meaningless, illusory and indeed unhelpful *vis-a-vis* the actual bone of contention between the parties. In my judgment, the learned trial Judge

*i* could not rightly reach any meaningful decision in this case while the disputed period of the loan remained unresolved.

*j* I think that there was also need, having regard to the financial accommodation accorded to the appellant; long after the

30 days' period had elapsed, to ascertain whether such accommodation was consistent with the one-year period as urged by the appellant, or whether it was the basis of an entirely new contract arising from the parties' conduct. Furthermore, there was need for the trial Court to make a finding whether there was obligation on the respondent to give any notice of withdrawal of the facilities (if found to be for a one year period as asserted by the appellant) or that in fact such notice was unnecessary and un contemplated by the transaction that had expired after 30 days (as asserted by the respondent). These and such other material issues required some clarifications which could only be achieved if specific findings of fact were made by the learned trial Judge on such material issues. From the foregoing, I think there is considerable force in the submission by appellant's Counsel that the learned trial Judge failed to make findings of fact on all the relevant and material issues raised by the parties in their pleadings and at the trial. For these reasons, I will also return a negative answer to the question No. 2 for determination, ground 4 of the grounds of appeal having succeeded.

Making of findings on material issues is generally the exclusive prerogative and indeed the sacred duty of the trial Court. Therefore, the appellate court is ordinarily incompetent to make findings of fact which the trial Court ought to have made, seeing that it had not the singular opportunity of observing the witnesses in the case while giving evidence; *vide Armels Transport v. Martins* (1970)1 All N.L.R. 27. The proper course where the trial Court had failed to make specific findings of fact on material issues, as in this case, where the period of the overdraft was in dispute, is to order a re-hearing of the case; *vide Okuwobi v. Ishola* (1973) 3 S.C. 43 and *Anukanti v. Ekwonyeaso* (1978) 1 S.C. 37.

In the final result, all the grounds of appeal having succeeded, the appeal succeeds. The judgment and consequential orders of the court below are hereby set aside. I order

- a* a retrial of this case before another judge of the Kano High Court, costs in favour of the appellant are assessed and fixed at ₦250
- b* **AIKAWA JCA:** I had the preview of the judgment just delivered by my learned brother Achike JCA, I agree with his reasons and conclusions.
- c* **OGUNDARE JCA** (*Dissenting*): I regret I cannot support the lead judgment of my learned brother Achike JCA.

*d* The case for the plaintiff now appellant at the lower court was that he opened a current account with the defendant, now respondent on 30th March, 1984 with ₦30. In June, 1984, he approached the bank manager for an overdraft of ₦2,000 for two years to enable him rent an office and purchase furniture and he offered his life insurance policy worth

*e* ₦20,000 as a collateral, which the manager rejected as the premium for the preceding two years were not paid. The bank manager however granted him ₦1,000 overdraft which he withdrew twice in the amount of ₦500 each within the

*f* month of June. On 27th September, 1984 he issued another cheque for ₦261.26K in favour of the African Alliance Insurance Co Limited when he had ₦97 to his credit, which cheque was marked “Refer to Drawer.” That dishonoured

*g* cheque was the cause of this action. He wrote the bank for an apology; the bank refused to apologise.

*h* The defendant called in evidence the bank manager who granted the loan to the plaintiff. He said the plaintiff opened an account with ₦30 in March, 1984 and three months later made a passionate appeal to him to grant him an overdraft as he had just secured an office for his law practice along Church Road, Sabon Gari, Kano, and that he was expecting

*i* fees from a professional service within 30 days. The manager testified that he explained to the plaintiff the conditions for granting an overdraft, and that as the life policy he offered as a security was valueless, he used his personal discretion to grant him a temporary 30 days overdraft of

*j*

₦1,000 in order to assist him, as the turnover in his current account did not entitle him to an overdraft. He said if the bank inspectors came at that time, he would have been seriously reprimanded as by banking practice, the bank has a right to recall facilities granted to a customer at any time. He had honoured a cheque for ₦200 in excess of the overdraft purely in his discretion to assist the plaintiff. He had dishonoured the cheque for ₦261.26K to plaintiff's insurers as his account was overdrawn to the tune of ₦107.41K and a letter to that effect had been written to him.

The learned trial Judge found that the facilities granted to the plaintiff was a temporary one and on a personal agreement between him and the branch manager. In order to be granted overdraft facility for one year as alleged by the plaintiff, the application has to be supported with a security or collateral to be binding on the bank. Be it noted that the plaintiff aware of that produced a worthless insurance policy which was rejected. He then expressed satisfaction that the plaintiff had failed to prove his case by a balance of probabilities. The plaintiff appealed and both parties filed and exchanged briefs of arguments.

What then is the law in this regard? The House of Lords in *Foley v. Hill* (1848) 2 H.L.C. 28 classified the relationship of banker and customer as fundamentally that of an implied contract of loan of debtor and creditor. *Foley's* case was cited with approval by the Supreme Court in *Yesufu v. A.C.B.* (1981) 1 S.C. 74 at 98-99 per Bello then JSC. Thus when a bank credits the current account of its customer with a certain sum, the bank becomes a debtor to the customer in that sum. *Hirschorn v. Evans (Barclays Bank Ltd, Garnishee)* [1938] 3 All E.R. 491, 498; *Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. 110; and conversely when a bank debits the current account of its customer with a certain sum, the customer becomes a debtor to the bank in that sum. See Paget's *Law of Banking*, (8ed), page 84. Superimposed upon and arising from that relationship and the customs of bankers is

- a* the obligation to honour the customer's cheque if an adequate credit balance is available: *London Joint Stock Bank v. MacMillan and Authur* (1918) A.C. 777. The relationship
- b* between banker and customer has also been described as that between principal and agent, therefore a cheque drawn on the banker by the customer represents the order of the principal to his agent to pay, out of the principal's money in his
- c* hands, the amount stated on the cheque to the payee endorsed on the cheque. Therefore a refusal by the bank to honour a customer's cheque when he holds the customer's funds in hand equivalent to that endorsed on the cheque
- d* amounts to a breach of contract for which the banker is liable in damages, *Balogun v. NBN* (1978) 3 S.C. 155 per Idigbe JSC at 163-164.

- An unpaid cheque marked: "Refer to Drawer" is couched
- e* in a form least liable to damage the customer's credit and is ordinarily used in cases of want of funds to meet the drawer's cheque. The words merely invite the presenter of the cheque to inquire of the drawer as to the reason of dishonour. *Flach v. London and South Western Bank* (1915) 31
- f* T.L.R. 334; *Plunkett v. Barclays Bank* (1906) 22 T.L.R. 171. Where words are not plainly defamatory in their meaning, the test is not what they would convey to a particular person,
- g* but what they would suggest to a person of average intelligence. *Frost v. London Joint Stock Bank* (1906) 22 T.L.R. 760. If a bank wrongfully dishonours a cheque, in addition to an action in breach of contract, an action in the tort of libel will lie if the drawer is a business or professional person
- h* especially when the officials of the bank by mistake dishonour a cheque when the customer has enough funds in the bank and a libellous endorsement is entered on the dishonoured cheque. In such a situation the defence of qualified
- i* privilege will not avail the bank. *Davidson v. Barclays Bank* (1940) 56 T.L.R. 343; *Balogun v. National Bank of Nigeria* (1978) 3 S.C. 155, 179-180; *Allen v. London County and Westminster Bank* (1915) 31 T.L.R. 210; *Gatley on Libel and Slander* (7ed) page 83; Lord Chorley, *Law of*
- j*

*Banking* (1974), 6ed, page 11. In an action for a breach of such contract, nominal damages will be awarded, unless a special damage is specifically pleaded and proved. In *Balogun*'s case a practising lawyer, who sued in breach of contract and the tort of libel, the award of ₦10 damages by the High Court was set aside, and ₦1,000 damages was awarded by the Supreme Court. The sum on the dishonoured cheque was £20.

As to overdrafts, the taking of an overdraft from a bank, even in breach of instructions; is not more than accepting a loan. *R. v. Prince* II Cox C.C. 193; also when a client paid a cheque into his bank and drew another for payment before the first cheque was cleared he was only asking the bank for a loan. *Cuthbert v. Roberts, Lubbock and Co* (1909) 2 Ch.D. 226; *Adereti v. Attorney-General Western Nigeria* (1965) 1 All N.L.R. 254.

The main question that arises in this appeal is whether there was a contract of loan or overdraft between the parties, and under which conditions? Under sections 134 to 136 of the Evidence Act, the burden lies on the plaintiff in the court below to prove the contract of loan or overdraft, with the conditions that he alleged existed, and the sufficiency of funds in his account when his cheque was referred to drawer. The plaintiff tendered no correspondence or document in proof of the loan as conceived by him. The statement of account exhibit D tendered by the bank corroborated the testimony of the bank manager in the main. Exhibit B dated October 17, 1984 drew the plaintiff's attention to his overdrawn account and called on him to remedy the situation. Thus the defendant's respondent's account of the loan transaction seem more probable. exhibit E of 19 October, 1984, from the plaintiff to the bank complaining of the dishonoured cheque in violation of one year ₦1,000 overdraft was refuted in the bank's letter exhibit B of the same date, 19th October, 1984 in which plaintiff was warned that if he sought legal redress as he threatened, he would only expose

- a* his ignorance of the law on bank overdraft. Exhibit A is the cheque marked “Refer to Drawer.” The plaintiff tendered no document to evidence the loan transaction. It was therefore a
- b* case of oath against oath. It would seem from the facts analysed above that the findings of the lower court was fair and based on the evidence on the record. His decision was also
- c* unimpeachable as he had put the cases of the two parties on the proverbial scale and found plaintiff’s case of little weight and not deserving judgment on his claim in line with the
- d* magisterial direction of the Supreme Court in *Mogaji v. Odofin* (1978) 4 S.C. 91 per Fatayi Williams, then JSC at 93-95. See also *Woluchem v. Gudi* (1981) 5 S.C. 291 at 294 per Idigbe JSC.

- In this regard where the decision of the trial Court is based substantially on the credibility of witnesses who testified before it, and an assessment thereof, a Court of Appeal cannot,
- e* and must not, substitute its own credibility of witnesses for that made by the lower Court, except where the lower Court has been found to be perverse, and it must go beyond a mere
- f* entertainment of doubt as to whether the decision of the lower Court was right, the Court of Appeal must be convinced beyond doubt that it was in fact wrong. See the
- g* speech of Lord Kingsdown in *The Julia* (1860) 14 Moo P. C.C. 210 at 235; *Lawal v. Dawodu* (1972) 1 All N.L.R. Part II page 270, 276. The findings of fact and conclusion of the
- h* trial Court in this case, cannot by any stretch of imagination be termed perverse. The lower Court was perfectly correct. The appellant, as the plaintiff in the Court below would
- i* seem to have embarked on an uncharitable, unconscionable and unprofitable gold digging exercise and he thereby put the career advancement of his benefactor, the bank manager in jeopardy. The appeal is dismissed seriatim and in toto with ₦300 costs to the respondent.

*Appeal allowed by majority.*

**African Continental Bank Limited v.  
Egbunike and others**

COURT OF APPEAL, ENUGU DIVISION

KATSINA-ALU, MACAULAY, OGUNTADE JJCA

Date of Judgment: 14 JULY 1988

CA/E/68/86

*Banking – Customer drawing a cheque over amount in account – Effect*

**Facts**

The appellant as plaintiff in the lower court claimed against the respondents as defendants jointly and severally as follows:

- (i) The sum of ₦800,312.28k (eight hundred thousand, three hundred and twelve naira, twenty-eight kobo) balance of overdraft with compound interest at the rate of 10% per annum as at close of business on the 26th November, 1979.
- (ii) Compound interest at the rate of 10% per annum with monthly interest until the debt is fully repaid or judgment is obtained from 27th November, 1979.

The appellant's claim was predicted on the following facts:

The respondents about 17th February, 1978 opened a current account in their individual names with the plaintiff's Abakaliki branch and thereafter operated the same account by making payments and withdrawals. On 8th March, 1978 the respondents lodged two cheques totalling ₦678,000 into their account. The same day the cheques were lodged, the respondents sought for and were granted an overdraft of ₦661,000 against the clearing of the two cheques.

However for some reasons the two cheques paid by the respondents were never sent to the paying bank for collection. The cheques could not be traced, in other words the appellant did not have value on the two cheques for ₦678,000



*a* while the respondents had been allowed to withdraw  
 ₦661,000. On 16th March, 1978, the respondents paid in  
*b* two drafts totaling ₦661,000 and on the same date they  
 withdrew the whole amount through the connection of the  
 first respondents brother who was the appellant Abakaliki  
 Branch Manager, thereafter a debt balance of ₦800,312.28k  
*c* resulted in the account of the respondents when compound  
 interest of 10% per annum was added and statements of ac-  
 counts were sent to the respondents. The respondents unable  
 to pay the bank facilities tried unsuccessfully to prevail on the  
 appellant that a newly incorporated company would take  
*d* over the existing account of the respondents and its debt  
 portfolios, and also that the debt would be paid instalmen-  
 tally with effect from 30th June, 1980. The respondents in  
 their statement of defence admitted that their account with  
 the appellant could only be credited after the two cheques  
*e* for ₦678,000 which they paid had been cleared. There was  
 however nothing to show that the respondents account with  
 another bank at Aba on which account the cheques were  
 drawn was debited for the said sum being the face value of  
*f* the two cheques. The respondents, further in paragraph 11 of  
 their statement of defence admitted that the cheques were  
 not sent to Aba, or returned unpaid to the appellants or even-  
 tually sent to the respondents. The respondents also ex-  
*g* pressly in their pleadings admitted the appellants averment  
 that the respondents account was overdrawn in the sum of  
 ₦800,312.28k.

*h* The learned trial Judge nevertheless dismissed the plain-  
 tiff's case.

The plaintiff dissatisfied with the order dismissing its case  
 appealed to the Court of Appeal contending that in the face  
*i* of the pleadings, it was entitled to judgment.

**Held –**

1. If a customer to a bank draws a cheque for a sum in ex-  
*j* cess of the amount standing to the credit of his current  
 account, it is really a request for loan and if the cheque is

- honoured the legal effect is that the customer has borrowed money from the bank. a
2. In this case the defendants having admitted their indebtedness to the plaintiff, the onus shifted upon them to justify the avoidance of indebtedness which they pleaded. The onus was clearly on the defendants to prove that which they asserted. b
3. Where as in this case the plaintiff's witness's evidence was uncontradicted the clear duty upon the lower court was to have given judgment in favour of the plaintiff in consonance with the writ. No other cause was open to the lower court. c
- d

*Appeal allowed.*

### **Cases referred to in the judgment**

e

#### ***Nigerian***

*Emegokwue v. Okadigbo* (1973) 4 S.C. 113

*George and others v. Dominion Flour Mills Ltd* (1963) 1 All N.L.R. 71 f

*Ikoku v. Obi* (1962) 1 All N.L.R. Vol. (Part 1) 194

*Imam v. ABU* (1970) N.N.L.R. 37

*Jules v. Ajani* (1980) 5-7 S.C. 96 g

*Lewis and Peat v. Akhinmien* (1976) 7 S.C. 157

*Nwakwere v. Adewunmi* (1967) N.M.L.R. 45

*Nwobodo v. Onoh and 5 others* (1984) 1 S.C. 40 h

*Okporaoke v. Egunonu and others* (1941) 7 W.A.C.A. 53

*Onobruchere and Another v. Esegine and another* (1986) 2 S.C. 385

*The British India Insurance Co. Nig. Ltd v. Tharwades* (1978) 3 S.C. 143 i

#### ***Foreign***

*Arab Bank v. Ross* (1952) Q.B.D. 216 j

*a* *Brooks and Co. v. Blackburn Benuet Society* (1884) App. Cases 857

*Cuthbert v. Robbers Lubbock and Co.* (1909) 2 Ch. 226

*b* *Harris v. Gamble* (1878) 7 Ch. D. 877

*Rutler v. Tregent* (1879) 12 Ch. D. 758

*Wallersteiner v. Mior* (1974) 1 W.L.R. 991

*c* *Warner v. Sampson* (1959) 1 Q.B. 287

**Nigerian statute referred to in the judgment**

Evidence Law Eastern Nigerian, 1963, section 137

*d* **Nigerian rule of court referred to in the judgment**

Anambra State High Court (Civil Procedure) Rules, Order 33, rules 9, 10 and 11

*e* **Book referred to in the judgment**

Bullen, Leake and Jacobs: *Precedent of Pleading* (12ed), page 83

*f* **Counsel**

For the appellant: *Nwokoye*

For the respondent: *Chukwuma*

*g* **Judgment**

**OGUNTADE JCA:** (*Delivering the lead judgment*) The appellants were the plaintiffs in the lower Court. They had claimed from the defendants jointly and severally as follows:

*h* “(i) The sum of ₦800,312.28k (eight hundred thousand, three hundred and twelve naira, twenty-eight kobo) balance of overdraft with compound interest at the rate of 10% per annum as at close of business on the 26th November, 1979.

*i* (ii) Compound interest at the rate of 10% per annum with monthly rests until the debt is fully repaid or judgment is obtained from 27th November, 1979.”

Pleadings were ordered, filed and exchanged. The case was tried by Obayi J at the Abakaliki High Court of Anambra State. The plaintiffs called three witnesses in support of their

*j*

case. The defendants elected not to call evidence. The lower court on 17 April, 1985, after hearing counsel's addresses, delivered its judgment. It dismissed plaintiff's case. a

The plaintiffs were dissatisfied with the order dismissing their case. They have come before us on appeal. There was only one original ground of appeal which is the omnibus ground that decision of the Court below is against the weight of evidence. The appellants later sought and were granted leave to file four additional grounds of appeal. The additional grounds without their particulars read thus: b

- "2. That the Court below erred in law in not entering judgment for the plaintiff on the state of pleadings and evidence of the plaintiffs' witnesses. d
3. That the Court below misdirected itself on facts and law when it held that defendants denied all that the plaintiffs filed in its (*sic*) statement of claim when the reverse was the case as to the material averments. e
4. The Court below misdirected itself on fact and law by holding that the plaintiff should prove its case beyond reasonable doubt. f
5. The Court below erred in law in requiring the plaintiff to discharge the burden of proof when the pleadings did not raise any issue to warrant the plaintiff to do so."

In the appellants' brief of argument filed, the issues for determination in this appeal are stated to be: g

- "(i) Whether the Court below erred in law in not entering judgment for the plaintiff/appellant on the state of pleadings and evidence of the plaintiff's witnesses. h
- (ii) Whether the Court below misdirected itself on facts and law when it held that defendants denied almost all that the plaintiff filed in the statement of claim when the reverse was the case as to the material averments thus resulting in miscarriage of justice. i
- (iii) Whether the Court below misdirected itself by holding that the plaintiff should prove its case (including admitted facts which require no proof) beyond reasonable doubt. j

*a* (iv) Whether the Court below erred in law in requiring the plaintiff to discharge the burden of proof when the pleadings did not raise any issue to warrant the plaintiff to do so.”

*b* The respondents filed their brief on 31 July, 1986 and the appellants filed a reply brief on 10 October, 1986.

*c* It would appear that the grounds of appeal and the issues for determination tied to them revolve around the pleadings of parties and the burden of proof in the light of the state of pleadings upon which the case was tried and the standard of proof which the pleadings call into play. These grounds of appeal could be conveniently taken together.

*d* I start a consideration of issues by examining closely the pleadings of parties upon which the case was tried. The plaintiffs in paragraphs 3 to 13 of their amended statement of claim filed on 15 April, 1983 averred thus:

*e* “3. On or about the 17th February, 1978, the defendants opened a current account with the plaintiff’s Abakaliki Branch and thereafter operated the same account by making payments and withdrawals. The plaintiff at the trial of this suit will

*f* found on a copy of resolution dated 16 February, 1978 appointing the first defendant the sole signatory to their account.

*g* 4. The said account was at all material times opened, maintained and operated in the individual names of the first and second defendants.

*h* 5. On or about the 8th day of March, 1978, the defendants paid into their account No. 9180, two Co-operative Banks of Eastern Nigeria Limited Aba branch cheque Nos. A37M8 and A373589 for the sum of ₦330,000 and ₦348,000 respectively, which said cheques were issued by the defendants against their account of the said Bank at Aba. The defendants’ account was accordingly credited with the total sum of ₦678,000. Thereafter the plaintiff’s functionaries at

*i* Abakaliki made no effort to clear the said cheques. There was no record showing how, and when the said cheques were dispatched to Aba for clearing neither was there, any trace of

*j* the schedule advice of cheques purchased in the file

for cheques outwards schedule for, the plaintiff's Aba main branch. There has been no trace of the said cheques. The tellers with which the said cheques were paid in will be founded upon at the trial. *a*

6. Immediately after paying the said cheques on the 8th March, 1978, the defendants asked to be allowed to withdraw the sum of ₦661,000, from the said account. The defendants did so fully aware that their account at the Co-operative Bank of Eastern Nigeria was in 'RED.' The plaintiffs Abakaliki Branch Manager, Michael Egbunike (the first defendant's brother) promptly granted the defendant's request and allowed them to withdraw the said sum without bothering to have the effects of the said Aba cheques cleared: The plaintiff will at the trial of this suit found on the ACB Limited cheque No. 022736 dated 8th March, 1978 with which the said sum was withdrawn. *b*

7. On or about the 16th day of March, 1978, the defendants lodged in their account two bank drafts Nos. D4128317 for ₦331,000 and D128318 for ₦330,000 (totalling ₦661,000.00) issued on Martin Street, Lagos Branch of the plaintiff. On the same day the defendants insisted on withdrawing the total *c*

amount even though to their knowledge they had no funds at their Co-operative Bank of Eastern Nigeria Limited, Aba account to cover their two earlier cheques lodged into their account No. 9180 on 8th March, 1978. The plaintiff's manager, Mr Michael Egbunike once more allowed the defendants to withdraw the said sum on borrowed ACB Limited cheque No. 026538 dated 16th March, 1978. The said cheques will be founded on at the trial of this suit. *d*

8. On or about the 11th October, 1978, the defendant's account No. 9180 was debited with the two Aba cheques purchased for ₦330,000 and ₦348,000 which were paid into the said account on 8th March, 1978 and this resulted in a debit of over ₦670,000 on the account aforesaid. The decision by the plaintiff to debit the said account was based on the findings of their Chief Inspector as regards the said account and the transactions pleaded hereof. A debit voucher dated 10th October, 1978 was promptly sent to the defendants through their Aba address. Moreover, a letter was addressed to the defendants, informing them of the cheques *e*

- a* and the management decision to debit their account. The plaintiff will at the trial found on the debit voucher as well as the said letter and the defendants are hereby given notice to produce the same.
- b* 9. The defendants' account; thereafter became overdrawn in the sum of ₦711,848.03k (seven hundred and eleven thousand, eight hundred and forty-eight naira, three kobo) with compound interest at the rate of ten percent per annum with monthly rests:
- c* 10. As at 26th November, 1979, the debit balance of the said overdraft with compound interest stood at ₦800,312.28k (eight hundred thousand, three hundred and twelve naira twenty-eight kobo). The said debit balance is reflected in the defendants' statement of account which will be founded upon at the trial of this suit. The defendants were supplied their own copy of the statement of account regularly.
- d* 11. On or about the 4th day of November, 1979, the first defendant at Abakaliki submitted to the plaintiff a photocopy of a Certificate of Incorporation of Metropolitan Paints and Chemical Company as a Limited Liability Company. The said document indicated that the Company was incorporated on 24th July, 1979. The first defendant asked the plaintiff to transfer the debt to the incorporated company.
- e* 12. In a letter dated the 6th day of November, 1979, referred to as 1 February, 1979 signed by the first defendant as the Managing Director and addressed to the plaintiff, in reply to the plaintiff's demand letter, the first defendant argued that the debt was to be repaid as from the 30th day of June, 1980 and assured the plaintiff that the defendants will honour their obligations. This letter will be founded upon at the final of this suit. The defendants are hereby given notice to produce at the trial of this suit copy of the plaintiff's demand letter to which the defendants were replying. The plaintiff will at the trial found on a letter from the Ag. Chief Inspector A.C.B. Limited on the subject matter dated 3 October, 1978.
- f*
- g*
- h*
- i* 13. The plaintiff did not at any time material to this claim agree with either the defendants or the incorporated company for repayment of the overdrawn account to commence as from the 30th day of June, 1980, or at all. This is more so because the incorporated company has no account with the plaintiff."
- j*

From the averments in the plaintiffs' amended statement of claim above, it would seem that the case being made by the plaintiffs was simple and straight forward. It comes down to this: The defendants lodged two cheques totalling ₦678,000 into their account. The same day the cheques were lodged, the defendants sought for and were granted an overdraft of ₦661,000 against the fate of the two cheques. However, for some reasons the two cheques paid by the defendants were never sent to the paying bank for collection. The cheques could not be traced. In other words, the plaintiffs did not have value on the two cheques for ₦678,000 while the defendants had been allowed to withdraw ₦661,000. On the 16th March, 1978, the defendants paid in two drafts totalling ₦661,000. On the same date they withdrew the whole amount through the instrumentality of first defendant's brother who was plaintiffs Abakaliki Branch Manager. A debit balance of ₦800,312.28k has now resulted to the account of defendants when compound interest of 10% per annum was added. Statements of account were sent to the defendants. The defendants tried to prevail on the plaintiff that a newly incorporated company would take over the existing account of the defendants and its debts; and also that the debt would be paid instalmentally with effect from 30th June, 1980. The plaintiff did not agree with these proposals. Now, how did the defendants meet the case so clearly made by the plaintiffs? In paragraphs 2, 6, 7, 9, 11 and 12 of the amended statement of defence the defendants averred:

- "2. The defendants admit paragraphs 1, 3, 9 and 10 of the amended statement of claim.
6. Save and except that the defendants paid in two cheques totaling ₦678,000 into the plaintiff company's branch at Abakaliki on the 8th of March, 1978, the defendants make no further admission with regard to paragraph 5 of the amended statement of claim and will put the plaintiff to the strictest proof of the allegations therein contained.
7. In further answer to paragraph 5 of the amended statement of claim the defendants state that their account could not



- a* have been credited with the sum of ₦678,000 without the Co-operative Bank of Eastern Nigeria Aba branch cheques being cleared as required by normal banking regulations . . .
- b* 9. In further answer to paragraph 6 of the amended statement of claim the defendants state that the bank draft for ₦661,000 given to the defendants was a different transaction altogether. The draft was as a result of an overdraft facility enjoyed on a continuing basis by Metropolitan Paints and Chemical Company Limited from the plaintiff company. The defendants also state that this was not the first time the Metropolitan Paints and Chemical Co Limited enjoyed such facility from the plaintiff company.
- c*
- d* 11. Save and except that the account of the defendants was debited with the sum of ₦678,000, the defendants deny that their own cheques were ever sent to Aba or were returned unpaid to the plaintiff company or were eventually sent to the defendants and will put the plaintiff to very strict proof of the allegations contained in paragraph 8 of the amended statement of claim.
- e*
12. The defendants deny paragraph 10 of the amended statement of claim and will put the plaintiff to strict proof of the allegations contained therein.”
- f*

A few comments must be made about the above averments in the amended statement of defence. In paragraph 2 of the amended statement of defence, the defendants expressly admitted the averment in paragraph 10 of the amended statement of claim. But in paragraph 12 of the same amended statement of defence the same averment in paragraph 10 of the amended statement of claim was denied.

- g*
- h* In paragraph 7 of their defence the defendants were in fact putting across an argument that in accordance with banking regulations; the plaintiff could not have credited their (defendants) account without first clearing the two cheques for
- i* ₦678,000 which they paid in.

- Although the plaintiff pleaded in paragraph 5 of the amended statement of claim, that the two cheques for ₦330,000 and ₦348,000 were drawn on the defendants’ account with the Co-operative Bank of Eastern Nigeria
- j*

Limited, Aba, the defendants did not aver that their account at the Aba Branch of Co-operative Bank of Eastern Nigeria was debited for the sum of ₦678,000 being the face value of the two cheques.

Indeed, the defendants in paragraph 11 of the defence admitted that the cheques were not sent to Aba or returned unpaid to the plaintiff or eventually sent to the defendants.

Be it noted that it was the case of the plaintiffs that the two cheques could not be traced. In other words, they were lost and never presented for payment against the account of the defendants at Aba. Since the defendants admitted that it paid in the two cheques for ₦678,000 and since the defendants did not deny that they were allowed to withdraw ₦661,000 on the very day the two cheques for ₦330,000 and ₦348,000 were paid in, and since the defendants have admitted that the two cheques were never presented to their Co-operative Bank of Eastern Nigeria, Aba branch for payment, it seems to me that the material averments in the plaintiff's pleading had all been admitted.

In paragraph 9 of the amended statement of claim, the plaintiff pleaded that the account of the defendant became overdrawn, in the sum of ₦711,848.03k and that this amount included compound interest at the rate of ten percent. The defendants expressly admitted this in paragraph 2 of the amended statement of defence.

In *Emegokwue v. Okadigbo* (1973) 4 S.C. 113 the Supreme Court per Fatayi-Williams JSC (as he then was) said:

“It is trite law and we have repeated it on many occasions, that parties are bound by their pleadings and that any evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the Court. The reason for this rigid rule of pleading and evidence has been clearly stated by this Court in *George and others v. Dominion Flour Mills Ltd* (1963) 1 All N.L.R. 71 at page 77 as follows:

‘The fairness of a trial can be tested by the maxim *audi alteram partem*. Either party must be given an opportunity of being

- a* heard, but a party can not be expected to prepare for the unknown; and the aim of pleadings is to give notice of the case to be met; which enables either party to prepare his evidence and arguments upon the issue raised by the pleadings, and saves either side from being taken by surprise.’

*b* Incidentally, it makes for economy. The plaintiff will, and indeed must confine his evidence to those issues, but the cardinal point is the avoidance of surprise.”

- c* Looking closely at the pleadings filed by the defendants, it is clear that they have not complied with the applicable Rules of Court governing pleadings. The pleadings of the defendants are evasive and in some respects ambivalent or equivocal.

*d* Order 33, rules 9, 10 and 11 of the Anambra State High Court (Civil Procedure) Rules provide—

- e* “9. The defendant’s pleading or defence shall deny all such material allegations in the petition as the defendant intends to deny at the hearing. Every allegation of fact, if not denied specifically or by necessary implication or stated to be not admitted shall be taken as established at the hearing.
- f* 10. It shall not be sufficient to deny generally the facts alleged by the statement of claim, but the defendant must deal specifically therewith, either admitting or denying the truth of each allegation of fact seriatim, as the truth or falsehood of each is within knowledge or (as the case may be) stating that he does not know whether such allegation or allegations are true or otherwise.
- g* 11. When a party denies an allegation of fact, he must not do so evasively, but answer the point of substance. And when a matter is alleged with diverse circumstances, it shall not be sufficient to deny it as alleged with those circumstances but as a fair and substantial answer must be given.”

- h* And in *Lewis and Peat v. Akhimien* (1976) 7 S.C. 157, the Supreme Court said at pages 163-164:

- i* “When as a result of exchange of pleadings by parties to a case, a material fact is affirmed by one of the parties but denied by the other, the question thus raised between the parties is an ‘issue of fact.’ We must observe, however, that in order to raise an issue of fact in these circumstances, there must be a proper traverse; and a
- j*

traverse must be made either by a denial or non admission either expressly or by necessary implication. So that if a defendant refuses to admit a particular allegation in the statement of claim, he must state so specifically; and he does not do this satisfactorily by pleading thus “defendant is not in a position to admit or deny (the particular allegation in the statement of claim) and will at the trial put the plaintiff to proof.” As was held in *Harris v. Gamble* (1878) 7 Ch.D. 877, a plea that “defendant puts plaintiff to proof” amounts to insufficient denial; equally a plea that the “defendant does not admit the correctness” (of a particular allegation in the statement of claim) is also an insufficient denial – See *Rutler v. Tregent* (1879) 12 Ch.D. 758. We are, of course, not unmindful of the first paragraph of the statement of defence. Nowadays almost every statement of defence contains such a general denial (See *Warner v. Sampson* (1959) 1 Q.B. 2,87 at 310-311. However, in respect of essential and material allegations such a general denial ought not to be adopted; essential allegations should be specifically traversed. (See *Wallersteiner v. Moir* (1974) 1 W.L.R. 991 at 1002 per Lord Denning M.R., also Bullen and Leake and Jacobs: *Precedent of Pleadings*, (12ed) page 83.”

In the instant case, the defendants in one breadth admitted a material part of the pleading while denying the same in another. Further the defendants admitted their account was in the debit to the tune of ₦711,848.03k while they also sought to argue that their accounts would not have been credited if the cheques they paid in had not been cleared. Still more surprisingly, the defendants averred that the two cheques were never sent to their Bank at Aba for clearing.

It seems to me that upon a fair and true construction of the amended statement of defence, the conclusion to be arrived at is that the defendants had admitted the plaintiff’s claim.

In paragraphs 4, 13, 15 and 17 of the amended statement of defence, the defendants averred:

“4. The defendants state in answer to paragraph 4 of the amended statement of claim that the said paragraph is true as regards events up to the 25th of July when the assets and liabilities of the defendants were transferred to the Metropolitan Paints and Chemical Company Limited.”

- a* “13. By a letter dated the 25th of July, 1979, the plaintiff company was advised that the Metropolitan Paints and Chemical Company Limited had taken over the assets and liabilities of the defendants. Paragraph 11 of the amended statement of claim in so far as it conflicts with the foregoing statement is denied.”
- b*
- c* “15. The defendants deny paragraph 13 of the amended statement of claim and will put the plaintiff to strict proof of the allegations therein contained. In further reply thereto, the defendants state that at no time did the plaintiff indicate that it was not ready and willing to receive payments from the Metropolitan Paints and Chemical Company Limited nor did it require the said company to open a new account with the said plaintiff’s company but had by conduct represented to the defendants that it was willing to treat with the company.”
- d*
- e* “17. The defendants deny paragraphs 15 and 16 of the amended statement of claim. In answer thereto the defendants state that by a letter dated the 19th of March, 1980, the Metropolitan Paints and Chemical Company Limited requested the plaintiff company to review the retirement date of the debt. The defendants will rely on this letter.”
- f* There can be no doubt that the case being made by the defendants is that they had sought from the plaintiffs and that the plaintiffs had agreed an understanding that the debts previously owned by them in the Account No. 9180 be taken over by Metropolitan Paints and Chemical Company Limited. In other words they pleaded “confession and avoidance.” In essence, they said that the debts had become the liability of the incorporated company. They also pleaded that they wrote to the plaintiff that the date for the payment of the debt be reviewed.
- g*
- h* In his judgment at pages 44 and 45 of record, the trial Judge said:
- i* “The defendants filed their statements of defence which contained nineteen paragraphs. In their statement of defence, the defendants denied almost all that the plaintiff filed in his statement of claim. In fact the defendants in paragraph one of their statement of defence said:
- j* ‘Save as is herein expressly, admitted, the defendants deny each and every allegation of facts contained in the statement of claim

appearing as if they were set out seriatim and denied specifically and will plead and rely on all legal and equitable defences which may be open to the defendants and will specifically plead and rely on: a

(a) Laches b

(b) Acquiescence, and

(c) Estoppel by conduct.’ c

The defendants however admitted the facts as contained in paragraphs 1, 3, 9 and 10 of the amended statement of claim.”

I think that the trial Judge seriously misdirected himself by accepting that the defendants denied almost all the averments in the amended statement of claim. d

On the contrary, the correct view would be that the defendants admitted all the material averments. As stated in *Lewis and Peat v. Akhimien (supra)*, the material averments in a pleading must be specifically denied to raise an issue. This cannot be done by a mere general traverse clause in a statement of defence. e

Again in his judgment at page 56 of the record, the trial Judge said: f

“It is well settled law that fraud in both civil and criminal cases has to be specifically pleaded and proved and general allegation however strong are (*sic*) insufficient to amount to an averment of fraud of which any court ought to take notice. See the case of *Wallington v. Mutual Society* (1880) 5 Appeal cases 697. Also see *Johnson v. King* A.C. 817 PC. In the above quoted cases, it was shown that no evidence of, fraud was led but in the present case now before me, I hold that evidence somehow has been led but was such evidence led sufficient for me to hold that the plaintiff has proved his case beyond reasonable doubts. Such is what one should advert one’s mind to in this present case. This calls into question section 137(1) Evidence Law Eastern Nigeria, 1963 applicable to Anambra State. This section of the law says: g

‘If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.’ h

i

j

- a* Section 137(2) says:
- b* ‘The burden of proving that any person has been guilty of a crime or wrongful act is subject to section 140, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.’
- c* Such is our Evidence Law. Now taking into account the present case on hand, paragraphs 5, 6 and 7 of the pleadings as well as the evidence of PWs 1, 2 and 3 show that the defendants had defrauded the plaintiff/bank; if not for any other criminal offence; that of obtaining by false pretence contrary to section 419 of the Criminal Code, cheating under section 412 of our Criminal Code, unlawful grant of advance contrary to section 11A(1)(b) of Decree
- d* No. 45 of 1972 and may be conspiracy to commit felony or stealing are all implied in those paragraphs 5, 6 and 7 of the plaintiff’s pleadings such being the case, it follows as per section 137(1) Evidence Law that the plaintiff has to prove his case not only on the balance of probability but beyond reasonable doubts. Such offences as listed above can properly be said to be the basis of the plaintiff’s action. Since the defendants denied the allegations, the commission of crimes by the defendants was directly in issue and so section 137(1) comes into play. The issue of crime must arise
- e* on the pleadings for this section to operate.”
- f* With profound respect to the trial Judge, I think he again misdirected himself in the above passage of his judgment reproduced above. In *Nwobodo v. Onoh and 5 others*
- g* (1984)1 S.C. page 40/41, the Supreme Court per Bello JSC said:
- h* “The issue of a ‘crime must’ arise on the pleadings. The subsection only applies. where there is specific allegation of a crime so that its commission can properly be said to be a basis or foundation of the claim or defence as the case may be: *Ikoku v. Obi* (1962) 1 All N.L.R. Volume 1, page 1194 at 1199 and *Jules v. Ajani* (1980) 5-7 S.C. 96 at 116.”
- i* However, where a plaintiff makes an allegation of a crime in his pleadings but nevertheless can succeed in his claim without proving the crime it cannot then be said that the alleged crime was a fact in issue or directly in issue: *Nwankwere v. Akinwunmi* (1967) N.M.L.R. 45 at 48, Denning LJ
- j*

stated the rule aptly in *Arab Bank v. Ross* (1952) Q.B.D. 216 *a*  
at 229 in these terms:

“Under the rules of pleading, as I have always understood them, a  
pleader who has pleaded more than he strictly needs to have *b*  
done, can always disregard the unnecessary or surplus averments  
and rely simply on the more limited one.”

I do not see that the plaintiffs anywhere in paragraphs 5 to 7  
of their amended statement of claim pleaded the commission *c*  
of crime by the defendants. True, it is, that in paragraph 6,  
the plaintiffs pleaded that the defendants asked to be allowed  
to withdraw ₦661,000 from their account with full knowl-  
edge that their account at Aba upon which the two cheques *d*  
for ₦678,000, were drawn was in the “RED” but this clearly  
is a case of surplus or excess pleading. The case made by the  
plaintiffs is that when the defendants paid in two cheques for  
₦678,000, the defendants asked to be allowed to withdraw, *e*  
₦661,000 immediately. At the time, they had not enough  
funds in their account to cover it apart from the two cheques  
paid in which were still to be cleared. The plaintiff bank al-  
lowed them to do so. Whether or not the defendants’ account *f*  
at Aba was in the “RED” would not alter the fact that the  
plaintiff through its manager (who happened to be a brother  
to first defendant) had granted the defendants an overdraft.  
As it happened, the two cheques paid in by defendants for *g*  
₦678,000 were never presented for payment against the ac-  
count of the defendants as they were lost. They might have  
been stolen or deliberately destroyed. But this has nothing to  
do with the fact that the defendants were granted an over-  
draft. *h*

Lord Chorley in his *Law of Banking*, 6ed at page 216  
writes:

“Should a loan be temporarily required by the customer he will *i*  
usually make his offer to his banker to borrow the amount needed  
by the process of overdrawing, at any rate if it is not substantial.  
To write the offer out in full, the customer by overdrawing impli-  
edly makes an offer to borrow from the banker a sum of money  
measured by the difference between the amount of his cheque *j*



- a* and the amount standing to the credit of his account. The banker is free to reject this offer which he may simply do by dishonouring the cheque, though in some circumstances this might be bad business, or to accept it by simply paying the cheque. Thereupon
- b* the ‘superadded’, contract arises by which the customer undertakes not only to repay in due course but to pay interest at the rate ruling at the time. The whole of such an overdraft transaction may thus take so – without anything being said on either side and
- c* it then provides as good an example of an implied contract as one could hope to find.”

In *Brooks and Co. v. Blackburn Bennet Society* (1884) App. cases 857 at 864, the House of Lords in England per Lord Blackburn said:

- d* “But they are under no obligation to honour cheques which exceed the amount of the balance or in other words to allow the customer to overdraw. Bankers do generally accommodate their customers by allowing such overdrafts to some extent; when they do so the
- e* legal effect is that they lend the surplus to the customer . . .”

And in *Cuthbert v. Robert Lubbock and Co.* (1909) 2 Ch. 226 at 233, Cozens-Hardy MR said:

- f* “If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for loan and if the cheque is honoured, the customer has borrowed money.”

- g* All that has happened in this case is that the defendants by overdrawing their account requested for an overdraft which the plaintiffs by honouring their cheques agreed to give them. The only added colouration is the fact that the cheques paid in by the defendants were discovered missing and that
- h* the manager who dealt with the defendants on behalf of plaintiff was a brother of first defendant. These, notwithstanding, it was still possible for the plaintiffs to succeed on their claim without relying on any crime committed by anybody not the least the defendants. The lower court was therefore wrong to have called on the plaintiffs to prove their case on a standard beyond reasonable doubt.

- j* Even if there was the need for the case of the plaintiffs to be proved on a standard beyond reasonable doubt, the lower

court should have seen that the so called averments in the amended statement of defence were upon a true construction an admission of the claim of the plaintiffs. It is settled law that a party is bound by admissions made on his pleadings: See *Imam v. Ahmadu Bello University* (1970) N.N.L.R. 37. It is also settled law that there is no issue between the parties in respect of matters expressly admitted on the pleadings and therefore no evidence is admissible in respect of those matters. See *The British India Insurance Co Nigeria Ltd v. Thawardas* (1978) 3 S.C. 143; *Okporaoke v. Egbuonu and others* (1941) 7 W.A.C.A. 53, 55.

The defendant having admitted that their account with the plaintiff was in the debit to the tune of ₦711,848.03k the plaintiffs were without further ado entitled to judgment.

It is my view that on the state of pleadings upon which this case went to trial, the only issue remaining to be resolved by evidence was whether or not the plaintiffs had agreed that Metropolitan Plastic and Chemical Company Limited should take over the assets and liability of the defendants including the overdraft which stood against the defendants.’

In *Onobruchere and Anor v. Esegine and another* (1986) 2 S.C. 385 at pages 397-398, the Supreme Court per Oputa JSC said:

“An onus of proof does not exist *in vacuo*. The onus or burden of proof is merely an onus to prove or establish an issue. There cannot be any burden of proof where there are no issues in dispute between the parties. For example, if the plaintiff’s claim is admitted, there will no longer be an onus to prove what has been admitted by the opposite party. Therefore to discover where the onus lies in any given case, the court has to look critically at the pleadings. Where for instance the plaintiff pleads possession of the land in dispute as his root title and the defendant admits that possession but adds that the land was given to the plaintiff on pledge, then the onus shifts onto the defendant to prove that the plaintiff is not the owner of the land his possession of which has been admitted.”

- a* The defendants in this case having confessed their indebtedness to the plaintiffs, the onus shifted upon them to justify the “avoidance” of the indebtedness which they pleaded. They
- b* asserted that the liability that previously attached to them had shifted to Metropolitan Metal and Chemical Company Limited. The plaintiffs never so pleaded. The onus was clearly on the defendants to prove that which they asserted.
- c* But at the trial, the defendants never testified. Rather, they rested their case on the plaintiffs. The evidence given by the plaintiffs’ witnesses was uncontradicted. As I said, the plaintiffs did not need to have called any evidence in any case in
- d* view of the state of pleading. The clear duty upon the lower court was to have given judgment in favour of the plaintiffs in terms of their writ. No other cause was open to the lower court.
- e* In the final conclusion, judgment is entered in favour of the plaintiffs/appellants against the defendants/respondents in the sum of ₦800,312.28k (eight hundred thousand, three hundred and twelve naira, twenty-eight kobo) being balance
- f* of overdraft granted to the defendants/appellants by the plaintiffs.
- The said amount is to attract compound interest at the rate of 10% per annum with monthly rests and with effect from
- g* 26 November, 1979 till the debt is fully paid.
- The appellants are entitled to cost in the lower court which I fix at ₦500 and in this court which I fix also at ₦500.
- h* **KATSINA-ALU JCA:** I have read in advance the judgment of my learned brother Oguntade JCA, and I am of the view that he has dealt adequately with the issues in the appeal. I adopt his conclusions and the orders he has made in the lead judgment.
- i* **MACAULAY JCA:** I agree
- Appeal allowed.*

**Savannah Bank of Nigeria Limited and  
another v. Ajilo and another**

SUPREME COURT OF NIGERIA

OBASEKI, NNAMANI, KARIBI-WHYTE, KAWU, BELGORE, AGBAJE, CRAIG  
JJSC

Date of Judgment: 27 JANUARY 1989

S.C.: 188/1987

*Banking – Mortgages – Valid legal mortgage – How created  
over landed properties – Requirement for governor’s con-  
sent – Scope of – Whether required for deemed grant*

*Land law – Land Use Act – Governor’s consent – Need for  
governor’s consent before alienation of land – Section 22  
Land Use Act – Scope of – Whether covers land deemed  
granted by governor under section 34(2) of the Act*

*Statute – Interpretation of statutes – Construction of statutes  
– Narrower construction and wider construction – Attitude  
of court*

*Words and phrases – “Deemed” – Meaning of*

**Facts**

By a Deed of Legal Mortgage dated 5th September, 1980,  
the first respondent as surety mortgaged all his rights, title  
and interest in No. 1, Oyekanmi Street Mushin – Lagos to  
the first appellant as collateral for credit facilities or ad-  
vances made by the first appellant to the second respondent.  
In exercise of the first appellant powers of sale under the  
Mortgage Deed, the first appellant instructed the second ap-  
pellant who advertised the sale of the mortgaged property by  
public auction on Friday, 14th June, 1985.

The respondents filed an action wherein they claimed  
against the appellants:

- (i) A declaration that the first appellants by itself, ser-  
vants or agents is not entitled to sell, auction, or deal

- a* in any manner with, dispose of any right, title or interest in the mortgaged property without the prior written consent of the Governor of Lagos State under
- b* section 22 of the Land Use Act, 1978 having been first sought and obtained.
- (ii) A declaration that the purported mortgage or transfer of the said mortgaged property is ineffective, null and
- c* void as no consent had been sought or obtained by either parties or at all.
- (iii) An order of perpetual injunction restraining the first
- d* appellants by itself, agents or servants from auctioning, selling or otherwise dealing with any rights in mortgaged property.

Pleadings were filed and exchanged and issues joined.

- e* From the pleadings it was obvious that while the respondents contended that the consent of the Military Governor in writing is a pre-requisite to any valid transaction pertaining to the mortgaged property, the appellants contended that
- f* such requirement pertain to statutory right of occupancy granted by the Military Governor and not to land vested in the holder of a statutory right of occupancy deemed issued to him by the Military Governor by virtue of the title to the land and vested in him prior to the commencement of the
- g* Land Use Act.

- At the hearing, no witnesses were called but two documents, the Deed of Legal Mortgage and the title deed were
- h* admitted by consent and marked exhibits “A” and “B” respectively. Counsel then closed their clients cases and addressed the Court. At the end of submissions the learned trial Judge in a considered judgment held that failure to obtain the required consent of the Military Governor under section
- i* 22 of the Act rendered the deed of Mortgage exhibit “A” null and void *ab initio* and the Mortgage transaction illegal. He accordingly held that the power of sale under the Mortgage cannot be exercised. He also granted the order of in-
- j* junction claimed.

Dissatisfied, the appellants appealed to the Court of Appeal, which in dismissing the appeal further held that any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of the Land Use Act is null and void.

Still dissatisfied, the appellant appealed to the Supreme Court.

**Held –**

1. When a thing is to be deemed something else, it is to be treated as that something else with the attendant consequences but it is not that something else. Deemed grant is to be treated as a grant by the Military Governor with all the attendant consequences and subject to the provisions in the Act for the control by the Governor of the use and transfer of the right.
2. A statute should not be given a construction that will defeat its purpose. In the instant case to exclude a holder of a deemed grant of statutory right of occupancy, the interpretation would defeat the purpose of the Act particularly the provision of section 22. The construction *utres magis valent quam perat* must be given. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation and reduce the legislation to futility, that should be avoided for the bolder construction based on the view that the legislation would legislate only for the purpose of bringing about an effective result. Where alternate constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.
3. The deemed right granted by section 34(2) falls within contemplation of the conditions attaching to statutory

- a* right of occupancy under the Act. The holder of a statutory right of occupancy granted by the Military Governor contained in section 22 of the Act, includes the implied grant in sections 34(2) and 36(2) of the Act. Any failure by a holder under sections 34(2) or 36(2) of the Act to comply with the provision of section 22 would attract the full rigour of section 26 of the Act and render a transaction or instrument arising therefrom null and void
- b*
- c*
4. The object of all interpretation is to discover the intention of the legislation from the language used in the statute and to give effect to it. One of the most useful guides to interpretation is the mischief rule which considers the state of the law before the enactment, the defect which the legislation sets out to remedy and/or prevent, the remedy adopted by the legislation to cure the mischief and the true reason of the remedy. The duty of the court therefore, is to adopt such interpretation that will enable the suppression of the mischief and to promote the remedy within the true intent of the legislation.
- d*
- e*
- f*
- g*
- h*
- i*
- j*
5. Every holder of a right of occupancy whether statutory or otherwise is regarded as having been granted the right by the Military Governor or Local Government as the

case may be, for the purpose of control and management of all land comprised in the State. Accordingly, every such holder, whether under sections 5, 34 or 36 of the Land Use Act requires the prior consent of the Military Governor before he can transfer, mortgage or otherwise dispose of his interest in the right of occupancy. This means that section 22 is of general application to every rights holders under the Act pursuant to sections 5, 34 or 36 thereof.

6. A deemed grant under the Land Use Act is a grant by operation of law. An actual grant is a grant made by the activities of the Military Governor under the Land Use Act. Both the actual and the deemed grants being grants, the deemed grant being regarded by the law as if made by the Military Governor also become subject to legal control as if granted by the Military Governor

*Appeal dismissed.*

### Cases referred to in the judgment

#### *Nigerian*

- Adesanya v. President* (1981) 5 S.C. 112 at 134
- Adeshina v. Lemonu* (1965) 1 All N.L.R. 233 at 235 and 236
- Akeredolu v. Akinremi* (1986) 2 N.W.L.R. (Part 25) 710
- Akpene v. Barclays Bank Ltd* (1977) 1 S.C. 47
- Amachree v. Kallio* 2 N.L.R. 108 at 111
- Braide v. Adoki* 10 N.L.R. 15
- Bucknor-Macleans v. Inlaks Ltd* (1980) 8-11 S.C. 1
- Dickson v. Solicitor-General Benue Plateau State* (1974) 5 S.C. 21
- Dzungwe v. Gbishe* (1985) 2 N.W.L.R. (Part 8) 528 at 540-541
- Esi v. Moruku* 15 N.L.R. 116
- Ifezue v. Mbadugha* (1984) 5 S.C. 79
- Mamiso v. Pate* (1971) N.N.L.R. 62



- a Nahman v. Odutola* (1953) 14 W.A.C.A. 381  
*Nakyauta v. Maikima* (1977) 6 S.C. 51  
*Nasr v. Bouari* (1969) 1 All N.L.R. 35 at 41
- b Ojokolobo v. Alamu* (1987) 3 N.W.L.R. (Part 40) 179  
*Omonfoman v. Okoeguale* (1986) 5 N.W.L.R. (Part 40) 179  
*Orjiako v. Orjiako* (Unreported) J.D. 27/1955
- c Rabiou v. State* (1980) 8-11 S.C. 130  
*Solanke v. Abed* (1962) N.R.N.L.R. 92  
*Uyovwukerhi v. Afonughe* (1976) 5 S.C. 85 at 91
- d Foreign*  
*Attorney-General v. Brown* (1920) 1 K.B. 773  
*Barclays Bank Ltd v. Inland Revenue Commissioner* (1961) A.C. 509 at 523
- e Canada Sugar Refining Co. Ltd v. R* (1898) A.C. 735 at 741  
*East End Dwellings Co. Ltd v. Finsbury Borough Council* (1952) A.C. 109 at 132
- f Hill v. Hill* (Park Lane) Limited (1949) A.C. 530 at 546 and 577  
*Lincoln College* (1595) 3 Co. Rep. 586 at 596  
*Nokes v. Doncaster Amalgamated Collieries Ltd* (1940) A.C. 1014 at 1022
- g Pardoe v. Pardoe* 82 L.T.R. 547  
*Prigg v. Pennsylvania* 10 I.L. Ed. 1060  
*R v. Norfolk County Court* 60 L.J. Q.B. 380
- h Re Wingham* (1940) P.187  
*Reid v. Covert* 354 US 177 Set 1222, IL. Ed 2dh41148  
*Shannon Realities Ltd v. Villeda St. Michael* (1924) A.C. 185 at 192-193
- i Singh v. Kulubyu* (1961) 33 P.C. 67  
*Turquand v. Board of Trade* (1886) 11 A.C. 286  
*Viscount Simon in Hill v. William Hill* (Park Lane) Ltd (1949) A.C. 530
- j*

**Nigerian statutes referred to in the judgment**

*a*

Lands and Native Rights Ordinance, 1916

Land Tenure Law of Northern Nigeria, 1962

Land Use Act, 1978, sections 1, 2(1)(a),(b), 5(1)(a),(b),(c),  
6(1)(a),(b), 8, 9, 15, 20, 21, 22, 26, 28, 34(1)–(4), (6)(b),  
(7), 36(4), 37, 38, 39(1)(a), 40, 41, 45 and 48

*b*

Public Lands Acquisition Ordinance, 1903

*c*

**Books referred to in the judgment**

Craies *Statute Law* (7ed) pages 127

**Counsel**

*d*

For the appellants: *Williams*

For the respondents: *Kusamotu*

**Judgment**

*e*

**OBASEKI JSC:** (*Presiding and delivering the lead judgment*)

This appeal deals with the interpretation and application of some of the provisions of the Land Use Act, 1978. Since the promulgation of the Act by the Military Administration of General Obasanjo in 1978, the vast majority of Nigerians have been unaware of its revolutionary effect. They have been unaware that the Act swept away all the unlimited rights and interest they had in their lands and substituted them with very limited rights and rigid control of the use of their limited rights by the Military Governors and Local Governments.

*f*

*g*

This appeal is probably one of the earliest of contested matters that will bring the revolutionary effect of the Act to the deep and painful awareness of many. The experience of disbelief and the ultra sensitivity to the irritating thoughts of loss of freedom to use one's property without exploitative government control exhibited by the appellants' counsel notwithstanding the fact remains that we must all appreciate the true legal position and bring it to the knowledge of the beneficiaries of rights and interest in land in each State of the Nigerian Federation. This will enable the steps necessary to bring the law in line with the wishes of Nigerians to be taken. Section 1 of the Act has made no secret of the intention and purpose of

*h*

*i*

*j*

- a* the law. It declared that land in each state of the Federation shall be vested in the Military Governor of each state to be held in trust for the use and common benefit of all Nigerians.
- b* The principal question for determination in the appeal before this Court has been well formulated by the appellants. The formulation of the question for determination by the respondents, though in line with the argument in the briefs
- c* filed by the appellants, is not expansive enough to accommodate a broad view of the question. I will therefore, in preference, adopt the question formulated by the appellants for the purpose of this judgment. It reads:
- d* “Whether a person, who is deemed to be a holder of a right of occupancy pursuant to section 34 of the Land Use Act, requires, solely by virtue of that fact, the consent of the Military Governor before he can transfer, mortgage, or otherwise dispose of his interest in the right of occupancy. More specifically, do the provisions of section 22 of the Land Use Act apply to a person who is deemed to be the holder of a right of occupancy pursuant to section 34 of the Act *solely by virtue of his being deemed such a holder.*” (Italics mine.)
- e*
- f* Before embarking on an examination of this question, a brief narration of the course of this matter since the initiation of the proceedings in the High Court is desirable. Also, a brief resume of the facts as found by the two courts below and
- g* their judgments will be given to enable the complaints of the appellants to be appreciated.

The proceedings leading to this appeal were initiated in the High Court of Lagos State by the respondents, Ammel O Ajilo and Ammels Photo Industries Limited as plaintiffs claiming against the appellants as defendants:

- h* “1. A declaration that the first defendant by itself, its servants or agents (including the second defendant) or acting in any other manner, howsoever, is not entitled to sell, auction, or deal in any other manner with, dispose of, any right, title or interest of the first plaintiff in the property situate; lying, and being at No. 1, Oyekanmi Street, (off Itire Road), Mushin, Lagos, in exercise or purported exercise of a power of sale under a Deed of
- i*
- j* Mortgage dated the 5th day of September, 1980 and

registered as No. 52 at page 52 in Volume 1807 of the Lagos State Land Registry, in the office at Lagos (which property is hereinafter called ‘The Mortgaged Property’) without the prior written consent of the Governor of Lagos State under section 22 of the Land Use Act, 1978, having been first sought and obtained and as no such consent has been sought and obtained. *a*

2. A declaration that the purported mortgage or transfer of the said mortgaged property to the first defendant by the first plaintiff is ineffective, null and void and as no power to mortgage the said mortgaged property can be exercised or exercisable by any of the parties thereto as the power to mortgage is subject to the written prior consent of the Governor of Lagos State under section 22 of the Land Use Act, 1978 and no consent has been sought or obtained by either the plaintiff or the first defendant or at all. *b*

3. A declaration that the Public Notice entitled ‘Auction Notice’ dated 24th May, 1985 whereby the second defendant as agent of the first defendant advertised that the mortgaged property shall be sold by public auction on Friday, 14th June, 1985 on the instruction of the first defendant in exercise or purported exercise of the power of sale of the first defendant under the mortgage deed aforesaid, is invalid, null and void because no power of sale under that mortgage deed can be exercised or is exercisable on 14th June, 1985 without the prior written consent of the Governor of Lagos State under section 22 of the Land Use Act, 1978 and no such consent had been sought or obtained by the first defendant or at all. *c*

4. An order of perpetual injunction restraining the first defendant by itself, its servants or agents (including the second defendant) or otherwise however, from auctioning, selling, disposing or otherwise dealing with any rights, title or interest of the first plaintiff in the mortgaged property in exercise or purported exercise of a power of sale under the said mortgage deed.” *d*

Pleadings were filed and exchanged and the issues joined were listed for hearing and determination before Hotonu J. *e*  
At the hearing, no witnesses were called but two documents, the Deed of Legal Mortgage and the title deed were admitted by consent and marked exhibits A and B respectively. Counsel then closed their clients’ cases and addressed the Court. *f*

- a* At this juncture, it is necessary to refer to the pleadings to ascertain the issue joined. The statement of claim contains only 10 paragraphs and the statement of defence 5 paragraphs.
- b* As evidence was not heard in this matter, I think it necessary for the purpose of this judgment to set the pleadings (the statement of claim and the statement of defence) out in full. The statement of claim reads:
- c* “1. The first plaintiff is the managing director of the second plaintiff company;
2. The second plaintiff is a company incorporated in Nigeria under the Companies Act, 1968 with its registered office at 43 Bamgbose Street, Lagos, Lagos State and is a customer of the first defendant bank.
- d*
3. The first defendant is a bank incorporated as a limited liability company with its registered office at 9/11 Catholic Mission Street, Lagos and having branches throughout Nigeria.
- e*
4. The second defendant is a licensed auctioneer and has been engaged as an auction agent of the first defendant to carry out the sale of the mortgaged property mentioned in paragraph 5 infra.
- f*
5. By a deed of Legal mortgage dated 5th day of September, 1980, and registered as No. 52 at page 52 in Volume 1807 of the Lagos State Land Registry, in the, office at Lagos, the first plaintiff as surety mortgaged all his rights, title and interest in the property situate, lying and being at No. 1 Oyekanmi Street, (Off Itire Road), Mushin, Lagos (hereinafter called ‘the Mortgaged Property’) to the first defendant, the sums secured by that deed of mortgage in respect of credit facilities or advances made by the first defendant to the second plaintiff.
- g*
6. The plaintiffs aver that in the Public Notice entitled ‘Auction Notice’ dated 24th May, 1985, the second defendant as agent of the first defendant/bank advertised that the mortgaged property shall be sold by public auction on Friday, 14th June, 1985 by 2 pm on the instruction of the first defendant in exercise or purported exercise of a power of sale of the first defendant under the said mortgage deed.
- h*
7. The plaintiffs further aver that by and under section 22 of
- i*
- j*

- the Land Use Act, 1978, the purported mortgage/transfer of the mortgaged property to the first defendant by the first plaintiff is ineffectual without prior written consent of the Governor of Lagos State, and at all material times no such consent has been sought and obtained by the first defendant; *a*
8. By under section 22 of the Land Use Act, 1978, the statutory power of sale contained in the said mortgage deed is not exercisable without the prior written consent of the Governor of Lagos State, and at all material times no such consent has been sought or obtained by the defendants or at all. *b*
9. The plaintiffs aver that in breach of the requirements of section 22 of the Land Use Act, the first and second defendants are planning and are taking steps to sell, auction, assign or dispose of the rights, title and interest of the first plaintiff in the mortgaged property and would do so unless restrained by this Honourable Court. *c*
10. The plaintiffs shall found on the following documents at the trial of this case namely: *d*
- (a) auction notice dated 24th May, 1985;
  - (b) copy of Deed of Mortgage mentioned in paragraph 5 (*supra*) whereof the plaintiffs claim as per their writ of summons.” *e*

The statement of defence as I said earlier, is comparatively shorter than the statement of claim. It consists of only five paragraphs and reads: *f*

- “1. Save and except as are hereinafter specifically admitted, the defendants deny each and every allegation of fact contained in the Statement of Claim as if each and every such allegation were set out seriatim and separately denied; *g*
- 2. The defendants admit paragraphs 1-6 of the Statement of Claim; *h*
- 3. The defendants state that: *i*
  - (a) the property at No. 1, Oyekanmi Street mentioned in paragraph 5 of the statement of claim was vested in the first plaintiff for an estate in fee simple under and by virtue of a deed of conveyance dated the 23rd of December, 1965 and registered as No. 31 at page 31 in Volume 896 of the Land Registry in Ibadan (now in Lagos); *j*

- a* (b) by the operation of the provision of section 34(2) of the Land Use Act, 1978, No. 6, the said property continued to be held by the said first plaintiff as if he was the holder of a statutory right of occupancy issued by the Military Governor of Lagos State with effect from 29 March, 1978;
- b*
- c* 4. The defendants will contend at the trial of this action that the provisions of section 22 of the Land Use Act apply only to rights of occupancy granted by the Military Governor and the said provisions do not apply to rights of occupancy deemed to be granted by the Military Governor.
- d* 5. In the premises the contentions of law contained in paragraphs 7 to 9 of the statement of claim are misconceived; whereupon the defendants say that the action is frivolous, vexatious and an abuse of the process of the court and ought to be dismissed.”
- e* From the pleadings, the issue is clear. While it is the contention of the plaintiffs/respondents that the consent of the Military Governor in writing is a pre-requisite to any valid transaction pertaining to the mortgaged property, the appellants contend that such requirement pertain to statutory right of occupancy granted by the Military Governor and not to (land vested in the holder of) a statutory right of occupancy deemed issued to him by the Military Governor by virtue of the title to the land and vested in him prior to the commencement of the Land Use Act and section 34(2) of the Land Use Act.
- f*
- g*
- h* Learned Counsel to the defendants/appellants made copious references to section 39, section 39(1)(a), section 22, section 34(5) and section 34(2) to throw light on his contention. Learned Counsel for the plaintiffs/respondents rejected the appellants’ contention. He submitted that the key to the proper interpretation of section 22 is not to be found in section 39 of the Act but can be discovered by reading the Act as a whole against the general intention of the policy behind the promulgation of the Act and the purposes and objectives for which the Act was designed. According to him, the broad interpretation is that section 22 applies both to holder
- i*
- j*

of certificate of occupancy actually granted by the Military Governor and deemed holders of certificates by virtue of section of the Act. The narrower interpretation of section 22 limits its application to holders of statutory right of occupancy actually granted whereas the broad interpretation extends its application to the holders of deemed statutory right of occupancy. He made copious references to sections 1, 2, 34(2), 36(4), 40, 5(1)(a) and 41 of the Act. He also referred to sections 39(a) and 21(b), 45, 48 and 34(4) of the Act.

The learned trial Judge gave detailed consideration to all the submissions of counsel made to him in his well considered judgment wherein he granted all the declarations and reliefs claimed. In the penultimate paragraph of his judgment, he said:

“Having considered the Act as a whole, I think I should be bound by the case of *Nahman v. Odutola* and also Supreme Court decision in the case of *Labaran Nakyauta v. Ibrahim Maikima (supra)*. I am of the opinion that failure to obtain the required consent of the Military Governor under section 22 of the Act has rendered the deed of mortgage exhibit A null and void *ab initio* and the mortgage transaction illegal. Accordingly, the power of sale under the mortgage cannot be exercised.”

He then proceeded to make the declaration and grant the order of injunction claimed.

The defendants were dissatisfied with the decision and they appealed to the Court of Appeal on two grounds. The grounds were:

“1. The learned trial Judge erred in law in holding as follows:

‘I am of the opinion that failure to obtain the required consent of the Military Governor under section 22 of the Act renders the deed of mortgage null and void *ab initio* and the mortgage transaction illegal.’

#### PARTICULARS OF ERRORS

(a) The provisions of section 22 of the Act do not apply to land such as the one involved in this case where the holder is a deemed holder of a statutory right of occupancy under section 34 of the Act;



- a* (b) In the premises the deed of mortgage in this case is not null and void.
- b* 2. The learned trial Judge erred in law in failing to observe that statutory provisions are not to be construed as displacing or abolishing vested rights save only to the extent to which their provisions clearly displace or abolish such rights.”
- c* The Court of Appeal heard the written and oral submissions of Counsel to the parties and considered them in a well considered judgment which it delivered when dismissing the appeal.
- d* In dismissing the appeal, Kolawole JCA, said in the penultimate paragraph of his lead judgment:
- e* “The logical conclusion following from this view is that every rights holder whether under section 34 or section 36 of the Land Use Act requires the consent of the Military Governor before it can transfer, mortgage or otherwise dispose of his interest in the right of occupancy. In other words, sections 22 or 21 of the Act applies to every rights holder pursuant to sections 34 or 36 of the Act.”
- f* The result of all that I have discussed is that the judgment of Hotonu J dated 12th February, 1986 is unassailable.”
- Concurring with Kolawole JCA, Ademola JCA said:
- g* “The transaction here is a mortgage deed. It comes within the provision of section 26 of the Act which says thus:
- ‘Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provision of this Decree is null and void.’
- h* In effect it requires that the deed of mortgage exhibit A must show on its face that the approval under section 22 has been sought and granted otherwise it is void and of no effect.”
- Also concurring, Nnaemeka-Agu JCA (as he then was) said:
- i* “That the Governor has authority over deemed right is just beyond question by section 38 of the Act.”
- The defendants were still dissatisfied. They were not satisfied with the decision of the Court of Appeal. They then
- j* brought this appeal against that decision on the same

grounds as those they set out against the decision of the trial Judge, Hotonu J. They read: a

- “1. The Court of Appeal erred in law in holding that the failure to obtain the consent of the Military Governor under section 22 of the Act rendered the deed of mortgage null and void and the mortgage transaction illegal. b

*PARTICULARS OF ERRORS*

- (a) The provisions of section 22 of the Act do not apply to land such as the one involved in this case where the holder is a deemed holder of a statutory right of occupancy under section 34 of the Act; c
- (b) In the premises the deed of mortgage in this case is not null and void. d
2. The Court of Appeal erred in law in failing to observe that statutory provisions are not to be construed as displacing or abolishing vested rights save only to the extent to which their provisions clearly displace or abolish such rights. Accordingly deemed grants of statutory right of occupancy under section 34 of the Land Use Act do not require the consent of the Military Governor.” e

Naturally arising from these grounds of appeal, the issue formulated by the appellants is only one and it reads: f

“Whether a person who is deemed to be the holder of a right of occupancy pursuant to section 34 of the Land Use Act, requires, solely by virtue of that fact, the consent of the Military Governor before he can transfer, mortgage or otherwise dispose of his interest in the right of occupancy. More specifically, do the provisions of section 22 of the Land Use Act apply to a person who is deemed to be the holder of a right of occupancy pursuant to section 34 of the Act solely by virtue of his being deemed to be such a holder?” g  
h

The respondents formulated the question for determination differently. They identified what they termed the “Real Question for Determination.” This, they stated in their brief as follows: i

“Whether the provisions of section 22 of the Land Use Act should not be read to include a holder of a right of occupancy in whom any land was vested prior to the commencement of the Act as envisaged by sections 34(2) and 36(2); or a holder whose holding is j

- a* “deemed to be granted by the Military Governor” as contained under section 39(1)(a) of the Act in order to reflect the clear intention of the Act; in other words, whether the Land Use Act, 1978 was enacted to create two types of interest in land which
- b* may be obtained by citizens viz: A right of occupancy expressly granted by Military Governors or their agents, Local Government authorities, which interest is subject to the provisions of the Land Use Act, 1978 as opposed to a right of occupancy deemed
- c* granted by the respective Military Governors or their agents – the Local Government authorities; which interest exists outside the Land Use Act, 1978 and is not subject to its provisions.”

- While the question formulated by the respondents arises for consideration, the real question for determination is the
- d* question formulated by the appellants.

- Put in another way, the question is whether the first respondent required the written consent or consent in writing
- e* previously obtained to mortgage his property called the mortgaged property to the first appellant having regard to the fact that the property was vested in the first respondent before the commencement of the Land Use Act, 1978 and by
- f* virtue of section 34(2) of the Act the first respondent continues to hold the land as if he is the holder of a statutory right of occupancy issued by the Military Governor under the Land Use Act.

- g* Learned Counsel to the appellants, Chief FRA *Williams*, SAN in amplification of his brief of arguments addressed the court extensively on this question.

- h* Dr *Kusamotu*, learned Counsel to the respondents, in reply also addressed the court at length in amplification of his brief.

- Professor AB *Kasunmu*, SAN, as an *amicus curiae* on his
- i* application addressed the court briefly on the question, pitching his tent on the side of the respondents’ Counsel.

- In the course of the address of Counsel, the court’s attention was drawn to various sections of the Land Use Act but emphasis was laid on sections 1, 2, 5, 9, 22, 34, 36, 39, and 40
- j*

I intend to examine the submissions of counsel separately in dealing with the question for determination. a

Chief FRA *Williams*, in his submission, referred to section 1 of the Land Use Act and placed emphasis on the phrase “subject to the provisions of this Decree.” He then referred to the state of land in the country before the Land Use Act. Before the Land Use Act, land was held either under common law, statute law or customary law. Learned Counsel then urged the court not to presume that there is implied repeal of these laws unless there is an express provision in the Land Use Act which is inconsistent with the old law. He then referred to the book titled *Vennion Statutory Interpretation*, (1ed), page 317. The book emphasised according to him that laws should not be subject to casual change. By analogy he cited the Minerals Act of 1916 which vested the property in Waters of the country in the Crown then. But he contended that still it was held that the law did not destroy the right of the public to fish in the waters. He cited *Ama-chree v. Kallio* 2 N.L.R. 108 at 111 per Ross J. He cited the case of *Braide v. Chief Adoki* 10 N.L.R. 15 and *Adeshina v. Lemonu* (1965) 1 All N.L.R. 233 at 235 and 236. He then referred to: Maxwell on *Interpretation of Statutes*, 10ed. He conceded that when there is a vesting provision, there is an intention to take away the vested rights or interest formerly held such as interests in fee simple, for life or for a term of years. He contended that the pragmatic approach of this Court is to preserve the existing right of customary tenants. He then submitted that section 1 of the Act is subject to the provisions of sections 34 and 36 of the Act. He conceded that the administrative powers in respect of all land are vested in the Governor and contended that there are different schools of thought as to whom the ultimate title to land is vested the Governor or the people. b  
c  
d  
e  
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g  
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i

On vesting he cited the case of *Uyovwukerhi v. Afonughe* (1976) 5 S.C. 85 at 91 per Obaseki JSC where the cases cited above were approved. j

*a* Learned Counsel then examined section 34 of the Act subsection by subsection and then drew the court's attention to subsection 7 which expressly requires the prior consent in writing of the Military Governor to any further sub division of the land or any transfer of the land. The penal provision in subsection 8 of section 34 is also significant.

*c* Learned Counsel also examined section 36 subsection by subsection and drew attention of the court to the absolute prohibition of any transfer of land to which the section relates. He then asked what the need was to promulgate subsection (5) of section 36 if section 22 applies to deemed grant.

*e* Learned Counsel then submitted that since there are special provisions in section 34 and section 36, the sections should not be governed by the general provisions in section 22 of the Act.

Concluding his oral submissions, learned counsel adopted all the submissions in his brief.

*f* It is however significant to note the concession made by learned Counsel in his brief on the import of section 38 of the Land Use Act. At page 10 of the brief, learned Senior Advocate and Counsel to the appellants submitted thus:

*g* "With respect, the argument regarding the correct interpretation of section 22 of the Land Use Act is not based upon the suggestion that section 34(2) of the Act is to be read as not being subject to the powers of the governor in general. The argument is that a deemed grant under section 34(2) does not come within the scope of the expression 'statutory right of occupancy granted by the Military Governor' as used in section 22 of the Act and in other parts of the Act. The provision's contained in section 38 of the Act was put there to ensure that no argument would be advanced to the effect that the powers of revocation conferred on the Military Governor by section 28 of the Act are inapplicable to deemed grants arising under the transitional provisions contained in sections 34 to 37. It is accordingly submitted that the correct inference to be drawn is that but for the provisions of section 38 of the Act, it may have been arguable that deemed grants are not

subject to the powers of revocation conferred on the Governor by section 28 of the Act. In short, section 38, far from showing that there is no distinction between deemed grants and actual grants confirms the distinction by providing that for the purposes of section 28, the distinction shall make no difference expression *unius est exclusion alterius*. The distinction without difference is however confined to section 28 and not the rest of the Act.”

I shall, in the course of the judgment show that this concession determines the appeal against the appellant.

That there is a distinction between a deemed grant and an actual grant goes without saying. That the same incidence flows from both grants also goes without saying.

In origin, a deemed grant is different from an actual grant. A deemed grant under the Land Use Act is a grant by operation of law. An actual grant is a grant made by the activities of the Military Governor under the Land Use Act. Both the actual and the deemed grants being grants the deemed grants being regarded by the law as if made by the Military Governor also become subject to legal controls as if granted by the Military Governor. Having made this short interim observation, I proceed to the submissions of Dr *Kusamotu*.

Dr *Kusamotu* submitted that a deemed grantee is like an actual holder of a grant of a statutory right of occupancy and is subject to the provision of section 22 of the Land Use Act. Failure to obtain the prior consent in writing of the Military Governor to any transaction, transfer, mortgage etc renders the transaction null and void. He then cited:

- (1) *Paul Dickson and another v. Solicitor General of Benue-Plateau State* (1974) 5 S.C. 21
- (2) *Alhaji Labaran Nakyauta v. Alhaji Maikima* (1977) 6 S.C. 51.

He referred to and dealt with the provisions of sections 1, 2, 5, 15, 21, 26, 34, 36, 39, 41, 40 and 50 of the Land Use Act. He considered the policy and intention of the Act and observed that the Act is a revolutionary legislation, its main aim being to change the land tenure law of Nigeria. It did

*a* not provide a half way house or create two parallel land holding systems.

*b* Professor AB *Kasunmu*, in his contribution asks the court to examine the scheme of the entire legislation. He submitted that sections 1 to 33 tend to unify the land law of both the north and south. It did not leave any room for one system to operate in the north and another to operate in the south as  
*c* is claimed by the appellants.

This case has once more highlighted the unnecessary difficulties created by lack of precision and inelegant drafting of statutes. The Land Use Act as a major legislation affecting the fortunes of every Nigerian leaves a lot to be desired in its drafting. The Land Use Act is an existing law and, as I declared in another forum earlier on last year, has come to stay with us. Laudable as the intention of the Act declared in the provisions of section 1 is, it is my opinion that it cannot be realised as long as the administrative provisions which deprive all Nigerians of the use and benefit of the land vested in the Military Governor remains. It is for Nigerians through their representatives (elected and non-elected) to give detailed examinations to these provisions and make the necessary amendments to enable the Act achieve its laudable purpose.

*g* The question for determination in this appeal can only find an answer in the correct interpretation of section 34(2), section 22 and section 26. This however cannot be achieved by  
*h* taking these sections in isolation and interpreting them without regard to other sections of the Act.

Although the first plaintiff/respondent by the tenor of the Land Use Act committed the initial wrong by alienating his statutory right of occupancy without prior consent in writing of the Governor, the express provisions of the Land Use Act makes it undesirable to invoke the maxim *ex turpi causa non oritur actio* and the equitable principle enshrined in the case of *Bucknor-Maclean v. Inlaks Ltd* (1980) 8 11 S.C. 1.

*j*

I will start the further consideration of this question by examining the meaning of ‘deemed’ grant of statutory right of occupancy in section 34(2). The section did not use the term ‘deemed.’ The words are ‘as if’ and quite appropriately describe the nature of the interest. In full, section 34(1) and (2) of the Land Use Act reads:

- “1. Part VI. Transitional and other related provisions. The following provisions of this section shall have effect in respect of land in an urban area vested in any person immediately before the commencement of this Decree;
2. Where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Decree as if the holder of the land was the holder of a statutory right of occupancy issued by the Military Governor.” (Italics mine.)

The words “as if” are clear enough to equate deemed grant with actual grant. It is conceded that the first respondent is the holder of a statutory right of occupancy in respect of the mortgaged property by virtue of section 34(2) of the Land Use Act. The first respondent is therefore deemed to be the holder of a statutory right of occupancy issued or granted by the Military Governor. The word “deemed” freely used by the parties to describe and qualify the interest held by the first respondent in the mortgaged property has many meanings but the meaning that is most appropriate in the circumstances, in my view, is one of the definitions in *Stroud’s Judicial Dictionary* (4ed), Volume 2, page 716. It reads:

- “4. When a thing is to be ‘deemed’ something else, it is to be treated as that something else with the attendant consequences but it is not that something else (per Cave J, *R v. Norfolk County Court* 60 L.J.Q.B. 380); therefore, an attornment, within section 6 of the Bills of Sale Act, 1878 (c. 31). and which thereby ‘shall be deemed to be a bill of sale’ requires registration to perfect its validity as though it were a bill of sale, it is not a bill of sale, and therefore, need not be (indeed it could not be). In accordance with the form prescribed by section 9 of the Bills of Sale Act, 1882.”



- a* It is therefore my opinion that “deemed grant” is to be treated as a grant by the Military Governor with all the attendant consequences and subject to the provisions in the Act for the control by the Governor of the use and transfer of the right.

- c* The words of section 34(2) of the Act are clear and unambiguous and so should be given their ordinary meaning. The discovery of the intention of the law maker as conveyed by the words of the statute is what the search is all about when the court embarks on statutory interpretation. Thus, the deemed grant of statutory right of occupancy so declared by section 34(2) of the Land Use Act is totally different from the grant of statutory right of occupancy made or issued by the Military Governor under section 5(1) of the Act. Section 5(1) of the Act reads:

- e* “It shall be lawful for the Military Governor in respect of land whether or not in an urban area—
- (a)* to grant statutory right of occupancy to any person for all purposes.”

- f* Holders of statutory right of occupancy granted by the Military Governor are subject to the provisions of section 22 of the Act which read:

- g* “It shall not be lawful for the holder of a *statutory right of occupancy granted* by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sub lease or otherwise howsoever without the consent of the Military Governor first had and obtained.”

- h* These are provisions which are of great import in the instant appeal.

- i* The contention of the appellants is that this section has no binding effect on holders of deemed grant under section 34(2) primarily because that section did not expressly say so and also because that section imposed restriction on alienation of land to which subsection (5)(a) or (6)(a) applies without the prior consent in writing of the Military Governor.
- j*

To ascertain the correct interpretation of the provision of section 34(2) *vis-a-vis* that of section 22 of the Act, the Land Use Act is to be read as a whole. Every clause of a statute is to be construed with reference to the context of other clauses of the Act so as far as possible to make a consistent enactment of the whole statute. (See the case of *Lincoln College* (1595) 3 Co. Rep. 586 at page 596; *Canada Sugar Refining Co Ltd v. R* (1898) A.C. 735 per Lord Davey at page 741). In this connection, if section 34(2) is read together with sections 38, 22, 28, 20 and 15, the construction that will emerge will in my view be that section 22 applies to any alienation by the holder of a deemed grant of a statutory right of occupancy.

A statute should not be given a construction that will defeat its purpose. To exclude a holder of a deemed grant of statutory right of occupancy, the interpretation would defeat the purpose of the Act particularly the provision of section 22. The construction *ut res magis valeat quam perat* must be given. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we shall avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that the legislature would legislate only for the purpose of bringing about an effective result (*Nokes v. Doncaster Amalgamated Collieries Ltd* (1940) A.C. 1014 per Viscount Simon LC at 1022).

Where alternate constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system (*Shannon Realities Ltd v. Ville de St. Michel* (1924) A.C. 185 per Lord Shaw at pages 192 and 193).

The holder under the provision in section 34(2) of the Act does not come either under the restriction of subsection (8) of section 34 or be made to suffer the penalty under subsection (9) of section 34. These are special provisions.

- a* If the Military Governor can revoke the right of occupancy held by virtue of section 34(2) in exercise of his powers under section 38 and section 28, it follows that section 22 of the Act a breach of which attracts revocation under section 28 applies to a deemed grant.

It is necessary at this juncture to refer to the provisions of section 38 and section 28 of the Act. Section 38 reads:

- c* “Nothing in this part shall be construed as precluding the exercise of the Military Governor or as the case maybe the Local Government concerned of the powers to revoke, in accordance with the applicable provisions of this Decree the rights of occupancy, whether statutory or customary in respect of any land to which this part relates.”

- e* It is my opinion that the rights of occupancy to which the provisions of section 38 of the Act refers are those deemed to have been granted by the Military Governor under sections 34(2), (5)(a) and (6)(a) of the Act and those deemed to have been granted by section 36(2) of the Act. The provisions of subsections (1) and (2)(a) of section 28 read:

- f* “1. It shall be lawful for the Military Governor to revoke a right of occupancy for overriding public interest;
2. Overriding public interest in the case of statutory right of occupancy means
- g* (a) the alienation by the occupier by assignment, mortgage, transfer of possession, sub-lease or otherwise of *any right of occupation* or part thereof contrary to the provisions of this Decree or of any regulations made thereunder.”

- h* The consequence of a breach of section 22 of the Act is therefore expressly stated or stipulated as revocation. Section 20 of the Act, however provides an alternative in the form of penal rent without prejudice to the power of revocation. Subsection 1 of section 20 reads:

- i* “If there has been a breach of section 22 or 23 the Military Governor may in lieu of revoking the statutory right of occupancy concerned demand that the *holder* shall pay an additional and penal rent for and in respect of *each day* during which the land the subject of a statutory right of occupancy or any portion thereof or
- j*

any buildings or other works erected thereon shall be or remain in the possession, control or occupation of any person whomsoever other than the holder.” *a*

It should be observed that these penal provisions are directed at the holder principally to emphasise that his action of alienating the property is unlawful. Sections 26, 34(8) and 36(5) and (6) of the Act however seriously affect the right and interest of the transferee. Section 26 reads: *b*

“Any transaction or any instrument which purports to confer on or vests in any person any interest or right over land other than in accordance with the provision of this Decree shall be null and void.” *c*

It is my opinion that all these restrictive and penal provisions are designed to emphasise and reinforce the superior position in which the Decree or Act has placed the Military Governor in respect of Land matters in each State of the Federation. Although section 1 vested, subject to the provisions of the Act, all lands comprised in the territory of each state in the Federation in the Military Governor of that state and made him a trustee to hold the land in trust and to administer it for the use and common benefit of all Nigerians in accordance with provisions of the Land Use Act and section 2(1)(a) placed all land in urban areas under his control and management, the penal provisions were designed to strengthen his hand in carrying out his duties of control and management. Section 1 makes it clear that it is all land comprised in the territory of each state with the exception of land vested in the (Head of the Federal Military Government) President to which section 49 refers, that is vested in the Military Governor of each State. Section 1 reads: *d*

“Subject to the provisions of this Decree all land comprised in the territory of each State in the Federation are hereby vested in the Military Governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Decree.” *e*

Chief *Williams* observed quite rightly that the Military Governor is only trustee and does not become the beneficial *f*

*a* owner of the land. He contended and I agree with him that  
 section 2 of the Act vests in the Military Governor no more  
 than administrative or management powers over land in ur-  
*b* ban areas. It is clear that in view of the wordings of section 1  
 of the Act, the powers of control and management vested in  
 the Military Governor and Local Government by section 2  
 of the Act are not outside but as set out in the Act. While the  
 interest vested in the Military Governor is unstated in the  
*c* Act, the interest a Nigerian can lawfully acquire from the  
 Military Governor is scaled down to statutory right of occu-  
 pancy. In terms of known interests in land, the quantum of a  
 statutory right of occupancy remains unclear. To the extent  
*d* that it can only be granted for a specific term (see section 8  
 of the Act) it has the semblance of a lease. Also to the extent  
 that a holder has the sole right to and absolute possession of  
 all the improvements on the land during the term of a statu-  
 tory right of occupancy, a holder does not enjoy more rights  
*e* than a lessee under common law. When therefore section  
 34(2) of the Act converted the interest held by an owner to a  
 statutory right of occupancy the Act reduces him to the posi-  
 tion of a tenant subject to the control of the state through the  
*f* Governor. As a tenant, he is bound by the implied and the  
 express terms of the tenancy. As one of the terms stated in  
 the Act is that a holder requires prior consent in writing of  
 the Military Governor to any alienation, I would answer the  
*g* question for determination in the affirmative.

It is observed and rightly pointed out by learned Counsel  
 to the appellants that section 39(1) of the Act in conferring  
 jurisdiction on the High Court in respect of certain proceed-  
*h* ings conferred jurisdiction in respect of: “proceedings in re-  
 spect of any land the subject of a statutory right of occu-  
 pancy granted by the Military Governor or deemed to be  
 granted by him under this Act and for the purpose of this  
*i* paragraph proceedings include proceedings for a declaration  
 of title to a statutory right of occupancy.”

But having regard to section 38 of the Act the non-mention  
 of deemed grant in section 22 of the Act does not affect the  
*j* application of the section to deemed grant. In view of

section 40 of the Act, the emphasis on the jurisdiction of the High Court over deemed grants of statutory right of occupancy in section 39(1) was necessary. Section 40 reads:

“Where on the commencement of this Act proceedings had been commenced or were pending in any court or tribunal (whether at first instance or on appeal) in respect of any question concerning or pertaining to title to any land or interest therein such proceedings may be continued and be finally disposed of by the court concerned but any order or decision of the court shall only be as respects the entitlement of either of the parties to the proceedings to a right of occupancy, whether statutory or customary, in respect of such land as provided in this Decree.”

It is important to observe that the Military Governor has the control and management of land in urban areas. Subsection 1(a) and (b) of section 2 reads:

“As from the commencement of this Act:

- (a) all land in urban areas shall be under the control and management of the Military Governor of each State; and
- (b) all other land shall subject to this Act, be under the control and management of the Local Government within the area of jurisdiction of which the land is situated.”

The control and management of all land in the state, apart from the land vested in the President, Commander in Chief of the Armed Forces, is therefore vested either in the Military Governor or the Local Government and while the Military Governor has power to grant statutory right of occupancy in respect of any land (see section 5(1)(a)) the Local Government has power to grant customary right of occupancy in respect of land not in an urban area (see section 6(1)(a) and (b)).

Chief *Williams* laid great emphasis on the Rule of Statutory Interpretation that tautology should not as a rule be attributed to the legislature. I entirely agree with the rule. The words of *Viscount Simon in Hill v. William Hill (Park Lane) Ltd* (1949) A.C. 530 at 546-577 and the advice of Lewis JSC

*a* in *Nasr v. Bouari* (1969)1 All N.L.R. 35 at 41 needs to be recalled.

*b* Viscount Simon said:

*c* “Though a parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute, the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out. (See *Hill v. Hill (Park Lane) Ltd* (*supra*)). In a forthright manner, Lewis JSC said:

*e* ‘we must lean against treating the words as surplusage or tautologous and give effect to all the words of the section if that is possible’.”

*f* A careful reading of the Land Use Act as a whole and relating the various sections to one another in appropriate cases will disclose no tautology. Likewise, section 34(2) of the Act cannot be read in isolation to relieve the holder of a statutory right of occupancy the consequences of a breach of certain provisions of the Decree including section 22 and section 28 in particular.

*g* In my view and I agree with Chief *Williams*’ expression of anxiety over the implementation or consequences of the implementation of the consent clauses in the Decree; it is bound to have a suffocating effect on the commercial life of the land and house owning class of society who use their properties to raise loans and advances from the banks. I have no doubt that it will take the whole working hours of a State Military Governor to sign consent papers (without going half way) if these clauses are to be implemented.

*j* These areas of the Land Use Act need urgent review to remove their problem nature. This appeal fails.

I would dismiss it and I hereby dismiss it with ₦500 costs to the respondents. a

**NNAMANI JSC:** I had a preview of the judgment just delivered by my learned brother, Obaseki JSC and I agree with his reasoning and conclusions. I would also dismiss this appeal. This is however such an important case that some comment is necessarily called for. b

The facts of this case have been adequately and admirably set down in my learned brother's judgment and I do not find it necessary to repeat them. c

What I have to set down, however, are the issues for determination as set down by both the appellants and the respondents. In their respective briefs of argument these were set down as follows:— d

As seen by the appellants, the issue was: e

“Whether a person who is deemed to be a holder of a right of occupancy pursuant to section 34 of the Land Use Act, requires, *solely by virtue of that fact*; the consent of the Military Governor before he can transfer, mortgage, or otherwise dispose of his interest in the right of occupancy. More specifically, do the provisions of section 22 of the Land Use Act apply to a person who is deemed to be the holder of a right of occupancy pursuant to section 34 of the Act solely by virtue of *his being deemed to be such a holder*.” f  
g

The formulation of the issues by the respondents in their own brief is a little more detailed and, in my view, highlights more the matters which arise for resolution in this appeal. At page 3 of their brief of argument the issue is stated thus:— h

“Whether the provisions of section 22 of the Land Use Act should be read not to include a holder of a right of occupancy in whom any land was vested prior to the commencement of the Act as envisaged by sections 34(2) and 36(2) or a holder whose holding is ‘deemed to be granted by the Military Governor’ as contained under section 39(1)(a) of the Act in order to reflect the clear intention of the Act; in other words, whether the Land Use Act, 1978 was enacted to create two types of interests in land which i  
j



- a* may be obtained by citizens *viz*: A right of occupancy expressly granted by Military Governors or their agents, The Local Government Authorities, which interest is subject to the provisions of the Land Use Act, 1978 as opposed to a right of occupancy
- b* deemed granted by the respective Military Governors or their agents The Local Government Authorities, which interest exists outside the Land Use Act, 1978 and is not subject to its provisions.”
- c* The three sections of the Act more directly involved in this suit are sections 22, 26 and 34. It is relevant to set them down at the beginning. These sections read as follows:
- d* “22. It shall not be lawful for the holder of a Statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage transfer of possession sub-lease or otherwise howsoever without the consent of the Military Governor first had and obtained.”
- e* “26. Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Decree shall be null and void.”
- f* “34 (1) The following provisions of this section shall have effect in respect of land in an urban area vested in any person immediately before the commencement of this Decree.
- g* (2) Where the land is developed the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Decree as if the holder of the land was the holder of a statutory right of occupancy issued by the Military Governor under this Decree.
- h* (3) In respect of land to which subsection (2) of this section applies there shall be issued by the Military Governor on application to him in the prescribed form a certificate of occupancy if the Military Governor is satisfied that the land was immediately before the commencement of this
- i* Decree vested in that person.”

Before embarking on this interpretation of these sections and other sections of the Land Use Act such as 1, 2, 9, 15, 36, 39, 41, 49 and 50, to which our attention has been drawn, I

*j* think there are a few matters that one should call to mind:

The most important, and this is among the matters urged on this Court by Dr *Kusamotu* and Professor *Kasunmu*, SAN, learned Counsel to the respondents and *amicus curiae* respectively, is a clear understanding and appreciation of the objectives of the Land Use Act. No interpretation of the Act in my view can be meaningful without due recognition of the revolutionary intention of the Act – an intention to drastically alter the pattern of ownership, control and management of land in the southern part of this country. Before the Land Use Act came into force in 1978, it is not in dispute that there were broadly two different and distinct land systems in North and South Nigeria. In the North, they had a tenurial system which in effect left the ownership and management of land with the Local Authorities and State Governments. The system of issue of certificate of occupancy was already in existence. In the south, on the other hand there were various patterns of ownership and control of land. Under the Public Lands Acquisition Ordinances and Laws, land was compulsorily acquired from individuals or communities and eventually used for some public purpose either for building of an institution or for the development of layouts for residential purposes. The various State land laws followed in this direction acquiring land and using same for public purposes. Often this involved laying such land into layout plots and allocating same to individuals. In either of these cases, the freehold interest remained with Government and the individuals to which plots were allocated got leasehold interests. Alongside this, there was private ownership of land in which land was owned by individuals or communities freehold, such land having come either by inheritance, outright purchase, or gift.

The preamble to the Land Use Act puts the objectives of the Act clearly:

“Whereas it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law:

AND whereas it is also in the public interest that the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits

- a* thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected and preserved.”
- b* Section 1 of the Land Use Act reads:
- “Subject to the provisions of this Decree, all land comprised in the territory of each State in the Federation are hereby vested in the Military Governor of that State and such land shall be held in
- c* trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Decree.”

- It seems to me that when one takes this section together with such portions of the preamble as say that “the rights of all
- d* Nigerians to the Land of Nigeria be asserted and preserved by Law,” there is a clear intention to take over what is referred to as the land of Nigeria and to hold it in trust in the interest of all Nigerians whatever may have been the prior
- e* individual or group interests therein. Provisions of the Act which give the Governor powers of control and management of the land and which involve the issue of certificates of occupancy, provisions for consent of the Governor before dealing
- f* with the land, as well as such provisions as even limit the amount of undeveloped land each individual can hold suggest that this was the intention of the Act. I would not of course subscribe to the view that the Act nationalised land in
- g* Nigeria for there are provisions which protect individual dealing with land, subject to the provisions of the Act, which is inconsistent with the concept of nationalisation. One cannot go through the provisions of the Land Use Act without
- h* coming to the conclusion that to vest all land in the territory of a State on the Governor, give him powers of control and management of same, concede to individual or groups nothing more than a certificate of occupancy – whether statutory or customary and insist on all dealings with land being
- i* subject to his consent, is to give to the Governor almost all the incidents of ownership, or at the very least radical title. It is my view that a readier acceptance of this obvious meaning of the Act does not preclude the wider question of whether
- j* such a legislation ought to continue to remain on our statute

book. It is the refusal to accept this revolutionary import of the Act that has led to the varied interpretations of its provisions as well as the many controversies that so often come to the court for resolution. One suspects that some interpreters of the provisions of the Act do so as if they were anxious to wish away what I have just referred to as the import of the Act and the objective of the legislature in promulgating it.

It is also clear to me, as indeed Dr *Kusamotu* submitted to this Court, that one other major objective of the Act is to harmonise the land tenurial system in both North and South of Nigeria. It is clear that for some time the north had had the system whereby control and management of land were in the hands of the Local Authority or the Governor as the case may be. Control was by means of certificates of occupancy. What the Land Use Act has in fact done is to bring control and management of land along the same line by the use of Certificates of Occupancy. This was indeed a marked change from the types of tenure which I had underlined earlier in this judgment.

One other general matter that one ought to deal with before coming to grips with the sections of the Act to which I earlier made reference, is the general principles which must be observed in the interpretation of this Act as indeed all Statutes. One of the important principles in the interpretation of statutes is that the clauses or sections of the Act or statute should be construed together. It was stated in *Canada Sugar Refining Company v. R* (1898) A.C. 735 at 741 per Lord Davey that:

“Every clause of a statute is to be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute.”

See also case of *Lincoln College* (1895) 3 Co. Rep. 586 at 596; *Turquand v. Board of Trade* (1886) 1 App Case 286; *Attorney-General v. Brown* (1920) 1 K.B. 773. This principle has been adopted by this Court in the interpretation of our Constitution which is itself a Statute. See *Adesanya v*

- a* *President* (1981) 5 S.C. 112, 134. See also *Reid v. Covert* 354 US 77 Sct: 1222; IL. Ed. 2d H41148. One other principle of construction of Statutes is what is usually referred to as beneficial construction. This is the tendency of the courts, when faced with a choice between a wide meaning, which carries out what appears to have been the object of the legislature more fully, and a narrow meaning, which carries it out less fully, or not at all to choose the former. See *Re Wingham* (1949) 187. This is also the attitude which our courts have adopted in the interpretation of our Constitution. One recalls the memorable words of Udoma JSC in *Rabiu v. State* (1980) 8-11 S.C. 130 at 148-149. The learned Justice said:
- d* “In my view, this Court should whenever possible; and in response to the demands of justice, lean to the broader interpretation; unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carry out the objects and purposes of the Constitution . . . I do not conceive it to be the duty of this Court to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.”
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A similar attitude was evolved in relation to the Constitution of the United States for construction cannot defeat its obvious ends but rather must accord the words sense and thus enforce and protect it. See *Prigg v. Pennsylvania* 10 L.E.D.1060.

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*h* Relating all this to the matter in hand which is the interpretation of the Land Use Act, one cannot arrive at the proper meaning of section 34(2), and much less the true intentment in enacting it, by construing it narrowly and in isolation from the other provisions of the Act. The true meaning is more likely to be arrived at by looking at that section of the Act together with sections 1, 2, 5, 9, 34(3) and 39 at least. Such an examination shows whether there was any intention to exclude the holder under section 34(2) of the Act from the total scheme of the Act as can be discerned from sections 1-33,

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control and management by the Governor through the issue of certificates of statutory rights of occupancy and the general intendment to vest the land on him in trust for all Nigerians. Further, the section in issue has to be so construed as not to defeat the object of the legislation. Was it the intention of the legislation to create two separate and distinct land holding systems? The answer is clearly in the negative. Again, could the legislature in enacting section 34(2) have intended to defeat its purpose which is essentially to put all land in the control and management of the Governor albeit for the benefit of all? Again the answer must be in the negative.

Having thus set the background to the Land Use Act including what I perceive to be the objectives of the legislation, it seems to me fairly obvious what the true meaning of section 34(2) must be. Although I had set it down earlier, I think for emphasis I should refer to it once more. It provides that, “(2) where land is developed the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Decree *as if the holder of the land was the holder of a statutory right of occupancy issued by the Military Governor under this Decree.*” (Italics mine.)

Section 5 of the Decree (now Act) empowers the Governor of a State to issue in respect of land *whether or not in an urban area* (italics mine) (a) a grant of rights of occupancy to any person for all purposes. It is not in dispute that a statutory right of occupancy granted by the Governor under this section of the Decree will be subject to all the implications of such a grant which must include the conditions of the grant such as are in section 5(b),(c) and (d) as well as in sections 22 and 26 of the Act etc. It has to be remembered that the grant of section 5 can be in respect of land in urban area. It is now being contended that because of the provisions of section 34(2) of the Act, a holder of developed land in an urban area will hold such land as if it were outside the Act,

- a* outside the implications of a grant of statutory right of occupancy. In my view the use of the words “as if” in section 34(2) denotes nothing more than that that person is taken as if he is already holding a statutory right of occupancy. What is particularly significant is that if he is taken as if he is holding a statutory right of occupancy, it must mean that his holding, whatever it was prior to the commencement of the Act, is one which is within the contemplation of a grant of statutory right of occupancy. The only difference is that while a person who holds undeveloped land in or outside an urban area has to apply and obtain a certificate of statutory right of occupancy, the person who had developed land was taken as already holding one. That this is the obvious interpretation is shown by the provisions of section 34(3) which in respect of land to which subsection 2 applies, the Military Governor can, on application, issue a certificate of occupancy in the prescribed form. Such a certificate is in no sense different from the certificate of occupancy he would have issued in cases in which section 5 of the Act applies. Indeed, in practice, persons holding land under section 34(2) of the Act have had to apply for such certificates of occupancy for purposes of loans from banks and other commercial transaction. See also section 34(4) of the Act.
- g* One other matter worth noting is that the holder under section 34(2) holds the statutory right of occupancy as if he is holder of right of occupancy issued by the Governor under this Decree. It follows from my reasoning that if he is in the same position as a person who applied and obtained his statutory right of occupancy, his holding must be subject to whatever conditions attach to a statutory right of occupancy. If there was a further need for clarification in this matter, it seems to me to have been provided by section 39(1)(a), for there, as if there was need to clear whatever ambiguity may have been created, proceedings referred to in that section are “proceedings in respect of any land the subject of a statutory right of occupancy *granted by the Military Governor or*
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*deemed to be granted by him under this Decree.” No difference appears between these two grants by the Military Governor. It is essential in resolving this matter to look at the structure of the Act itself. Sections 1-33 deal with the scheme. Sections 34-38 deal with transitional and other related provisions. The first point worth noting is that there is nothing specifically excluding the operation of the other parts of the Act to this part. A perusal of the sections in this part will show that they were intended to deal with purely transitional matters, particularly reconciling the provisions of the Act with the realities of what is already on the ground. One cannot closely examine the provisions of this part of the Act without appreciating that, having regard to its obvious revolutionary provisions, and the radical and sudden transformation of land interest it was making, at least in the south of the country, it was intended to some extent to ameliorate the rigours of the Act. This is why section 34(5), against the pervasive nature of section 1 of the Act, dealt with the amount of land which a previous holder of undeveloped land could still hold and the amount of land a holder of several portions of land in parts of an urban area could still hold. Section 35 dealt with land which had been laid out as plots by a family or group of persons and compensation payable if the Military Governor wished to take it over. On the other hand, section 36 dealt with land held by persons in the Local Government area before the commencement of the Act and section 36(2) is in similar terms as section 34(2) and was intended to preserve land which was being used for agricultural purposes – it certainly was intended to save families which had held their farming land for centuries from rushing to the Local Government Headquarters for the issue of a certificate of occupancy. By the same token, such families were saved from unnecessary harassment. Section 36(2) accorded specific recognition to the customary practice of shifting cultivation and included land left to lie fallow under that system within agricultural land in respect of which a grant of customary right of occupancy is presumed.*

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*a* It is against this background that section 34(2) must be viewed. It did nothing more than save the holders of developed land before the commencement of the Act from the inconvenience of rushing to the Governor's Office to obtain a certificate of statutory right of occupancy. A holder of developed land which was held freehold before the commencement of the Act, although he would on the coming into effect of the Act hold as if he was already holding a statutory right of occupancy, might never have contact with the Military Governor's Office if he never had to make any transfers or assignment to any other person or never needed to borrow money, etc.

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Chief *Williams*, SAN in contending for the special status of the deemed holder of a statutory right of occupancy under section 34(2) of the Act raised two issues. First, he referred to section 1 of the Act which starts with the words "Subject to the provisions of the Decree." This he used to buttress his contention that the words of section 34(2) were intended to give the holders of the deemed statutory right of occupancy (ie holders of developed land before March, 1978) a different holding not subject to the conditions attached to statutory rights of occupancy such as are in sections 22 and 26 of the Act. I am afraid I cannot give those words such a restrictive interpretation. There were several other matters in the Act which necessitated the use of those words in section 1 which vested all land on the Military Governor. Section 49 of the Act for instance excluded land held by the Federal Government. Perhaps more important, is the fact that the holding by the Military Governor is subject to all the control and management procedures mentioned in sections 2(2) 5, 9, etc. Secondly, Chief *Williams* pointed out that while it is said that section 22 deals with the whole land vested in the Governor, section 34 had saved some land held by persons before the commencement of the Act and 34(7) also states that no land to which sections 5(a) and (b) and 6 apply shall be transferred to anybody without the consent of the Military

Governor. Section 34(8) makes any instrument of transfer in contravention of 34(7) void. He relied on the legal maxim *generalibus non specialibus derogant*. In other words why would one argue that the general provisions in section 22 would derogate from the special provisions in section 34(7). He also argued that since the same provisions appear in sections 22 and 34(7) there was a case of tautology which is usually not attributed to a legislature. He referred to *Hill v. Hill (Park Lane) Ltd* (1949) A.C. 530 at 546 and 547 and *Nasr v. Bouari* (1969) 1 A.N.L.R. 35 at 41.

I had previously made reference to Subsections 5(a), (b) and 6 of section 34 which dealt with the land which a holder of undeveloped land in an urban area can now hold on the coming into effect of the Act. This was set at one plot of not more than half hectare. The balance of undeveloped land went to the Military Governor. By subsection 6, out of the aggregate of all undeveloped land held prior to the Act, only one plot of half hectare size could now be held, the balance going to the Military Governor. It was in respect of the portion left to the holder that he is deemed to be the holder of a statutory right of occupancy granted by the Military Governor. It cannot be disputed that land which falls to the Military Governor under subsections 5(a) and 6 would be treated as other undeveloped land under the Act and so subject to sections 22 and 26. It was indeed to make assurance doubly sure, particularly as those sub sections had specifically left one hectare and ½ hectare to a previous holder of land, that Subsections 7 and 8 of section 34 were inserted. Such holders of land may well think, in respect of land left to them, that they were free to deal with it without restrictions. Subsections 7 and 8 far from being tautologous, were indeed to state the status of such land beyond any pale of doubt.

The result of all my interpretation is that the deemed right granted by section 34(2) falls within the contemplation of the conditions attaching to statutory right of occupancy under the Act. I do accept the submission made by both Dr

- a* *Kusamotu* and Professor *Kasunmu* that the “holder of a statutory right of occupancy granted by the Military Governor” contained in section 22 of the Act, includes the implied
- b* grant in sections 34(2) and 36(2) of the Act. It is my view too that any failure by a holder under sections 34(2) or 36(2) of the Act to comply with the provisions of section 22,
- c* would attract the full vigour of section 26 of the Act and render a transaction or an instrument arising therefrom null and void. In the circumstances of this case, I would, as the
- d* two lower courts did, hold that the deed of mortgage dated 5th September, 1980 (marked exhibit A in these proceedings) executed by the first plaintiff in favour of the first defendant bank to secure money owed it by the second plaintiff company (respondents herein) is null and void, the consent of Military Governor of Lagos State having not been obtained before the execution of the Deed.

*e* In the final result, this Appeal is dismissed. I abide by all the orders made by my learned brother, Obaseki JSC including the order for costs.

- f* **KARIBI-WHYTE JSC:** This is an appeal from the judgment of the Court of Appeal, Lagos Division, dismissing the appeal against the judgment of Hotonu J of the High Court of Lagos State. The facts of this case, though simple and
- g* straightforward, the legal implications call for the construction of some of the provisions of the Land Use Act, which have been the subject matter of criticism since its enactment.

- h* No. 1 Oyekanmi Street, (off Itire Road), Mushin, Lagos was by a deed of conveyance dated 23 December 1965 vested in fee simple in the first plaintiff, then known as Abraham Oladotaun Samuel. The land was registered as No. 31 at page 31 in Volume 896 of the Land Registry in Ibadan
- i* (now Lagos). By a deed of mortgage dated the 5th September, 1980, all the rights, title and interest in the said land was mortgaged to the first defendant bank by the first plaintiff to secure credit facilities and advances made by the first defendant
- j* to the second plaintiff. By notice of auction dated

24th May, 1985, the second defendant as agent of and on the instruction of the first defendant/bank in exercise of a power of sale in the said mortgage deed advertised for the sale of the property mortgaged to the first defendant/bank, by public auction on Friday, 14th June, 1985. On the 12th June, 1985, first plaintiff issued a writ of summons seeking the following declarations:

“A declaration that the Public Notice entitled “auction notice” dated 24th May, 1985, whereby the second defendant as agent of the first defendant advertised that the mortgage property shall be sold by public auction on Friday 14th June, 1985 on the instruction of the first defendant in exercise or purported exercise of a power of sale of the first defendant under the Mortgage Deed aforesaid, is invalid, null and void because no power of sale under that Mortgage Deed can be exercised or exercisable on 14th June, 1985 without the prior written consent of the Governor of Lagos State under section 22 of the Land Use Act, 1978 and no such consent had been sought or obtained by the first defendant or at all.

An Order of Perpetual Injunction restraining the first defendant by itself, its servants or agents (including the second defendant) or otherwise however, from auctioning, selling, disposing or otherwise dealing with any rights, title or interest of the first plaintiff in the Mortgaged Property in exercise or purported exercise of a power of sale under the said Mortgage Deed.”

In the statement of claim filed, paragraphs 7 to 9 averred as follows—

- “7. The plaintiffs further aver that by and under section 22 of the Land Use Act, 1978, the purported mortgage/transfer of the mortgaged property to the first defendant by the first plaintiff is ineffectual without the prior written consent of the Governor of Lagos State, and at all material times no such consent has been sought or obtained by the first defendant.
8. By and under section 22 of the Land Use Act, 1978, the Statutory Power of Sale contained in the said Mortgage Deed is not exercisable without the prior written consent of the Governor of Lagos State, and at all material times no such consent has been sought or obtained by the defendants or at all.

- a* 9. The plaintiffs aver that in breach of the requirements of section 22 of the Land Use Act, 1978, the first and the second defendant are planning and are taking steps to sell, auction, assign or dispose of the rights, title and interest of the first plaintiff in the Mortgaged Property and would do so unless restrained by this Honourable Court.”
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*c* In the statement of defence, having admitted all the averments in paragraphs 1-6 of the statement of claim, the defendants averred in paragraphs 3 and 4 as follows—

*d* “34 (1) The following provisions of this section shall have effect in respect of land in an urban area vested in any person immediately before the commencement of this Decree.

*e* “3 (a) the property at No. 1 Oyekanmi Street, mentioned in paragraph 5 of the Statement of Claim was vested in the first plaintiff for an estate in fee simple under and by virtue of a Deed of Conveyance dated the 23rd of December, 1965 and registered as No. 31 at page 31 in Volume 396 of the Lands Registry in Ibadan (now in Lagos)

*f* (b) by the operation of the provision of section 34(2) of the Land Use Act, 1978, No. 6, the said property continued to be held by the said first plaintiff as if he was the holder of a statutory right of occupancy issued by the Military Governor of Lagos State with effect from 29 March, 1978.

*g* 4. The defendants will contend at the trial of this action that the provisions of section 22 of the Land Use Act apply only to rights of occupancy granted by the Military Governor and the said provisions do not apply to rights of occupancy deemed to be granted by the Military Governor.”

*h* The parties therefore joined issues in the averments in paragraph 4 of the statement of defence; ie whether the provisions of section 22 of the Land Use Act apply only to rights of occupancy granted by the Military Governor, and that

*i* they did not apply to rights of occupancy deemed to be granted by the Military Governor. The question before the learned trial Judge was whether the plaintiff’s right of occupancy fell within what is contemplated in section 22 of the

*j* Land Use Act.

Parties at the trial agreed to tender by consent, the deed of legal mortgage as exhibit A and the document of title ie the conveyance as exhibit B. There was no oral evidence at the trial. The crux of plaintiff's case founded on section 22 of the Land Use Act, *was that the defendant having not obtained the consent of the Governor could not exercise the power of sale under the deed of mortgage. Secondly the deed of mortgage having not been executed with the prior consent of the Governor was void and of no effect.*

Chief *Williams*, SAN for the defendants conceded that by virtue of section 34(2) of the Land Use Act, the plaintiff is a person who is deemed to be the holder of a statutory right of occupancy, having held the land immediately before the Land Use Act came into force. It was also conceded that the holder of a right of occupancy by virtue of section 34(2) is in the same position as a person granted a Certificate of Occupancy under section 5. Learned senior Counsel however submitted that the phrase "granted by the Military Governor" was capable of including or excluding the phrase "deemed to be granted by the Military Governor."

Referring to section 39(1)(a), learned senior Counsel submitted that the expression was not intended to include "*deemed to be granted.*" For this view Counsel relied on Maxwell on *Interpretation of Statutes* page 293; and Dr Omotola, *Essays on Land Use Act* pages 27-28. It was contended that section 22 will not apply in cases where there is a deemed grant. Accordingly the consent of the Military Governor was not required in respect of lands granted under section 34(2). It was submitted that the Land Use Act was not intended to protect holders under section 34.

The contention of Counsel for the plaintiffs on the other hand was that on a broad construction of section 22, the consent required in that section applied to holders of land whether granted under section 5 or deemed to have been granted under section 34(2). The section has not created any dichotomy between holders of land under the Act. Learned Counsel referred to sections 1, 2, 34(2), 36(4) and 40 of the

- a* Act and submitted that the policy of the Act was to convert existing titles into rights of occupancy. The effect of the sections 1, 2, 34(2), 36(4), 40 is to create uniformity in land holding. Learned Counsel dealt at length with the policy of the legislation. He pointed out that the general intention of the Act is to ensure Governmental control of alienation of land and the reduction of litigation and speculation in land.
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- c* It was submitted that the Mortgage transaction in exhibit A was not only a nullity, but also by virtue of sections 22 and 26 illegal.

- d* Learned Counsel for the defendants submitted that since it was the plaintiff who should obtain consent and had failed to do so he could not set up his own fault to avoid his obligations. He cited and relied on *Solanke v. Abed* (1962) N.R.N.L.R. 92.

- e* In a well considered judgment the learned Judge held that the requirement of obtaining consent under section 22 of the Land Use Act applied both to holders of statutory right of occupancy actually granted by the Military Governor, and
- f* deemed holders of statutory rights of occupancy by operation of law. It was also held that the phrase “granted by the Military Governor” in section 39(1)(a) of the Act includes “deemed to be granted” by him. The learned Judge held that
- g* failure to obtain the required consent of the Military Governor under section 22 of the Act rendered the Deed of Mortgage exhibit A null and void *ab initio* and the transaction illegal. All the declarations and injunction sought were
- h* granted.

The defendants appealed to the Court of Appeal. Only two grounds of appeal were filed. They are as follows:-

- i* “1. The learned trial Judge erred in law in holding as follows:
- ‘I am of the opinion that failure to obtain the required consent of the Military Governor under section 22 of the Act rendered the deed of mortgage null and void *ab initio* and the mortgage transaction illegal.’
- j*

2. The learned trial Judge erred in law in failing to observe that statutory provisions are not to be construed as displacing or abolishing vested rights save only to the extent to which their provisions clearly displace or abolish such rights.”

The question for determination arising from the grounds of appeal is as follows—

“Whether a person who is deemed to be a holder of a right of occupancy pursuant to section 34 or 35 of the Land Use Act, requires, *solely by virtue of that fact*, the consent of the Military Governor before he can transfer, mortgage, or otherwise dispose of his interest in the right of occupancy. More specifically, do the provisions of section 22 or 21 of the Land Use Act apply to a person who is deemed to be the holder of a right of occupancy pursuant to section 34 of the Act solely by virtue of his being deemed to be such a holder.”

*Stricto sensu*, this is the only issue for determination in this matter. The arguments presented in the Court of Appeal were in essence those presented before the trial Judge. The Court of Appeal dismissed the appeal and affirmed the judgment of Hotonu J of the High Court of Lagos State.

Against the judgment of the Court of Appeal, appellant has filed the following grounds of appeal—

- “1. The Court of Appeal erred in law in holding that the failure to obtain the consent of the Military Governor under section 22 of the Act rendered the deed of mortgage null and void and the mortgage transaction illegal.
2. The Court of Appeal erred in law in failing to observe that statutory provisions are not to be construed as displacing or abolishing vested rights save only to the extent to which their provisions clearly displace or abolish such rights. Accordingly deemed grants of statutory right of occupancy under section 34 of the Land Use Act do not require the consent of the Military Governor.”

Briefs of argument were filed by both Counsel and were relied upon in oral argument before us. There appears to me no difference in the substance of the question for determination as formulated by Counsel in their briefs of argument. I however prefer and will adopt the more accurate and terse



- a* formulation of the issue by Chief FRA *Williams*, SAN Counsel to the appellants. The issue as formulated is as follows—
- b* “Whether a person who is deemed to be the holder of a right of occupancy pursuant to section 34 of the Land Use Act, requires solely by virtue of that fact, the consent of the Military Governor before he can transfer, mortgage or otherwise dispose of his interest in the right of occupancy. More specifically, do the provisions of section 22 of the Land Use Act apply to a person who is deemed to be the holder of a right of occupancy pursuant to section 34 of the Act solely by virtue of his being deemed to be such holder.”
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- d* Chief *Williams*, SAN opened his submissions with a criticism of the approach adopted by both the trial Judge and the Court of Appeal. He observed that both courts were influenced in their decisions by their conception of the powers and interests conferred or vested in the Military Governor under the Land Use Act. The view is that the Land Use Act vested all land, private or State, developed or undeveloped in the Military Governor of a State to hold in trust and to manage, control and administer for the use and benefit of all Nigerians. Counsel submitted that it was wrong to hold that the above being the object of the Act, section 22 thereof applied to both holders of statutory right of occupancy actually granted by the Military Governor, and those deemed granted by the Military Governor. Counsel referred to section 2 of the Act and observed that the distinction therein between the management and control of land on the one hand, and the right of ownership of interest in land on the other, was not made in any of the courts below. He described the former as “administrative” or “managerial” powers, a necessary incident of trustee powers, whilst the latter is described as proprietary or beneficial interest which trustees or other fiduciaries may not have, but which beneficiaries may have. *Pardoe v. Pardoe* 82 L.T.R. 547 was cited in illustration.
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*j* Chief *Williams* submitted that the administrative or managerial powers vested in the Military Governor is circumscribed by section 1 which has vested all land in the State in

the Military Governor, to be “held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.” a

Learned senior Counsel submitted that although section 1 of the Act vests all land in the territory of each State in the Military Governor in trust for all Nigerians, there is no suggestion that the Military Governor thereby became the beneficial owner or absolute owner under that section even though all rights to land in the State are held directly or ultimately from the Military Governor. It was conceded that the Military Governor is clearly a trustee with administrative powers including powers of granting rights of occupancy to any person under section 5 of the Act. b  
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Counsel submitted that the trust imposed on the Military Governor by section 1 of the Act is in the nature of a public or charitable trust. As trustee the Military Governor is only a nominal owner with statutory powers of management and control. The Act having used express words to declare the abrogation of certain existing rights in sections 34(5)(b) and 34(6)(b), the Court should be slow in implying the abrogation of proprietary rights of interests in the absence of express words. Reliance was placed on Craies on *Statute Law* (7ed) page 118, Halsbury’s *Laws of England* (4ed) Volume 44, paragraph 906 and *Dzungwe v. Gbishe* (1985) 2 N.W.L.R. (Part 8) 528 at 540-541 for this submission. e  
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The submission of Counsel to the respondents is that the Land Use Act has made a revolutionary change to the land holding system by virtue of the rights and powers bestowed on the Military Governor. It was submitted that section 1 of the Act is a recognition that hitherto land was owned by individuals, families and communities in several parts of the country. It also epitomises the general concept that the Military Governor’s holding is in trust and impersonal. The Act has made the vesting right of the Military Governor subject to the title to land of the Federal Government and its agencies. h  
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- a* Counsel to the respondent rejects the submission by appellant's Counsel that the Land Use Act did not create a "Private Trust" since there are no identifiable beneficiaries who can sue. It was submitted that the statutory powers of management and control by itself has created a trusteeship quite distinct from an ordinary trusteeship. The Military Governor's powers to manage and control goes beyond an ordinary trustee's powers to control. This includes the powers to control transactions relating to land – sections 34(2), 34(4) and 36(2).

- d* Counsel adopted the dictionary meanings of the word "control" and "management" and submitted that both words have different meanings, although the word "control" has a wider meaning and appears to include management. Referring to the trust concept, Counsel submitted that the word "trust" used in section 1, was not used in its technical sense, but in a political sense to declare the policy that land is for the "use and common benefit of all Nigerians."

- f* Professor AB Kasunmu appeared as *amicus curiae* and in his submission supported the contention of the respondents that consent of the Military Governor was a *sine qua non* to validity of the mortgage. So much for the submissions of the general purpose of the Land Use Act. There is no doubt that before the enactment of the Act two different tenurial systems applied in the country. The Land Tenure Law applied in the northern part of the country, whereas there was no general law relating to land holding in the south. The individual, family or community held land absolutely or for term of years as the case may be. There is no doubt however that before the Land Tenure Law introduced in 1962, the Land and Native Rights Proclamation of 1910 which was repealed by and re-enacted as the Land and Native Rights Ordinance of 1916 was in operation. The principles behind the legislation was to bring land under the control of the Government as against control by traditional rulers; to make the Government the allocating authority, and to subject transfers of interest in land subject to the consent of the governor. Despite

the vehemence of opposition to the law, the policy was defended by the colonial administration as an effective attempt at protecting land rights and to secure for the community in perpetuity, the continual use of their land and the fruits of development. It was also felt necessary to prevent the exploitation of many by a few. This policy was the result of the Report of the Northern Nigeria Lands Committee (1908). It was therefore restricted in the application of the laws based on it to the northern region.

The military administration of the mid-1970s was not satisfied with the duality in the tenurial system. It was not a true reflection of the political aspirations of the Nigerian people who wanted a sense of national unity, purpose and well being. The land policy of the administration must therefore be compatible both with the social, economic and political objectives, and not only support but also facilitate the government's programmes of urban and rural development. The administration found the answer in a law which will vest both the control and management of land throughout the country in the Government, neutralise the influence in respect of the holding and allocation of land of the traditional authorities, make Government the allocating authority, and make dealings with respect to land subject to control by the Government. The Military administration set up the Land Use Decree panel in 1977. The Land Use Act which is the result of the report of that panel was the answer. The paramount objectives of the terms of reference of the panel were to consider the implications of the implementation of a uniform land policy for the country, and the steps necessary for controlling future land use. These objectives are clearly stated in the preamble and implemented sections 1 and 2 of the Land Use Act, 1978, which came into force on the 29th March, 1978.

I have already stated the facts of this case. The facts essential to the application of the Land Use Act, 1978 and essential to the interpretation of the relevant provisions are—

1. That the property in issue was vested in the respondent on the 23rd December, 1965.

- a* 2. That it was developed property.
- b* 3. It was still vested in the respondent on the 29th March, 1978 immediately before the Land Use Act came into force.
- c* 4. The mortgage on the property was created on the 5th September, 1980.
5. The prior consent of the Military Governor was not obtained before the creation of the mortgage.
- d* The main contention of the appellants in this appeal as has been clearly stated in the question to be determined concisely is that the consent of the Military Governor required in respect of transactions relating to land granted by him is
- e* not necessary where the land was not granted by him but deemed to have been granted by him. A proper answer to this involves a construction of several of the provisions of the Land Use Act, 1978. I have already given a very short
- f* historical background of the purpose of the legislation which I consider invaluable for the construction of its provisions. The principal sections involved are sections 1, 2, 5, 22, 34(1), (2), (3), (4), 36(4), 39, 49. For the purposes of this
- g* judgment I produce verbatim sections 5(1)(a), 22, 34(4) of the Land Use Act.
- “5 (1) It shall be lawful for the Military Governor in respect of land, whether or not in an urban area:
- h* (a) to grant statutory rights of occupancy to any person for all purposes.
- i* 22. It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise
- j* howsoever without the consent of the Military Governor first had and obtained.

34 (4) Where the land to which subsection (2) of this section applies was subject to any mortgage, legal or equitable, or any encumbrance or interest valid in law such land shall continue to be so subject and the certificate of occupancy issued, shall indicate that the land is so subject, unless the continued operation of the encumbrance or interest would in the opinion of the Military Governor be inconsistent with the provisions, or general intendment of this Decree.”

Section 22 has already been reproduced. The relevant part provides:

“It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Military Governor, first had and obtained.”

Respondents have relied on this section in their contention that the validity of the mortgage of the property being put up by the appellants for sale by auction dependent on the prior consent of the Military Governor before its creation. Since such consent was not obtained the mortgage was illegal, null and void, and there was nothing to sell. Appellant’s contention is that since the property in issue was not acquired by grant of the Military Governor, but was to be regarded as if it was granted by him, section 22 which prescribes the requirement of prior consent to alienation was not applicable.

It is therefore necessary for a proper understanding to analyse the sections of the Land Use Act which deal with the holder of the statutory right of occupancy.

The general policy of the Act as declared both in its preamble and sections 1 and 2 is to vest all land in the territory of each State in the Military Governor of each State to be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of the Act.

Section 1 states—

“Subject to the provisions of this Act, *all land comprised in the territory of each State in the Federation* is hereby vested in the Military Governor of that State . . .”

- a* The expression italicised in the section is significant. The only exceptions made to this all inclusive provision is in section 49(1) to which section 1 is subject which excludes “any  
*b* title to land whether developed or undeveloped held by the Federal Government or any agency of the Federal Government at the commencement of this Act,” and accordingly any such land shall continue to vest in the Federal Govern-  
*c* ment or the agency concerned.

The same policy has been adopted in respect of the control and management of all land so held by the Military Governor. Section 2(1) of the Act provides as follows—  
*d*

“(1) As from the commencement of this Act:

- e* (a) all land in urban areas shall be under the control and management of the Military Governor of each State; and  
(b) all other land shall, subject to this Act, be under the control and management of the Local Government, within the area of jurisdiction in which the land is situated.”

*f* It is important to stress for emphasis the only exceptions to the vesting in the Military Governor and of control and management by him are those lands excluded under sections  
*g* 22 and 49(1) of the Act, see *Omonfoman v. Okoeguale* (1986) 5 N.W.L.R. (Part 40) 179.

*h* Chief *Williams* has submitted and I agree with him that the Land Use Act has vested all land in each State in the Military Governor, not as beneficial owner but in trust for the use and common benefit of all Nigerians. In this sense, though not a beneficial or absolute owner the ultimate ownership of interest in land, in other words, *dominium or the*  
*i* *radical title* is vested in him. Hence, all rights to land in the State are held directly or ultimately from the Military Governor. This is consistent with the new concept of ownership of interests in land, which is the objective of the uniformity  
*j* of tenure north and south of the Niger and Benue Rivers.

In *Dzungwe v. Gbishe* (1985) 2 N.W.L.R. (Part 8) at page 541, Aniagolu JSC discussing the issue of customary holders under the Land Use Act said:

“In the instant appeal, two courts had declared that the land in dispute was vested in the respondents as customary holders, and has always been so vested in them under customary tenancy. *Subject to the radical title (The Seisin) being vested in the Governor by operation of law, all other incidents of ownership belong to the customary holder.*”

This is an accurate statement of the incidents of customary holding under section 36. The incidents are not different for a holder under section 34(2). A section 5 holder is different being determined entirely by the certificate of occupancy. The portion underlined clearly accentuates the nature of the vesting of the title in the Governor. The amplitude and plenitude of the holder of land is affected by the vesting of the radical title in the Governor; and the express and implied incidents of the grant as stipulated under the Act. Sections 5(1)(a), 5(2), 6(1)(a),(b), 34(2), 36(1) of the Land Use Act state the categories of title which can be granted under the Act.

The Military Governor can:

- (i) grant statutory rights of occupancy to any person for all purposes – section 5(1)(a).

The Local Government can:

- (ii) grant customary rights of occupancy to any person or organisation for the use of the land in the Local Government area for:
  - (a) agricultural, residential and other purposes – section 6(1)(a);
  - (b) grazing purposes – section 6(1)(b);
- (iii) (a) Developed land in an urban area vested in any person immediately before the commencement of the Act, shall continue to be held by the person in whom it was so vested, as *if he is the holder of a statutory right of occupancy issued by the Military Governor under the Act*. The holder is deemed to have been granted a statutory right of occupancy under the Act – section 34(2);



*a* (b) In respect of undeveloped land in an urban area the holder is deemed to have been granted a statutory right of occupancy in respect of one plot not exceeding half hectare.

*b* Section 36 which deals with land not in urban areas is not directly relevant. It seems from the provisions of section 34(4) that the fact that the holder of the land is now regarded as the holder of a statutory right of occupancy does not affect the existing encumbrances or interests which are valid in law because it provides that where the land is subject to any mortgage, legal or equitable, or any encumbrance or interest valid in law such land shall continue to be so subject and the certificate of occupancy issued, shall so indicate. It is otherwise where the encumbrance or interest are inconsistent with the provisions or intendment of the Act. The two types of rights of occupancy are—

- e* (1) Statutory rights of occupancy:
- (a) made by the Military Governor after the Act came into force,
- f* (b) “As if” or “Deemed” statutory rights of occupancy, existing holdings not created by the Military Governor, but resulting from operation of law.
- (2) Customary rights of occupancy.

*g* We are not concerned with customary rights of occupancy in this appeal.

*h* I now turn to the contention by Counsel to the appellants that the application of section 22 of the Act should be confined to grants of statutory rights of occupancy made by the Military Governor. It was submitted to us that the legislature is presumed not to interfere with or abrogate vested rights; and any person construing a statute should so construe it as to preserve such vested rights. The cases of *Amachree v. Kallio* 2 N.L.R. 108; *Braide v. Adoki* 10 N.L.R. 15, and *Ade-shina v. Gemonu* (1965) 1 All N.L.R. 233 were cited in support of the submission. Counsel conceded that the provisions of section 22 could be construed to include the “deemed holder.” It was however submitted that if section 22 was

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applied to deemed holders then part, of section 34(7) would be tautologous. a

I do not agree with the submission that section 34(7) is in the circumstances tautologous. Where a statute is divided into parts, the ideal is to construe the sections in the part in relation to other sections in that part. Thus although the general rule is to construe the statute as a whole clarity is better attained where the words so indicate, by construing the sections in their related parts. I think Dr *Kusamotu's* submission that section 34(7) which relates to urban areas and in Part IV, the transitional provisions, should be construed within that part makes a lot of sense. This explains why a similar but stronger provision which prohibits transfers appears in section 36(5)(6) which refer to land not in urban areas. This also explains the provisions of a penalty in this Part, see section 36(6), section 37. There is therefore no question of regarding the words used in section 34(7) as tautologous since they deal with different considerations. It seems to me that section 22 is designed to deal with all interests created on the coming into force of the Act, whereas section 34(7), (8) are concerned with the interests resulting from property in existence before the coming into force of the Act and contravening its provisions. The provision of section 34(8) prohibits further subdividing or laying out in plots any undeveloped land in existence at the commencement of the Act without the prior consent in writing of the Military Governor. Any instrument in contravention of section 34(7) shall be void and of no effect and any party to such instrument shall be guilty of an offence and liable on conviction to imprisonment for one year or a fine of ₦5,000. Section 33 which preserves the powers of the Military Governor or the Local Government as the case may be to revoke rights of occupancy in Part IV of the Act applies to both statutory and customary rights of occupancy without discrimination. b  
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The contention by Chief *Williams* that to construe section 22 as including statutory rights of occupancy granted by virtue of section 34(4) will lead to the abrogation of vested j

- a* rights ignores the express provision of section 34(4) which preserves the continuance of any mortgage, legal or equitable, or any encumbrance valid in law, unless the continued
- b* operation of the encumbrance would in the opinion of the Military Governor be inconsistent with the provisions or the general intendment of the Act.

- c* It is a fundamental rule of our law that no statute shall be construed to affect vested rights unless the language of the statute and the subject matter clearly points towards that effect. See *Ojokolobo v. Alamu* (1987) 3 N.W.L.R. (Part 61) 377. There is no doubt that the general intendment of the
- d* Land Use Act, the express words vesting title, management and control of the use of land in the Military Governor, the curtailment of the interest of land holder prescribing consent to alienation in all cases, whether the land concerned was
- e* absolutely owned, are clear expressions of intention to abrogate vested rights.

- f* The cases of *Amachree v. Kallio* (*supra*), *Braide v. Adoki* (*supra*) and *Adeshina v. Lemonu* (*supra*) cited by Chief Williams, are all cases where the intention to abrogate vested rights were neither expressly provided nor could it be gathered from the general intendment of the legislation. In *Adeshina v. Lemonu* where the two other cases were discussed,
- g* the facts were that the plaintiff's nets were seized whilst fishing in the stretch of tidal water near Apapa. The trial Judge granted him an injunction to restrain the defendant from molesting him in his fishing in that stretch. The defendant claimed that by section 3(1) of the Minerals Act, public rights of fishing had been taken away. The Supreme Court dismissing the appeal held that the common right of fishing in tidal waters had been recognised by the full court in *Amachree v. Kallio*. The defendant did not show that there were
- i* any words in the Minerals Act evincing the intention to affect existing rights of fishing by the vesting of the rivers, streams and watercourses in the crown that right was not affected by the Act. The position in the instant case is different.
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As I have already shown, the vesting of all land in the Military Governor was coupled with powers of management and control and various exercise of powers restricting alienation without consent. The cases cited are therefore not applicable.

In considering whether section 22 of the Act applies to section 34(2) it is relevant to construe the statute as a whole. This is because section 34(7)(8) apply to section 34(5)(a) or (6) relating to land in urban areas. Section 34(2) in respect of which the holder of the land was as if the holder of a statutory right of occupancy, issued by the Military Governor acquires a statutory right of occupancy by operation of law. Although section 34(3) makes it mandatory on the Military Governor to issue a certificate of occupancy on the application in the prescribed form, it seems to me that the Military Governor is bound to grant to the holder such terms existing in the holding before the date of the acquisition of the statutory right of occupancy, which are not inconsistent with the provisions of the Act. See section 34(4). I do not think indefinite duration of tenure is inconsistent. But undoubtedly freedom to alienate will be inconsistent with section 22.

The dominant expression in section 34(4) is the phrase “as if” which has been construed in *East End Dwellings Co. v. Finsbury Borough Council* (1952) A.C.109 at page 132. Asquith LJ said to an “as if” clause:

“If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine the real consequences and incidents which, if the putative state of affairs had in fact existed must inevitably have flowed from or accompanied it.”

I consider the dictum of Lord Simonds in the recent case of *Barclays Bank Ltd v. Inland Revenue Commissioners* (1961) A.C. 509 at 523 is most appropriate. He said:

“I bear in mind what Lord Radcliffe said in *St. Aubyn’s case* (*supra*) about the word ‘deem’ but nevertheless regard its primary function as to bring in something which would otherwise be excluded.”

*a* In ordinary language which is reflected in legislation, when a thing is deemed to be something, it is not meant to be the thing it is deemed to be. It is an admission that it is not that

*b* other thing but should be regarded as that thing. I think it is correct to say that the word “*deem*” or phrase “*as if*” are used to extend the meaning of a subject matter which they do not properly designate.

*c* In the instant case statutory right of occupancy by operation of law which is a different thing is regarded as if it is a statutory right of occupancy granted by the act of the Military Governor. Hence in section 34(2) the Act says that

*d* “where the land is developed the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act, as if, the holder of the

*e* land was the holder of a statutory right of occupancy issued by the Military Governor under this Act.” The land so regarded was not created by the Act. This provision equates a statutory right of occupancy by operation of law under section 34(2) with one under section 5 granted by Military

*f* Governor. It is well settled that the object of all interpretation is to discover the intention of the legislature from the language used in the statute and to give effect to it. One of the most useful guides to interpretation is the mischief rule

*g* which considers the state of the law before the enactment, the defect which the legislation sets out to remedy or/and prevent, the remedy adopted by the legislature to cure the mischief and the true reason of the remedy. The duty of the

*h* court therefore is to adopt such interpretation that will enable the suppression of the mischief and to promote the remedy within the true intent of the legislation. See *Ifezue v. Mbadugha and another* (1984) 5 S.C. 79.

*i*

The purpose of the provision of section 34(2) is to bring land holding in existence before the Creation of the Land Use Act in line with that Act for uniform control and management, hence the holders of such title are to be deemed to

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be holders of statutory right of occupancy issued by the Military Governor. Thus the contention that the Act envisaged two categories of rights holders, one granted by the Military Governor and subject to all the provisions of the Act, the other by operation of law not within the control and management of the Military Governor is clearly wrong and inconsistent with the express words of the Act, and the mischief intended to prevent.

Both Professors Omotola and James, acknowledged authorities on Nigerian Land Law whose opinion Chief Williams, SAN adopted are of the view that the holder under section 34(2) is not subject to the provisions of section 21 and 22 of the Act. See Omotola; *Essays on the Land Use Act* pages 27-28; and James: *Nigerian Land Use Act: Policy and Principles* (1987) page 104. It seems clear from analysis of the sections ie sections 22 and 34(2) that the learned Professors did not consider that section 34(2) read together with section 5 of the Act are not restricted to undeveloped land. Again it is not allowable to adopt a construction (which they have done) that will result in the defeat of the purpose of the legislation. It is a useful maxim of interpretation of statutes to interpret a statute to save rather than to destroy its real purpose *ut magis valeat quam pereat*, see *Nafiu Rabi v. Kano State* (1980) 8 11 S.C. 130. The direct result of adopting the views of the learned professors to the interpretation of the sections as Chief Williams has done, will result in the existence of two systems of land holding under the Act, the duality the legislation was designed to prevent.

Like Professor Omotola, Chief FRA Williams has also dwelt on the distinction between actual and presumed grant in section 39. This ignores the fact that the phrase “*as if*” used in section 34(2), 34(5)(a), 34(6)(a) of the Act, brings those grants within the meaning of section 5. Again the expression used in section 22 is grant. The word *actual* is an

- a* importation of the learned Professor. The section speaks of statutory right of occupancy granted by the Governor and not *actually* granted by the Governor. It cannot therefore be
- b* seriously contested that a statutory right of occupancy created by operation of law and deemed to have been issued by the Military Governor is not equivalent to grant under sections 5 and 22. See *Akeredolu v. Akinremi* (1986) 2 N.W.L.R. (Part 25) 710.
- c*

As I have stated before, this is the category to which section 34(2) belongs. When the holder even if in fee simple becomes the holder of a statutory right of occupancy he becomes subject to the express and implied terms of the grant. The term relating to prior consent in writing by the Governor to alienation is a statutory requirement which will be inconsistent with any contrary provision. I therefore will answer the question to be determined in this case in the affirmative. See *Akpene v. Barclays Bank Ltd and another* (1977)1 S.C. 47.

- d*
- I think the Court of Appeal was right to hold that *every holder of a right of occupancy* whether statutory or otherwise is regarded as having been granted the right by the Military Governor or Local Government as the case may be, for the purpose of control and management of *all land* comprised in the State. Accordingly every such holder, whether
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- f*
- g*
- h*
- under sections 5, 34 or 36 of the Land Use Act requires the prior consent of the Military Governor before he can transfer, mortgage or otherwise dispose of his interest in the right of occupancy. This means that section 22 is of general application to every rights holder under the Act pursuant to sections 5, 34 or 36 thereof.

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- The observation by Chief *Williams* that the requirement of consent in every transaction is a veritable clog in the progress of the commercial life of the Nation and requires urgent review is a point well taken. It is hoped that in the review the true spirit of the legislation will take into consideration the fundamental basis of the exercise by a holder of
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the plenitude of his powers and rights vested in him by the nature of his holding with minimal restrictions to ensure uniform control, but to enable uninhibited commercial transactions.

For the above reasons and the reasons given by my learned brother Obaseki JSC in his judgment, I hereby dismiss this appeal and affirm the judgment of the Court of Appeal with costs assessed at ₦500 to respondents.

**KAWU JSC:** In this appeal it is not in dispute that the first respondent, having held the land in question before the Land Use Act came into force, is a person who is deemed to be the holder of a statutory right of occupancy by virtue of the provisions of section 34(2) of the Act. The question is whether the provisions of section 22 of the Act apply to him. Now, section 22 of the Act reads as follows:

“It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Military Governor first had and obtained.”

I have had the advantage of reading in draft the lead judgment of my learned brother, Obaseki JSC which has just been delivered. I am in complete agreement with his reasoning and his conclusion that this appeal should be dismissed. Reading the Act as a whole, I am left in no doubt that the provisions of section 22 of the Act do apply to land deemed to have been granted by the Governor. In my view if the provisions of the section do not apply to such land, it will be almost impossible for the Governor to implement the general policy of the Act which is set out in its preamble and also in sections 1 and 2. It is for this reason and for the fuller reasons contained in the lead judgment of my learned brother, Obaseki JSC that I have come to the conclusion that the Court of Appeal was right in its decision affirming that of the trial Court. I too will dismiss the appeal with ₦500 costs awarded to the respondents.



*a* **BELGORE JSC:** The appellant bank entered into a deed of conveyance with the respondent whereby the respondent mortgaged his interest in a piece of developed land situate at  
*b* Oyekanmi Street, Itire, Lagos, to the appellant. Prior to Land Use Act of 1978, the respondent held the land in fee simple, a tenure abrogated by that Act. The deed was executed and registered in the Deeds Registry. The respondents defaulted  
*c* in redeeming the mortgage and in an attempt to foreclose, the respondents as plaintiffs went to Court and claimed a number of reliefs based on the ground that the deed of mortgage was null and void. The trial Lagos High Court, granted  
*d* the reliefs by affirming that the deed of mortgage was null and void in that prior to entering into the mortgage, the consent of the Military Governor so to do, was not obtained, a failure fatal to the agreement in view of section 22 Land Use Act 1978, which reads:

*e* “22. It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Military Governor first had and obtained.”  
*f*

The Court of Appeal upheld the High Court’s decision giving rise to this appeal before this Court. There are only two grounds of appeal which read:  
*g*

*h* “1. Court of Appeal erred in law in holding that the failure to obtain consent of the Military Governor under section 22 of the Act (Land Use Act, 1978) rendered the deed of mortgage null and void and the mortgage transaction illegal

*PARTICULARS*

*i* (a) The provisions of section 22 of the Act do not apply to land such as the one involved in this case where the holder is a deemed holder of a statutory right of occupancy under section 34 of the Act.

*j* (b) In the premises, the deed of mortgage in this case is not null and void.

2. The Court of Appeal erred in law in failing to observe that statutory provisions are not to be construed as displacing or abolishing vested rights save only to the extent to which their provisions clearly displace or abolish such rights. Accordingly, deemed grants of statutory right of occupancy under section 34 of the Land Use Act do not require the consent of the Military Governor.”

The appeal is therefore based, in essence, on misapplication of law and wrong interpretation of law. The Land Use Act, 1978 is a revolutionary law in that it swept aside all known tenures known in customary law in the entire Federation and replaced them with statutory provisions. Thus the Act left no ambiguity as to its purport when it states:

- “1. Subject to the provisions of this Act, all land comprised in the territory of each state in the Federation are hereby vested in the Military Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.”

2.(1) As from the commencement of this Act—

- (a) all land in urban areas shall, subject to this Act, be under the control and management of the Military Governor of each State; and
- (b) all other land shall, subject to this Act, be under the control and management of the Local Government within the area of jurisdiction of which the land is situated.”

There has been no statute like this before. It took away the land from every “landed gentry” and vested it for administration in the Military Governor of the State in which the land is situated for management and control for the benefit of all Nigerians. The Military Governor has not got the land vested in him as beneficial owner, far from it. The vesting in this instance is for administrative and management purpose, in trust, for all Nigerians. If the Land Tenure Law of Northern Nigeria, 1962, Cap 59 (Laws of Northern Nigeria, 1963) was revolutionary for its time, in a region tagged, I believe mischievously if not dishonestly, feudalism, this Act is all embracing for it replaced “indigenes of a State” for “all Nigerians.”

- a* The whole land in each State is thus vested in trust in the Military Governor to be administered for the benefit of all Nigerians irrespective of where they may be. The management and, control is in the Governor for land in urban areas and other land (in rural areas to be so designated in accordance with the Act) shall be under the management of the Local Government within which the lands are situated. It is in this wise that the Act should be construed in its peculiar circumstance and by giving each word, each phrase, each expression its natural, ordinary and grammatical meaning. Considering the grounds of appeal and the issue formulated for determination, to wit:
- d* “Whether a person who is deemed to be a holder of a right of occupancy pursuant to section 34 of the Land Use Act, requires solely by virtue of that fact, the consent of the Military Governor before he can transfer, mortgage, or otherwise dispose of his interest in the right of occupancy. More specifically, do the provisions of section 22 of the Land Use Act apply to a person who is deemed to be the holder of a right of occupancy pursuant to section 34 of the Act solely by virtue of his being deemed to be such a holder.”
- e*
- f* It is pertinent to set out the relevant subsection of section 34 of the Act reading as follows:
- g* “34 (1) The following provisions of this section shall have effect respect of land in an urban area vested in any person immediately before the commencement of this Act.
- h* (2) Where land is developed the Land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Military Governor under the Act.”
- i* Chief *Williams*, SAN, submitted that a distinction ought to be drawn between right of management and control of land on one hand and right of management and interest on the other hand and cited the English case *Pardoe v. Pardoe* 82 C.T. R. 541 where meaning of control was explained in respect of a testator’s bequest. It is to be observed that the
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phrase used in that case is “full and absolute control” and it was interpreted to mean no more than “superintendence and power of management” in the context of that will. The meaning of “vested” in section 1 of the Act, in its context, does not imply personal interest to the Military Governor, but merely gives the Governor power of superintendence in the sense of management and control, as provided in section 2(1) thereof, in trust for all Nigerians. The Military Governor by the intendment of the Act is not made a beneficial owner but a manager or controller of the use of the land within the State he administers for the benefit of all Nigerians. Chief *Williams*, SAN, obviously does not favour assertion of *Kolawole JCA*:

“The mischief aimed at by the Land Use Act was the abrogation of absolute ownership or freehold interest (in land) by the community, the family the individual. That was a complete revolution of the land tenure system in Southern Nigeria. Section 1 and section 2 of the Act clearly spelt out the purpose of the legislation.”

But that is the correct statement of law. All other interests in land are abrogated and the only interests are those in urban areas governed by the granting of right of occupancy granted by the Military Governor and other interests in rural areas governed by the right of occupancy granted by the Local Government. Vested rights before the commencement of the Act are even not saved. The transitional provisions in section 34 thereof deemed previous interest to be either of the two mentioned above. This certainly is not evolution, for it set aside age long tenures and replaced them with statutory rights traceable to the grant by the Governor or the Local Government.

The question now is, to my mind, as follows:

“What right was in the first respondent when on 5th September, 1980 he mortgaged his property at No. 1 Oyekanmi Street, to the appellant?”

The respondent prior to 1978 had developed a building on the land, having purchased earlier what amounted to an absolute interest or freehold as it was called. By the operation

*a* of section 34(2) (*supra*), that interest was vitiated. The respondent on 29th March, 1978, the commencement date of the Act, had his interest automatically converted to statutory

*b* right of occupancy granted by the Military Governor of Lagos State. The right is immediately deemed to exist and the first respondent could apply at any time he so wishes to the Military Governor for a certificate of occupancy – section

*c* 34(3). To all intent and purposes, the first respondent is a holder of statutory right of occupancy over the land on which the property mortgaged stands. The words used in section 34(2) are:

*d* “as if the holder of the land was the holder of a statutory right of occupancy issued by the Military Governor.”

This means as if the Military Governor issued the right of occupancy. It is true the draftsman exercised little discretion

*e* in choice of words: *in practical* terms, the word “granted” would be more appropriate in this context than the word “issued.” Normally the Military Governor grants a right of occupancy and as evidence thereof a certificate of occupancy

*f* is issued. See Land Tenure Law, 1962 (Northern Nigeria Laws, 1963), Cap 59, (*supra*) and also section 22 Land Use Act. It is thus very clear that serious injustice will be done to the interpretation of section 22 of the Act if it is read into it words extrinsic to it. It is unlawful, says the section, for the

*g* holder of a statutory right of occupancy granted by the Military Governor to alienate such a right of occupancy in any manner whatsoever whether by assignment, mortgage, transfer of possession or sub-leases without the consent of the

*h* Military Governor first had and obtained. Any right of occupancy granted by the Military Governor is covered. To attempt to read into the section exceptions outside the provisos contained in (a), (b) and (c) following the section will not

*i* only do serious mischief to the Act in its entirety but will diametrically go against all known canons of construction, in that words will be imported into the section that is clear and unambiguous. The answer, to my mind, to the issue formulated for determination is that the title in the respondent

*j*

being that of a statutory right of occupancy granted by the Military Governor, it is caught squarely by section 22 of the Act. It makes no difference whether the Military Governor actually in the sense of physical act granted the statutory right of occupancy or is deemed to have been so granted or is to be regarded as if granted by the Military Governor. All say the same thing; any alienation, etc, must be made with prior consent of the Military Governor. The clear meaning manifests the intention of the legislature and it is unnecessary to resort to canon of *ut res magis valeat quam pereat*. The statute as a whole has one clear mission, which is to narrow down the tenure by telescoping all grants to the discretion of the Military Governor, who is the trustee of all lands within the State he governs. There is no more communal land, freehold, fee simple and all other tenures based on customary laws. To succumb to the proposition that there are two rights of occupancy, one granted by the Military Governor and another as if granted (or deemed granted) by him will lead to an absurdity of construction of statute as there is nothing in the Act to indicate such a division. Once a statute is clear, the courts will have no difficulty in its interpretation and any attempt to add words to its provisions will create not only injustice and inconvenience, but also clear absurdity as it will result in assault on the statute itself which is not the function of the courts. I find no substance in this appeal and it is for the above reasons and fuller reasons in the lead judgment of Obaseki JSC, that I dismiss it and hereby make the same consequential orders as he has done in dismissing the appeal.

The feature of this appeal is that the issue based on the grounds of appeal has been confined within narrow limits of interpretation of section 34 and section 22 of the Act. This is unfortunate as this Court must confine its decision to the argument of the parties. To do otherwise will amount to raising issues, *suo motu* for the parties. Otherwise, all the equities were not canvassed. Decisions in such cases as *Esi v*

- a* *Moruku* XV N.L.R. 116, based on Public Lands Acquisition Ordinance, 1903, the Uganda case of *Singh v. Kulubya* (1961) 33 PC 67, the Nigerian case of *Solanke v. Abed*  
*b* (1962) N.R.N.L.R. 92, or *Orjiako v. Orjiako* (unreported JD/27/1955 a High Court, Jos, case), *Mamiso v. Pate* (1971) N.N.L.R. 62 (also a High Court, Kaduna case) would have been canvassed. Perhaps Counsel will one day move further  
*c* than this narrow confine this Court has been placed in this case.

**AGBAJE JSC:** I have had the opportunity of reading in draft the lead judgment of my learned brother Obaseki JSC. My  
*d* Lord Obaseki JSC has in his judgment meticulously considered the facts and the law relating to the main issue raised in this appeal namely:

- e* “Whether a person who is deemed to be a holder of a right of occupancy pursuant to section 34 of the Land Use Act, requires, solely by virtue of that fact, the consent of the Military Governor before he can transfer, mortgage, or otherwise dispose of his interest in the right of occupancy. More specifically, do the provisions of section 22 of the Land Use Act apply to a person who is  
*f* deemed to be the holder of a right of occupancy pursuant to section 34 of the Act solely by virtue of his being deemed to be such a holder.”

- g* My learned brother has also taken great pains to review the provisions of the Land Use Act, 1978 and of the other statutes relevant to the point at issue. He also spared no pains to consider virtually all the relevant decisions both local and foreign on the point. Having done all this, my Lord Obaseki  
*h* JSC answered the question for determination in this appeal in the affirmative. I entirely agree with him. I cannot usefully add anything to what he has said in coming to his conclusion.

- i* In the result I too dismiss the appellants’ appeal with costs assessed at ₦500 to the respondent.

- j* **CRAIG JSC:** I have had the pleasure of reading in draft the judgment just delivered by my learned brother, Obaseki

JSC, and I agree entirely with his statement of the facts, his <sup>a</sup>  
analysis of the issues involved and his conclusions.

For the reasons given in the said judgment and which reasons I adopt as mine, I too would dismiss the appeal and it is <sup>b</sup>  
hereby dismissed with ₦500 costs to the respondent.

*Appeal dismissed.*