COURTS JUDGEMENTS ON INSURANCE AND RELATED CASES IN NIGERIAN COURTS–AIDE MEMOIRS FOR MEMBERS

(VOLUME 1)

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ARRANGED IN ORDER OF SENIORITY OF COURTS

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FOREWORD

Insurance aims to financially restore the insured to a pre-loss state, acting as a safety net against unforeseen events in our unpredictable world. In the complex framework of contemporary society, insurance stands as a pivotal mechanism, offering a fortification against the vagaries of fate and the unforeseen uproars that life, with its intrinsic unpredictability, may hurl at us.

This compendium of insurance-related cases in Nigerian courts serves not merely as a source of judicial precedents but as a beacon, guiding stakeholders through the often tempestuous seas of insurance law in Nigeria. It is a reflection of the evolving dialogue between the judiciary and the insurance industry, a crucial tale that shapes the curves of legal and financial security in the nation.

Nigeria's rich legal heritage and dynamic market create a unique environment for the development and practice of insurance law. This collection of cases covers various issues in both Life and Non-Life insurance, ranging from policy interpretation disputes and breach of contract claims to the crucial discussion of regulatory compliance. Judgments from diverse courts, including the Supreme Court, Appeal Court, Federal High Court, and State High Courts, are included.

Each case, a story in itself, offers invaluable insights into the complexities of ensuring justice and fairness in contractual relationships within the insurance sector.This collection aims to serve a wide range of readers, including legal practitioners, scholars, insurance professionals, and policymakers. It strives to not only provide a snapshot of the current state of Nigerian insurance law but also offer a glimpse into its future trajectory. The meticulous analysis and insightful compilation of cases emphasise the timeless principle that underpins the very fabric of insurance: utmost good faith.

As we turn the pages of this significant compilation, I hope that readers find within it not only the robust analysis and forensic detail expected of such a work but also a source of encouragement. May it encourage a deeper appreciation for the role of law in structuring economic relations and protecting the vulnerable. May it also serve as a reminder of the judiciary's role in interpreting, shaping, and, when necessary, reshaping the law to meet the demands of justice in a swiftly evolving world.

This foreword, therefore, is more than an introduction; it is an invitation to explore, understand, and engage with the living body of law that insurance represents. It is with great enthusiasm that I invite you to explore the pages that follow, fully confident that the knowledge contained therein will inform, challenge, and ultimately enrich your understanding of insurance law in Nigeria.

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SUPREME COURT

1.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: Supreme Court
Date: June 16, 1978
Suit Number: SC.260/1975
Judge: IRIKEFE, J.S.C

Ajufo & Others - (Appellants)

vs.

Ajarbor & Others - (Respondents)

1.2. REPORTS/FACTS-ISSUES

There is no privity of contract between the parties to entitle a third party to join an insurer in an action by the third party for damages for negligence arising out of the use of motor vehicle in respect of which the insurer undertook to indemnify the insured. The Plaintiff had sustained Injuries in an accident involving a lorry in which he was travelling. In a bid to recover damages for the injuries sustained he brought an action against the first and the driver of the said lorry respectively. At his instance, the third defendant was joined in the action as the person in whose name the lorry was allegedly insured. During trial, the insurer of the lorry was joined in the action as the fourth defendant upon the application of the first defendant. Damages were awarded against all the defendants jointly and severally. The fourth defendant contending that his joinder to the action at the Lower Count was wrong in law as there was no privity of contract between it and the Plaintiff third party.

1.3 DECISION OF THE COURT

Held, by the Supreme Court allowing the appeal there was no privity of contract between the plaintiff and the fourth defendant insurer and the latter should

therefore not have been joined as a defendant nor should judgment have been given against it

Per IRIKEFE. J.S.C

Even if it were established that an identifiable person. i.e the third defendant, took up the policy of Insurance as with in the fourth Defendant we are satisfied that a third party such as the plaintiff could not sue the fourth defendant ab initio. This must be so

as there would be no privity of contract between the parties and even if such a right were conferred by a Statute such as s. 10 of the Motor Vehicles (Third Party Insurance) Act, it would still be inappropriate to bring in the insurer as a party, except, perhaps, by the way of third party proceedings, based on a contract of indemnity, If any: see Post Office V Norwich Union Fire Insurance Society Ltd. and Odubanjo V. New India Insurance Co. Ltd .We think it was an error on the part of the Trial Judge to have joined the fourth defendant in these proceedings and have proceeded to record a verdict against it when, at the end of hearing, no issue was joined on the pleadings between the Plaintiff and the fourth defendant. In the Odubanjo's case this court ruled that the insurer be struck out from the claim. We propose to adopt the same course on this occasion.

1.4 REMARKS

There is no privity of contract between the parties to entitle a third party to join an insurer in an action by the third party for damages upheld.

1.5 REFERENCES

1. Post Office Norwich Union Fire Insurance Society Limited.[1967] 2 QB 363, [1967] 2 WLR 709, [1967]1 ALL ER 557, CA.
2. Odubanjo v. New India Insurance Company Limited. (unreported, sc 85/69, 8th October, 1971)SC.

2.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: Supreme Court

Date: *8th October, 1971*

Suit Number: LD|541|67

Judge: Lewis, J.S.C

New India Insurance Company Limited

vs.

Odubanjo, Ladipo and Abiodun

2.2 REPORT/FACTS/ISSUES

A third party has no claim in law or in equity of any sort against the insurance company, nor has he any claim against the person who injures him, the assured, to direct the assured to pay over the sum of money received under the insurance policy to him because there was no privity between him and the insurance company.

Following a collision resulting in damage to the plaintiff's car and allegedly caused by the negligent driving of the first defendant's car by the second defendant, his driver, the plaintiff brought an action at the High Court to recover damages for damage done to his car. He joined in the action, the third defendant against third party liabilities. The application of the third defendant insurer to have its name struck out from the suit was rejected, hence this appeal where the appellant /third defendant insurer contended that it was improperly joined in the action since there was no privity of contract between it and the plaintiff /respondent, and that assuming Section 10 of the Motor Vehicles (Third Party Insurance) Act entitled the plaintiff to claim was not in respect of liability for death or bodily injury within the meaning of section 6 (1) (6) of the Act. The plaintiff, however argued that a third party could join an insurer in an action against their insured where there was a dispute between the insurer and the third

party as to the extent of the liability if the liability itself had been admitted; as was the case here on the allegation of the plaintiff that the third defendant insurer had admitted liability to him but that he had rejected it.

2.3 DECISION OF THE COURT

Held, by the Supreme Court, the respondent third party lacked the locus standi to join the appellant insurer in the action because the latter was not under any contractual liability to the former. Therefore, the alleged admission of liability, i.e. offer for settlement made by the insurer was unenforceable.

Per Lewis, J.S.C

In our view, in no circumstances could such an equitable right arise out of the facts as pleaded in the present appeal before us. This passage which we have quoted from the Judgment of Lord Wright was approved and followed in Green V. Russell (2) by Romer, L.J ([1959]) 2 G.B at 240, [1959]2 All E.R at 531).

In the Re Harrington Motor Company Limited (4) Atkin, L.J (as he then was) (1928)At 118; L.7 at 189); said:

"But the position in law seems to me clearly to be that a third party in a case like the present has no claim in law or inequity of any sort against the insurance company, or against the money paid by the insurance company, nor has he any claim against the person who injures him, the assured to pay over the sum of money received under the insurance policy to him. The amount that the assured infact received is part of his general assets. As a general rule the expediency of that, I think, cannot be disputed. It obviously would disturb the whole practice of insurance if the claimant against the assured who caused the risk had a direct right of recourse against the insurance company, and we know that in actual practice the assured receives money. The parties being solvent and does not pay over necessarily that sum of money to own assets and uses the insurance money, so far as it goes, because it does not always completely meet his liability. Mr. Stable in his interesting and able argument, admitted that, apart from insolvency the third party has no sort of right in equity against the insurance company, under the policy, if that is so, that really seems to me to dispose of the case, because I find it impossible to see how a special right, arising out of the circumstances which ordinarily occur in cases of solvency, could come into existence merely because the assured happen to be in difficulties or financial

weakness, or to become bankrupt. or, of a company, to have a winding up order made against it.

And in Windsor V Chalcraft (10) Siesser, L.J (albelt dissenting) from the majority decision on another aspect of the case dealing with S. 10 of the Road Traffic Act, 1934, which is similar to S.10 of the Motor Vehicles (Third Party Insurance) Act in Nigeria, said (1939) ALLER at 754.

"The position, in my view, depends in part on the Common Law and in part on s.10 of the Road Traffic Act, 1934. The Common Law is clearly stated by Tomlin,J. in Hood's Trust v Southern Union General Insurance Co. of Australasia Ltd. (1928) ch. 105,118)

Tomlin. J said;"The position in law was quite clear, and it was that the appellant in that case being the third party had no right or claim against the Insurance Company or against money paid by the Insurance Company, the Applicant being the Third Party.

"The assured had a direct right of recourse against the insurance Company at Common Law, therefore, it is clear that the plaintiff in this case could not have obtained judgement against the underwriters. In strict law, the underwriters should have paid to the defendant so much money as the defendant became liable for the plaintiff"

We turn now to Sec.10 (1) of the Motor Vehicles (Third Party Insurance) Act (cap.126), but to our mind it is not material to the facts as pleaded in the present appeal as the plaintiff here was not suing for damages to his car. The passage in the judgment of Lord Denning, M.R in Post Office v Norwich Union for Instance to which Mr. Sofola referred (1967) 2G.B at 374- 375(1967) I ALL E.R. at 580) while appropriate to an interpretation of the legal effects arising out of S.10 (1) is not dealing with the situation that we have here.

It is true that one stage soon after the passing of the first English Legislation in regard to third party insurance in motor cases it was thought wrong to join the

insurers in injury cases as this might affect the mind of the Jury, so that this was held to be a reason for non- joinder: see Carpenter v. Ebblewhite (1). Nonetheless that has changed by 1967, because the practice of hearing such cases by a Judge and Jury had changed to a hearing by a Judge alone. This has indeed been emphasized earlier in Harman V. Crilly but it is important to note this case was one where in the defendant were seeking to join their insurers as third parties under a contract of indemnity between the Defendants and the Insurers so that there was privity of contract between them and it was thought convenient to try at the same time as the action by the plaintiff against the defendants, as Godard, L.J indicated when he said (1973) K.B at 173; (1943) 1 All E.R at 143): *"it seems to me that the deciding question whether or not there is a contract of indemnity should be tried in the same proceedings as the action in which the liability of the defendants would be determined. There is no ground for saying this third-party notice is in any way embarrassing or would lead to anything but a fair trial of the action".* The action was not begun there by the plaintiff suing the insurers.

Returning now to the writ and statement of claim in this matter, it is clear that in the writ it is solely as insurers that the third defendants were sued, as the words "the third defendant company is at all material times the insurer of the first defendant "and" the third defendants are sued as the insurers of the first defendant" show paragraphs 8 and 10 of the statement of claim which we have already quoted above are to the line effect that the third defendants are insurers of the first defendants. On the authorities clear to us that the plaintiff cannot in any circumstances be said to be suing the third defendants herein that, and he can therefore only be permitted to join the third defendants if he can establish their contractual liability. On the most favourable construction to the plaintiff of paragraph 11 to 15 of the statement of claim we fail to see how he was alleging the contractual liability of the third defendants such as would make to them leading liable. He alleged there was no contract with any consideration and all he said was to plead that the third defendants made an offer of £150 which the plaintiff rejected. We cannot see that, as pleaded in the statement of claim, that offer by the third defendants was enforceable and indeed not only was it rejected according to the pleading but Mr, Augustto in his argument in the High Court said. "We are not saying that the insurance Company is liable, there must be an end to litigation once he had admitted the insurance company were not liable in our own view have disposed of the matter. We further note that the first and second defendants in their filed statement of defence denied liability, though in accordance with 0.XXVII of the Supreme Court (civil procedure) rules (Laws of

Nigeria, 1948, cap.211) they pleaded that they had paid money into the Court without admitting liability. Moreover, the plaintiff was not suing the third defendant as principals of the first defendant nor was he suing them as being liable in the alternative to the first defendant. The dispute in issue as between the plaintiff and the first and second defendants as to liability for the damage to the plaintiff's car could be completely and effectually disposed of without joining the third defendants, and there was no necessity to join the third defendants so as to make them bound by the decision, so as far as the plaintiff was concerned he had shown no possible cause of action against them, there was no need to join them to bring litigation to an end. Dealing with joinder under O.15r.6 of the English Rules of the Supreme Court (with which we had cause to deal recently in Oriare v Government of W. Nigeria in (6), in Supreme Court practice at 169 (1979) it is stated.

"The Court has no jurisdiction under the rule to order third parties to be added as defendants where the cause or matter is not liable to be defeated by the non-joinder, where the third parties are not persons who ought to have been sued in the first instance, and where the third party were not persons whose presence as defendants was necessary to enable the Court effectually to adjudicate on all the question involved (Miguel Sanchez and Compania S.L v Result, (1958) P. 174).

There is no doubt in our mind that under the English Rules or under the rules applicable in the Western State which are similar, the plaintiff would not be permitted to use the third defendants here, but we have to consider whether this is different in Lagos because of the provision applicable there of Order iv rule5(II) of the former Supreme Court (Civil Proceedings) rules (Laws of Nigeria, 1948, Cap. 211), which reads".

(1) If it shall appear to the Court, at or before the hearing of a suit, that all persons who may be entitled to or who claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court may adjourn the hearing of the suit to a future date, to be fixed by the Court, and shall direct that such persons shall be made either plaintiff's or defendants in the suit, as the case may be. In such case the Court shall be served in the manner provided by the rules for the service if a writ of summons or in such other manner as the Court thinks fit to direct, and on proof of the due service of such notice,

the person so served, whether he shall have appeared or not, shall be bound by all the proceedings on the cause:

Provided that a person so served, and falling to appear within the time limited by, the notice for his appearance, may, at any time before Judgement in the suits apply to the court for leave to appear, and such leave may be given upon such terms (if any) as the Court shall think fit.

(2) The Court may, at any stage of the proceedings, and on such terms as appear to the Court to be just, order that the name or names of any party or parties, whether as plaintiff's or defendants, improperly joined, be struck out.

In our view there was no application to allow the third defendant to be joined here as they were already sued, but the objection by the third defendant was that they were improperly joined. It is not a case of non-joinder which would fall under Order iv rule5(II) but a case of mis- joinder which fall under Order iv rule5(II). Therefore, the question whether the third defendants may be likely to be affected by the result within the terms of Order iv rule5(II) does not arise though vis-a-vis the plaintiff we do not see that the third defendants could in any case "be likely to be affected by the result". Here, as we have stated, in our view the third defendant could not as pleaded have been legally liable to the plaintiff directly, whatever their liability to the first defendant and as it was not the first defendant here seeking to join them, when other considerations would arise, but the third defendants objecting to being improperly joined by the plaintiff, the Court in its discretion ought not to have allowed them to remain party upon their objection. As this was not a case falling within S. 10(1) of the Motor Vehicles. (Third Party Insurance) Act (cap. 126) there was not even any possible further legal liability that the plaintiff had the right to enforce against the third defendants, if the first and second defendants were found to be liable in damages, as whatever claim the first defendant might have had as against the third defendants under the terms of his policy of insurance was not enforceable by the plaintiff against. The third defendants under the terms of his policy of insurance was not enforceable by the plaintiff against. The third defendants as there was no privity of contract between them. It is incidentally to be noted that in JIA Enterprises (Electrical) Ltd v British Common Wealth Insurance Company Limited (5), Brett, F. J., Albert dealing with an application to be

joined as plaintiff under this same O.I.V, r.5 (1) said (r1962) 1 All N.L.R at 372).

"The Bank has no claim whatsoever because it has suffered no loss in respect of the property damaged or destroyed. That property was pro tanto replaced by the claim under the policy which itself came under the floating charge. The Bank therefore has suffered no loss and has no locus standi at all to make a claim. The appeal in relation to the second application under o.ivr.5, must also fail"

Thus, the bank there was not "likely to be affected by the result" within the meaning of o.i.v r.5(1). So here we think that the plaintiff had no locus standi to make the third defendants parties to the action that he was bringing against the first and second defendants, though different considerations would arise, as we have stated if the first defendants were seeking to join the third defendants.

We would only like to add, so far as the passage from Sun Insurance Office Limited v. Ojemuyiwa is concerned on which Mr. Agusto relied, (1965 AIR comm at 5 (1965 I ALL N.L.R. at 5) that it was certainly obiter dictum in the appeal, as that appeal turned upon the interpretation of a statutory provision as to the right of appeal. In any case the remarks were not in our view directing any course of action but were observations made with reference to what was in fact a case falling within s.10 (1) of the Motor Vehicles. (Third Party Insurance) Act (cap.126). In so far as the observations were directed to the defendants Counsel so that he could consider whether in any particular case it was desirable to bring in the defendant insurers as Third parties we are in full agreement as if there is in any way that litigation and the costs incurred thereby can properly be reduced, it should be.

We come to the conclusion therefore that Mr. Sofola was entitled to take the objection which he did to the joinder by the plaintiff of the third defendants as parties to the action when nothing was pleaded in such a way to establish any legal liability of the third defendants to the plaintiff, though in our view the main relief he ought to have asked for was for the matter to be struck out not dismissed, having regard to O. IV, r 5(2) of the former Supreme Court (Civil Procedure) Rules (Laws of Nigeria, 1948, cap. 211), but the Court could have done this as he asked also for such other orders as the Court thought fit.

We accordingly allow this appeal, set aside the ruling of Adedipe, J. together with the award of 3 Guineas costs to the plaintiff, and order that the third defendant be struck out of the suit.

2.4 REMARKS

Respondent third party lacked the locus standi to join the appellant insurer in the action because the latter was not under any contractual liability to the former.

2.5 REFERENCES

1. Motor Vehicles (Third Party)Insurance in Nigeria.
2. Road Traffic Act 193
3. Green V. Russell (2) by Romer, L.J ([1959]) 2 G.B at 240, [1959]2 All E.R at 531).
4. *Tomlin,J. in Hood's Trust v Southern Union General Insurance Co. of Australasia Ltd. (1928) ch. 105,118)*
5. Sun Insurance Office Limited v. Ojemuyiwa (1965 AIR comm at 5 (1965 I ALL N.L.R. at 5)

3.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: Supreme Court
Date: 3rd January,1986
Suit Number: SC194/1984
Judge: Obaseki, J.S.C.

National Insurance Corporation of Nigeria (NICON)

Vs.

Power & Industrial Engineering Company Limited

3.2 REPORTS/FACTS/ISSUES

Sequel to a verbal agreement, on a contract of Insurance between the Respondent Insured and the Appellant Insurance company in mid-January 1978 regarding the former's consignment of rice en route Nigeria. It was given a Marine Insurance open cover and the certificate of Insurance on 15th February and 23rd February, 1978 respectively. However, unknown to the parties, the goods had sunk with the carrying vessel on the 10th of February, 1978. It was then in question in the ensuing action whether the contract had been concluded before the loss occurred and consequently whether the liability of the Insurer arose.

3.3 DECISION OF THE SUPREME COURT

Held, by the Supreme Court, inter alia, that the Marine open cover and the certificate of insurance by their express terms constitute an affirmation that there was in existence a contract of Marine insurance which had been verbally concluded since mid-January 1978. There was therefore, a valid contract of Marine Insurance in existence.

Per Obaseki, J.S.C.

"The certificate of insurance is therefore by its express terms an affirmation that these was in existence an open contract embodied in Exhibit 'J' was issued and certified that the insurance was in respect of the voyage per 'M.V Eastern Saturn' from Bangkok to Port-Harcourt/Lagos as reported in respect of 86,612 new double jute bags of parboiled rice valued ₦1,231,459.00.

Per; UWAIS, J.S.C. "the question that follows is: does either of the documents, (Exhibits B and j) qualify as a policy of Marine Insurance or do they together constitute policy? Exhibit B does not on the face of it purports to be a policy. It is simply a certificate of Insurance which is issued in consequence of Exhibit J. the following words appear in italics at the bottom of page I of the Exhibit. 'this company (i.e. the appellant undertakes to issue a policy covering the goods described(sic) herein if necessary, it follows therefore that Exhibit B is meant to indicate that the goods described on the face of it that is "86,612 Parboiled Rice in New Double Jute Bags" are covered by a policy.

3.4 REMARKS

Admissibility of a certificate Insurance is an instrument which evidences the contract of Insurance.

3.5 REFERENCES

1. Pritchard v. Merchant and Tradesmen's Mutual Life Assurance Society 140 E.R 885 at 892.
2. Couturier v. Hastle (184-60) ALL.E.R. Rep 280 at 284.
3. Oceanic Steamship Co v. Faber (1907) 23 T.L.R. 673.
4. Scott v. Coulson (1903) 2 CH. 249.
5. Joseph Constantine Steamship Line Ltd. v. Imperia Smelting Corp.Ltd. (1941)2 ALL.E.R. 165 at 170.

4.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: Supreme Court

Date: *2nd July,1976*

Suit No: SC.138/1975

Judge: Bello, J.S.C

Niger Insurance Company Limited

vs.

Abed Brothers limited & Mini Transporter Repairs

4.2 REPORTS/FACTS/ISSUES

A vehicle consisting of a trailer and tractor had been insured with the Appellant. To the knowledge of the Insurer, the vehicle had been acquired under a hire purchase agreement and was also being used for commercial purposes. The policy provided that the Insurer had the option of repairing the vehicle if it was damaged instead of paying for the damages. A limitation of liability clause in the policy further stated that the Insurer's liability was not to exceed the value of the parts lost or damaged and also that it was not to be liable to pay for consequential losses. When the vehicle was extensively damaged, the Insurer elected to repair it but delayed effecting repairs to the trailer for over two years, whereupon the Insured instituted an action claiming damages for loss of profit and the payment made under the hire- purchase agreement, and general damages. The Insurer contended that it was in view of the limitation of liability clause, which released it from liability for loss of profit and payments made under the hire purchase agreement.

4.3 DECISION OF COURT

Held, by the Supreme Court, that the Insurer had taken longer than it was reasonably supposed to in repairing the vehicle, thereby committing a breach of a fundamental term of the contract which prevented it from relying on any limitation of liability and exemption clause in the contract. Therefore, the

Insurer cannot rely on the clause to escape liability for the claim for loss of profit and payment made under the hire purchase agreement.

Per, Bello J.S.C

Ground of Appeal Number 4 complain of the rejection by the Learned Trial Judge of the Appellants defense that damages for consequential loss which included loss of profit awarded ;

The issue relating to this ground is whether or not the Learned Judge was right in holding that the limitation of liability, under S.1, CL 2 and the exception clause 1(i) did not shield the Appellant from its own default in discharging its obligations under the policy to repair the motor vehicle within a reasonable time.

It is settled law that the question whether an exception clause or a limitation of liability clause in a contract is applicable where there is a fundamental breach of the contract is one of the true construction of the contract. The House of Lords had occasion to make an extensive review of the leading authorities on the matter in Suisse Atlantique Societe D' Aimement. Maritime S.A.V NV Rotterdamsche Kolen Centrale (12). We are particularly attracted by the highlight of Lord Upjohn's speech in that case where he stated (1967) I.A.C at 421 - 422 [1966]2 ALLER at 85 — 86. "There was much discussion during the argument upon the phrases 'fundamental breach' and 'breach of fundamental term' and I think it is time that in some of the cases these terms have been used interchangeably; but in fact they are quite different. I believe that all of your Lordships are agreed and indeed, it has not seriously been disputed before us that there is no magic in the words 'Fundamental breach'; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as go to the roots of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case. The innocent party may accept the breach or those breaches as a repudiation and treat the whole contract at an end and sue for damages generally or he may at his option prefer to affirm the contract and treat it as continuing on foot in which case he can sue only for damages for breach or breaches of the particular stipulation or stipulations in the contract which has or

have been broken. But the expression 'fundamental term' has a different meaning. A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication of which the general law regards as a condition which goes to the root of the contract such that any breach of that term may at once without further reference to the fact and circumstances be regarded by the innocent party as a fundamental breach and this is conferred on him by the alternative remedies at his option that I have just mentioned".

4.4 REMARKS

Delay is a fundamental breach of the term of an Insurance contract.

Effect of breach; Insurer's failure to repair a damaged vehicle within a reasonable time is a breach of a fundamental term a contract of Insurance which prevents the Insurer from relying on clauses limiting its liability under the policy.

4.5 REFERENCE

1. Atlantique Societe D' Aimement. Maritime S.A.V NV Rotterdamsche Kolen Centrale (12) (1967) I.A.C at 421 - 422 [1966]2 ALLER at 85 — 86.

APPEAL COURT

5. 1 ARRANGEMENT OF MATTERS, COURT, DATE

Court: Anambra State High Court (Onitsha)

Date: May 22, 1989

Suit Number: Suit No. 0/304/86

Judge: Iguh, J.C.A.

Chief F. N. Ejiofor

vs.

Arrowhead Insurance Company (Nigeria) Limited

5.2 REPORTS/FACTS/ISSUES

The Plaintiff a trader, had a lock-up store at the Onitsha Main Market and he insured his stock in trade contained therein against loss by fire with the Defendant Company for the sum of ₦10,000.00. It was stipulated in the Policy that in the event of fire, the Defendant would only be liable to indemnify the plaintiff if notice of loss was given forthwith in writing and particulars of property damaged were given in writing within 30 days of the loss.

While the Policy was still in force, the Plaintiff's goods were destroyed in a fire that engulfed the Onitsha Main Market on 17/12/84. One year and five months later, by his Solicitor's letter dated 19/5/86, the Plaintiff gave the Defendant notice of the loss and claimed the sum of ₦20,000.00 as indemnity. The Defendant did not respond to the letter nor meet the Plaintiff's claim where-upon he instituted an action in court claiming the sum of ₦20,000.00.

The Defendant did not file pleadings nor defined the suit.

5.3 DECISION OF COURT

HELD:

1. Fire Insurance being a contract of indemnity, the Plaintiff in the event of a loss cannot recover more than his actual financial loss.
2. In a fire insurance claim, the claimant must prove with credible evidence his loss as well as the value of his insured property before the loss. In this case, there was total lack of evidence on the points.
3. Breach of Policy condition requiring giving a written notice forthwith to insure is a fundamental breach which entitles the insurer to repudiate liability. The breach committed by the insured negatived his right to indemnity under the policy. What constitute "Forthwith" or "Immediate" in relation to the notice of loss depend on the circumstances of each case.
4. As the Plaintiff was in breach of the conditions precedent, the insurer was not liable: Claim Dismissed.

PER IGUH, J.

The Plaintiff claims against the Defendants the sum of ₦20,000.00 being amount due to him on a contract of Insurance between the parties. Pleadings were ordered in the suit. The Plaintiff filed his statement of claim which was duly served on the Defendant's Counsel on the 5th day of April, 1988.

The 30 days granted to the Defendant within which to file its statement of Defence expired on the 5th May, 1988. On the 24th November, 1988, the Plaintiff filed a motion on notice against the Defendant for judgment in default of the Defendant's Statement of Defence. This motion was served on the Defendant through its counsel, H.O. Ofuya Esq. on the 10th January, 1989.

When this motion came up for hearing on the 13th February, 1989 the Plaintiff/Applicant and his counsel were present in Court. The Defendant with his counsel were absent although served.

Learned Plaintiff's Counsel duly argued his application after which the Court granted the same and adjourned the suit to the 6th April, 1989 for the Plaintiff to prove his case. On the 6th April 1989, the case was further adjourned till the 2nd May, 1989, on which date the Plaintiff proceeded to prove his case.

The Plaintiff who testified as P.W.I. is a trader and a member of the Ogidi Customary Court. He has a lock-up store of stall No. H2/5 at the Onitsha Main market. He trades in babies wears and he moved into this store in 1975. He insured all his stock-in-trade with the Defendant company against loss by fire and he tendered the Fire Policy Exhibit A. He testified that his store together with all the goods in it were burnt down in the Onitsha Main Market fire disaster which took place in December, 1984. He notified the Defendant of this fire incident. He gave them this information in writing. He explained that by a letter of the 19th May, 1986, his Solicitors wrote to the Defendant claiming indemnity for the loss of his goods in the conflagration under the policy Exhibit A. The carbon copy of this letter is Exhibit B and the amount therein claimed is ₦20,000.00. he testified that the Defendant did not reply to Exhibit B. He explained that he insured his said stock-in-trade at the Onitsha Main Market for ₦10,000.00 and claimed this amount.

When at this stage learned Plaintiff's Counsel indicated his intention to close his case for the Plaintiff, the Court upon a quick glance at the policy Exhibit A, observed that it only covered the period 16th November, 1977 to the 16th November, 1978. The Courts as a result was obliged in the interest of justice to point this out to learned counsel who thereupon applied for and was granted leave to amend his statement of claim by pleading certain policy endorsement and receipts for the premiums paid by the Plaintiff under the policy. The Plaintiff thereafter further testified that he had been paying his premiums in respect of the policy. He tendered Exhibits C, C1-C9 which were issued to him by the Defendants in respect of the policy. Learned Counsel at this stage closed the Plaintiff's case.

I have given a careful consideration to the evidence led by the Plaintiff together with all the exhibits tendered and it is established that the Plaintiff who is a trader wisely insured his stock-in-trade against loss by fire with the Defendant company. These stock in-trade comprised of babies wears and fancy goods of all descriptions. Exhibit A is the Fire Insurance Policy. A close study of Exhibit A shows that the Plaintiff's stock- in-trade contained in the premises called No.47 Mba Road, Ontisha were insured for ₦10,000.00. Those in store No. H2/5 in the Onitsha Main Market were similarly insured for ₦10,000.00. There is a compulsory excess clause of ₦2,000.00 on the policy. This means that the

Plaintiff who is the insured shall bear the first ₦2,000.00 of any claim that arises under the policy.

It is not disputed that the Plaintiff's store together with the goods therein were burnt down in the first disaster which destroyed the Onitsha Main Market in December, 1984.

Exhibit B gives the date of this conflagration as the 17th December, 1984, and the Court has no reason to doubt this. there is a further evidence from the Plaintiff which has not been controverted that he notified the Defendants in writing about this fire incident. The Plaintiff claimed that he followed up this notice by consulting his Solicitors who by the original of Exhibit B dated the 19th May, 1986 put a claim on his behalf against the Defendant for ₦20,000.00. It would appear that the Defendant did not bother to reply to Exhibit B following which the Plaintiff on the 9th September, 1986 instituted this action against the company.

It is apparent on the face of exhibit A that it was issued on the 16th day of March, 1978 for valuable consideration. It was, however, to be in force in the first instance from the 16th November, 1977 to the 16th November, 1978. it was renewable from year to year at the instance of the Plaintiff. Exhibit C2 shows that the policy was fully in force and was duly renewed with the appropriate premium paid for the period, 16th November, 1984 to the 16th November, 1985. It is clear that the fire incident of the said 17th December, 1984 occurred on a date Exhibit A was in full force. I will now consider the issue of the Defendant's liability under Exhibit A.

It is beyond dispute that the insurance policy, Exhibit A is the contractual document that governs the parties. It sets down the precise terms and conditions of the transaction between the parties as well as their respective obligations and rights. The particular policy in issue in this case, Exhibit 'A', is a contract of indemnity and of indemnity only. It expressly stipulates that if the insured's stock intrade be destroyed or damaged by fire during the period of cover, the company will only pay him the actual value of the property destroyed or damaged subject of course to compliance by the Plaintiff with the several conditions, warranties and endorsement contained in the policy. What this does

mean is that the insured should on proof of his claim be indemnified in accordance with the terms and conditions of and the stipulations in the policy but should never recover more than a full indemnity. This stipulation is also in accordance with the fundamental principle policies, except those of life and personal accident, are generally contracts of indemnity and that the insured is therefore not allowed to recover more than his actual financial loss in one claim. In the leading English case of Castrllain v. Preston (1883) 11 O.B.D. 380 C.A. the proposition of law was succinctly put as follows:-"The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a Marine or Life policy (and that equally applied to accident policies other than personal accident) is a contract of indemnity and of indemnity only, and that this contract means that the insured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is a fundamental principle of insurance law and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the insured from obtaining a full indemnity, that proposition must certainly, be wrong.

The Defendant company therefore will, subject to the other terms and conditions of the policy, only pay to the Plaintiff, if I may quote from Exhibit 'A', "the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property or any part therefore, provided that the liability of the company shall in no case exceed.....the total sum insured hereby.....

The first question that now arises is whether the Plaintiff was able to establish the precise indemnity he is entitled to under his policy. The sum assured with regard to the Plaintiff's stock-in-trade in store No. H2/5 in the Onitsha Main Market is N10,000.00. This amount however only represents the sum assured. It is no proof of the exact value of the Plaintiff's stock-in-trade destroyed or damaged in the conflagration on the 17th day of December, 1984.

Indeed, that amount may very well be an under assessment or, indeed, an over assessment of the actual goods destroyed or damaged in the fire incident. It may all the same coincidentally tally with the exact value of the goods destroyed in the fire disaster. The Court's problem which I find insurmountable is the total lack of evidence by the Plaintiff on the actual value of his stock-in-trade that

were destroyed or damaged by the fire on the 17th December, 1984. This is because in the absence of some credible evidence on the point, it becomes impossible to ascertain the precise extent of indemnity Plaintiff is entitled to under the policy.

in the case on hand, it is not that some evidence which is not credible was adduced on the issue. it is a case in which there is total lack of evidence on the point. The law is well settled that it is not the function of a Trial Judge by his own exercise or ingenuity to supply or imagine evidence or work out the mathematics of arriving at an answer which only evidence tested under cross-examination could supply. See George Ikenga & Ors v. Akpala Ofune & Ors (1985)2 N.W.L.R.

This action is a claim on indemnity and in the absence of evidence upon which this can be worked out, the only option that appears open to the Court is to disallow the same.

There are a few more points that would appear to militate against the Plaintiff in this action. The policy, Exhibit 'A', expressly lays down a number of conditions, terms endorsements and stipulations as conditions precedent to the liability of the Defendant to indemnify the Plaintiff, and until the Plaintiff establishes that he complied with those terms and condition, no liability attaches to the Defendants under the policy. this is clearly stated in the very first page of the policy where the liability of the Defendant is expressly stated to be:

"Subject to the conditions contained herein or endorsed or otherwise expressed thereon which conditions shall so far as the nature of them respectively will permit be deemed to be conditions precedent to the right of the insured to recover hereunder". At page three of Exhibit A, the conditions referred to in the policy are carefully set out. Eleven conditions are therein indicated. I propose to examine only one or two of these conditions. I will take condition four first. Condition four of the policy stipulates as follows:-

"On the happening of any destruction or damage the insured shall forthwith give notice therefore in writing to the company and shall within 30 days after such destruction or damage, or such further time as the company may in writing allow, at his own expense deliver to the company a claim in writing containing as particulars as an account as may be reasonably practicable of the several

articles or portions of property destroyed or damaged and of the amount of destruction or damage thereto respectively having regard to their value at the time of the destruction or damage together with any other details of insurance on any property hereby insured. The insured shall also give to the company all such proofs and information with respect to the claim as may reasonably be required together with (if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith. No claim under this policy shall be payable unless the term of this condition have been complied with".

A close study of this term discloses several stipulations which have been expressly described as conditions precedent to the liability of the Defendant company to indemnify the Plaintiff under the policy. These conditions include the following. Inter- alia, that is to say:-

(1) That on the happening of the loss, the insured shall forthwith give notice thereof in writing to the company.

(2) That the insured shall 30days of the loss or such other time as the company may in writing allow delivery to the company a claim showing an account of the several property destroyed or damaged and the amount of the loss having regard to their value at the time of the loss. I will now examine these two conditions.

It is indisputable that a condition requiring an insured to give notice "forthwith or an "immediate notice" of his loss to his insurers is of the utmost importance to the insurers to enable them take immediate steps to protect their own interest. The policy condition provides that the notice must be "forthwith" because any delay in advising the insurer of the loss might prejudice their position. As MacGaillivray Insurance Law 6th Edition by Dennis Brown explained at page 822 Article 1713, "They (meaning the Insurers) have a much better opportunity of testing the genuineness of the claim when the events are recent than they would have after a substantial lapse of time, involving probably the loss of important evidence. They (meaning such conditions) are not inserted for the purpose of enabling the insurers to escape liability, but rather to give them a reasonable opportunity of investigating the claim under the most favourable circumstances and thereby of detecting and rejecting fraudulent or exaggerated demands" (words in brackets supplied).

The breach of an insurance policy condition by failure to give written notice forthwith to the insurers can therefore be a fundamental breach which entitles them to repudiate liability. It also negatives the insured's right of indemnity or recovery under the policy.

There are some reported authorities on the meaning of the words "forthwith or immediately" when used in insurance policies. It would seem that their meaning depends on the circumstance of individual cases. In Re-Williams and the Lancashire and Yorkshire Accident Insurance Co's Arbitration (1902) 19 T.L.R. 82, a delay of nearly two months was held to preclude the insured from recovering under the policy. See too Farrel V. Federated Employers Insurance Association Ltd.(1970) 1 ALLE.R.360, where Mackenna, J. held that seven weeks lateness in making a report did not amount to an immediate notice. But in a licensing case of R.V Justices of Berkshire (1878) 40 B.D. 469 where statute provided that an Appellant should enter into recognisance immediately after giving notice of appeal, the Court of Queen's Bench held that an unexplained delay of four days was not a compliance with the statute. Cockburn, C.J. in the course of his judgment, and I am with respect in complete agreement with the learned Chief Justice who had the following to say on the meaning of the word "immediately".

"It is impossible to lay down any hard and fast rule as to what is the meaning of the word "immediately" in all cases. The words "forthwith" and "immediately" have the same meaning. They are stronger than the expression "within a reasonable time" and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case".

It may very well be that the position might have been different had the Appellant given some satisfactory or reasonable explanation with regard to the delay.

In the South African case of Hean v. General Accident Fire and Life Assurance Co. (1931)N.L.R. 215, where the policy required immediate notice to be given, a delay of nine days was held to be too long. on the other hands, in the Canadian case of North Lethbridge Garage Ltd. v. Continental Casualty co. (1930) 2. ALL E.R. 835, it was held that notice within five days. was given "promptly".

A delay of one week was however held to be too long in another Canadian case of Montreal Harbour Commissioners V. Guarantee Co. of North America (1893) 22 S.C.R. 542 and I now ask myself what the position is in the present case under consideration.

The position as testified to by the Plaintiff is that the fire incident occurred on the 17th day of December, 1984.According to him, he notified the Defendant in writing about the tragedy. He neither gave evidence of the date he made the report to the Defendant nor did he tender a copy of the alleged report before the court. The issue of the date the alleged notice was given is of vital importance as without this it will be impossible to determine whether it was given forthwith after the loss.

I think it right to mention that the notice to the Defendants established by the Plaintiff in this proceeding of Exhibit B. This is a letter from the Plaintiff's Solicitors to the Defendants. That letter did not incidentally mention any earlier notice from the Plaintiff to the Defendant in respect of the fire incident or his loss.

It is a condition precedent to the liability of the Defendant that the Plaintiff shall give notice of any loss forthwith to the Defendants. Regrettably there is no evidence that this was done in this case. Exhibit B dated the 19th May, 1986 was issued one year and five months after the fire incident. I am more than satisfied that a notice given to the Defendants one year and five months after the loss can by no stretch of the imagination be regarded as a notice given forthwith to the Defendants. The result is that the Plaintiff has failed to satisfy the Court that he gave any notice to the Defendant in connection with his loss of the 17th December, 1984. The Plaintiff being in breach of this condition, no liability can in my view attach to the Defendants under that policy. The second condition under condition four of the policy stipulates that the insured shall within 30 days of the loss deliver to the company a claim in writing showing an account of the several property destroyed or damaged and the amount of loss having regard to their value at the time of the loss. Again this term is expressly described in the policy as a condition precedent to the liability of the Defendants to indemnify the Plaintiff and until the Plaintiff establishes that he complied with this condition, no liability attaches to the company. In Welch V. Royal Exchange Assurance(1939) 1 K.B. 294, the policy provided that no claim was to be

payable unless the required particulars were given within a reasonable time. It was held by the English Court of Appeal that production of the particular within a reasonable time was a condition precedent to recovery and that, even if the insured ultimately did produce them, he could not succeed in his claim.

In the claim on hand, the policy condition provides that the particulars or proof of loss shall be delivered by the insured to the Defendants within 30 days of the loss. There is no evidence that this term which is a condition precedent to the Defendants liability under the policy was complied with by the Plaintiff. In my view, and this being an express condition precedent to recovery there under, failure to establish that the required particulars were duly furnished to the Defendant within this stipulated time puts an end to the Defendants' liability and the Plaintiff cannot revive his right by delivering the required particulars and proof of loss at a later time. See Whyte v.Western Assurance Co.(1875)22 L.C.J. 215 P.C. Although the condition did provide that the required particulars and proof of loss also be delivered by the Plaintiff to the company within the stipulated time outside the 30 days prescribed as the company may in writing allow, there is no evidence that the Defendant granted any such time to the Plaintiff. No doubt, the Defendants are entitled under the policy to grant an extension of the time but proof of such an extension and any condition attached thereto must be strictly established by the Plaintiff. See Re-Carr and Sun Fire Insurance Co. (1897) 13 T.L.R. 186. The Plaintiff has been unable to establish any such extension of time on the part of the defendants and is therefore again in breach of this condition of the policy. Under the circumstance no liability may attached to the Defendants.

Having dealt with two of the major policy stipulations which are the conditions precedent to the liability of the Defendants to the Plaintiff under the policy and having held that the Plaintiff has failed to establish that he complied with them, this Court has no option than to pronounce that no liability attaches to the Defendants in respect of this claim. The Plaintiff's claim accordingly fails and the same must be and is hereby dismissed.

On the issue of costs my records do not show that the Defendants or their counsel put in any appearance before this Court all through the hearing of this case. What I see is a letter dated the 28th May, 1987 from the learned defence counsel applying for an adjournment of this case at some stage of the

proceedings. This application was granted but he never appeared thereafter in the suit. In the circumstance I must decline to make any order as to costs:

5.4 REMARKS

The learned Judge did not refer to or apply Section 2 of the Insurance (Special Provisions) Decree No. 40 of 1988 (now re-enacted as S. 49 of the Insurance Decree No. 58 of 1991) under which an insurer can only repudiate liability on the ground of fraud or breach of a fundamental terms. The omission was presumably due to the fact that the claim here was based on a contract made in 1984 i.e. before the promulgation of Decree 40 of 1988.

5.5 REFERENCES

1. Castelliain v. Preston (1883) 11OBO 380 C.A.
2. GeorgeIkenga v. Akpala Ofune & Ors. (1985) 2 NWLR 1.
3. Farrel v. Federal Employers Insurance Ass. Ltd. (1970) 1 All E.R.360.
4. Hean v. General Accident Fire And Life Assurance Co. (1931) NLR 215.
5. Montreal Harbour Commissioners v. Guarantee Co. of North America (1893)22 S.G.R 542.
6. North Lethbridge Garage Ltd. v. Continental Casualty Co. (1930) 2 All E.R.835.
7. R. v. Justices of Bershire (1878) 4QBD 469.
8. Re-Carr and Sun Fire Insurance Co (1879) 13 T.L.R. 186.
9. Re-Williams and the Lancashire and Yorkshire Accident- Insurance Co's Arbitration (1902) 19 T.L.R. 82.
10. Welch v. Royal Exchange Assurance (1939) 1 K.B.294.
11. Whyte v. Western Assurance Co. (1875) 22 L.C.J. 215 P.

6. 1 ARRANGEMENT OF MATTERS, COURT, DATE

Court: Court of Appeal
Date: 26th June, 1971
Suit Number: W/74/170.1971
Judge: Johnson, J. C. A.

Sule

vs.

Norwich Union Fire Insurance Society Limited

6.2 REPORTS/FACTS ISSUES

A person permitted by the owner to drive a motor vehicle has, by virtue of the policy covering him and sections 6 and 10 of the Motor Vehicles (Third Party Insurance) Act 1950, a direct right of action against the Insurer of third-party liabilities.

The Defendant Insurance Company had issued to the Action Group of Nigeria a Political Party, a third-party motor vehicle insurance policy under which the former undertook to indemnify the political party or any driver who was driving the vehicle on its order or permission against all sums which the insured or the driver may become liable to pay in respect of any bodily injury to any person. It was, however a condition of the policy that prompt notice of any accident be given to the Defendant insurer. Furthermore, due observance of the conclusions of the policy by both the political party and the driver was made a condition precedent to any right of claim against the insurer. The Plaintiff, a driver of the political party, while driving the car with the permission of the political party caused bodily injuries to one Mr. Bada who happened to be a member of the insured political party.

He however failed to notify the insurer of the accident but brought this action against the Defendant Insurer to secure indemnity from them against the

Judgment for damages which the injured Mr. Bada had obtained against him. The insurer resisted the claim on the grounds namely;

(a) The Plaintiff not being a party to the policy, could not enforce benefits there from.

(b) The Injured Mr. Bada, being a member of the Insured political party was not a third party covered by the policy and

(c) The Plaintiff had breached a condition of the policy.

6.3 DECISION OF THE COURT

Held, the Plaintiff, having been expressly specified in the policy as being covered could, therefore enforce the benefit of the policy by directly making a claim there under against the insurer even though he was not stricto sensus a party to the contract of insurance. This is more-so in view of the provision of sections 6(i) (b), 6 (3) and 10 of the Act which confer the right on the Plaintiff.

Also, on the authority of Sec 8 of the Motor Vehicles (Third Party Insurance) Act, the claim could not be defeated by reason of non-observance of the policy conclusion.

PER JOHNSON, J

Generally, in contracts, the benefits and burden of the parties are agreed to between themselves and can be enforced only by the parties. It is however permissible to make provisions to benefit other persons besides the parties. This in relation to a policy of insurance is particularly emphasised in the provision S.6 (3) of the Motor Vehicles (Third Party Insurance) Act (Cap. 126) hereafter referred to as "the Act) which provides as follows.

"Notwithstanding anything in any written law concerning a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of person specified in the policy in respect of any liability which the policy supports to cover in the case of those persons or classes of person".

In cases of insurance however it would appear that by provision of S.6 (3) of the Act referred to above and the liability provided for in Exhibit, there is derived the right of a permitted driver to claim directly against the Insurers even though he is in no strict sense a party to the contract of insurance. This right, which is confirmed by S.36 (4) of the Road Traffic Act, 1930, which is analogous to S.6 (3) of the Act, appears to have been recognized as far back as 1924, in Williams V. Baltic Ins. Assn. of London Ltd.(2), when the Insurers were liable to indemnify the sister of the Insured owner, who drove the owner's vehicle at the time of an accident, in the amount of the damages recovered from her by the injured persons.

The situation in this case with particular reference to the defence raised in Para. II of the statement of defence as quoted above appears to present an interesting feature.

The general statement of Law is that a stranger to a contract cannot benefit by the said contract and as I said earlier, the defence would appear to labour under the belief that the present Plaintiff would not be entitled to any indemnity by reason of the fact that Mr. Bada, who had obtained a Judgment against him, was one of the owners of the said car, and as such not a Third party covered by the provisions of the Act. An examination of the decision in Digby V. General Acc. Fire and Life Assurance Corp Ltd.(D) would in my view expose the fallacy of such an argument.

The head note in the all England reports reads (1942) 2 All E.R at 31a-320):

“The claimant was a chauffeur employed by the owner of the car. The owner was injured in a collision, and proceedings in respect of a claimant, she recovered damages against the chauffeur. The chauffeur thereupon claimed that the sum awarded as damages by the Respondent Insurance Company under a policy issued by them to the owner by the policy in a section with marginal heading “Third Party Liability,” the insurance company undertook to indemnity the policy holder against all sums which the policy holder should become legally liable to pay in respect of any claim by any person including passengers in the car) for loss of life or accidental bodily injury or damage to property caused by, through or in connection with the car.

The insurance was to extend to indemnity in the manner any person driving the car on the order or with the permission of the policy holder. (Emphasis supplied) and it provided that such person should as though he were the policy holder observe, fulfill and be subject to the terms, exceptions and conditions of the policy, in so far as they could apply.

The policy contained the usual Arbitration clause. It was contended that the extension of the class of claimants, and that, therefore acclaim against an authorized driver by the policy holder was not within the indemnity given by the policy.

Held (i) (Viscount Simon, L.G and Viscount Maughan dissenting) an authorized driver was entitled to be indemnified against the damages awarded to the policy holder in her claim against him.

(ii) The marginal heading in the policy was part of the material to be considered in reaching a correct construction of the section of the policy.

The well-reasoned judgement of Lord Atkin is particularly educative, and I find myself unable to resist the temptation of quoting a good portion of it. After examining the contents of the policy of insurance granted in that matter and coming to the conclusion that an owner of a vehicle comes within the classes of person who are entitled to claim from a driver who in turn would be entitled to be indemnified within the terms of the said policy. Lord Atkin continued thus (1943) A:C at 137-139; (1942 2All E.R at327):

“Personally, l am fortified in this opinion by consideration of the Road Traffic Act 1930. It is under the provisions of that Act that the appellant himself can sue the insurers, and I agree with Mackinnon, L.J (1940) 2K.B.266, 232) that this part of the policy is obviously based upon the requirement of S.36.The penal provision of S.35 prohibit any person using a motor vehicle on the road unless there is in force in relation to the user of the vehicle by that person such a policy of insurance in respect of a third policy risk as complies with the requirements of this part of this Act.:

It would be founded that the provisions SS.35 and 36 of the Road Traffic Act, 1930 referred to and considered by the learned Law Lord are in pari material with the provisions of SS.3 and 6 (I) b of the Act. The fact of the above case appear identical with those in this case, and by reason of the said decision, with

which I am in respectful agreement, it would appear that the Defendant company is liable to indemnify the plaintiff in respect of the liability to Mr. Bada, the injured person.

6.4 REMARKS

In contracts, the benefits and burden of the parties are agreed to between themselves and can be enforced only by them.

6.5 REFERENCES

1. Motor Vehicles (Third Party Insurance) Act 1950.
2. William v. Baltic Ins. Assoc. of London Limited 1924
3. Digby v. General Accident, Fire, and Life Assurance Corp Ltd. (1942) 2 ALLER ER AT 31-320.

7.1 ARRANGEMENT OF MATTERS, COURT, DATE

Court: Court of Appeal

Date: 17th February, 1996

Suit Number: PHC/171/85

Judge: Edozie, J. C. A.

Liberty Insurance Company Limited

vs.

John

7.2 REPORTS/FACTS/ISSUES

A third party cannot sue an insurer of third-party liability for death or bodily injury caused, by an insured person arising out of the use of a motor vehicle since the third party is not privy to the insurance contract with the insured and the insurer is not the Tortfeasor capable of being held liable in negligence. The respondent's husband had been killed in an accident allegedly caused by the negligent driving of a vehicle owned by one Mr. Igbokwe and insured against third party liabilities with the appellant insurer.

Both the owner of the vehicle and the negligent driver could not be located. Consequently, the Respondent brought an action against the Appellant insurer for negligence, claiming special and general damages for loss suffered inconsequence of the death of her husband. The Trial Court entered Judgment for the respondent, Dissatisfied, the appellant insurer brought this appeal whereby it contented that the respondent lacked locus standi to maintain the action against it since there was no privity of contract between them.

7.3 DECISION OF THE COURT

Held, allowing the appeal, the respondent being a third party to the contract of insurance between the insured Tortfeasor and the appellant insurer could not

maintain the action against the appellant insurer as there was no privity of contract between her and them. Furthermore, the insurer, not being either the Tortfeasor, could not be liable in negligence.

PER EDOZIE J.C.A

No doubt, the respondent's claim is one covered under the policy in question, but from the policy of insurance EXHIBIT 9 the insured or assured is one Patrick Azubuike Igbokwe and not the respondent who is a third party. It is trite law that a third party cannot sue the insurer of a wrongdoer whether at Common Law or in equity. In the case of New India Assurance Company limited v. Odubanjo & ORS (1971) 1 NCLR363, the Supreme Court, Per Lewis, J.S.C. adopted with approval the statement of the law by Atkin L.J as he then was, in the case of in Re Harrington Motor Co. Ltd. (1928) ch.105at 118 as follows:

"But the position in law seems to me clearly to be that a third party in a case like the present has no claim in law or in equity of any sort against the insurance company, nor has he any claim against the person who injures him, the assured to direct the assured to pay over the sum of money received under the insurance policy to him. The amount that the Assured in fact received is part of his general assets. As a general rule the expediency of that, I think, cannot be disputed. It obviously would disturb the whole practice of insurance if the claimant against the assured who caused the risk had a direct right of recourse against the insurance company.

It was further held in the said case, that is New India Assurance Company case, supra, that there is no need, in Law to join the insurer of a Tortfeasor in order to make that insurer bound by the decision of the Court unless there is a cause of action against such insurer the rule no doubt is based on the Doctrine of privity of contract.

The principle was restated by the Supreme Court in the case of Chuba Ikpeazu v. African Continental Bank Ltd (1965) NMLRP.374 at p. 379 where Ademola, CJN said:

"Generally, a contract cannot be enforced by a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue upon it: Tweddle V Atkinson 30 L.J.Q.B 380. This view was supported by the House of Lords in Dunlop Pneumatic Tyre Co. Ltd V Selfridge & Co. Ltd. (1915) A.C 847"

See Ajufo v. Ajarbor (1978) 1 LRN 295, (1978) 6-7 SC39 Where the Court emphasised that there is no privity of contract between the insurer and a third party .As decided in the case of Sese V. Sentinel Assurance Ltd. (1986) 3 NWLR (PT 31) p.673, by virtue of the provisions of sections 6 (1) (b), 4 and section 10 (1) of Motor Vehicles (3rd Party Insurance) Act, 1988, where Judgment is obtained in respect of any liability covered by a policy of insurance issued pursuant to a liability in respect of which a certificate of insurance has been issued or liability as specified in the provisions and insured persons specified in the policy, the insurer is obliged to pay in respect of the liability the benefit of the Judgment to the person entitled thereto. A similar provision is also made in section 43 of the Insurance Act 1976.

From the foregoing the respondent being a third party, that is not a party to the policy Exhibit 9 cannot maintain the present action.

Had she sued and obtained Judgement against the insured, the appellant would have been obliged to pay to her the benefit of the Judgement. This is not the case here. Since the respondent had no cause of action against the appellant, other issues raised in this appeal become merely academic and a matter which the Courts have persistently refused to decide: Governor of Kaduna state V Dada (1986) 4 NWLR (pt.38) 687,

In the result, this appeal succeeds and is hereby allowed. The Judgement in suit No.PHC/171/85 delivered by Fiberesima J.on 19/7/87 together with the Order for costs is here by set aside and in substitution therefore, the respondent's claim is here by struck out. I make no order as to costs.

Per ROWLAND, J.C.A *(at 201)*

The respondent is not a party to the insurance policy Exhibit 9 and therefore cannot maintain the present action as there is no privity of contract between her and the appellant. Generally, a contract cannot be enforced by a person who is not a party, even if the contract is made for his benefit and purport to give him the right to sue upon it. See; Chuba Ikpeazu V African continental Bank it a (1965) NMLR 374;

Tweddle V. Akinson 30 L.J.G.B.2.J, Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd.(1915) A.C 847. The law is also settled that a third party cannot sue the insurer of a wrongdoer whether at Common Law or Equity see New India Assurance V. Odubanjo (1971) 1 NCLR363. In the instant appeal, what the respondent would have done was to sue the insured and if she got Judgement against him the appellant would have been obliged to pay to her the Judgment sum. For these reasons and for the fuller reasons contained in the lead judgement this appeal is allowed. The Judgement of the Court below in suit No. PHC/17/85 delivered on19/8/87 together with the Order for costs are hereby set aside. The respondent's claim is struck out with no order as to costs.

Per ONALAJA, J.C.A (at 201-202)

As the appeal touches on the law of privity of contract, I wish to add my comments by the way of emphasis. Sun Insurance Office Ltd. Victoria Olayinbo Ojemuyiwa on behalf of herself and the dependant relatives of Chief P.A.F Ojemuyiwa (deceased) (1965) NMLR 451SC, was a case wherein the insurance company sought the leave to appeal to the Supreme Court under section 117 (6) (a) of the 1963 Constitution of the Federation of Nigeria as an interested party. The applicant stated as it had a duty to pay under section 10 (1) of the Motor Vehicles (Third party Insurance) Act the Judgement sum awarded against its insured in a Judgement to which they were not a party but as it had defence not to satisfy the Judgement due to a fundamental breach as it was not given notice required under section 10 (1) Motor Vehicles (Third Party Insurance) Act, hence the application to appeal against the said judgement as an interested party.

It was in the course of giving Judgement that Bairamian J.S.C. at page 454 observed as follows:

“At present, it is usual to name the owner of the vehicle and his driver as the defendants to a suit claiming damages and to leave the insurer, who controls the defence, formally out of the suit. We would ask the Solicitor of the parties to consider whether in these third-party insurance cases it would not be better to have the insurers also joined’.

Having been bridled under the Common Law with cases of Tweddle V Akinson 301J or B 265; Dunlop Pneumatic Tyre Co. ltd V Selfrdge & Co. Ltd. (1915) AC 847 at 853; Visount Haldane declared two principles to be fundamental in the Law of England. The first was that our law knows nothing of a Jus Quaestitum Tertio arising by way of contract and that “only a person who is a

party can sue on it" adopted by Ademola, C.J.N in Chuba Ikpeazu V African Continental Bank Ltd. (1968) NMLR 374 at 379 where in was held:

"Generally, a contract cannot be enforced by a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue upon it". The quare posed in Sun Insurance Office Co. Ltd. V Ojemuyiwa supra re surfaced in Andrew O. Ajufo V Christopher Ajarbor and (Mercury Assurance ltd. As appellant (1978) 6-7 SC 39, (1978) NSCC 374). Irikefe (as he was) observed at page 32. Thus: "Even if it were established that an identifiable person, i.e. the 3rd defendant took up the policy of insurance (Exhibit G and H) with the appellant (Mercury Assurance Co.Ltd), we are satisfied that a third party such as the respondent, would not sue the appellant ab initio. This must be so as there would be no privity of contract between the parties, and even if such a right were conferred by a statute, such as s.10 of the Motor Vehicles (Third Party Insurance) Act cap.126 Laws of the Federation of Nigeria (now cap.233 Laws of the Federation 1990) it would still be inappropriate to bring in the insurer as a party, except, perhaps, by the way of third party proceedings based on a contract of indemnity, if any: see Post Office V Norwich Union Fire Insurance Society Ltd. (supra) and Odubanjo V New India Insurance Co. Ltd. (supra). We think it was an error on the part of the Trial Judge to have joined the fourth defendant in these proceedings and to have proceeded to record a verdict against it when, at the end of hearing, no issue was joined on the pleadings between the plaintiff and the fourth defendant. In the Odubajo's case this Court ruled that the insurer be struck out from the claim. We propose to adopt the same course on this occasion". In accordance with the step taken by the supreme court in Odubanjo and Ajufo to cases supra, my learned brother Edozie J.C.A took the right step in striking out the appellant in this case. In conclusion for the fuller reasons given in the lead judgement, I am in complete agreement that the appeal is meritorious and it is allowed. I abide with the consequential orders made in the lead judgment.

7.3 REMARKS

No privity of contract.

7.4 REFERENCES

1. Ajufo v Ajarbor (1978) I LRN 295

2. Chuba Ikpeazu v African Continental Bank Ltd. (1965) NMLRP3743.Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co. Ltd. (1915) AC 847
4. Governor of Kaduna State v Dada (1986) NWLR (Pt. 38) 687.
5. Oriare v Government of Western Nigeria S.C.275 (1969)
6. Sese v Sentinel Assurance Ltd. (1986) 3 NWLR (Pt. 31(673)

8.1 ARRANGEMENT OF MATTERS, COURT, DATE

Court: Court of Appeal

Date: 25th February, 1996

Suit Number: HCS/68/85

Judge: Oguntade, J.C.A

Oluwanishola Development Company

vs.

Guinea Insurance Company Limited

8.2 REPORTS/FACTS/ISSUES

Utmost Good Faith; Fraudulent Misrepresentation: Gross Over-Valuation and Fraudulent Representation of the value and quantity of goods insured amount to a breach of the duty of good faith which entitles the insurer to avoid the contract of insurance.

The Plaintiff consignee of goods aboard a vessel en-route Nigeria, while applying for a Marine Insurance Policy in respect of the goods, had falsely represented the quantity of the goods as 100 cases of baby carriages, each case containing only 2 pieces each. Also, the origin of the goods was falsely stated as Hong Kong, when in fact they were ordered from Taiwan. The Plaintiff Insured fixed the Insured value of the goods based on the representations. When the goods were landed, 41 cases were delivered, leaving the remaining 59 cases missing, so the Insured made a claim under the policy for the cost of the missing 59 cases alleged to contain 100 pieces each. The Insurer, however repudiated liability on the ground of fraudulent misrepresentations as to the true value of the goods and their origin, hence the ensuing action.

8.3 DECISION OF COURT

Held; the goods had been fraudulently and grossly over - valued and this amounted to a material misrepresentation and breach of utmost good faith which entitled the Insurer to avoid the policy.

Per, Belgore, J. "..... and thirdly, I have highlighted these facts to show that the Plaintiff was fully aware of the true fact and chose to present a false one to the Defendant. It is an undisputed fact that the Plaintiff cannot be held liable for not disclosing what it did not know or that which it could not be reasonably expected to know at the material time. But with evidence before me, I am convinced that the Plaintiff knew at the time he was taking up the policy in Exhibit A that he ordered only for 200 baby carriages and not 10,000 as he claimed and that the total value of the 200 baby carriages was far less than the amount he told the Defendant when he was taking up the policy.

What then is the effect of this misrepresentation of Insurance contracts especially, when Marine Insurance Act 1961 is very categorical about it. The section says:

"A contract of Marine Insurance is a contract based upon the utmost good faith and if the utmost good faith is not observed by either party, the contract may be avoided by the other party".

From the analysis of the evidence in this case, it cannot be said that the Plaintiff acted in utmost good faith and by virtue of Section 19, the Defendant can avoid the contract.

On the issue of disclosure, Section 20 of the Marine Insurance Act 1961 states:

(1) Subject to the provision of this section, the Assured shall disclose to the Insurer, before the contract is concluded, every material circumstance which is known to the Assured, and the Assured shall be deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the Assured fails to make such disclosure, the Insurer may avoid the contract.

(2} Every circumstance is material which would influence the judgment of the prudent Insurer in fixing the premium or determining whether he will take the risk.

Looking at these two submissions, it has been found through evidence that the Plaintiff did not disclose all the material facts he actually knew when he was taking the policy. If the Defendants knew the full facts, they would not have Insured non-existent goods or would have connived at the criminal act of attempting at exporting more money abroad than was due. On this ground also the Defendant can avoid the contract. Whether circumstances are material or not are issues of fact to be determined through evidence. Thus, a fact not material to one case may be material to another.

The case of Ionides V Pender {1874) L.R 9Q 8.531where over valuation of the Assured goods was held as material to enable the Insurer to avoid the contract will have to be compared with the case of Berger and Light Diffusers Pty Ltd V Pollock {1973] 2 Lloyd's Rep.442 where over valuation was held to be a matter of opinion and that it could not allow the Insurer to avoid the contract.

These may be regarded as borderline cases unlike the present one which is a clear-cut case of misrepresentation and attempted fraud. I have no doubt that the misrepresentation is very material and it is of such nature that can enable the Defendants to avoid the contract. In that circumstance the Plaintiff's claim must fail and it is dismissed".

8.4 REMARKS

Material misrepresentation and breach of utmost good faith makes an insurer to avoid policy.

8.5 REFERENCES

1. Ionides v. Pender {1874) L.R 9Q 8.531
2. Berger and Light Diffusers Pty Ltd v. Pollock {1973] 2 Lloyd's Rep.442

9.1 ARRANGEMENT OF MATTERS, COURT, DATE

Court: Court of Appeal

Date: 22nd October, 2012

Suit Number: CA/L/967

Judge: Pemu, J. C. A.

Unitrust Insurance Company Limited

vs.

Ambico Sendirian Nigeria Limited

9.2 REPORTS/FACTS/ISSUES

The Appellant, Unitrust Insurance Company Limited, entered into various contracts of insurance with the Respondent, Ambico Sendirian Nigeria Limited, the insured, who paid only part of the premium. The insurance company subsequently instituted an action for the sum of ₦7,357,585.15 (seven million, three hundred and fifty- seven thousand, five hundred and eighty-five naira, fifteen kobo) against the insured as outstanding premium. After filing of pleadings by both parties, the insured raised a preliminary objection challenging both the validity of the contract and the jurisdiction of the court. The preliminary objection was hinged on two grounds namely:

(i) the actual receipt of the insurance premium is required by Section 50 (1) of the Insurance Act as a condition precedent to a valid contract of insurance.

(ii) It is the duty of the Court to refuse to enforce a contract in breach of the condition for ex-facie illegality.

NOTE: The trail court upheld the preliminary objection that it lacked jurisdiction to hear the suit on the ground that the condition precedent to a valid contract of insurance had not been met. The insurance company, as Appellant, appealed against the ruling.

9.3 Per Pemu, J. C. A.

Delivering the lead judgement, agreed with the Respondent's brief of argument that the interpretation of Section 50 (1) was at the heart of the matter. The learned Justice of the Court of Appeal then went on as follows:

"Section 50 (1) of the Act is explicit as to when the premium should be paid. It is to be paid in advance. What is the effect of failure to pay premium in advance, in respect of an insurance coverage? It, in my rendering view, make the contract an illegal contract thereby rendering it void. The Act does not talk about part payment".

Unitrust Company Limited's claim for unpaid part premium was challenged by the Defendant, Ipco Nigeria Ltd, on the ground that the contract was illegal for non-payment of the full premium as required by sec 50 (1) of the Insurance Act. This preliminary objection was upheld at both First and Appellate instances.

Per, Bage, J.C.A in the lead judgment, said "by the express provisions of the relevant laws (here in Section 50 (1) Insurance Act) the payment insurance premium is a condition precedent to a valid contract of insurance. Therefore, non-compliance with same renders the contract null and void".

9.4 REMARKS

Matter is settled beyond doubt from the above that full payment of the premium is a condition precedent to a binding contract of insurance in Nigeria.

9.5 REFERENCE

1. Insurance Act 2003 – Sec 50.

10.1 ARRANGEMENT OF MATTERS, COURT, DATE

Court: Court of Appeal

Date: 24th November, 1982

Suit Number: FCA/1/33/82

Judge: Kutigi, J. C. A.

American International Insurance Company Limited

vs.

Nzayi

10.2 REPORTS/FACT/ISSUES

The deceased took out a life policy with the Appellant Insurer. When he died, the insurer failed to pay the insurance sum despite the repeated demands by the Respondent, the deceased's sister. In an ensuing action by the Respondent, the Insurer argued that the deceased had breached his duty of utmost good faith by not stating his true earnings. Furthermore, they contended that the Assured was never a person in existence and that the whole case was a fraud perpetrated by the Respondent, and as such, the policy was void. The Insurer did not, however, state in their statement of defense the facts which showed that the policy was void for non-disclosure and fraud. They however contended that the non-disclosure and fraud was a question of law which need not to be pleaded.

10.3 DECISION OF COURT

Held; although law need not be pleaded, the facts on which such law is based must be pleaded. Evidence adduced in support of facts not pleaded goes to no issue. The insurer, having failed to plead facts on which they sought to invalidate the insurance contract, could not set it aside.

Per KUTIGI, J. C. A.

Mr. Odofin, learned Counsel for the Appellant, arguing ground (b) said that the deceased died leaving assets worth only ₦19.00 (nineteen naira) whereas in his application form for insurance, he stated that he is worth ₦30,000.00 net and that his income was ₦12.00 per annum. He said the policy was taken out in January 1972, while death occurred only four months later in April and the Insured virtually left nothing behind. He referred to the evidence of Defence Witness Dw2 (the Insurance agent on the point). He submitted that these discrepancies show that the Assured was not acting uberrimae fidei tides and that this goes to the root of the contract itself.

Mr. Odofin said if the Appellants knew that the Assured was not a man of substance they would not have Insured him for such a colossal sum of ₦46,000.00. He said the question of the validity of Insurance being uberrimaefidei tides and as such a question of law, he needed not have pleaded it and referred to *0.16 R.4 High Court of Lagos State Civil Procedure Rules J 1972*in support.

Mr. Abayomi Learned Counsel for the Respondent in reply stated that although law needs not be pleaded, the fact on which such a law is based must be pleaded. So that if the Appellants wanted to reply on the principle of uberrimae fidei tides in contracts, they would be expected to plead the facts on which they relied upon. He referred to *0.16 Rll High Court of Lagos State Civil Procedure Rules 1972.*

I *believe the general rule is that every pleading must state facts not law, but there is nothing which prevents a party from raising a point of law in his pleadings.* If a Defendant wishes to prove as in this case that a contract is void, he just cannot simply plead that "contract is void and of no effect" without stating all the facts which would show that the contract was void. The relevant *0.16 Rll High Court of Lagos State Civil Procedure Rules J 1972provides as follows:*

"11. The Defendant or Plaintiff (as the case may be) must raise by his pleadings all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in points of law, and all such grounds

of defense or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise or would raise issues of facts not arising out of the proceedings as, for instance, fraud, limitation decree 1976, release, payment, performance, facts showing illegality either by enactment or by Common Law, or by the Law Reform (contracts) Act 1961.

I am satisfied that the Appellant having failed to plead all matters which would show that the action was not maintainable or that the transaction was void or voidable, *the Trial Judge was right when he held that the assured had faithfully disclosed all the facts within his knowledge at the time the application forms were filled.* The evidence of Dw2 (the Insurance Agent) on the facts and which were not pleaded go to no issue *{George & ORS V Dominion Flour Mills Ltd. 1963} I ALL NLR. 71}.*

THIS GROUND OF APPEAL THEREFORE FAILS".

10.4 REMARKS

Ultimate good faith is essential for all Insurance contract. Good faith, fraudulent claim, allegation of fraud must be specifically pleaded and proved beyond reasonable doubt as required by the general law before an insurance contract or claim would be set aside; onus of proving the fraud is on the insurer.

10.5 REFERENCES

1. George &ORS v. Dominion Flour Mills Ltd. {1963} I ALL NLR. 71.
2. O.16 R.4 -High Court of Lagos State Civil Procedure Rules, 1972.

11.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: Court of Appeal
Date: June 23, 1982
Suit Number: FCA/A/107/80
Judge: Ogunkeye, J. C. A.

Akwiwu Motors Limited Innocent Anosike

vs.

Dr. Babatunde O. Sangonuga

11.2 REPORTS/FACTS/ISSUES

The Respondent, a Surgeon and university lecturer, on 13/7/76, then aged 37 years, while driving his car at about 8:30p.m. along Ondo/Ife Road, suddenly ran into a stationary heavy-duty lorry which had remained on that spot for some time without any warning light. It was dark and there was no street light. The stationary vehicle was owned by the 1st Appellant Respondent was seriously injured as a result of the accident and became a quadriplegic.

In a suit field by the Plaintiff at the lle-lfe High Court, special and general damages of ₦301,490.30 were awarded against the Defendants.

In an appeal to the Court of Appeal, the Appellants argued that the judgment was against the weight of evidence, that the Respondent was contributorily negligent and that the damages were excessive. Further, it was argued that tax ought to have been deducted from the award. The Court of Appeal, affirming the judgement.

11.3 DECISION OF COURT

(1) In a running down case, it is for the Trial Court and not the Appellants Court to decide upon the fact whether a motorist drove at an excessive speed.

(2) Leaving a broken-down vehicle on an unlighted highway at night without warning or without pushing it to the grass verge is an evidence of negligence on the part of the driver.

(3) In assessing damages for bodily injuries all the natural and foreseeable consequences of the Defendants negligence are relevant facts.

(4) A multiplier of 12 years as a basis for the award of compensation in a case of negligence was reasonable where the accident victim was aged about 40years at the date of trial.

(5) The Court of Appeal may not interfere with an award of damages by the trial court unless it has acted on wrong principles of law or the award was clearly an erroneous estimate an award cannot be set aside on the mere ground that it was excessive.

(6) It is not the practice in Nigerian Courts to deduct Tax from award of damages.

(7) Award of ₦301,409.30 upheld.

PER, DOSUNMU, J.C.A

On the 13th July, 1976 the respondent to this Appeal, Dr. Babatunde Owolabi Sangonuga, was involved in a motor accident along Ondo-Ife Road which today left him completely paralysed only to be moved around in a Wheelchair for the rest of his life. On that day he was driving a Peugeot 504 Salon Car Registration No. WF 8719 AROUND 8:30p.m on that road when he suddenly ran into a stationary heavy-duty vehicle which had remained on that spot for some time without any warning light. It was dark and there were no street lightings. The vehicle, owned by the 1st Defendant/Appellant was driven by the first defendant/appellant now reported dead. Following the injuries, he received treatment at the University Teaching Hospital, Ibadan, followed up with further treatment in the National Spinal Injuries Centre, Stroke Mandeville Hospital, Bucks, England. At the time of the accident, he was 37 years old. He was a Medical Doctor and Lecturer Grade 1 in the University of Ife, Department of Health Sciences and Consultant Surgeon to the Teaching Hospital Ile-Ife. The sky was the limit for him in his chosen profession of medicine. He was living a

full family life with a wife and children. He was a swimming and badminton enthusiast. The prospect of continuing full life has now been shattered by this unfortunate incident.

On 20th March, 1977 he commenced an action against the appellants in the High Court Ile-Ife claiming damages for their negligence. The trial Judge, after a judgment in which both the facts and the law were reviewed with assiduity awarded him total damages of ₦301,490.30.

The breakdown is as follows:

SPECIAL DAMAGES

(a) Loss of earnings of Consultancy fees at the rate of N3,00.00 p.a. from 31/7/76 to date of trial. ₦10,000.00

(b) Medical bills and expenses in England. ₦18,750.30

(c) Transport fares of Plaintiff's wife on her return trips to Britain. ₦ 1,600.00

(d) Maintenance and other expenses of wife on overseas trip. ₦ 2,500.00

(e) Salary of two house-helpers taking care of the Plaintiff at the rate of ₦120.00 per month

i.e. ₦240.00 per month from August, 1977 up to date, a total of ₦ 3,240.00

(a) Drugs, extra food and nourishment and other nursing care expenses from 6/8/77 to date ₦ 1,500.00

GENERAL DAMAGES

(i) Pain and suffering etc. and item (iv) loss of Amenities of life. ₦25,000.00

(ii) Prospective loss of earning:

(a) Basic salary of N7,620.00 per annum for 25years: ₦190,500.00

(b) Consultancy Earnings at the rate of N3,000.00 p.a. for 25years: ₦75,000.00

(iii) (a) Prospective medical expenses inclusive of overseas trip for follow-up treatment, costs of medical gadgets; and

(b) Salary for a house helper; 1 trained nurse and 1 driver: ₦150,000.00

Here for item (a) and using a multiplier of 5 at ₦5,000.00 per annum ₦25,000.00. For item (b) using a multiplier of 12 years:
₦62,400.00(See item (i)

(iv) Provision of drugs, extra food and nourishment using a multiplier of 12 * 500:₦6,000.00

(v) Not allowed as a capital expenditure to be met from other heads

(a) Loss of a advancement in service using a multiplier of 12 at ₦1,500.00 perannum₦18,000.00 .
TOTAL: ₦301,490.00

The Appellants appealed the judgment to this Court on a variety of grounds herein stated.

1. That the learned Judge wrongly received and/or rejected evidence during the trial.
2. That the learned judge erred in law and misdirected himself on aspects of the evidence before him.
3. That the learned Judge failed to direct himself that since the Plaintiff in his evidence had stated he lived at the main Campus of the University of life at the material time he must be held to have seen the Defendant's vehicle on his way to Sijuwade Estate Ile-Ife there being no other way than the said trunk B highway to reach the said Estate and that in any event the evidential burden had shifted to the Plaintiff to establish he did not pass and/or see the Defendant's vehicle on his way to Sijuwade Estate.
4. That the damages awarded by the learned Judge are excessive.
5. That the entire judgement is against the weight of evidence.
6. That fresh evidence has been newly discovered.
7. That there was no evidence to support the findings of the learned Judge that the Defendants are hundred percent liable for the accident. The argument before us were directed against the finding of liability for negligence as well as the award of damages.

Taking grounds 5 and 7 together Counsel for the appellants submitted that the entire judgment was against the weight of evidence because in the light of the evidence at the trial it was not open to the trial Court to find the Appellants 100% liable for the negligence which led to the respondent's injuries, In other words, he contended that the respondent was contributorily negligent. It was claimed that the evidence revealed that the respondent was driving at an excessive speed, not because there was any evidence to support his, but it was to be inferred from the excessive damages done to the respondent and his vehicle. he drew attention to evidence of some of the respondent's witnesses P.W. 9 and P.W. 10 to the effect that after the accident they discovered the respondent's vehicle under the stationary lorry, and this could not happen if the respondent was driving at 25k.p.h on a third gear, which he claimed he was doing before the collision. At a stage during his arguments, counsel obtained an adjournment to call an expert witness, which, in his words, he considered crucial to his client's case, and this, in regard to the speed at which the car of the respondent was driven on the occasion. At the end, leave to call any additional evidence was refused. Undaunted, counsel persisted with the argument that the Court could not have accepted the Plaintiff's evidence that he was driving at 25. k.p.h. before the negligence on the Appellant's part 100% and the judgment is by no means against the weight of evidence, it is, indeed, a mis-statement to say so in the circumstance of this case. The respondent, apart from himself, called 10 witnesses as against 2 witness for the Appellants.

On the issue of negligence, he testified as to the Appellant's vehicle standing on the highway in the night without any warning light and on a dark road. He was confirmed as to this by the evidence of P.W.B. Rufus Amusan, a former police constable who visited the scene that night and the following morning in company of P.W.10 Emmanuel A. Owolabi who had earlier passed the road in the day seeing the vehicle remaining so dangerously on the road and so testified.

On the issue of damages all the doctors who had to do the treatment of the respondent testified as to the extent of the injuries suffered by him. This is apart from his own evidence as to his agonies and pains and suffering following the accident. The finance officers of his employers, University of Ile-Ife - also testified as to his earnings and relevant matters.

As against all these, the two witnesses called by the defence whose evidence did not fill a full page of a foolscap sheet said nothing on the issue of negligence, the extent of injuries to the respondent and the damage.

They only testified as to the purchase price of their vehicles and from whom they bought them - matters which are hardly relevant to the issue before the trial Court. It sounds almost absurd that a verdict reached after a review of all these pieces of evidence before the trial Court will be described as being against the weight of the evidence, it is far from it.

On Ground 1, Counsel contended that the trial Court wrongly received and/or rejected evidence during trial. In making good this Ground of appeal, he dealt with the inadequacy of proof of special damages before the Court, an issue which I shall postpone till the time for the consideration of Ground 4 that damages awarded are excessive. In the meantime, I consider the submission that the sketch plan of the accident area Exhibit P8 was inadmissible because the Police stamp was not on it. As Counsel was not able to bring any authority for this proposition, the point might as well be passed over. The sketch plan was tendered by P.W.8 a former Police Constable, who prepared it and he obtained the signature of the driver of the appellant's vehicle on it signifying his agreement with its accuracy. It was not that of the driver. The fact that he was dead at the time of trial is irrelevant and not a good ground for denying the exhibit the weight that it deserves. No suspicion was cast on the authenticity of the driver's signature. On Exhibit P8 either by cross-examination or positive evidence to the contrary, it seems to me that the submission that the sketch plan should not have been admitted, or if admitted, that not much weight be attached to it is misconceived. And coming to think of it, all the Trial Court said was why did collision occur if his vehicle was located under the lorry soon after the incident. That the possibility, that respondent was driving at over 25 k.p.h and the fact that he was familiar with the road with its high rate of accidents would add up to a high degree of negligence on his part.

Before going too far, let this point be cleared. Whether the Court believed the Plaintiff's evidence as to the speed at which he was traveling was a matter for it, not for the Court, if there was evidence to support such a belief. This Court will therefore not question such finding by inferring the contrary from a combination of irrelevant facts. The fact that some witness discovered the respondent's car

under the stationary vehicle, granted with extensive damages to it, or the fact that a less grievous damage was only caused in a previous accident with the same lorry sometime before cannot displace the clear evidence of the respondent that it was all of a sudden that he discovered this unlighted vehicle in the middle of the road and rammed into it. What speed was the Court to infer from the evidence that Counsel highlight which is to be described as excessive?. The respondent testified that he was doing 25 - 30 k.p.h before the accident P.W. 9 Oladipo Onayemi who was following him in his car confirmed this. It was the futility of pursuing this line of argument without tangible evidence that made Appellant Counsel to seek to call additional evidence to prove the speed at which the respondent was travelling. As he did not succeed, he abandoned ground 6 of his appeal, just as he abandoned ground 3.

This was a heavy-duty lorry, the pressure of which the Doctor testified caused the fracture to the neck and damage to the spinal cord of the respondent. This takes me to the issue of matter of Transmatology when P.W.3 answered as followings:

"In Transmatology, it is pressure, not speed that counts. You can break your neck even while sitting down with a stone falling on you. By pressure I mean, size, the weight that applied the pressure not necessarily speed of 5 k.p.h or more. I also speak of velocity".

This evidence shows that the issue of speed on which Appellant's Counsel harped so much can be discounted in a matter like this where one hits a heavy vehicle of considerable size. It is an issue of fact whether the respondent was contributorily negligent, and after a careful review of the evidence including the innocuous fact that some dry leaves were left on the side of the road, in the night the Court reached the conclusion that the Appellant's negligence was the actual cause of the injuries to the respondent. There was the evidence from the respondent that although he lived on Ife University Campus, he was not aware of the fact that the break down lorry had been lying there for days.

I do not intend to burden this judgment with legal citations on the law of contributory negligence. The judgement of the learned trial Judge is replete with them. The evidence before the Court supports the finding of the 2nd Defendant,

that the Driver, did not park the vehicle on the grass verge which was 7.5 ft? The sketch shows the extent of the grass verge, and it is, indeed, an element of negligence on green verge by getting the vehicle pushed there after the breakdown.

On Ground 2, it was argued that the trial Court cast on the Appellant the burden of proving what the respondent failed to prove. This, Counsel for the Appellant said is the passage of the Judgment which reads:-*"It was not put to the Plaintiff that he took the same route on his way to Sijuade Estate and he saw parked vehicle on his outward journey so as to receive a prior warning of it".* It is difficult to appreciate the point made by him on this.

The Plaintiff/Respondent testified thus:

"It is not also true as averred in paragraph 8 of the Statement of Defence that I had knowledge that the defendant's vehicle broke down on the road. At the time of the accident I lived at Flat 3, Ajanaku Estate, Ibadan Road, Ife. My house was not near the scene of the accident which was on Ife-Ondo Road".

Question: You must have done some running around before the incident?

Answer: I travelled to Ondo once with my family, the second time I passed by Sijuwade Estate was the date of the accident. I was on the road inclusive of the date of the accident less than five times.

Question: You should be familiar with the high accident rate on Ile-Ondo Road?

Answer: Yes, that was exclusive of the part of the road in Ife Township. Clearly, therefore, no question was asked of him whether he had earlier passed in the day or so, the route on which the vehicle broke down so as to have some notice of it. That was the observation which the trial Judge made, and it was a legitimate observation. It was not shifting any burden on the Appellants who pleaded contributory negligence on the respondent's part. They have to prove that the respondent contributed to the negligence by ignoring the danger posed by the breakdown which he noticed when he passed the same route in the day.

Because the Respondent lived in Ife University Campus and was returning to it on the fateful evening was no evidence that he had already passed the same route earlier in the day so as to have seen the breakdown lorry. Any such evidence had to be elicited from him under cross-examination if he did not

testify on it in-chief. The witness had earlier testified that he had no knowledge that the defendant's vehicle broke down on the road as pleaded in para. 8 of the Statement of Defence. It is the duty of the Appellants to prove the averments in their defence which they failed to do.

While still on this ground of appeal I shall consider the submission that the trial Judge erred by inferring civil liability on the basis of violation of Regulation 35(2) of Road Traffic Regulations of Oyo State and the authority of Okuarume v. Obabolor (1966) N.M.L.R 47 which Counsel relied upon, as it were. First that case only decides that the standard of proof of an alleged crime in a civil proceeding is proof beyond reasonable doubt. (See Section 137 of the Evidence Act.) This point however, does not arise in this case. The trial Court found the appellants in breach of their statutory duty as well as in breach of their common law duty of care. This is how the Court put it.

"On the main issue of negligence, the Plaintiff's established that the second defendant, primarily, and the first defendant, vicariously, were in breach of their statutory duty of care under Regulations 35(1) of the Road Traffic Regulations in keeping a parked lorry on the highway without lights as prescribed by law. The more so as the highway on which the vehicle was parked was unlighted. They were also in breach of ordinary duty of care to the Plaintiff in not removing the said parked vehicle after two previous collisions with it by two separate vehicles and before the third collision involving the Plaintiff".

The negligence pleaded and for which the appellants were found liable are stated as in paragraphs 9 & 10 of the amended Statement of Claim namely:

9. The second defendant, a professional motor driver on or about the 13th day of July, 1976 while acting as the said servant and agent of the 1st defendant negligently drove the aforesaid commercial vehicle number I.A 1335 K along Ondo-Ife Road, a public highway and dangerously left the said vehicle in the center of the highway and in the township of life.
10. The said vehicle was, for several days, so negligently left by the defendants, unattended, unlighted and in a manner dangerous to other road users.

The respondent succeeded in proving all these averments. it was not in question that the vehicle was left on the highway for upward of 2 days without any warning light in the night when the accident occurred, and the respondent could not have reasonably avoided the collision. In Tidy v. Battman (1934) 1 KB 319, 321 Mcnaghten J. said;

"It cannot, I think, be said that where there is an unlighted obstruction in the roadway, a careful driver of a motor vehicle is bound to see it in time to avoid it and must therefore be guilty of negligence if he runs into it. The circumstances may be such that a prudent and careful driver proceeding at a proper pace and exercising the care which everybody ought to exercise, may be unable to observe it in time to stop before he reaches it. Here there is no evidence as to the colour of the lorry or as to the background against which it was standing but it is significant that, in the short space of time during which it was stationary, two motorcycles should have run into. it".

The facts of this case are almost similar to the facts of the matter on appeal, and there, as in the present appeal, the owner of the stationary vehicle was held liable in negligence. The breach of Traffic Regulations has nothing to do with this. (See Bankole v. U.A.C Ltd. 15(W.A.C.A) 42 & Alhaji Kalla v. Jarmankani Transport Ltd. (1961) 1A.LN.R. Part IV 747).

Finally, Counsel for the appellants describe the damages awarded as being excessive. I have already set these out in detail in the early part of the judgment.

As for the award of special damages all he was prepared to concede was the sum of ₦10,000.00. Loss of earning of consultancy fee up to date of trial, arguing that all other items are not relevant and that the appellants cannot be saddled with them. In my humble view, all the items of special damages (b-f) were pleaded and proved and are allowable being the natural foreseeable consequences of the appellant' negligence. In the case of medical treatment, there was detailed statement of account expended in Exhibits P4 toP6 and there would appear to be no duplication under it. It was necessary for him to be accompanied by his wife and a nurse to England for further treatment.

On the award of general damages, it was contended that it was excessive because the trial Court used the multiplier of 12. Counsel did not suggest any

appropriate multiplier. The Plaintiff/Respondent was until the accident a practicing surgeon acting as consultant to the Ife University Teaching Hospital. He was 40years old at the time of the action with working life of 25years before him. I believe a multiplier of 12 is reasonable, and there is no good reason for disagreeing with the trial Judge on this. Apart from this, there was no valid criticism against the award save that it was said that the trial Court relied heavily on a reported case of one John Yatter Priestly in the London Time who was awarded the high sum of £225,000 in England after becoming a quadriplegic from a fall while working on a a bridge on the A53 two years ago.

It was just one of the cases referred to by him. The Judge referred to a number of English cases on injury and the level of awards made in each case realising that he was using them to acquaint himself with trends in the past and in the present, but clearly appreciating that the facts of each case may be different and the assessment of damages should bear relationship to the particular facts of each case. The learned Counsel for the appellants left the Court with a number of authorities on award of damages but at the end of the day, the Court of Appeal will hardly interfere with an award of damages by the trial Court unless it has acted on wrong principles of law or the award was clearly an erroneous estimate. The Court will not intervene because it might feel disinclined to agree with the amount awarded as an amount which it might itself have assessed. (See Zik's Press Limited vs. Alvan Ikoku (3 W.A.C.A) 188.

It may well be true as the Counsel for the Appellants said that the level of award in this case was the highest in the history of award of damages in Nigeria; but this is hardly a justification for interfering with it. As Lord Scarman said at page 188 in Lim Poh Choo's v. Camden & Islington Health Authority (1930 1 A.C. 174, 188:

"The attack, therefore, on the total damages awarded as being excessive, merely by reason of its size fails. If the Appellants are to succeed, they must show that one or more of the component items of the award are wrong."

This, His Lordship said, while dealing with the argument that the total award in that case was in broad terms too much. At page 187 of the report he had earlier said there was no room for considering the consequence of high award upon the wrongdoer or those who finance him, and there is no public policy consideration limiting the size of an award.

I now discuss the award of damages in some detail. There was evidence that the respondent would need two people constantly around him, one of them should be a professional nurse. The respondent, according to Dr. Olumide, P.W.1 is permanently handicapped, completely paralysed and cannot do anything for or by himself. The wife, in full-time employment as Chief Pharmacist, cannot be expected to cope with all demands of the respondent, day and night. I believe the provision of two helpers are reasonable and the rate of ₦120.00 per person from August, 1977 to date are justified.

As for the award of ₦25,000.00 for pain and suffering, I almost thought this was inadequate. The evidence of the respondent himself, quite apart from those of the doctors who treated him, more than justified this amount. The respondent was admitted to the Casualty Department of Ibadan University Hospital immediately after the accident from 13th July,1976 to 14th December, 1976. He was moved to National Spinal Injuries Centre England for further treatment. He returned to Nigeria on 6th August, 1977.

Testifying on his condition after returning from abroad, Dr. Olumide said that although his morale was better and he was more optimistic, but as at today, he remained complete paralysed in four limbs. He had very little flexion in his elbow, and he cannot hold anything or grip anything. He now has an automatic bladder at intervals but he cannot control it. It is impossible for him to have sexual intercourse. Narrating his condition in the Ibadan hospital, the respondent said he started having severe pains in his mouth. He had abnormal feelings all over his body below the neck, that is, his skin felt hot all the time. Sometime he felt peppery, at other times when he was wearing a shirt, he felt as if all parts of his body were being pressed hard against sand or gravel. He underwent series of operations here and in England. In my view the award of ₦25,000.00 for pains and sufferings and loss of amenities should not be disturbed.

As for the award of ₦127,440.00 for loss of prospective earnings I have already said that the multiplier of 12 is correct. It was not in dispute that his salary per annum with Consultancy fees are ₦7,620.00 and ₦3,000.00 respectively.

The respondent had a working life of 25 years and according to P.W.1 Dr. Olumide, it is possible for him to live his full span of life. Using the multiplier of 12 and the sum of ₦10,620.00 per annum as multiplicand, the award of ₦127,440.00 should stand.

For prospective medical treatment inclusive of overseas trips for following-up treatment, the Court awarded ₦25,000.00 using the multiplier of 5 at ₦5,000.00 per annum. Although there was not much detailed evidence in support of the figure, the respondent said he was advised to return to England every two years for a following-up treatment. Allowing for 5 years purchase for this is not unreasonable, and having regard to the cost incurred on the first occasion in 1976 the sum of ₦5,000.00 can be allowed.

As for the sum of ₦62,400.00 for future nursing care, that is salary of 1 house-helper, 1 professional nurse, the multiplier of 12 is again correct with the multiplier of ₦5,200.00 per annum. On the provisions for extra drugs, the respondent said he spent ₦3,000.00 for drugs which he used for spasms and relief of skin discomfort and special items of food for himself. He would need this all the time. To allow the sum of ₦500.00 per annum on this for 12 years would not appear to be unreasonable.

In the writ of summons, the Plaintiff/respondent claimed ₦100,000.00 for loss of earning capacity including loss of advancement in service. Possibly because this figure includes an element of duplication in that there had been claim for prospective loss of earnings, the trial Judge awarded ₦18,000.00 as loss of advancement in service using the multiplier of 12 at ₦1,500.00 per annum. The judgment itself is not so clear as to how this figure was arrived at. The evidence of the Plaintiff/respondent nearest to it was his claim of ₦50,000.00 for loss of expectation of life, for which there was no award made in the judgment. The evidence of the respondent that he expected to be a professor as fast as they do in Nigeria after 5-7 years of being a Lecturer Grade 1 may be the basis for the award of ₦18,000.00. There being no appeal against it as such, and no argument was advanced against it, the award will stand.

It has not been the practice in Nigerian Courts to make tax deductions from award of damages. Professor Uche who appeared for the Appellants did not refer

to any precedent for this in Nigeria. As Chief Afe Babalola rightly observed, this is a matter between the respondent and the Tax Authorities. In the result therefore, the Appeals is dismissed and the judgment of the lower court is accordingly confirmed. The Appellants shall pay cost of ₦250,000.00 to the respondents.

Per OGUNKEYE, J.C.A. I have had the privilege of reading in draft the judgment of my learned brother, Dosunmu J.C.A. just delivered and I entirely agree with, the conclusions reached therein.

Per AKANBI, J.C.A. I agree with my learned brother Dosunmu J.C.A whose lead judgment I have had the privilege of reading in advance that all the grounds of appeal canvassed in this case must fail.

The fact that the Appellants were negligent and that it was their negligence that caused the accident which severely decapacitated the Respondent to this appeal, was not seriously challenged at the trial. The evidence proffered, was in the main one-way.

I also note that the trial Judge found that a case of contributory negligence was, on the evidence, not made out. And although Professor Uche cited to us many interesting cases relating to the issue of contributory negligence, it is, with some regret that I say that in the absence of the necessary evidence on record to substantiate that defence, those authorities would not apply to the case on hand.

On the quantum of damages, it was seriously canvassed that the award should be reduced as it is manifestly too high in every respect. I agree that the award ex facie is staggering; and as far as I am aware it is the highest of its kind to be awarded in this country. But in view of the evidence, I find it difficult to interfere with it. Here again, I might observe that the evidence adduced is one-sided and the trial judge accepted it all. In this Court, it has not been convincingly shown that any of the heads of the damages was wrongly awarded. But more importantly, it is also my view that if the award is set against the irreparable damage done to the health, the physique and totality of the person of the Respondent who is a specialist doctor of some standing, it would be right to

conclude that the award was not only fair but justified in the circumstances of the case.

Accordingly. I also dismiss this appeal with the order of costs as made by my learned brother Dosunmu J.C.A.

11.4 REMARKS

The Appellants appealed further to the Supreme Court (Appeal No. SC. 97/1983). Following a preliminary objection raised by Counsel to the Respondent, the Supreme Court on the 21st may, 1984, struck out the appeal on the ground that the two grounds of appeal were based on facts and no leave of the Court was obtained prior to the appeal as required under Section 213(3) of the Constitution of the Federal Republic of Nigeria 1979.

11.5 REFERENCES

1. Evidence Act,. Cap. 112 1990 L.F.N.
2. Road Trafic Regulations of Oyo State. Reg. 35(2).
3. Bankole v. UAC Ltd. 15 W.A.C.A 42.
4. Kalia v. Jarmankari Transport Ltd. (1962) 1 All, NLR Parts iv 747.
5. LimPoh Choo's v. Camden & Islington Health Authority 1930 1 AC 174.
6. Okuarume v. Obabolor 1966 N.M.L.R.47.
7. Tidy v. Battman (1934) 1 KB 319.
8. Zik's Press Ltd. v. Alvan Ikoku 3 W.A.C.A 188.

12.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: Court of Appeal

Date: 25th February, 1996

Suit Number: HCS/68/85

Judge: Oguntade J.C.A

Unity Life & Fire Insurance Co. Ltd. (Plaintiff)

vs.

LADEGA & OTHERS (Defendants)

12.2 REPORTS/FACTS/ISSUES

The right given to a third party under Section 53 of the Insurance Act 1990 (formerly Sec 11 of the Insurance (Special Provisions) Decree 1988) to join the Insurer in an action is purely procedural and not substantive, which creates no independent right of action in the third party against the insurer unrecognized at common law.

In the absence of any clear indication to the contrary, the law-makers can be presumed not to have altered the common law than necessary. The first to fifth respondents as defendants claiming against them, jointly and severally, pecuniary damages resulting from an accident involving in the vehicle in which the former were travelling and another vehicle driven by the sixth Defendant. Shortly after the action had commenced, the co-Defendant in the action as the Insurers of the defendants, and the Court granted the prayer.

Dissatisfied with the order, the Appellant Insurer brought this appeal and argued that Sections 43(2) (a) of the Insurance Act, 1976 and of the Insurance (Special Provisions) Decree Number 11 of 1988 were complimentary of each other and therefore, the Respondents could not take the benefit of the later section which allows for its joinder in the action without first complying with the former section which requires the Plaintiffs to give the Appellant notice of the proceedings prior to or within seven days of its commencement.

12.3 DECISION OF THE COURT

Held; that Section 43 of the Insurance Act, 1976 had become Section 54 of the Insurance Act, CAP183, Laws of the Federation of Nigeria 1990. A third party who wants to join an insurer to a suit brought against the Insured must first show that the insurer has been served with requisite 7-day notice under sec.54(2)(a). to hold otherwise is allow the third party reap a benefit given by the statue without first fulfilling the condition precedent attached to the realization of that benefit. Furthermore, the court cannot act in vain by ordering the joinder since the Appellant Insurer, even in joined in the action, could raise the defense of noncompliance with sec.54(2)(a) against the Plaintiff to avoid liability. Consequently, the joinder was improper since the respondent third party had failed to give notice of action to the Appellant Insurer.

Per Oguntade, J. C.A.

At common Law, it is a firmly established principle that only a person who is a party to a contract can sue on it. This is the doctrine of privity of contract. In *Dunlop Pneumatic Tyre Company Limited vs. Selfridge & Company Limited (1915) AC.847* at the House of Lords (England). Lord Haldane L.C said of the position:

'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 quesitum tertio arising by way of contract. Such a right may be conferred by way of property as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personum. Scruttons Ltd vs. Midland Silicones Ltd (1962) A.C 466.

In so far as the common law doctrine relates to a contract of insurance (in Nigeria), the decision of the Supreme Court in *Andrew .O. Ajufor V Christopher Ajabor & Ors (1978) 6-7 S.C 39 at 52*is instructive.

There the Supreme Court said:

Even if it were established that an identifiable person, .i.e., the3rd defendant took up the policy of Insurance (Exhibits G&H) with the Appellant, we are satisfied that a third party, such as Respondent, could not sue the Appellant abinitio. This must be so as there would be no privacy of contract between the parties and even if such a right were conferred by a statue such as sec 10 of the Motor vehicles (Third Party Insurance) Act Cap 126, Laws of the Federation of Nigeria, it would still be inappropriate to bring the Insurer as a party, except, perhaps, by way of third party proceedings based in contract of indemnity, if

any; See Post Office v Norwich Union fire Insurance Society Ltd (1967) IAIIER. P. 577 and Odubanjo V New India Insurance Co Ltd- SC/69 – delivered on 8/10/71.

'We think that it was an error on the part of the Learned Trial Judge to have joined the Appellant record a verdict against it when, at the end of the hearing no issue was joined on the pleadings between the Respondent and the Appellant'.

Under the common law, the Plaintiffs in this matter could not have joined the Appellant as a party to the suit brought against the person said to be responsible for the Plaintiff's injuries. However, Section 11 of the Insurance (Special Provision) Decree No. 40 of 1988 altered the position. The section provides:

1. Where a third party is entitled to claim against an insured in respect of a risk insured against, he shall have a right to join the Insurer of the risk in an action against the Insured in respect of the claim: provided that before bringing an application to join the Insurer, the third party shall have given to the Insurer at least 30-day's notice of the pending action of his intention to bring the application. The relevant question to ask are when a third party joins an insurer to a suit brought against the Insured, what does the third-party claim from or against the Insurer?

And what is the basis of that claim? in the present suit brought by the Plaintiffs against the person responsible for their injuries, they have pleaded and relied on the negligence ascribed to the driver of vehicle No. LA. 225s (i.e., the 6th respondent)?

The Plaintiff's on the existing statement of claim have not pleaded any negligence or wrongdoing against the Appellant. Therefore, on the established principles governing pleadings, no issues could have been joined between the Plaintiffs and Appellants, when one allows oneself to be guided by the facts pleaded in the statement of claim. the Plaintiffs on those facts could not establish negligence against the Appellant. the correct position is that the law i.e., Sec 11 of Decree No. 40 of 1988 only allows the Appellant to brought in as an indemnifier for any judgement obtained against 6th to 8th respondents on the claim against them. However, Sec 11 of Decree No. 40 of 1988 did not state specifically the purpose why an insurer may be joined in an action against the insured.

It needs not have done so. Because that has been stated in Sec 54 of the Insurance Act CAP183, Laws of the Federation, 1990. The section provides:
54(1) where civil proceedings are taken in Court in respect of any claim under a policy of Insurance and Judgement is obtained against any person insured buy a policy of insurance, then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the Insurer shall be subject to this section, pay to the persons entitled to the benefit of any such judgement the sum payable (including cost of interest on such sum) not later than 30 days from the date of delivery of such judgement.

2. No sum shall be payable by an Insurer under the provisions of sec (1) of this section- (a) in respect of any judgement unless or before or within seven days after the commencement of the proceedings in which judgement was given the Insurer had notice of the bringing of the proceedings.

The right to join an insurer to a suit as given by Sec.11 of Decree No. 40 1988 is only to enable a third-party reach directly the insurer instead of just waiting for judgement to be given before asking the Insurers to settle as provided in Sec 54(1) of CAP 183 above. If Sec 54(1) of CAP183 were not in existence before the promulgation of section 11 of Insurance Decree 1988, the right conferred by section 11 would be incomplete and barren for there would have been no prize to claim for a third party who brings a claim against an Insurer 'unless before or within seven days after the commencement of the proceedings in which judgement was given a notice of bringing the proceedings has been served on the Insurer. It seems to me that a third party who wants to join an Insurer to a suit brought against the Insured, the Insured must first show that the Insurer has been served with the requisite notice under section 54(2)(a) CAP 183. To hold otherwise is to allow the third party to reap a benefit given by the statue without first fulfilling or satisfying the condition precedent attached to the realization of that benefit. In the Appellant brief, Prof. G.A Olawoyin of Counsel argued at pages 7 to 8 thereof thus:

'It is contended that whilst it is true that whilst it is true that by virtue of Sec 11 of the Insurance (special provisions) Decree of 1988, the Insured can now be made a defendant in the action against the insured at the instance of the third party, compliance with section 43(2)(a) of the Insurance Act, 1976 is still mandatory.

This is because in the absence of any clear indication to the contrary, parliament may be presumed not to have alerted common law further than necessary. See *Black- Clawson International Ltd vs Paper Werke Waldh of Aschaffenburg AG (1975) I ALL E.R 810 at 814 € per Lord Reid.* There is no presumption that by legislating, Parliament intended to change the Law.*See Planmouth Limited V Republic of Zare (1981) I ALLER. 1110 at1114.*

I am entirely in agreement with the view of Appellant Counsel reproduced above. It has not been necessary for me to interpret the provisions of either sec 54 of CAP 183 (1990) Laws of the Federation or Section 11 of the 1988 Decree. It is only necessary to consider and relate the provisions in both sections one to the other. The provisions of each of both sections are clear and require no interpretative effort in my own part.

The argument of Respondent's Counsel in the main is that the court should take sec 11 of the Decree No. 40 of 1988 on its own as complete and independent of Section 54 of CAP 183. Further it was the submission of the Respondent that the Court had the duty to just join the Appellant and not concern itself with the question whether or not at the end of the day the Plaintiffs would be able to get a satisfaction of the judgement. I need to say that on the present situation, the Plaintiffs would not be able to get judgement against the Appellant nor compensation against it. That being the position why should the Court assist the Plaintiff in a futile exercise that can only waste time and money. The Court does nothing in vain. *See Odufuwa vs. Johnson (1971) I ALL NLR 142 and Agbaje V Agboluaje (1970) I ALL NLR 21.*

The approach of the Trial Judge was that as Section 11 of Decree No. 40 of 1988 provides that an insurer could be joined to the suit, he would join the Appellant. and that the Appellant was free later in the proceedings to reuse special defenses including one founded on non-compliance by the Plaintiff with Section 54 (2)(a) of Cap 183 (1990 Laws). I think that the Learned Trial Judge adopted a rather simplistic approach which failed to recognize that the plaintiffs could not get compensation provided under Section 54 (1) of CAP 183 without complying with Section 54(2)(a) of the same Act.

It was undisputed that the plaintiff brought their suit on 30/12/1985. It was undisputed that they were not given a notice before they brought their suit or within seven days after bringing the suit to the Appellant. Clearly there was nothing to be gained by making the Appellant a party to the suit.

THE APPEAL SUCCEDES. The order of Odubiyi J made on 2nd May 1990 joining the Appellant as a Co-defendant in Suit HCS/68/8 is STRUCK OUT. In its place, I make an order dismissing the application by the Plaintiffs for the joinder of the Appellant.

I award ₦750 costs in favour of the Appellant against the Plaintiffs 1st - 5th Respondents.

12.4 REMARKS

The right to join an insurer to a suit as given by Sec.11 of Decree No. 40 1988 is only to enable a third-party reach directly the insurer instead of just waiting for judgement to be given before asking the Insurers to settle as provided in Sec 54(1) of CAP 183.

12.5 REFERENCES

1. Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd (1915) AC- 847 at 853.
2. Scurttons Limited vs. Midland Silicones Limited (1962) AC 466.
3. Andrew .O. Ajufor V Christopher Ajabor & Others (1978) 6-7 Sc 39 at 52.
4. Post Office v Norwich Union Fire Insurance Society Limited (1967) I ALL E.RP. 577.
5. Odubayo vs. New India Insurance Company Limited. SC/69- Oduduwa vs. Johnson (1971) I ALL NLT 142- Agbaje vs. Agboluaje (1970) I ALL NLR 21.

FEDERAL HIGH COURT

13.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: Federal High Court (Lagos)
Date: April 26, 1988
Suit Number: FNC/L/72/87
Judge: Sowemimo, J.

Unity Life & Fire Insurance Company Limited

vs.

City Insurance Brokers

13.2 REPORTS/FACTS/ISSUES

The Defendant was authorized to issue Marine Insurance Cover on behalf of the Plaintiff and to collect premiums. Nine certificates were issued A total amount of ₦21,804.86 being the value of the premiums due was not paid to the Plaintiff hence this suit was instituted for recovery of the premiums. The defendant through its Counsel raised a preliminary objection to the proceedings contending that the Plaintiff was not competent to institute the proceedings adding that only the Director of Insurance or the Attorney-General could institute the action because what the Plaintiff was complaining about was a public right by virtue of section 28 of the Insurance Act 1976.

ISSUES

1. The fact that a public right had been conferred by statute does not deny a private person to recover damages if such a person can prove personal damages.
2. The Plaintiff was competent to institute the proceeding without first reporting to the Director of Insurance.

3. The fact that the failure of the Defendant to pay over within specific period the amount of premiums collected by him will entail criminal sanction does not deprive the insurer from instituting civil action to recover such premiums.

13.3 DECISION OF THE COURT: *Per, SOWEMIMO, J.*

This is a preliminary objection raised by the Defendant stating that the Plaintiff is not competent to institute the action against the defendant at this stage on the ground that the purported breaches of the provisions of Insurance Act, 1976 especially Section 28(2) in which the Plaintiff purports to base its claim are only enforceable by the Director of Insurance and/or the Federal Attorney General and not by private persons being public rights having regard to Sections 28(3) and 55 of the Insurance Act, 1976.

There is an affidavit in support of the preliminary objection.

Mr. Olukoju, learned counsel for the Defendant submitted that the Plaintiff is not competent to institute the action against the Defendant at this stage because the Plaintiff has complained in his claim that the defendant has contravened Section 28(2) of the Insurance Act, 1976. He contended that it is only the Director of Insurance or the Attorney General that can institute an action against the defendant because what the Plaintiff is complaining of, is a public right. He contended that the essence of the Insurance Act, 1976 is to curb the excesses and to regulate the practice of Insurance business in the country. He said that the Plaintiff has not given the Director of Insurance any opportunity to investigate the allegation of the Plaintiff before the Plaintiff instituted this action and as such the Plaintiff's action is incompetent and should be dismissed.

He referred to two cases namely:

1. Heyting v. Dupont & Another (1963) 1 WLR 1192 in particular Pg. 1194.
2. Couriet & Others v. Attorney General & Others (1977)3 WLR 300 in particular Pg. 310.

Mr. Chuma Nwokolo, learned counsel for the Plaintiff submitted that the application before the court is procedurally defective and bad in form on the ground that it had been brought under a wrong Order which is Order 33 Rules 1, 4 & 6 of the Federal High Court (Civil Procedures) Rules, 1976, instead the

application ought to have been brought under 27 of the Federal High Court (Civil Procedures) Rules, 1976. He contended that the affidavit in support of the application is defective, in particular paragraphs 3, 4, 6 & 7 which are opinion legal arguments and conclusions of the Defendants Counsel who is not a deponent. Referred to Gleeson v. J. Wippel & Co. Ltd. (1977)3 All ER. 54 in particular Pg. 63. Referred also to Sections 56 to 64, 85 & 86 of the Evidence Act. He stated that the deponent in paragraph 5 of the affidavit has deposed to facts outside his knowledge. he submitted that all the paragraphs of the defendant's affidavit from 3 to 7 are defective and should be struck out.

He contended that the argument of the defence counsel appeared to be that the same facts disclose both criminal offence and civil cause and that civil action must first be stayed, until the criminal case has been disposed of. He contended that if that be the case, the legal principle to this argument is the case of Smith v. Selywn (1914)3 KB 98 but this principle is limited to a case of felony and not a misdemeanor or simple offence. He stated that the offence which the Defendant has based his objection is contained in Section 28(3) of the Insurance Act, 1976 and that subsection does not prescribe any imprisonment. He submitted that the rule in Selywn's case (Supra) has no application to the present case on the ground that it is a simple offence.

He stated that none of the Sections of the Insurance Act, 1976, cited by learned counsel for the Defendant supports his contention that the right the Plaintiff purports to base his claim on is only enforceable by the Director of Insurance or the Federal Attorney General.

He conceded that the Director of Insurance is the proper person to initiate criminal proceedings but that civil actions for damages are outside the competence of the Director of Insurance, and further the Federal Attorney General has a right to file a nolle prosequi as contained in Section 73 of the Criminal Procedure Act. However, that power does not give the Attorney General power to enter upon civil causes; it is only limited to criminal cases.

He contended that by virtue of section 28(2) of the Insurance Act,1976, the Plaintiff is competent to institute this action. see Dawson & Co. v. Bingley Urban District Council (1911)2 KB 149 in particular Pg.156.

Learned Council submitted that the fact that a public right has been conferred by statute does not deny a private person to recover damages. Referred to 2nd Edition Jowitt's Dictionary of English Law Pg. 1462. He contended that the Plaintiff is not suing on a public right and that even if the court holds that it is a public right, the Plaintiff has a right to sue on a public right if he can prove personal damages. Referred to Boyer v. Paddington Borough Council (1903)1 Ch. 109, David v. Britannic Merthyr coal Company (1909)2 KB 146 in Particular Pg. 157.

He finally submitted that the application of the defendant cannot dispose of this action because it relates only to paragraph 14 of the statement of claim whereas the Plaintiff has an alternative Claim in paragraph 16x17 of the statement of Claim which is based on negligence. Referred to Section 54(1) and 91(3) of the Marine Insurance Act, 1961. Referred to the Yeoman Credit Ltd. v. Latter & Another (1961)2 All ER. 294 in particular Pg.299. See also C.A. Banjo & 3 Others v. Eternal Sacred Order of Cherubim & Seraphim (1975)3 S.C. 37.

Mr. Olukoya, learned counsel for the defendant, in his reply, stated that bringing an application under a wrong order cannot vitiate the proceedings before the court. Referred to A. O. Awoyemi v. J.O. Solomon & Another 3 FRCR (1977)35. See also Nwoye v. Nigeria Road Construction Ltd. & Another (1966) MNLR 254. He stated that paragraphs 3 & 4 of the affidavit are not legal arguments and that paragraph 5 does not contravene any provision of the Evidence Act. He conceded that paragraphs 6 & 7 of his affidavit are legal arguments and are defective and therefore nothing could be built on them by learned counsel for the Plaintiff so that the submission of learned counsel for the plaintiff for the rule of Selywn's case (Supra) cannot be invoked. He submitted that Section 28(3) of the Insurance Act, 1976, cannot be read in isolation from Sections 30, 35 & 55 of the Insurance Act, 1976. He said that the Plaintiff has a duty under the Insurance Act. 1976 to report any transgression of the Insurance Act to the Director of Insurance for appropriate action Referred to Section 53 of the Marine Insurance Act.

In this case it is after the Plaintiff had filed the writ of summons with the statement of Claim that the Defendant brought this preliminary objection for the dismissal of the Plaintiff's Claim on the ground that the Plaintiff is not competent to bring this action and that it is the Director of Insurance or Attorney

General that can initiate such action. It is pertinent to set out the Plaintiff's claim which reads:-

The Plaintiff's claim is for the sum of ₦21,804.86 from the Defendant, being:

1. The value of premiums due from the Defendant to the plaintiff on nine Marine Insurance Certificates nos. 8483 to 8490 & 8492.
2. Further or in alternative, damages for loss of premium earnings sustained by the plaintiff on the said nine Marine Insurance Certificates of the plaintiff and caused by the negligence of the Defendant.

And for the interest at the rate of 13% per annum from the 7th of May, 1987 until judgement is given and thereafter at the rate 6% per annum until the full amount is liquidated.

The gist of the Plaintiff's Claim which can be gathered from the Statement of Claim is that the Plaintiff is an Insurance Company while the Defendant is a Broker transacting Insurance business with the Plaintiff. It happened that in 1986 the defendant in the course of its insurance business with the Plaintiff collected some booklets of Marine Insurance Policy Certificates from the Plaintiff. These certificates the Defendant issued out to certain assured and were to pay premiums on them to the defendants, and the defendants would pay over such premiums to the plaintiff. The contention of the Plaintiff is that all the premiums collected by the defendant were paid over to them.

Section 28(2) of the Insurance Act, 1976, the report should have been made to the Director of Insurance who will take appropriate action as provided by Section 28(3) of the Insurance Act,1976.

It is necessary to produce Section 28(2) & (3) of the Insurance Act, 1976 which reads; "28(2) every premium collected by the Broker shall be paid to the Insurer not later than 30 days after receipt thereof; and where payment is not feasible, either because of the remoteness of the Broker from the Insurer concerned or otherwise howsoever, the Broker shall effect a transfer of the funds within the said period" "28(3)any Broker who contravenes subsections (2)of this Section shall be guilty of an offence and shall on conviction-

(a) For a first offence be liable to a fine of ₦500.00;

(b) For the second offence be liable to a fine of ₦1,000.00

(c) For the third offence be liable to a fine of ₦2,000.00 and in addition the certificate of such Broker shall be cancelled and the person or, where this is a Firm, the persons constituting the Firm, shall be disqualified from being again involved in the setting up of the business of an Insurance Broker under this Decree either by himself or themselves or in conjunction with any other person or body".

From the statement of Claim it is obvious that there is an alleged breach by the defendant of Section 28(2) of the Insurance Act. But I entirely agree with the contention of learned counsel for the Plaintiff that the fact that a public right has been conferred by statute does not deny a private person a right to recover damages if such a person can prove personal damages. it is the law that a breach of a statutory duty created for the benefit of an individual or a class is a Tortious act, entitling anyone who suffers special damages therefrom to recover such damage against the Tortfeasor. See Dawson & Co. v. Bingley Urban Council (1911) 2 KB 149.

In my considered view, I do not think that it is necessary for the Plaintiff to report the defendant to the Director of Insurance or that the Director of Insurance should first take an action against the defendant as provided under Section 28(3) of the Insurance Act, 1976, before the plaintiff institutes this action to recover the amount of premium supposed to have been collected from the assured by the defendant.

The fact that the failure of the defendant who is a broker to pay over within specific period the amount of premiums so collected will entail penalty does not deprive the Insurance company from instituting Civil action to recover such premiums already collected or his negligence to collect such premiums.

I am in agreement with the submission of learned counsel for the Plaintiff that the rule in Smith v. Selywn (1914) 3 KB 98 is not applicable to this instant case because the failure of the Broker to comply with Section 28(2) of the Insurance Act, 1976 entails a simple offence as provided under Section 28(3) of the Insurance Act, 1976.

Since the Plaintiff has field his Statement of Claim, and the prayer of the defendant is an Order of dismissal of the Suit, he ought to have come under Order 27 of the Federal high Court (Civil Procedure) Rules, 1976 and not under

Order 33 Rules 1, 4, 6 of the Federal High Court (Civil Procedure) Rules, 1976 which is not applicable, nevertheless, that does not vitiate the proceedings. If the defendant had brought his application under Order 27, he need not file any affidavit. It is obvious that most of the paragraphs in the affidavit are opinion, legal arguments and conclusions which contravene the provisions of the Evidence Act.

The application of the defendant for the dismissal of the plaintiff's action lacks merit and is dismissed.

13.4 REMARKS

The fact that a public right had been conferred by statute does not deny a private person to recover damages if such a person can prove personal damages.

13.5 REFERENCES

1. Evidence Act Cap 112 1990 L.F.N
2. Insurance Act. 1976
3. Marine Insurance Act, 1961
4. Federal High Court (Civil Procedure) Rules 1976.
5. A.O.Awoyemi v. J.O..Solomon & Another 3 FRCR (1977)33.
6. Boyer v. Paddington Borough Council (1903) 1109 Ch.
7. C.A. Banjo & 3 Seraphim (1975)3 S.C. 37.
8. Couriet & Others v. Attorney General & Others (1977)3 WLR 300 Pg. 310
9. David v. Britannic Merthy Coal Company (1990)2KB 146
10. Dawson & Co.v. Bingley Urbari District Council (1911)2 KB 149.
11. Gleeson v. J.Wippel& Co. Ltd. (1977)3 AJI ER 54
12. Heyting v. Duport & Another (1963)1 WLR 1192.
13. Nwoye v. Nigerian Road Construction Ltd. & Another (1955) NMLR 254
14. Smith v. Selywn (1914)3 KB 98
15. Yeomen Credit Ltd. v. Lather & Another (1961)2 All ER 294.

14.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: Federal High Court

Date: September 23, 1985

Suit Number: FHC/B/4/84

Judge: Akpamgbo, J.

Jessica Trading Company Limited

vs.

Bendel Insurance Company Limited

14.2 REPORTS/FACTS/ISSUES

The Plaintiff imported 1,000 metric tons of granulated sugar from the United Kingdom packed in 50 kilos net polytene line new jute bags.

The Cargo, which was shipped in MV VORI, sailing from European Port to Warri, Nigeria was insured under a Marine Open Cover with the defendant on 7/7/77 effective for all sendings made thenceforth up to including 6/7/78. Premium was collected on 13/7/78 and the Certificate of Insurance was issued on the same day.

In September, 1978, Plaintiff received the news that M/V VORI had caught fire and was burnt on the high seas off the coast of Abidjan. The ship was declared a constructive total loss and Notice of Abandonment was given to the Insurer. However, for five (5) months nothing was heard from the defendant, whereupon the plaintiff filed a suit at the Benin High Court against the insurer. Thereafter, news came that M/V VORI had been towed to Warri. The defendant succeeded in claiming 6,629 bags, the balance having been lost or damaged.

Following a meeting between the Claimant and the Insurer, the defendant wrote a letter dated 3rd April, 1979 requesting the plaintiff to collect the available bags of sugar on board the wrecked ship while claim for any discrepancy sustained would be settled. The insurer agreed to reimburse the claimant for other incidental expenses.

The defendant confirmed that the Marine Open Cover given by it was binding in honour only since defendant had not made any declaration of the consignment and no policy had yet been issued. Further, that the Cover granted was "Free From Particular Average" and therefore, there was no liability in the event of total loss.

14.3 DECISION OF THE COURT: *Per, AKPAMGBO, J.*

1. There was a valid contract of Marine Insurance between the parties in consideration of which the defendant collected ₦1,092.95 as premium on 13/7/78.
2. There was a constructive total loss of the ship and Notice of Abandonment was properly given. The plaintiff as a prudent man of business did all in its power to minimize its loss.
3. The compromise of claim evidenced by the defendant's letter of 3rd April, 1979 was binding on the parties.
4. A policy of insurance does not bear interest. However, damages for delayed settlement may be awarded.
5. The defendant was liable in the sum of ₦227,513.18 consisting of.
   a) ₦146,138.18 being cost of 13.371 bags of damaged sugar.
   b) ₦29.375 General Average Contribution.
   c) ₦2,000.00 Overtime Service by the Customs; and
   d) ₦50,000.00 General Damages.

The Supreme Court Judges had held to an earlier case that a Marine Open Cover is an example of a Marine Floating Policy provided the Cover incorporates all the essential features of a Marine Policy. As "Free from Particular Average", clause, where a cargo is insured subject to the provision, the insurer will not be liable to indemnify the assured in the event of a partial loss of the cargo unless the ship carrying the cargo is stranded, sunk or burnt. (See Section 77 Marine Insurance Act. 1961).

PER, AKPAMGBO, J.

This is a hotly contested insurance claim.

The plaintiff in its Statement of Claim averred as follows:

1. The Plaintiff is a company registered in Nigeria with limited liability and having its registered office at Plot D.38, Golf Course Road, Benin City.
2. The Memorandum of Association of the plaintiff company empowers it to engage, inter alia, in import/export of commodities like sugar and cement and in this connection she is required by the laws of this country to insure the goods with an Insurance company registered in this country.
3. The defendant is a Limited Liability Company registered in Nigeria with its Head Office at No. 129 Ikpoba Slope, Benin City.
4. The defendant is a duly registered Marine Insurance Company and/or has held itself out as such at all material times.
5. Between June and July 1978, the Plaintiff, Jessica Trading Company Limited, negotiated with a Firm of European Suppliers based in the United Kingdom, namely, Messrs. Phynic Exports Limited of No. 195 Creighton Avenue, London N2 9BN, England, for the purchase of 1,000 metric tons of white granulated sugar, packed in 50 kilos net polytene lined new jute bags, minimum polarization 99.8 degrees.
6. Between June and July 5th 1978 Plaintiff began negotiation with its Banker, Messrs New Nigeria Bank Limited, Ring Road, Benin City with regard to the opening of an irrevocable Documentary Credit in favour of the suppliers, Messrs. Phynic Exports Limited. The Documentary Credit was eventually established with reference No. HO/RRB/LC/1281. The original being dispatched to the suppliers directly by the Banker who also sent to the Plaintiff the Customer's Copy. Plaintiff will rely at the trial on the Customer's Copy of the Documentary Credit.
7. By a contract of Marine Insurance evidenced by a Certificate of Marine Insurance No.4754 dated 13th July 1978, and made between the Plaintiff and the Defendant in consideration of the premium duly paid by the Plaintiff the Defendant agreed to insure, and did insure the Plaintiff's one thousand metric tons of white granulated sugar, ₦218,589.75 (two hundred and eighteen thousand, five hundred and eighty - nine naira seventy -five kobo) to be carried by a named vessel, the M/V Vori,on a voyage at and from a European

Port to Warri. The Plaintiff will at the trial rely on the Policy, Marine Certificate No 4754 and all other insurance document relating to this transaction.

8. The condition of the Policy are as over-leaf the said Certificate, was itself rested on a Marine Open Cover No. MAR 3195/8/77 effected on 7th July 1977 and effective for all sendings made thenceforward up to and including 6th July,1978. Plaintiff will rely on the said Marine Open Cover No. MAR 3195/8/77 effected on 7th July 1977 and effective for all sendings made thenceforward up to and including 6th July, 1978. Plaintiff will rely on the said Marine Open Cover.
9. After Messrs Phynic Exports Limited had shipped the sugar and negotiated the necessary documents through their Bankers, they wrote to Plaintiff and enclosed copy of their Export Invoice PEX 252/78 and also copy of B/L No. 12. They also enclosed certificate of Manufacture and Free Sales, Plaintiff will rely on these documents at the trial.
10. The Certificate also shows clearly that the sugar was insured to be carried on a specific and named vessel, the M/V Vori. The identity of the vessel was disclosed at the time the Defendants were asked to keep Plaintiff covered
11. On or about 31st July, 1978, Plaintiff's Bankers, Messrs New Nigeria Bank Limited forwarded and endorsed to Plaintiff for value B/L No. 12 on M/V Vori, along with Exporters invoice No. Export PEX252/78.
12. Early in September 1978, Plaintiff received the shattering news that the M/V Vori had caught fire and was burnt on the high seas off the coast of Abidjan. This information reached Plaintiff initially on 7th September, 1978, by way of a radio message from Plaintiff branch Office in Lagos relaying to Plaintiff the text of a cable from E.D. and F. Mann of the London Sugar Exchange.
13. On 25th September, 1978 Plaintiff received through its suppliers/consignors a statement that the damage to the M/V Vori was such that the vessel has been declared a commercial total loss and that the owners of the M/V Vori declared the voyage to Warri to be frustrated and abandoned. Plaintiff will at the trial rely on correspondence from its overseas suppliers more particularly on supplier's telex message dated 25/9/78. Further information on the matter came later by way of a letter dated 30 October, 1981 referenced ID/NH/GC from Lloyd's Service, Colchester, England. These documents will be relied on at trial.

14. The message referred to in the above paragraph also advised that cargo interest should make immediate arrangement to collect their cargo.

15. So soon as Plaintiff received this information about the disaster of the M/V Vori, Plaintiff transmitted same with great despatch to the Defendants. Plaintiff will at the trial rely on their endorsement No. LC. 1281/32 of 7th September 1978 to Defendant, as also on Plaintiff's letter of 6th September, 1978 Ref. No. L.C. 1281/34 and also on Plaintiff's consultant's letter to the Defendants dated 11/10/78.

16. Whereupon Plaintiff immediately set about calculating the cost of arrangements to collect their cargo from mid-ocean at Abidjan.

17. Evidence will be led at the trial to show that the cost of mounting cargo handling operations at the roads off the coast of Abidjan in order to sort out Plaintiff's cargo from below the deck and stevedore it out of the wreck of the Vori into a hired waiting vessel together with the cost of an insurance cover for this operation is of the order of ₦314,740.00.

18. Plaintiff came to the conclusion that the overall cost, namely, ₦314,740.00 of recovering its cargo entirely exceeded its value when recovered, and that the operation involved a most unreasonable hazard to lives and to other people's property of far greater value than Plaintiff's own cargo.

19. So soon as the actual total loss of the cargo appeared to be un avoidable or the fact of the situation showed that the cost of recovering and forwarding the goods to destination to which they are insured clearly exceeded their value on arrival, Plaintiff directly on the 24th and through its consultant on the 31st January, 1979 gave to Defendant written notice of abandonment by reason of constructive total loss. whereupon Plaintiff delivered to the Defendant the original invoice, bill of lading, certificate of insurance and other related documents in respect of the cargo. Plaintiff will at the trial rely on this letter of Notice and documents.

20. Five months after Plaintiff informed Defendant about the disaster of the M/V Vori and about a month after Plaintiff gave Notice of Abandonment, Defendant did precisely nothing: certainly nothing was communicated to Plaintiff to say what step Defendant was taking.

21. On 20th February, 1979, Plaintiff legalized its Notice of abandonment by taking out a writ, suit No. B/49/79 at the Bendel State High Court.

22. Early in March, 1979, news came that the remains of the Vori was on tow to Warri by tugs under the command of Bleasbjerg & Co. of Nordhavnsgade,

Denmark. On the 9th of March, 1979, Plaintiff received a letter from Messrs Bleasbjerg & Co. notifying Plaintiff of a debit to Plaintiff of ₦29,375.00 as Plaintiff share of the general contribution by all cargo interests. Attached to the letter were details explaining how the figure ₦29,375.00 was arrived at. Plaintiff will at the trial rely on both the letter and the attachment.

23. Anxious always to ensure that Defendant did not lose any possibility of benefit in respect of the goods over which in effect defendant has absolute control since they had been abandoned to him, Plaintiff communicated to Defendant immediately the information that the M/V Vori was being towed to Warri. This was to enable Defendant to exercise his absolute control and to do what he thought best in the circumstances in accordance with the terms of the policy, plaintiff will rely on its letter to the Defendant in this regard, i.e letter No. JTC/PF.0517/96 of 2nd March, 1979. Plaintiff will also rely on Defendant's letter No. CD/CBEO/EA1/79 of 30th March, 1979 and on Plaintiff's letter to the Defendant No. JTC/PF.0517/118 dated 30th March. 1979.

24. Subsequently, as a result, a meeting was arranged between Plaintiff and Defendant at which a new contract was made. Plaintiff will rely at the trial on Defendant's letter No. BIC/MAR/98/78 dated 3/4/79 to show that a new agreement was reached at the meeting held by both parties in the office of the General Manager of the Defendant Company. Plaintiff will at the trial rely on the said agreement between it and the Defendant, and will urge the Court to hold that by the agreement the Defendant is completely estopped from setting up any defence to avoid the payment it undertook to make under that agreement.

25. As a result of the new agreement/contract the Defendant made available to the Plaintiff under cover of letter No. BIC/MAR/98/78 dated 3/4/79 the original shipping documents, bill of lading, Insurance Certificate and shipping invoice. Plaintiff will rely on these letters and documents at the trial.

26. Further, Plaintiff will urge the Court to hold that Plaintiff having duly given notice of abandonment in January 1979 which Defendant accepted, the Defendant has conclusively admitted liability and the sufficiency of the notice.

27. Accordingly, in the interest of the Defendant and at his request, Plaintiff took action to ensure that as much cargo as could be retrieved was in fact retrieved, and anxious also again in the interest of the Defendant to cut

discharging expenses. Plaintiff sought and secured from the department of Customs and Excise a facility analogous to Release by a Bill of Sight.

28. Plaintiff will at the trial rely on:

- Relevant form sales 256 of the Department of Customs and Excise Nigeria, being acceptance of Customs Duty payment of ₦17,400.60; in respect of Bill of Entry no. 20117;
- Importer's copy of form C. 188 of the Department of Customs and Excise, i.e import Entry for Home Use No. 20117;
- Certificate copies of relevant Tally sheets.

29. Having paid to Messrs Bleasbjerg & Co. K/S Plaintiff's own proportion of the General Average Expenses, namely ₦29,375.00, Plaintiff took steps to ascertain as best he can the quantity of the sugar consignment that was on board. A representative of Plaintiff who entered the holds of the M/V Vori found that the quantity was about 7000 bags. Plaintiff duly paid Customs duty and took collection of all available bags of sugar on board, the total being 6629 bags. Plaintiff so informed. Defendant and asked repeatedly but in vain for reimbursement of the ₦29,375.00 paid to Bleasbjerg and for payment in respect of 13371 bags not found in the Vori i.e. ₦146,138.18., as also for the overtime expenses in respect of Customs officials who supervised the discharge of the Vori.

Plaintiff will at the trial rely on:

i A hand written endorsement dated 24/3/79 entered by Mr. Anker Hansan, Manager of Bleasbjerg & Co. K/S at the bottom of a letter written to him by the Chairman and Managing Director of Plaintiff's Company;
ii Plaintiff's letter No. PEL/JTC/PF/0517/125 dated 10th April, 1979 as well as the attachment thereto.

30. In an amazing demonstration of a flagrant breach of contract and in an insidious and malicious attempt to mislead the Plaintiff and prejudice his case, Defendant sought to persuade Plaintiff to repudiate the legalisation of his abandonment: he informed Plaintiff that he was prepared to redeem the general average and other conditions previously agreed and other conditions previously agreed upon provided Plaintiff repudiated the legalisation of his abandonment. Plaintiff will rely on Defendant's letter No. BIC/CD/CBE/RZU/79 dated 30/4/79.

31. Plaintiff pleads malice and will lead evidence to show that Defendant's delay in paying to Plaintiff money which ought to have been paid certainly between

April and June 1979 is malicious, grossly discriminatory and tainted with bad faith. The malicious act has resulted in a loss of ₦240,000 the Plaintiff, being interest charges incurred on the overdraft resulting from the establishment of the L/C in respect of the sugar by the New Nigeria Bank Ltd.

32. The Chairman of the Defendant Company was at all material times the chief Legal Officer of the New Nigeria Bank Ltd. He knew that Plaintiff financed the sugar on overdraft from the New Nigeria bank Ltd. He knew too that the controlling shareholder of the Defendant Company (about 80%) is also the controlling shareholder (60%) of the New Nigeria Bank Ltd.

33. Thus, the delay by the Defendant Company in paying Plaintiff money due to Plaintiff and the resulting debit of ₦142,371.01 in bank charges falling on the Plaintiff meant in fact a revenue of some 60% of ₦143,000.00 accruing to the said controlling shareholder of New Nigeria Bank, quite apart from the Defendant Company having the use of Plaintiff's money now for 5 years running.

34. In support of the averments made in paragraph 31-33 above, Plaintiff will rely on:

i. Plaintiff's letter No. B/49/79 of 10th November,1980 to Chairman, Bendel Insurance Company Limited.

ii. A letter No. Vori/8/79 dated 30th April, 1979, written to Defendant by Niki Manufacturing Company.

iii. All minutes entered at the bottom of the said letter by officials of the Defendant company.

iv. Bendel Insurance Company Limited "Approval for Payment" Form in respect of Claim No. MAR/103/78 Policy No. MAR/5710 together with all the entries and minutes thereon.

v. "Cheque Requisition – Claim No. MAR/103/78 (H/office) in respect of Policy No. MAR/5710: together with all the entries thereon, particularly the entries *₦9,701.06*. dated 18/6/79;

vi. Bendel Insurance Company limited Payment Voucher dated (H/Office) 18/6/79, stamped PAID for ₦9,701.06, payee Niki Manufacturing Company.

vii. Plaintiff's Bank Statement at Ring Road Branch of New Nigeria Bank Limited Benin City- Account Number 7909, for the relative period.

35. Plaintiff will rely on letters from Defendant to show that Defendant registered Plaintiff's Claim in his (i.e, Defendant's) book apropos the relevant policy (in Defendant's possession) in respect of Plaintiff's material sending/declaration on the M/V Vori in accordance with Open Cover No. MAR/3195/7/77.
36. Plaintiff claims and pleads that the Contract evidence by Defendant's letter No. BIC/MAR/98/78 of 3rd April, 1979 has been substituted for the contract evidence by Marine Certificate of Insurance No. 4754 dated in Benin City 13th July, 1978.
37. Evidence will be led to show that Plaintiff has fully performed its part of the new contract and that Defendant has neglected /failed to perform its part.
38. In the premises, the Defendant has breached the contract of 3rd April, 1979, whereby the Plaintiff has suffered loss and damage in the sum of N319,994.19.
39. Alternatively, the said sum of N319,884.19 is due and payable to the Plaintiff by the Defendant as indemnification for the loss of cargo insured and interest for that the loss was paid at the proper time.

And the Plaintiff claims:

1. Damages for Breach of the Contract of 3/4/79, to wit.
   (a) ₦146,138.18 being cost of 13371 bags of sugar lost;
   (b) ₦29,375.00 being money paid to Messrs Blaesbjerg on the authorisation of the Defendant;
   (c) ₦2,000.00 being expenditure on overtime services authorized by the Defendant;
   (d) ₦142,371.01 being loss suffered by the Plaintiff as interest on Bank overdraft for that the Defendant kept the Plaintiff out of his (Plaintiff's) money,
2. Alternatively, payment of the said sum of ₦319,884.19 as indemnification of the Plaintiff by the Defendant for loss of Plaintiff's cargo insured by the Defendant, for Plaintiff's portion of cargo interests contribution in getting the remains of the carrying vessel and cargo to Warri, for discharge expense and interest for that the loss was not paid at the proper time.

The Defendant filed a copious defence as hereunder:

1. SAVE AND EXCEPT as hereinafter expressly admitted the Defendant denies each and every allegation of fact contained in the same were set out SERIATIM and specifically traversed.
2. The Defendant admits paragraphs 3 & 4 of the Statement of Claim.
3. The Defendant denies paragraphs 1 & 2 of the Statement of Claim and will insist on very strict proof of all the averments contained in these paragraphs. the Defendant will say that Plaintiff's Company is not a legal person.
4. With reference to paragraphs 5 & 6 of the Statement of Claim, the Defendant will say that the alleged negotiations between the Plaintiff and Messrs Phynic Exporters of England on the one hand, and between the Plaintiff and the New Nigeria Bank Ltd. being on the other hand are Res Inter Alia Actos, the defendant being not a party thereto and hence irrelevant to the present proceedings.
5. With reference to paragraph7 to the Statement of Claim, the defendant avers that;

   (a) There was in existence NO POLICY/CONTRACT of Marine Insurance between the Plaintiff and the Defendant in 1978 or at any other time.

   (b) The Certificate of Marine Insurance No. 4754 dated 13th July, 1978 was issued by the Defendant to the Plaintiff as per Open Cover No. MAR 3195/8/77 both of which are BINDING IN HONOR ONLY.

   (c) The Custom and Practice in Marine Insurance business transactions is that a Marine Open Cover and Certificate are not Ipso Facto Insurance contract, it is only when a policy is issued after the fulfilment of some necessary conditions relevant thereto that a CONTRACT of Marine Insurance comes into existence. The Defendant will rely on the said Custom and Practice in Marine Insurance business at the trial of this suit.

4. In further answer to paragraph 7 of the Statement of Claim, the Defendant will say that one of the necessary conditions for the issuance of a Marine Insurance POLICY to be founded on an OPEN COVER is the Formal Declaration of consignment of goods as they are shipped; a broad statement of the number, quality and quantity of goods in the Marine Certificate and Open Cover being not enough to found a Marine Insurance Contract.
5. The Plaintiff failed to make any such DECLARATION of his consignment of granulated sugar in 1978 or at any other time.
6. The Defendant emphatically deny paragraph 8 of the Statement of Claim and repeat paragraph 5, 6 and 7 of the Statement of Defence. The Plaintiff will therefore be put to the strictest proof of all the averments in this paragraph.

7. In further answer to paragraph 8 of the Statement of Claim, the Defendant will say that:
   (a) There was no policy in existence and that any conditions overleaf the said Marine Certificate can only relate to a policy, when issued.
   (b) The OPEN COVER NO. MAR/3195/8/77 (F. P. A.) had long expired by the time Marine Certificate No. 4754 (binding in honor only as aforesaid) was issued. The Defendant will rely on the Marine Certificate and the said Open Cover No. MAR/3195/8/77 at the trial.
   (c) The said Marine Open Cover which expired on the 6th July, 1978 is an ineffectual document vis a vis shipment of Plaintiff's granulated sugar.
8. In answer to paragraphs 9 and 11 of the Statement of Claim the Defendant aver that the letter from Messrs. Phynic Exporters Limited referred to in that paragraph was numbered as No. PEL 1327/78 of 10th July, 1978 (earlier shown to Defendant by plaintiff), and it was written at a date which makes it abundantly clear:
   (a) That the Open cover (MAR/3195/8/77) which had expired since the 6th July, 1978 bears no relevance to the granulated sugar in question;
   (b) That the Marine Certificate No. 4754 had not by then, in fact come into existence. This was issued only on 13/7/84.
   (c) That the Defendants were not by that date aware of any arrangement by Plaintiff to import granulated sugar or seek to insure the goods.
   (d) That the Plaintiff at that date has no Insurable Interest in the said consignment of 1,000 M.T. of granulated sugar and that even till now, the plaintiff has no Insurable Interest in the said consignment. The Defendant will rely on the said letter written by Messrs. Phynic Exporters still in the possession of the Plaintiff.
9. The Defendant denies paragraph 11 of the Statement of Claim and will insist on very strict proof of the averment contained in the said paragraph. The transaction as stated is between 3rd parties and is self service statement.
10. With reference to paragraph 10 of the Statement of Claim the Defendant denies the averment in the said paragraph and so will put Plaintiff to the strictest proof thereof.
11. In further answer to paragraph 10 of the statement of Claim, the Defendant will say that the averment to the affect that "THE CERTIFICATE ALSO

SHOWS CLEARLY THAT the SUGAR WAS REGISTERED" is vague. A Marine Certificate does not constitute a Marine Insurance Policy/Contract.

12. The Defendant denies paragraph 12, 13, 14, 15 and 16 of the Plaintiff's Statement of Claim as pleaded; the Defendant shall insist on very strict proof of all the averments therein contained.

13. In further answer to paragraphs 12, 13, 14, 15 and 16 of the statement of Claim, the defendant of Claim, the defendant avers, that these paragraphs are evidence, not facts and should be expunged or the whole paragraphs struck out.

14. Paragraphs 17 and 18 of the plaintiff's Statement of Claim are denied as they do not relate to the contract of insurance. The Defendant shall insist on very strict proof of all the averments therein contained.

15. In further answer to paragraphs 17 and 18 of the Statement of claim the defendant shall contend that the assertions in those paragraphs are on the whole hypothetical and the figure of ₦314,740.00 is arbitrary and exaggerated and is raised in the vain hope of finding some support for a patently false claim.

16. The alleged conclusion which put the overall cost at ₦314,740.00 as per paragraph 18 of the Statement of Claim has no basis whatsoever.

17. The defendant will further say that the subject matter of the present proceedings (1,000 M. T. granulated sugar) eventually arrived at the NNPC jetty Warri in good condition. The Defendant will rely on extracts from Lloyd's Report to show that the sugar in question was all along in good condition.

20. The Defendant denies paragraphs 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 as pleaded and Defendant shall rely on very strict proof.

21. In further answer to paragraphs 19,20,21,22,23,24,25,26, 27,28,29 and 30 of the Statement of Claim, the Defendant shall contend.

    (a) That there was no constructive total loss of the goods or any part thereof by the PERILS Insured against. The sugar arrived the NNPC jetty Warri in perfectly good condition as aforesaid.

    (b) That the Department did not (repeat not) by writing, words or conduct accept the Plaintiff's Notice of Abandonment. The property in the imported sugar remained vested in the Plaintiff throughout. The Defendant therefore had no right to exercise any form of control over the goods or

any part thereof at all material times, there was therefore no abandonment for Plaintiff to legalise as stated in paragraph 21 of the Statement of Claim.

(c) That the Defendant's letter no. B/IC/MAR/98/78 dated 3/4/79 was written in ignorance of the true state of affairs, vis a vis Plaintiff's imported granulated sugar. The said letter creates no form of estoppel against the Defendants.

(d) That there was no general average sacrifice made and no General Average Expenditure was incurred at the time of the alleged fire incident on the M/V Vori at Abidjan to warrant a General Average Contribution of N29,375.00 from the Defendants. No General Average was declared as there was nothing in the voyage to give rise to such declaration.

(e) That there was no Insurance Policy in existence at all material times and that letter No. JTC/JE.0517/98 of 2nd March, 1979 as per paragraph 23 of the Statement of Claim is a mere self-serving document.

(f) That the Defendant merely handed over/returned to Plaintiff, Plaintiff's Bill of Lading, Insurance Certificate and shipping invoice which Plaintiff in their mistaken belief that the goods were lawfully abandoned to the defendant. had earlier forwarded to the Defendant. There was no new agreement/contract between the Plaintiff and Defendant as pleaded in paragraph 24 of the Statement of claim.

22. In still further answer to paragraphs 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of the Statement of Claim, the Defendant will say that the plaintiff was negligent and was in gross breach of duties for failing to take reasonable steps to protect the goods. The Defendant shall show by document, upon which the Defendant will rely, that the plaintiff's goods or consignment were stored in Hatch 1, 2, and 5 lower holds, and that there was no damage to the cargo.

23. The Defendant shall also rely on all documents necessary to show that plaintiff's claim is misconceived, and that if the plaintiff sustained loss of any part of the goods or at all, it was due to the fault of the plaintiff and its Managing Director, Mr. Wilson. Defendant will rely on the negligence or contributory negligence of the Plaintiff and its agents for delaying and failing to collect their goods from the NNPC Jetty, Warri in good time when notified to do so. the Defendant will rely on its letter to Plaintiff asking Plaintiff to collect well over 15,000 bags of sugar from the Vori; it will also rely on letter dated 28/3/79 written to Defendant by Eke.

24. In further reply to paragraph 29 and 30 of the Statement of Claim, the defendant shall contend:

    (a) That the sum of ₦29,375.00 is now canvassed by Plaintiff in the erroneous belief that a case for General Average existed at the material time when in fact there was none.

    (b) That there was no enforceable Marine Insurance Policy in existence at the time the goods were allegedly abandoned.

25. The Defendant denies paragraphs 31, 32, 33 and 34 of the Statement of Claim, the Defendant shall contend:

    (a) That the defendant acted throughout with the utmost good faith and without malice. The Defendant did not send plaintiff to the New Nigeria Bank on an overdraft mission/errand. the Plaintiff is the sole architect of the interest charges incurred by it on the alleged overdraft which plaintiff negotiated and collected from the bank without the knowledge and/or authority of Defendant, nor was any private knowledge of late Chief J.U. Agbaza (if any) about the said overdraft transaction in the bank attributable to the Defendant, Late Agbaza had no such knowledge. The Defendant shall insist on very strict proof of this.

    (b) That in the alternative, the defendant had no knowledge of how plaintiff was to finance his said importation of granulated sugar. Any knowledge about the transaction in possession of Late Chief J.U. Agbaza was personal to him as part time political chairman of the Defendant's company. Such knowledge (if any) cannot bind the Defendant.

    (c) That Plaintiff's letter No. B/49/79 and all the other documents set out and pleaded as per paragraph 34 of the Statement of Claim are irrelevant to the present proceedings.

26. In further reply to paragraph 33 of the Statement of Claim, the Defendant will say that it is not owing the Plaintiff a kobo or at all. the Defendant has nothing to do with the alleged debit of ₦142,371.01 since the defendant was not instrumental to Plaintiff's decision to negotiate, arrange and receive overdraft loan from the New Nigeria Bank. There is none of Plaintiff's money in the possession of the Defendant.

27. With reference to paragraph 35 of the Statement of Claim the Defendant further repeat paragraphs 5, 6 and 7 of the Statement of Defence. Defendant will therefore insist on very strict proof of all averments contained therein.

28. The Defendant will say further in reply to paragraph 35 of the Statement of Claim that the alleged registration (If any) does not create liability. It does not give rise to a policy contract which has never been in existence. No declaration on the M/V Vori was made by plaintiff.

29. The Defendant denies paragraphs 36, 37, 38, and 39 of the Plaintiff's Statement of Claim and will at the trial put plaintiff to the strictest proof thereof.

30. In further reply to paragraphs 36, 37, 38 and 39 of the Statement of Claim, the Defendant will contend:

    (a) That Defendant's letter No.B/C/MAR/98/78 of 3rd April, 1979 as earlier pleaded was written in mistake of the true written in mistake of the true state of affairs and that there was no Marine Insurance contract/policy made between the Plaintiff and the Defendant. The Marine Certificate of Insurance No. 4754 of 13th July, 1978 is binding in honor only.

    (b) That the Defendant breached no contract whatsoever and the Plaintiff has suffered no losses or damages in the sum of ₦319,884.19 and the Defendant is not liable to indemnify plaintiff in the said sum of ₦319,884.19.

    (c) That at the commencement of the voyage, plaintiff knew or ought to know that M/V Vori was unseaworthy and unsuitable to carry the sugar and that it was registered under flag of CONVENIENCE by reason of her old age, but he failed to disclose these material facts, which said failure is also a breach of the rules of uberrimae fides rendering the whole transaction null and void. The Defendant will rely on all relevant documents affecting the above facts.

32. The Defendant avers that the plaintiff failed to take steps to recover all his insured goods and this gross negligence and "I do not care attitude" must be responsible for any loss if there were any loss. Plaintiff is the owner of an Enterprise called. PETRO JESSICA ENTERPRISES LIMITED. He sold and kept the proceeds of the granulated sugar after their discharge at Warri.

33. The Defendant avers that the action is instituted mala-fide.

34. In still further answer to paragraphs 29 and 30 of the statement of Claim, the defendant will say:

(a) that the plaintiff is not entitled to the sum of N146,138.18 or to over-time expenses as pleaded in paragraph 29 of the Statement of Claim.

(b) that the alleged endorsement dated 24/3/79 entered by Anker Hansan together with the letter on which the endorsement was made and Plaintiff's letter No. PEL/JTC/0517/125 dated 10th April,1979 are self-serving documents between 3rd parties.

(c) Defendant breached no contract whatsoever as no Marine Insurance contract/policy was made between the parties.

35. The Defendant denies categorically being liable to the Plaintiff as claimed in paragraph 39(1) and (2) of the Statement of Claim or at all and the Defendant shall rely on all equitable and legal defences at the trial of this case. The Defendant will say further that the claim for over-time charges and loss suffered as interest on bank overdraft are outside the ambits of Marine Insurance which is one of indemnity only.

36. WHEREFORE the defendant will urge the court to dismiss the action, as it is incompetent, an abuse of the court's process, frivolous and vexatious and that the claim should be dismissed with substantial cost.

The Plaintiff called 3 witnesses. The first witness Emmanuel Anunobi testified that he supervised the discharge of granulated sugar EX M.V. Vori at the Ekpan Refinery Jetty. The total number discharged were 6629 bags. The 2nd P.W. Andrew Iyere Wilson testified that he entered into Marine insurance contract with the defendant company as per Open Cover Insurance Exhibit "DD8". He opened an irrevocable letter of credit with its bankers about 5th July, 1978 after the bankers had examined Exhibit "D-D8". He insured 1,000 metric tons of sugar with the defendant company and was given a Marine Certificate of Insurance No.4754 dated 13th July,1978. It was tendered in evidence and marked Exhibit 'F'. The premium of ₦1,092.95 paid by the Plaintiff was reflected on Exhibit F.

Early in September 1978 he received a radio message from Lagos sating that the M.V. Vori was burnt off the coast of Abidjan. He wrote to his Bankers, endorsed same to the defendant company and his insurance brokers. He testified that the defendant company showed no reaction whatsoever and from Lloyds he got a letter saying that the M/V Vori was broken up as scrap. The defendant wanted the plaintiff to survey the accident but the Insurance Brokers to the Plaintiff said that it was not the work of the Plaintiff company but the defendant. The plaintiff

company surveyed the possibility of going to Abidjan to collect the sugar from M/V Vori mid-stream. but the cost was excessive and operation dangerous. The Plaintiff therefore wrote to the defendant abandoning the sugar as a total loss. The Plaintiff insurance Brokers also wrote a formal letter abandoning the sugar as the total loss and endorsed a copy to the plaintiff. The defendant did practically nothing and the Plaintiff filed a suit No. B/49/79 in the Benin High court to legalise the abandonment.

Sometime in March, the Plaintiff got news that the M/V Vori was being towed by a Danish Firm to Warri. Although he had abandoned the sugar he wrote the defendant to minimize their loss. For about one month, the Plaintiff did not receive a reply from the Defendant company but suddenly got a letter from the Defendant asking the Plaintiff to go to Warri to collect its sugar because non-collection was impeding collection of sugar by another client of theirs. The Plaintiff went to Warri and made his findings. On his return he had discussions with the Defendant company and were agreed on certain points. The agreement was reduced into writing and this was tendered as Exhibit 'T'. He fulfilled his own part of the bargain and made payments. The Defendant did not reimburse Plaintiff the sum of N 146,138.18 for 13,371 bags uncollected but rather asked the Plaintiff to withdraw the case from the Benin High Court. The Plaintiff maintained that there was a contract of Marine Insurance which was reflected on Exhibit 'F'. He maintained that contrary to paragraph 31A of the Statement of Defence it was not true that the Defendants were ignorant of the state of affairs when they wrote Exhibit 'T'. He testified that the defendant settled the claim of Niki Manufacturing Company in respect of sugar also in the M/V Vori. There were meetings between the Plaintiff and the Management of the Defendant company where the Chairman on seeing the document relating to Niki asked the Defendant to settle the Plaintiff out of Court. He then claimed N146,138,18 being value for 13,371 bags of sugar lost: N29,375.00 being money paid to the Dutch firm on the authorization of the Defendant, ₦2,000.00 being expenditure on Customs overtime and ₦142,371.01 being interest on bank overdraft. On the alternative, the Plaintiff claimed ₦319,884 as per statement of claim. He was subjected to a rather lengthy cross-examination which covered 14 pages. EVERY piece of evidence was examined.

The witness under cross-examination alleged that the Plaintiff relied on the Marine Open Cover to open the irrevocable letters of credit Exhibit 'E'. He

admitted that the closing date of Exhibit 'D1' to 'D8' was 6th July, 1978, that exhibit 'F' was dated 13th July, 1978. He maintained that the irrevocable letter of credit was opened on 5th July, 1978. The documents Exhibit 'D-D8 was to remain open for the full amount irrespective of declaration made attached to all sendings made on or after 7th July, 1977 to 6th July, 1978. He said that the receipts given him by the Defendant when he had paid the premium were among the documents returned to the Defendant when the cargo was regarded as constructive total loss. He admitted that by 31/7/78 Exhibit 'D-D8' had expired but the Defendant had already undertaken to take the cargo covered throughout the journey to Nigeria. He testified that the Defendant did not give the Plaintiff a policy but that all the details of the conditions were on the Certificate of Insurance. He however admitted that by September, 1978 he had written that the vessel was a constructive total loss. He also admitted that once there was a total loss the Plaintiff's interest fades out except his money but maintained that after it came to the knowledge of the Plaintiff that there was something to be done to minimize loss to the Plaintiff he was right to take action. he took out a writ to legalise abandonment on 20/2/79 in the State High Court and went to the Jetty in April 1979 to minimize loss. He said that 6,629 bags of sugar were discharged and he paid for the same. He admitted that not all the sugar was lost. He said that F.P.A. means Free from Particular Average and it was a Warranty Clause and once the warranty is broken then there is no question of partial loss being not covered. On the question about his complaint relating to Niki's claim, he maintained his complaint was the discriminatory attitude of the defendant which was more serious in that they paid Niki whose papers were bad and failed to pay the Plaintiff whose papers were in order and said that Exhibit 'Z' and 'Z1' were confirmed by the Chairman of the Defendant company at a meeting where the Chairman asked the Defendant to pay the plaintiff so that the Defendant does not get into further disgrace. He said Exhibit 'Z1', 'Z2' and 'Z3' were given to him by the Defendant. He denied that he bought the documents but that they were given to him by an official of the company who attended the meeting but disassociated himself in that what the defendantwas doing to Plaintiff was immoral. He said that in Exhibit T, it was mentioned that any loss or discrepancies should be forwarded to the Defendant for settlement.

Counsel tried to show that the Plaintiff insured his sugar with another Insurance Company

Question: Do you know African Overseas Maritime Company U.K.?

Answer: I do not know them.

Question: You tendered Exhibit G?

Answer: Yes

Question: What connection has this company with your importation of sugar?

Answer: They prepared the Bill of Lading and are forwarding agents.

Question: They insured for you the sugar?

Answer: This is not possible by law we are prevented from insuring with overseas Insurance Company.

Question: Do you know an Insurance broker called Edodel?

Answer: They are our Insurance consultants and commissioned agents for the Defendant.

Question: For the purpose of this transaction they were your insurance Broker?

Answer: They were my Insurance brokers and commissioned agents for the Defendant.

Question: They wrote Exhibit 'P' and 'Pi' as your Insurance Brokers.

Answer: They wrote as our Insurance consultants.

Question: Edodel wrote to Overseas Maritime Company U.K. Ltd. to pay N20,000.00 for your sugar

Answer: I am not aware and I gave them no instructions to that effect.

Question: Do you remember ever seeing a copy of this letter undated?

Answer: I do not remember.

Question: Overseas Maritime Company has paid you in full?

Answer: That is not correct-we did not approach them and they paid nothing"

About the amount of ₦29,375.00 debited by the Dutch company, the Plaintiff said that the document was placed before the meeting with the defendant before they wrote the second contract - Exhibit 'T'. He said that the question of total loss did not arise because of Exhibit 'T' which was drawn up between the parties.

The 3rd witness for the Plaintiff was a Bank official of New Nigerian Bank Ltd., Bank official of New Nigerian Bank Ltd. Benin City. He tendered a Statement of Account of the Plaintiff company from 1978 to May, 1985. He gave a fluctuating rate of interest in accordance with Central Bank of Nigeria guidelines. Under cross examination the salient point made was that he cannot say the exact interest on ₦203,743.35 pursuant to Exhibit 'E' except when worked out and admitted that the interest on the particular figure had been worked out. After this witness the Plaintiff closed its case.

The Defendant called one witness an underwriter working for Bendel Insurance Limited Defendant Company. He testified on oath that at about July 1977, they contacted the Defendant Company for issuance of an Open Policy Cover. He identified Exhibit 'F' as a Marine Insurance Certificate issued by the Defendant Company on 13/7/17 to 6/7/78 which meant that the insurance took effect from 7/7/77 for a period of one year and to expire on 6/7/78. He testified that when Exhibit 'F' was issued on 13/7/78 based on Exhibit 'D-D8', the Marine Open Cover had expired and was never renewed. He said that the cover granted for the sugar was FPA only that is Free From Partial Losses or Free From Particular Average. The Plaintiff never issued Defendant's company with policy of insurance. Where there is loss suffered under F.P.A the effect is that the Insurance Company pays only when there is total loss. He gave the procedure for issuing Marine Insurance Certificate and said that if the Marine Insurance Certificate is being issued on Open Marine Cover Policy the policy must have been in force or renewed. Exhibit 'F', was issued and that the conditions for issuing a certificate were not completely satisfied. He said that the Plaintiff wrote to Defendant that he was abandoning the cargo as constructive total loss. The Defendant Company appointed a Surveyor to look into the case. He did and reported back. He said that the Surveyor did not declare the cargo a total loss. He said that the M.V/Vori was the vehicle in respect of which Exhibit 'F' was issued. He maintained that the F.P.A. clause was not broken by the Defendant Company. If there was constructive total loss, the assured has to abandon the cargo to the detriment of the Defendant Company and must not tamper with the cargo. He denied that the Defendant Company discriminated against the Plaintiff and maintained that the Defendant Company did not pay the plaintiff as there was no contract between the parties and no loss based on the contract. He admitted that Niki was paid in full because it had All Risks Policy. He identified Exhibit 'F' and maintained that there was no subsequent contract between the Plaintiff and the Defendant in respect of this transaction, and finally denied

liability. Under cross-examination, he was shown Exhibit 'G' and admitted that the consignee was the Defendant Company, that the back of Exhibit 'G' was endorsed to Defendant Company, that the date of shipment was 21/6/78. He admitted that Clause 5 in Exhibit 'D7' was the same as Clause 5 in Exhibit 'F'. He further admitted that Exhibit 'T' was written by the Defendant Company and that it was not written under ignorance. The Defendant closed its case.

At the close of the case of the parties, learned Counsel for the Defendant addressed the Court at length. He admitted there was variance between particulars of claim, statement of claim and the writ of summons, and made reference to certain paragraphs of the Statement of Claim. He said that when Plaintiff opened Exhibit 'E', Exhibit 'D-D8' was then current, effective from 7/7/77 to 6/7/78 but on 5/7/76 Exhibit 'D-D8' had only one day to run.

Defendant issued Exhibit 'F' on 13/7/78 after payment of premium of N1,092.95 by virtue of Exhibit 'D-D8' and said that it was based on a non-existent policy which had expired on 6/7/78. He referred the Court to Compania Martitina V. Oceanus Mutual (1976) 3 All E.R. 243 at 248, 249 and submitted that this was "time policy" and after 6/7/78 Exhibit 'D-D8' could not affect anything. He said Exhibit 'G' dated 21/6/78 and Exhibit 'H' dated 10/7/78 failed to form a contractual nexus. The goods were shipped on 21/6/78. Plaintiff did not obtain Exhibit 'E' Letter of Credit until 5/7/78 and did not obtain Certificate of Insurance Exhibit 'F' until 13/7/78. He referred to American International Insurance Company V. Ceekey Traders Ltd. (1961) 5 S.C. 81 at page 88 to 89 and submitted that consideration must be present not past or future. Premium paid on 13/7/78 cannot relate to Exhibit 'G' shipped on 21/6/78. He referred to other authorities and attacked a claim for towage, interest, and overtime saying that they were not in the contemplation of the parties at the time they were making the contract. He said that Exhibit 'T' cannot form the basis of any contract as there was no consensus ad idem between the parties as to the quantity of sugar on M.V. Vori. There was also no consideration.

He attacked the sum of ₦29,375 paid to the Dutch firm as excessive and referred the court to Section 65, 66, 71, 72 and 73 of the Marine Insurance Act of 1961 and submitted that where there was partial loss, Assured would be entitled to proportion not the whole and asked Plaintiff case to be dismissed.

Learned Counsel for the Plaintiff replied. She said that on 5/7/78 Plaintiff opened Exhibit 'E' by making available to the Bank Exhibit 'D-D8'. By the middle of June, 1978 Plaintiff made declarations to the Defendant and on the basis of that, made the entries on Exhibit 'F'. He said that Exhibit 'D-D8' was "to attach to all sendings made on or after 7th July, 1977 to 6th July,

1978". The sending was as on Exhibit 'G' which was 21/7/78 and within time. Once a cargo is shipped it attaches and continues to attach till the cargo is discharged. She said it was a "Voyage policy" She said that only 6629 bags of sugar were collected. She submitted there was a valid contract of Marine Insurance between the Plaintiff and the Defendant - see Exhibit 'F'.

The property passed to the purchaser when the Bill of Lading was endorsed to the purchaser on 13/7/78 and submitted that the Defendant cannot escape contractual agreement on the ground that it had not issued a policy which it undertook in Exhibit 'F' to issue. She said that 'D-D8' was current when Exhibit 'G' was issued, when the supplier loaded M.V. Vori for sending to the plaintiff on 21/6/78. It was current when presented to its Bankers for Issuance of Letters of Credit Exhibit 'E' on 5/7/78. It therefore attached to the sending which according to Exhibit 'F' was declared to be insured for a voyage "At" and "From" any European port to Warri. She said that the effect of burning on the F.P.A. clause, Clause 5 at the back of Exhibit 'F' Defendant accepts liability. See also clause 5 in Exhibit "D7" warranted Free From Particular Average. By the burning of the vessel, the journey of M. V. Vori was frustrated and warranty broken. Referred to Ship Glenivet- The Glenlivet Steam Ship Glenlivet- The Glenlivet Steam Ship Co. v. Titcombe T/Ltd. v. 10p.97 and 98. The Vori was towed and later broken up as scraps. She said that Exhibit 'T' was a binding contract and could not be repudiated by the Defendant. She submitted that the Plaintiff has made out a case and was entitled to succeed.

Shortly put, the Plaintiff's case is that it insured its cargo 1,000 M.T. sugar against loss with the Defendant Company and paid the premium. The ship carrying the goods was burnt off the coast of Abidjan and he promptly informed the Defendant Company. The Defendant Company did practically nothing. The Plaintiff took out a suit against the Defendant in the State High Court of Benin City. The burnt ship was later towed to Warri with part of the goods therein. The Defendant asked the Plaintiff to go and collect its goods. The Plaintiff collected

6629 bags of sugar the balance being either not seen or damaged. There was a meeting between the Plaintiff and the Defendant resulting in certain agreements clearly set out in Exhibit 'T'. The Plaintiff is suing to recover as per insurance and the subsequent agreement.

The Defendants are saying that there was no valid agreement and the insurance transaction between the Plaintiff and the Defendant, was to no effect in that when the plaintiff opened Exhibit 'E', Exhibit 'D-D8' was current effective from 7/7/77 to 6/7/78 but that on 5/7/78 when the Plaintiff opened Letter of Credit, Exhibit 'D-D8' had only one day to run. Defendant issued Certificate of Insurance on 13/7/78 by virtue of Exhibit 'D-D8' which was by then non-existent because it had expired on 6/7/78.

One question arises in my mind and that is when the Defendant collected N1,092.95k as premium what was it in aid of?. If Exhibit 'D-D8' had expired on the 6th July, 1978, why did the company collect money from the Defendant on the 13th July, 1978? The Defendants did not answer this question either in the pleadings or in evidence. I find it hard to believe that a reputable insurance company like the Defendant Company was labouring under a misapprehension when it collected the Plaintiff's money. Or was it trying to cheat the Plaintiff?. It must have been the bilateral intention of both parties to insure the goods set out in Exhibit 'F' from any European country to Warri Port in Nigeria and the goods insured were 1,000 metric tons of white sugar and it was insured for the sum of N218,598.75k. It is admitted on both sides that the ship was burnt off the coast of Abidjan. The Plaintiff notified the Defendant that it was a constructive total loss. Subsequently, the ship was towed to Warri and the Plaintiff as a prudent man of business did all in its power to minimize the loss. The Defendant on its part did practically nothing but would appear to have accepted the plaintiff's line of action when in a subsequent meeting certain agreements which formed the basis of Exhibit T were reached. It must not be forgotten that at that time a suit was hanging over the Defendant Company in the Bendel High Court in respect of this matter.

In the pleadings the Defendant averred that Exhibit 'T' was issued out of ignorance but rescinded that line of defence when under cross-examination the Defendant said that Exhibit 'T' was not issued out of ignorance. The position therefore as it appears to me was that throughout its dealings with the Plaintiff, the Defendant accepted that Exhibit 'F' was in order and was prepared to enter

into Exhibit 'T' in order to settle the matter out of Court. Due to lack of jurisdiction no doubt, the matter was withdrawn from the State High Court Benin and commenced in this Court. The Defendant did all in its power to resile Exhibit 'F' and Exhibit 'T'

Exhibit 'T' reads as follows:

COPY

Our Ref. BIC.MAR/98/78 3rd April, 1979

The Managing Director,

Jessica Trading Co. Ltd., P. O. Box 568 Benin City.

Sir,

Our Claim N. MAR. 98/78

Our Policy No. 3195/77

Insured Jessica Trading Co. Ltd.

Reference to the discussion you and your representative had with the General Manager of Bendel Insurance on Tuesday 3rd April, 1979, during which the following conditions were agreed upon. I hereby write to confirm the acceptability of these conditions by the company for a mutual compromise:

(1) That you should collect all available bags of your imported sugar on board M/V Vori and any loss or discrepancy sustained, should be forwarded for settlement

(2) That you should pay the General Average for towage as invoiced to you by Blaesbjerg and company which is N29,375.00. However, the necessary receipt for the payment of the said amount should be forwarded for reimbursement.

(3) That the company will be responsible for the over-time liability in respect of the Custom men to be posted to the site during discharge.

In view of these mutual developments, I enclosed herewith the following documents. Bill of Lading, Insurance Certificate and Shipping Invoice

Yours faithfully,

for: BENDEL INSURANCE COMPANY LTD Sgd (C.B. EDO-OSAGIE)
Marine Claim Manager.

This is the document the Defendant is saying in the pleadings was issued out of ignorance and saying in evidence that it was not issued out of ignorance.

I hold that the document is binding on the parties. The amount to be paid to the Dutch Firm was specifically authorized in Exhibit 'T' above and all cross-examination to the effect that it was excessive, appear academic and irrelevant.

One point in the claim that has worried me was the claim for interest. The Plaintiff's witness did not prove it. Even if he did, it is doubtful whether the Plaintiff will be entitled to interest under the law.

In Webster v. British Empire Mutual Life Assurance Co. (1879) W. 221 James L.J. said.

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"A Policy of Insurance does not bear interest. In itself, there is neither an expressed nor an implied contract to pay interest on the amount payable. Anything in the nature of interest can only be given, in my view, as damages for the wrongful detention of money which ought to have been paid" Calton L.J. in the same case said:

"The instrument sued upon was a policy of assurance. It contained no stipulation whatsoever that the company should, under any circumstances, pay interest, therefore is no part the debt or the sum stipulated in the contract to be paid. If it can be recovered, it must be in the nature of damages".

The question now arises whether or not I can award damages. In Incar (Nigeria) Limited vs. Benson Transport Limited (1975) 3 Section 117, the Supreme Court said that General Damage is such as the law will presume to be the natural and probable consequence of the Defendant's act need not be specifically pleaded. It arises by inference of law and need not, therefore, be proved by evidence. Owing to the circumstances of this case I hold that I can award general damages.

The Plaintiff has proved its case in part and is entitled to ₦146,138.18 being cost of 13371 bags of sugar; ₦29,375.00 being money paid to Messrs. Blaesberg on the authorisation of the Defendant company &₦2,000.00 being expenditure for over-time service by Customs.

I disallow the claim for interest on the Bank Overdraft. There was doubtless an unjustified detention of the Plaintiff's entitlement. I hereby award ₦50,000.00 general damages for wrongful detention of Plaintiff's money.

There will, therefore, be judgement for Plaintiff in the sum of ₦227,513.18.

Costs assessed at ₦3,000.00.

14.4 REMARKS

Validity of Marine Insurance contract.Damages for Delayed Settlement.

14.5 REFERENCES

1. American International Insurance Company v. Ceekea Traders Limited (1981) 5.
2. S.C. 81 Companie Maritina v. Oceanus Mutual (1976) 3 All E.R. 243.
3. Incar (Nig) Limited v. Benson Transport Limted (1975) 3 Section 117.
4. The Glenlivet Stream Ship Co. v. Titicombe T.L.R. v. 10 pages 97.
5. Webster v. British Empire Mutual Assurance Company (1879) W.221.

15.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: Federal High Court
Date: April 13, 1988
Suit Number: F HC/L/50/84
Judge: Koko, J.

Mercury Assurance Company Limited (Plaintiff)

vs.

Nigeria Ports Authority (Defendant)

15.2 REPORTS/FACTS/ISSUES

NULEC Industries Limited was the importer of a consignment of telephone antennae which it insured under a marine open cover with the Plaintiff. The consignment was off–loaded from the ship MV – NORDKAP at Apapa Port where the Defendant took custody of same. 212 cartons of the goods were stolen from one of the containers at the Port by persons, three of whom were subsequently arrested and arranged at the court. A loss Adjuster having surveyed the loss on the instruction of the Plaintiff the Insurer settled the claim of the Insured consignee in the sum of ₦24,733.38. By a letter, the Insured subrogated its right to the Insured. Plaintiff brought this action based on negligence against the Defendant claiming the amount paid to the insured with the interest thereon. The Defendant claiming that it was not liable and the Plaintiff as subrogate could not sue in its own name.

15.3 DECISION OF COURT

1. Subrogation is a kind of assignment. The Insured's letter assigning its rights and remedies to the Plaintiff is an effective Subrogation and by virtue of Section 80[1] and [2] of the Marine Insurance Act, 1961, the Insurer could sue in its own name.

2. The liability of the Nigerian Ports Authority as bailee is limited by Sections 91[a] and [b] of the Ports Act. By virtue of this provision, the onus is upon the Plaintiff to establish want of reasonable care and diligence on the part of NPA or its servants.
3. The Defendant was entitled to the statutory protection as it has provided reasonable security and the Plaintiff has to prove want of reasonable care and diligence on the Defendants was one of the persons who stole the goods. The Plaintiffs action was dismissed

Per Koko J.

The Plaintiff's claim against the Defendants, as per writ of summons and amended claim is for the sum of ₦24,733.38, and also interest being special damages said to have been suffered by the Plaintiff as a result of the loss of 212 cartons of color TV antenna containing 2,540 pieces of Antenna as per container No MOLU – 2312174 on board the vessel MS NORDKAP at Apapa, Lagos on 20/2/84.

The Plaintiff also claims from the Defendant the amount of Insurance premium with which the Plaintiff had indemnified the Insured Company by the name of NULEC Industries Limited. The Plaintiff also claims interest at the rate of 10% per annum from 19/4/84 until the date of judgment and thereafter 6% per annum until the final liquidation of the above-mentioned sum. According to the Plaintiff the breakdown of the claims is as follows:

Special Damages

- Cost and freight value of 212 cartons of TV antenna short received by the Plaintiff (insured).
- 1 policeman and 1 representative from the Defendant.

He said all those people including himself noticed a big hole in one of the containers

- The hole measuring about 57 x 40 cm sq and a large position of the contents found missing. He also told the court that at that time they could

not conduct the survey because the Customs Formalities had not been completed and so they had to go back there on 5/3/84 when the survey or examination was carried out in the presence of himself and the following people.

- Representatives from the Plaintiff Company.
- Representative from NULEC Industries Ltd, and one tally Clerk from the Defendants [NPA]. It was at this occasion, according to Mr. Temowo, that they cut open the seal and discovered that 212 cartons of TV antenna were missing and also found four pieces of Antenna (not in cartons) around the area.

The Plaintiff called 6 [six] witnesses to establish its claim against the Defendant, the first Witness for the Plaintiff was Mr. Temowo who said that he was a Loss Adjuster and Marine surveyor in the employment of International Loss Adjusters Limited and said that he was instructed on 27/2/84 to carry out a survey of this consignment. That when he went to carry the instruction, he met the following

- representatives from NULEC Industries Limited.
- representative from Plaintiff antenna [not in cartons] around the area. A report was then made at Apapa Police Station where, according to him and it was also confirmed that some culprits had been apprehended earlier on by the police for being in possession of three pieces of Antenna which were with the Police to be used as exhibits in Court. Mr. Temowo's Company [International Loss Adjuster] then issued their report of their finding in Exhibit 2 to the Plaintiff Company who commissioned them to carry out the survey. The Plaintiff Company also settled the subsequent bill [Exhibit 4].
- The second witness for the Plaintiff was Mr. Chieze Ugwogbu who said he was in the employment of Palm Line Agencies [agents] to the ship owner of the vessel that brought the consignment as the Releasing officer of the said company. He tendered his company's subpoena as Exhibit 5, a letter addressed to NULEC as Exhibit 6, the original bill of the lading as exhibit 7 and the landing Tally as Exhibit 8.

On cross-examination by the defense Counsel, Mr Ugwoegbu told the Court that Exhibit 7 was taken to his company NULEC Industries Nigeria Limited who according to him were the consignee of the goods. Mrs Caroline Chiebonam Aniewelu, the Assistant Manager of the Plaintiff Company was the 3rd witness for the Plaintiff. She started by narrating to the court the sort of Business carried

out by the Plaintiff Company as an Insurance Company and that it was in that light the Plaintiff Company issued out, at about 14/11/81, a Marine Insurance Cargo open cover Policy to NULEC Industries Nig. Ltd covering cargo to the value of N6, 000.00 per annum in the aggregate with ₦750, 000.00 as the maximum bottom limit cover per shipment, she then tendered the said policy cover Exhibit 9. She went on and said that when NULEC Industries Limited informed them of the arrival of this consignment as per the declaration, the Plaintiff then calculated the premium to be paid and which was paid as per certificate [Exhibit 10] which was issued to NULEC after the latter had submitted the attested invoice upon which the value of the interest to be Insured is usually determined. She tendered the said attested invoice as Exhibit 11 and the packing list is Exhibit 12. The witness then went through Exhibit 7 and then said that it showed that the vessel arrived Apapa on 20/2/84 although the relevant Import duties pursuant to Exhibit 7 [Bill of Lading] that when NULEC went to take delivery, they found that one of the containers was breached. That as a result of this information from NULEC the Plaintiff Company the Firm of International Loss Adjusters to carry out a survey as already told the Court by the first Plaintiff witness.

The bill for this exercise was first settled by NULEC lndustries Limited but that the Plaintiff

Company later Indemnified NULEC as in Exhibit 13 & 14 [The discharge vouchers]. The Plaintiff Company then got from NULEC the documents pertaining to all payments made by NULEC in respect of the loss after which the Plaintiff said it wrote Exhibit 15 to the Defendants showing also the right of subrogation as given to the Plaintiff by NULEC Industries Ltd. On cross-examination by the defense Counsel, this witness told the Court that although Exhibit 13 was not on the Leaded paper of NULEC in that of the Plaintiff

Company, the said Exhibit 13 was nonetheless a subrogation authority to the Plaintiff by NULEC Industries Limited.

The 4th Plaintiff witness was Mr. Saka Adeyemo Owoso, a customs officer who came and only tendered bill of entry as Exhibit 18. On cross-examination, Mr. Saka admitted that Exhibit 18 only showed that only two containers were released but did not show number of cartons so released herein the container. He also admitted on cross-examination that Exhibit18 also did not show whether or not the two containers were full.

The next witness was Mr. Pascal Okololu NULEC's Shipping Manager and who testified as the 5th witness for the Plaintiffs Company. The sum total of his testimony was a kind of confirmation that the Plaintiff Company was the Insurance Company for NULEC Industries Limited. He also identified Exhibit 9, 10 & 18. The rest of his story was more or less like that of the first and third witness for Plaintiffs Company. He also added that there was said to have been an employee of the Defendants [NPA] among the three people said to have been arrested in connection with the missing antenna. He also confirmed that the Plaintiff Company paid to NULEC the sum of N23/ 016.7K as a result of which NULEC issued Exhibits 13 & 14 to the Plaintiff Company. On cross-examination, this witness told the Court that the containers in this case were at Adekunle way Apapa quays. Mr. Alex Uzo Akwunwa who was to be the 6th Plaintiff witness was withdrawn by the Plaintiff no sooner than he stated his name as a witness.

For its defense, the Defendants called two witness. The 1st witness was Mr. Fatai A. Davis who was a senior Registrar Grade 1 at Apapa Chief Magistrate Court and the only tendered paper or documents connected with a charge No 18ll84 before she said Chief Magistrate Court. These documents were tendered as Exhibits 25, 25 [a] to 25 [d]. The 2nd witness for the Defendants was Mr. Olatunji Olalegin who was a police officer from the Apapa Port at the time of the transaction which gave rise to the present suit before this Court. He also told the Court that sometime in February 1984 while on patrol along Adekunle way in Apapa with his team, he arrested three men for breaking into a container and that he took these men to the Police Station together with 37 cartons of indoor TV antenna found in their Possession. He said that when he looked into the container he saw indoor TV antenna belonging to NLUEC Industries Limited. He said that he handed over the three accused persons to the station Master before he returned to his patrol team. He concluded his evidence by listing Navy, Army, Air Force and members of the NSO as being those jointly responsible for the security at the Apapa Port at the time. On cross-examination by Mr. Mbadiwe, this witness said that he could not recollect the names of those three men arrested nor was he aware that any one of them was an employee of the Nigerian Ports Authority [NPA] and the Defendants in this suit. In her address, the Learned Counsel for the Defendants Mrs. Frequent made submission on two main issues. These were that if the Plaintiff was suing, as it contented, under subrogation, it cannot therefore sue in its name of NULEC Industries Limited which had given in its name but in the name of NULRC

Industries Limited which had given such a subrogation. She referred the Court to Sec 80 [a] Marine Insurance Act 1961 which is on the right of subrogation. She also referred to the English case of *Yorkshire Insurance Co Ltd Nisbet Shipping Co Ltd [1961] 2 AER 487* which also defines the expression of subrogation as being [no more than a convenient way of referring to those terms which are to be implied in the contract between the Assured and the Insurer to give business efficiency to an agreement whereby the Assured in the case of a loss against which the policy has been made shall be fully indemnified; and never more than fully indemnified". Mrs. A. Freqene also referred to Section 51[1] of the Marine Insurance Act 1961 but which I venture to say is not relevant since Plaintiff said that it was suing in its own name. Mrs. A Freqene citied another English case of King vs. Victoria Insurance Company Ltd [1896] AC 250 where it was held, among other things that a subrogation by Law does not give the Insurer a right to sue in Court of Law in his own name. The second major issue on which Mrs. Freqene addressed the Court was that of intelligence. It was her submission that the Defendant was not negligent in the handling of the missing items the fact that the said items were found missing notwithstanding. She supported this submission by the evidence of the 2nd Defense witness who as I said earlier on, told Court of the security measures adopted by the Defendant. She concluded her address by urging the Court to hold that the Defendant is after all, protected by the provision of

*Section 91 Ports Act as held in the case of NPA V Akar & Sons [1965] I ANLER 253 at 263.*Mr. Mbadiwe the Learned Plaintiff Counsel notwithstanding, the Plaintiff can still sue, under subrogation in its own name if the Plaintiff can show as in this case according to M. Mbadiwe that it has Insurable interest. Mr. Mbadiwe relied on section 7 [1] [&] Marine Insurance Act wherein an Insurable interest has been defined as follows.

"7[1] subject to the provision of this Act every person has an Insurable interest who is interested in a Marine adventure"

"2" In a particular a person is interested in a Marine adventure where he stands in any legal or equitable relation to the adventure or to any Insurable property at risk or equitable relation to the adventure or to any benefit by the safety or due arrival of Insurable property, or may be prejudiced by its loss or damage thereto, or by the detention thereof or may incur liability in respect thereof.

Here I respectfully observe that the English case of *Rosenthal vs. Alderton & Sons [1946] IAER 583* citied by Mr. Mbadiwe is not relevant since the ratio decidendi in that case does not support Mr Mbadiwe's submission above in the instant case. The issue in that case was assessed as at the date when the action arose or at the date of judgment or verdict. My view on the case *Kaycee vs. Prompt Shipping Co Ltd [1986] 2 NWLR part 23 p. 458* are citied by Mr. Mbadiwe is also the same in that the decision in that case does not support the above submission of Counsel in the instant case before me. Mr. Mbadiwe then concluded this leg of his submission by placing reliance on sec 80[1] Marine Insurance Act 1961 and another English case of *Castellian V Preston & Others [1881- 85] AER Reprint 493 at 495 – 6* where it was held, among other things at page 495 that "Every Contract of Marine or Fire Insurance is a contract of indemnity and of indemnity only, the meaning of which is that the Assured in case of a loss is to receive a full indemnity, not is never to receive more" Mr. Mbadiwe also contended that the Plaintiff had shown that the loss occurred when the goods were in the custody of the Defendants and that since it was said that an employee was one of the culprits caught with some of the missing antenna, the protection offered by sec 91 Ports Act cannot be available to the Defendants in the presents circumstances. The issue for decision by this court can now then be said to be in the following manner.

1. Whether or not the Plaintiff can sue in its own name where it sues as in this case under subrogation as in the provision of Se3c 80[1] Maine Insurance Act.
2. Whether or not section 91 Ports Act can be relied upon to offer protection to the Defendant can be held liable to the Plaintiff.

The fact that the consignment in this suit were shipped on board the vessel "NORDKAPO" for the benefit of NULEC Industries Limited is not disputed nor is the fact that the present Plaintiff Company being the Insurance Company with which NULEC has entered into a contract of Marine Insurance. It is equally not disputed that the said NULEC suffered a loss of part of the consignment which were not delivered by the Defendant who previously took custody of the whole consignment including the subject matter of this suit. Here Exhibit 6 refers. It is also not disputed that NULEC paid all the relevant duties and dues in respect of the whole consignment including the missing ones. It also agreed that the Plaintiff Company had made good the loss suffered by NULEC Industries Ltd and as a result of which the latter is said to have issued Exhibit 13 to the Plaintiff

Company as the bedrock on which the Plaintiff Company relies in bringing this suit.

This Exhibit 13 which is written on a sheet of headed paper belonging not to NLUEC but the Plaintiff Company reads in the second paragraph as follows:

"You [Plaintiff Company] have authority to use our [NULEC'S] name and extent necessary to affectively exercise all or any of such rights and remedies. We will provide all necessary documents and give your assistance you may reasonably require of us in exercising such rights and remedies. On your part, you will bear all cost, charges and expenses arising in connection with any proceedings which you may take in our name in the exercise of such rights and remedies".

From this Exhibit 13 coupled with the provision of Sec 80[1] and [2] Marine Insurance Act 1961, I have no difficulty in coming to the conclusion that NLUEC has subrogated its right and remedies to the Plaintiff Company and that the issue of whether or not the Plaintiff cannot sue in its own name cannot, in my view, be fatal to destroy the action. I am further strengthened in this view by a passage on p. 256 of the decision in the case of *King vs. Victoria Insurance Company* [supra] where Lord Hodhouse said a payment honestly made by Insurers in consequence of a policy granted by them and in satisfaction of a claim by the Insured to the remedies available to the Insured and that the highly artificial defense of a Defendant in that regard shall fail". After all, it is my respectful view that the art of subrogation is a kind of assignment on which the above English cases were decided.

Now that it is my holding that the Plaintiff can sue the Defendant under the rule of subrogation, can the protection of Section 91 Ports Act be available to the Defendant in this suit. This brings in the case of Nigerian Ports Authority vs. Ali Akar & Sons which held that:

1 When a chattel to a bailee is lost, the onus of proof is on the bailee to show that the loss did not happen as a consequence of his failure to use reasonable care and diligence.
2 But if a bailee's liability is limited either by contract or by statute, the onus of proof shifts to the bailer to prove want of reasonable care and diligence.

3 That on the plain meaning of Sec 91[a] and [b] of the Ports Act [cap155] the onus is upon the Plaintiffs, to establish want of reasonable foresight and care on the parts of the NPA or its servants.

In the instant suit, it has been alleged that an employee of the Defendant was among those said to have been arrested in connection with the missing TV antennae.

It is my humble view that such assertion or allegation is not enough a proof to make the Defendant liable. As things stand now the Court has been told who this employee was nor position in the employment of the Defendant – all this gives a very hazy picture of that allegation and which, I humbly say, cannot be relied upon the Defendant liable merely on that account alone.

I am therefore satisfied that the Defendant has provided reasonably security and that the Plaintiff, on whom the onus lies to prove otherwise against the Defendants has not done so. I therefore say and rule that the protection under the provision of Sections 91[a] and [b] Ports Act is available to the Defendant in the present suit before me.

It therefore goes without saying that it is not necessary to go further from here. The Plaintiffs action against the Defendant, in its entirely, must therefore of necessary fail and Is hereby dismissed accordingly and the Defendant are hereby held NOT liable to the Plaintiffs.

15.4 REMARKS

Marine Insurance - Insurer's Right of Subrogation – Liability of the Nigerian Ports Authority as Bailee.

15.5 REFERENCES

1. Castellain vs. Preston & others (1985) AER
2. Kaycee v. Prompt Shipping Co. Ltd. (1982) 2 NWLR pt3, page 458
3. King v. Victoria Insurance Co. Ltd. (1896) SC 250
4. N.P.A. v. Ali Akar & sons (1946) AER 583
5. Yorkshire Insurance Company Limited v. Nisbet Shipping Co. Ltd. (1961) 2 AER 487.

16.1 ARRANGEMENT OF MATTER, COURT AND DATES.

Court: Federal High Court

Date: 3rd August

Suit Number: FHC/L/198

Judge: Belgore, J.

Oluwanishola Development Company (Plaintiff)

vs.

Guinea Insurance Company Limited (Defendant)

16.2 REPORTS/FACTS/ISSUES

Marine Insurance policy: Effect of Fraudulent Misrepresentation of Material Fact. The plaintiff took out a marine insurance policy with the defendant for consignment of goods … ordered from abroad. The documents presented by the plaintiff to the defendant indicated that the goods were shipped from Hong Kong on board the vessel "ocean strength" and comprised 100 cases of baby carriages each case containing 100 pieces, based on which the defendant agreed to insure the goods for ₦318,401.00 against all risks of loss or damage.

Subsequently, the plaintiff made a claim for indemnity under the policy from the defendant alleging that on arrival in Nigeria, only 13 cases containing 1,300 pieces of the goods were short-delivered to it, the rest being missing.

The defendant repudiated liability on the ground that the plaintiff made fraudulent misrepresentation of the facts within its executive knowledge at the time it approached the defendant for marine insurance cover for the consignment. Whereupon the plaintiff instituted an action in court claiming the sum of ₦187,866.09 being the cost of 59 cases of the baby carriages insured under the policy.

In court, the defendant objected to the claim contending inter-alia... that it could avoid the policy on the ground of fraudulent misrepresentation made by the plaintiff as the plaintiff had presented forged documents indicating that each case contained 100 carriages, instead of 2 being the actual figure, thereby grossly inflating the total consignment which should have been 4,740 pounds only. Furthermore, the goods were shipped from Taiwan and not Hong-Kong.

16.3 DECISION OF COURT

Held,

1. The plaintiff is not a witness of truth and his testimony in the witness box, being equivocal, is disbelieved by the court.
2. The invoice and packing list presented by the plaintiff to the defendant contained incorrect and fraudulent particulars on which the marine insurance policy was based. There was an over valuation of the consignment and this amounted to a material misrepresentation, which made the policy voidable at the defendant's stance.
3. The invoice sent by Percentum; it in Taiwan was the true invoice of the baby carriages from which the court could glean the fact that 200 pieces of baby carriages costing 4,740.00 pounds were ordered by the plaintiff and not 10,000 pieces costing 300,000 pounds as claimed by it.
4. In disproving a plaintiff's claim, the standard of the proof required of a defendant must be commensurate to the gravity and the allegation against the plaintiff.

The defendant, in this case has discharged the standard beyond reasonable doubt by giving detailed evidence of discrepancies or misrepresentation and fraud perpetrated by the Plaintiff in connection with the marine Insurance policy.

5. By virtue of S19 and S20 of the marine Insurance contract is based on utmost good faith required full disclosure of all material facts to the transaction by parties.
6. Based on the evidence adduced, the plaintiff did not disclose all the material facts he actually knew when he was taking out the insurance policy and thereby did not act in utmost good faith and by virtue of which THE DEFENDANT COULD AVOID THE CONTRACT.

- Plaintiff's claim dismissed

JUDGEMENT

Per BELGORE, J.

The plaintiff claims a sum of ₦187,866.09 being the cost of 59 cases of baby carriages insured on a marine policy with the Defendant. The Defendant denied liability on various grounds. The Plaintiff's account was given by the first witness one Yisawu Olateju Yusuf who carries on business in the name of Oluwanisola Development Company at number 38 Ideolowo. He insured 100 cases each containing 100 pieces of baby carriage with the Defendant. He ordered the goods in 1981 from...Thomas in Hong-Kong and the goods were shipped from there and arrived in 1982.

He purchased the goods through proforma invoice. He got form M which he tendered as Exh.B. He got D/A from the Bank of the North at its Balogun Street branch and he had 6 months to pay after the receipt of the goods. When he took the insurance the Defendant gave him Exh.A.

The goods, Baby Carriages were carried in a vessel named "ocean strength". He got a bill of lading of the goods which he tendered as Exh. D. the goods arrived in Nigeria in May 1982, and out of the 100 cases only 13 cases containing 1,300 pieces were delivered. Inter-contra Lloyds Agency informed the Plaintiff that 41 cases were off -loaded but only 13 cases were found.

The shipping company also informed the Plaintiff that 41 cases were tendered but that 59 cases were not discharged and he was given Exhibit E.

The witness reported to the defendant and the defendant stated that the company would investigate. He obtained Adjusters report Exhibit F. But later the Defendant said that they would not pay because he claimed that there were hundred pieces in a case whereas there were only two pieces. The letter in which the Defendant made this statement is Exhibit G.

Under cross examination, the witness said that he had sold the goods since 1982, and he did not know to whom or where he sold the goods to. He saw the baby carriage but he could not describe it by giving its size. He did not describe the type of baby carriage he wanted. He ordered 10,000 pieces of baby carriages and

he had no other consignment of baby carriages in the same vessel that carried the relevant baby carriages. He did not order any baby walkers from another exporter in Hong-Kong at the same time and he was not making a claim on another insurance company on account of baby walkers shipped in the same vessel as the relevant baby carriages.

The witness says he knows Omoniyi Shola & Company that they were not sharing the same office but that Omoniyi Shola & Company used to come and type some documents in his office. He would not be surprised that Omoniyi Shola & Company used his office address on his Omoniyi's headed paper. He did not know that Omoniyi Shola & Company ordered 100 cases of baby walkers shipped on "ocean strength". The Baby carriages he ordered was not like the one shown to him in the catalogue.

The witness had heard of export Industry Corporation through friends though he did not have any trade with them. He knew that export Industry Corporation and F.M. Thomas Trading Company used the telex number but did not know that the same person owned the two companies. The witness identified a document which was admitted as Exhibit H.

The witness stated that his company wanted to order glass from export industry corporation but did not do so again. He could not say whether Exhibit H was prepared in his office or in Hong-Kong but denied having blank form of confirmation of export from Industry Corporation in his office.

He did not know that the baby carriages were from Taiwan. It was not correct that the number of baby carriages in a packing case should not be more than four. It was not correct that the number of baby carriages in a packing case should not be more than four, his own cases contained 100 pieces each.

The second witness for the plaintiff was a staff of Bank of the North Lagos branch. He testified that 1.P. W used to be a customer of the bank operating a current account which he opened on the 7th May, 1981.

Speaking from records in the bank, the witness stated that the bank had a document in its custody, a document from F. Thomas in Hong -Kong as

exporting to the plaintiff 10,000 pieces of baby carriages. He tendered three documents Exhibits J to J3. and commented that on observation of the documents, the 1.P.W had not paid the bank. He was not owing them as they were collecting banks only, he would be owing the suppliers F. Thomas. The 1.P.W. registered form M with the witness bank. The documents of the goods came from Llyods Bank in Hong-Kong.

Under cross examination, the witness tendered as Exhibit K the bill of exchange. Under normal international practice Llyod's Bank would be banker of the supplier F.M Thomas. His bank had received many queries from Llyod's Bank asking for payment, the latest of such queries being in November, 1983.

The plaintiff ceased to be a customer in 1984. The witness could not say how many transactions the plaintiff dealt through the bank, but he could remember another one which the plaintiff dealt through the bank, the remitting bank in the other transaction was Lloyd's bank of Hong Kong also. Witness could not say who was the supplier of the goods of the other transaction seventeen tracers were admitted as Exhibits L1 to L17. That was the Plaintiffs case.

The first witness for the Defendant was a marine investigator by International Chamber of commerce. Her duty included investigation of all cases of fraud in the shipping industry and she had investigated more than 30 cases of that nature in Nigeria. During her investigations she had come across a company named Oluwanishola Development Company making claims more than six times on insurance companies. She undertook investigation at a later stage of the case the baby carriages imported by Omoniyi Sola from Taiwan. The baby carriages were carried by a vessel called "ocean strength". She investigated also the case of Oluwanishola Development Company which was a case of baby carriages also. The supplier of the baby carriages also. The supplier of the baby carriages were Parcentur Company Limited in Taiwan. The proprietor of the company handed over the catalogue and she tendered it as Exhibit M.

She found also that Percentum shipped three consignments on "ocean straight" to Oluwanishola Development Company in Lagos. The proprietor of Percentum gave her some documents about the goods shipped, which she tendered as Exhibit N. The goods were shipped in Keelung in Taiwan, but the Bill of Ladin

was to be changed in Hong-Kong from Taiwan - Lagos to Hong-Kong - Lagos. The witness did not come across Exhibit C during her investigation but observed that Exhibits C and N had the same number. The Bill of Ladin in Exhibit N showed that the boxes inside which the goods were packed measures 5.7 meters hence it was not possible to have 100 baby carriages inside one, since according to the Bill of Ladin list. Exhibit N, the net weight of one baby carriage was 41 kilograms and gross and gross weight was 16 kilograms. There was no weight of the goods shown in exhibit C on Exhibit D. which was the packing list prepared by F. M. Thomas, net weight per case was given as 218 kilo grams net.

According to registration of the company in Hong Kong, F.m Thomas did not carry out the packing of the goods in this case. The witness had a colleague by name David Belsham who also investigated this case but had left the bureau. The witness is familiar with his handwriting and tendered the note he made about the case. The note is admitted as Exhibit 0106 09.

Under cross-examination, the witness admitted that she did not personally investigate the case in Hong Kong. Exhibit N was consigned to Oluwanishola Development Company of P.O Box 9575. Lagos so also Exhibit D. Exhibits C&D did not disclose country of origin of the goods.

The second witness for the Defendant was the claims manager of American International Insurance. He knew a company called Omoniyi Ishola company.

The company had a marine insurance policy with American International Insurance Company sometime in 1982. The company filed a claim for short Landing of baby Walkers carried by a vessel known as "ocean Strength" The witness company carried out Investigation and found that no such loss arose and the company refused to pay. The witness Identified 1.P.W as the person who made the Claim. The witness stated that it would not be correct if 1.P.W should say he did not know Omoniyi Ishola Company as that witness's Company dealt with IPW throughout the investigation of the claim.

The Defendant which comprised Exhibit N showing the quantity to be 200 pieces. The Obvious Inference was that the plaintiff arranged with FM Thomas to get more foreign exchange that he was entitled.

The contract of Insurance was therefore Unenforceable for there was misinterpretation on the part of the Plaintiff. The Plaintiff was also not entitled to the foreign exchange he was claiming.

Misrepresentation affects Exhibit A. as it alleged 10,000 pieces instead of 200 pieces. There is no good faith and by virtue of Section 19 of the Marine Insurance Act. 1961 the Defendant can disclaim.

Section 20 of the Act deals with disclosure while S.22 (1) & (2) deals with misinterpretation.

A letter written to Omoniyi Ishola Co. was tendered as Exhibit p. and a claim filed by the Omoniyi Ishola Co. was admitted as Exhibit A. The witness stated that I.pw personally brought it to him. A letter written by the witness Company rejecting the claim was admitted as Exhibit R.

The 3rd witness for the Defendant did not contribute to the case either way and with his evidence the Defense Closed its case.

In his Submission learned counsel for the defendant stated that the most important point in issue was whether the goods Insured by the Plaintiff comprised of cases, each case containing 100 pieces of baby Carriages or whether each of the 100 cases contained only two baby carriages. The Plaintiffs case was the former's assertion while the Case of the defendant was the later contention. The Plaintiff tendered Exhibit B, Form M.S.91 of the Marine Insurance Act incorporates usages of law merchant into our law and by the usages, non-disclosure and misinterpretation affects the validity of Insurance Contract. Arnolds law of Marine Insurance 16th Ed. Vol. 2, p.400.

There is evidence in Exhibit N issued by the Percentum Company that packed the goods in Taiwan showing the value of $5000 against the evidence on Exhibit B being invoice prepared by F.M Thomas and upon which the Plaintiff Insured the goods for $500,000 as its value and this amounts to an illegality which is

contrary to S.44 for Exhibit A shows the place of origin of the goods to be Hong Kong whereas it was Taiwan.

The Plaintiffs claims should be dismissed. In his Submission Counsel for the Plaintiff stated that the totality of the defense case was an allegation of commission of crime by the Plaintiff. Paragraph 5 of the amended S/D Shows the offences under SS. 418 and 419 of the criminal code, the defendants must prove the case beyond reasonable doubt. The State V Fagbolu & Other 1 L.R.N I/l

On Plaintiffs case, counsel Submitted that the description of the Baby's Carriage was not given and the Exhibits C&P Showed that the goods originated from Hong Kong and not Taiwan • Documents tendered by the Defendant were copies and there was no signature of the maker on Exhibit 01 to 09.

The information given by the Plaintiff to the Defendant was the only one in his possession and there was no misrepresentation Plaintiff's had not contravened S.42 of the Marine Insurance Act. Evidence of the other Case of Omoniyi was irrelevant to the Plaintiff's case the Plaintiff was entitled to Judgment.

This is a Marine Insurance where the plaintiff went to insure some goods he ordered from abroad. There is no evidence as to the discussion between the Plaintiff's witness and any of the Defendant's representative.

So it was not possible to know what actual representation was made, voluntarily or through reply to question or enquiry. We can only guess this through documents tendered in evidence the first of such document was Exhibit A which was a Certificate of Insurance issued by the Defendant to the Plaintiff dated 8th February 1982. The goods insured according to Exhibit A were 10,000 pieces of baby Carriage according to preformat invoice dated 10th September, 1981 lodged with the Defendant Company. The goods were conveyed by an approved steamer from Hong Kong and the goods were Insured for a sum of $318,401.00 the Insurance was against all risk of loss or damage to the subject matter. That for the purpose of this claim were the relevant Information on Exhibit A.

The next document is Exhibit B Form M under Exchange Control Act 1962.It showed that the Plaintiff was allowed to send a total sum of US $500,000.00. US $495,500 for value and us $4,500 for freight to F.M Thomas Trading Company, Company in Hong Kong. The amount is the value and freight of 10,000 pieces of baby carriages. The country of origin and that of supply of the carriages were given as Hong Kong.

The Information contained in Exhibits A&B could not only be supplied by the Plaintiff to the different bodies that issued them. The Plaintiff did not deny supplying the information. There is also in his category Exhibit D. which is the packing list prepared by F.M Thomas Trading Co. showing that Exhibits C and D where 100 cases were mentioned.

The Information contained in Exhibits C&D are from F.M Thomas Trading Company. There are Exhibits J, K. & L. tendered by 2 .P.W Exhibit was a bill of notice to the Plaintiff Showing that 100 cases of baby Carriages was shipped in S.S Ocean Strength by F.M Thomas Trading Co. to the Plaintiff.

The value of the 100 cases was quoted as us $500,000.00 Exhibits S2 and J3 being letters to a bank in Hong Kong and another to the Plaintiff each of US $500,000.00. Exhibit K is bill of exchange while Exhibit L1 to L17 are reminders to the bank in Hong for payment The Last of such reminders Exhibit L17 was received by Bank of the North on 23rd November 1983.

If the evidence of the Plaintiff is believed, the Defendant would be liable but the Defendant contended that the evidence of the Plaintiff was not and could not be true.

In the paragraph 5 of their amended statement of Defense, the Defendant stated:

At the time of the Insurance being effected by the Plaintiff.

a. Misrepresented to the Defendants facts then material to be known to the Defendants and which were or ought to have been known to the Plaintiff but which were not (or presumed to be known to the Defendants).
b. Wrongfully concealed from or did not disclose to the Defendants material facts, then known to the Plaintiff and unknown to the Defendants, then material to be known to the Defendants.

c. PARTICULARS

i. Each of the 100 cases of baby carriages was alleged at the time of the contract to Contain 100 pieces or units of baby carriage. whereas in fact and to the knowledge of the Plaintiff each of the said cases contained Only 2 pieces or units of baby carriage

ii. The Plaintiff knew that the place of departure of the ship was Taiwan, yet to the Knowledge of the Plaintiff, the Defendants were led to believe that the Said goods were to be shipped directly from Hong Kong

iii. The Value or cost of the consignment as disclosed in invoice shown to Defendants at the time of the contract was US

iv. The Plaintiff made no complaints when he took delivery of 13 cases of the goods and must have known that there were only 2 Baby carriages in each cases. This fact be relied upon to establish that at all material times the Plaintiff knew that the number of Baby carriages in each was not more than 2 only.

The Plaintiff was not merely making or attempting to make payment in respect of goods supplied to him by overseas sellers (for which he may have received the necessary permission of Central Bank) but he was also In fact making or attempting to make additional payment of money over and above the true price of the said goods for which he had no permission of the central bank or the Federal Minister of Finance) in Contravention of the Exchange Control Acts, 1962

To establish their contention, the Defendant called two witnesses and tendered some documents 1. Deal with documents first. There was Exhibit K which was tendered through cross examination of the Plaintiffs witness. It is a copy of the bill of exchange of the goods and amount to be paid. It only mentioned 100 cases and not number of pieces. Next there is Exhibit N a copy of the original Invoice of the goods Sent to the Plaintiff. $500,000.00 whereas in truth and fact the said value was no more than US $4,740.00.

v. It was falsely represented to the defendants by the Plaintiff that the supplier of the goods were FM Thomas Trading Co. P.O Box 3116, Hong Kong when in fact the suppliers of the goods were PERCENTUM LIMITED of Taipei in Taiwan.

From the document, it was learnt from F.M Thomas was no longer trading but only remained to collect outstanding dues and that in respect of the relevant current shipment, F.M Thomas only acted as an intermediary between Nigerian buyers and Taiwanese suppliers on commission basis. It was sent by Percentum Company Limited (Taiwan Branch) to export Industries Corporation G.P.O box 6179 Hong Kong with Shipping mark: Olushola 254340 Lagos/Apapa No 1-100 made in Taiwan R.O.C

The Invoice contains further information of the country of origin as Taiwan ROC OF the goods being 100 cases only and 200 places Of baby carriage iron pipe, colour red," blue and green. Unit C&F Lagos price was US $22.70 and total amount being us $4,740.00 exhibit N has attached to it, the packing kits which contains identical information of a Certificate of origin showing the exporter and Importer of the Number of pieces. Also attached to Exhibit; is the Bill of Ladin which bore the same number KEHK5001 with Exhibit C. The Cases were in each 100 and in each the number of pieces were not given. The latter contained an authority for the Bill of Ladin to be switched at Hong Kong by Mitsui Os. Kunes Limited.

There is exhibit O where the maker did not give evidence but the document was tendered by another witness under S.90 of the evidence Act, because the maker of the document who's handwriting the witness was familiar with had left the bureau and his whereabouts unknown. The goods got to Hong Kong already packed and were transshipped only in Hong Kong. The document confirmed there were 100 cases.

What in my opinion makes these information of little value is the capacity of Tamchung Yur who gave them to the recorder. We are not told his relationship to F.M Thomas and he did not give evidence to provide opportunity for questioning. This makes me not place any weight on the evidence.

The main issue in this case is not whether the Plaintiff took a policy of Marine Insurance from the Defendant or not but what was the quality of the goods Insured? What are the numbers of baby carriages Insured and what are the numbers ordered by or sent to the Plaintiff? It is the duty of the Plaintiff not only to prove that he Insured certain number of the goods and that the number he Insured were those he actually ordered and those that were sent to him.

Though there is no direct evidence to that effect, he must have told the Defendant that he ordered 10,000 pieces of baby carriages, hence the Defendant could not put out such an information in Exh.A and the Plaintiff could not institute this action for short delivery of his ordered goods. The Plaintiff also put 10,000 pieces of Exh.B, form M, thereby informing the Central Bank of Nigeria that he places order for 10,000 pieces of baby carriages.

The two sources of evidences are from the Plaintiff only deducible from document. There is no direct evidence on the fact that he ordered 10,000 baby carriages, not that these are essential.

I must at this stage comment on the evidence of the 1.p.w and the impression he cast in the witness box particularly under cross examination. To me he was not witness of truth. He was not forthcoming in his evidence-in- Chief and denial of facts in his cross examination He denied being connected with Omoniyi Shola despite that the documents of the company were in his office and on this letter headed Paper. His explanation is unconvincing in the face of positive evidence of 2.D.W his denial of connection with Omoshola is a lie. He denied having other goods in "Ocean Strength" besides the one which is the subject of this case, but in view of the evidence of 1st and 2nd DW that is a lie.

He first denied having a trading connection with EXPORT INDUSTRY CORPORATION but when shown Exhibit H. He admitted that his company wanted to order glass from the company before.

He denied having another claim on another light of the Insurance Company but in the evidence of 1st and 2nd witnesses for the defendant and Exch. R that denial is false

He denied Knowledge of Omoniyi Shola & Co ordering baby carriages but in view of Exh. R and evidence of 2.D.W that cannot be correct. He lied in cross-examination that he did not know Omoniyi Shola ordered 100 cases of baby walkers carried in "Ocean strength" in the face or Exhibit R and evidence of

2D.W. All those eroded his integrity and make him most unreliable and a suspect.

What is the quality of evidence he has produced? He has alleged that 10,000 pieces had been ordered, the same number had been shipped but less number had been delivered. It is left for the defendant to show that the prime- facie case established is not what it appears to be. What is the degree of proof, the Defendant must be present to prove a case or disprove the Plaintiff's case in proving its case, the gravity and nature of allegation against the plaintiff determine whether it is to be proved beyond reasonable doubt or upon a balance of probability. The standard of proof must be commensurate to the nature of the allegation against the Plaintiff; but the division is not one the line of Criminal allegation or non-criminal accusation. Allegation of fraud has to be strictly proved and with his evidence the Defense closed its case.

In his submission Learned Counsel for the Defendant stated that the most important point in issue was whether the goods Insured by the Plaintiff compromised 100 cases each; each case containing 100 pieces of baby carriages or whether each of the 100 cases contained only two baby carriages. The Plaintiffs case was the former's assertion while the case of the Defendant was the later contention. The Plaintiff tendered Exhibit B, Form M. showing 10,000 baby carriages. These evidences have to be compared with those of the Defendant which comprised Exhibit N showing the quantity to be 200 pieces.

The obvious inference was that the Plaintiff arranged with F.M. Thomas to get more foreign exchange that he was entitled.

The company had a Marine Insurance policy with American International Insurance Company sometime in 1982. The company filed a claim for short landing of baby walkers carried by a vessel known as "Ocean Strength". The witness company carried out investigation and found that no such loss arose and the company refused to pay. The witness identified 1.P.W as the person who made the claim. The witness stated that it would not be correct if 1.P.W should say he did not know Omoniyi Ishola & CO. as that witness's company dealt with 1.P.W throughout the investigation of the claim.

A letter written to Omoniyi Ishola was tendered as Exhibit P and a claim filed by the Omoniyi Ishola was admitted as Exhibit Q. the witness stated that 1.P.W personally brought Exhibit Q to him. A letter written by the witness company rejecting the claim was admitted as Exhibit R.

The 3rd witness for the Defendant did not contribute to the case either way whereas that of misrepresentation may not have such a high standard of proof because misrepresentation may be fraudulent or innocent. But this division is only a guide not a rigid rule thus in Slattern v Mance 1962 1.Q. B. 676 a case of marine claim covering perils of the sea for loss of a vessel by fire; it was held that once the assured had Shown that loss was caused by fire, the onus of proving on a balance of Probabilities that fire was caused or connived at by the Assured rested on the Insurer. Thus the onus was placed on the Plaintiff and he has to discharge it on a balance of Probability.

Having this principle of law in mind, I will now decide which evidence I believe and why I do so.

I do accept Exhibit N as the true invoice of the baby carriages sent to the Plaintiff my reason for doing so are firstly, the plaintiff did not produce any Invoice for the goods nor did he produce any evidence oral but particularly document of the goods he placed order for. Secondly, the Plaintiff did not deny the document Exhibit N as the correct invoice as cross examination of the witness that rendered the document did not suggest a denial of it nor did the cross-examination cast doubt on its authenticity.

The only cross examination of Exhibit N was to whom was the goods in Exhibit N consigned to?" which brought out the answer that it was consigned to Oluwanishola Development Company of P.O Box 9575 Lagos: Thirdly there is oral evidence which I believe, that Exhibit N was obtained from Percentum Limited, the exporter of the baby carriages in Taiwan. Also attached to Exhibit N is a bill of lading in respect of the same goods. This document bears the same NO KEHK 5ool as Exhibit C the bill of lading prepared by FM Thomas Trading company while Exb.C is very scanty of necessary information, the other bill of Ladin has detailed information particularly as it contained instruction for the bill of ladin to be switched at Hong Kong by Mitsul O.S.K lines Limited.

The consequence of my accepting Exhibit N as authentic are that the baby carriages exported to the Plaintiff were from Percentum Limited in Taipei, Taiwan through Export Industries corp. of Hong Kong and not F.M Thomas. The number of Pieces exported were 200 baby carriages and not 10,000 baby carriages as given in Exhibits A, B and D as claimed by the Plaintiff. The total Cost was US $4, 740. That should be the amount on Exhibit B as that was the amount entitled to be transferred out of the country for 200 baby carriages. I found that Exhibit B is not only incorrect but that it is Fraudulent. Further consequence of my accepting Exhibit N as the correct invoice of the goods Sent to the Plaintiff and which the Plaintiff Insured In Exhibit A are that information in Exhibit A as to the number of baby carriages was false, the Insured value of ₦318,451 if for 10,000 carriage was at best false and at worst fraudulent and if for less than 10,000 carriages, grossly inflated as such over valuation had been held to beg misrepresentation. See William v Atlantic Assurance Co. Ltd 1932 AUE-R. (Rep) 32 does not contain the invoice number as the other one contained. These two omissions are fatal for if the weight of each cuticle is given and that of each case is given. It can easily be Known how many articles can possible be in each box. The invoice number also will the down the goods to their original source. In the result and at best, Exhibit D cannot be called a reliable one.

From the conclusion I have reached on Exhibit N. I found that the four main documentary evidence relied upon by the Plaintiff are suspect at best-Exhibit E are not relevant to the issue, for Exhibit E Is the number of cases complained missing while Exhibit E though inconclusive, also talks of cases missing The issue Is not cases missing, If any was missing, but the number of goods In each case, the total number of the goods. Insured and their value. For it is established that there was misrepresentation or fraud it goes to the root of the whole Contract Insurance and It is Immaterial whether one or two are missing since the whole agreement is voidable on account of misrepresentation or fraud. But it is not enough that misrepresentation or fraud had occurred, either or both must be related to the Plaintiff. There is the possibility that F.H Thomas played fraud on the Plaintiff and the Plaintiff was deceived by what F.H Thomas in giving information contained in Exhibits A/B.

This seems somewhat far-fetched as the plaintiff must know the amount of money he was ready to spend on the goods. But more than that the case of the Plaintiff was more equivocal In that it did not present in evidence the order he made containing the number of goods he ordered and their total amount. Secondly, he did not give oral evidence of these. I say that Exhibit C is deliberately vague by leaving out the gross weight and measurement, two very important criteria to determine the number of baby carriages that could be in the packing case.

The packing list Exhibit D is also inaccurate by emission and compared with the packing list attached to many information are missing. It does not give the weight of each article but only gave that of each packing case which facts when he testified in Court. Thirdly, F.H. Thomas could not have asked him to send more money than the amount of the goods it sent. Fourthly as I have accepted Exhibit H, the Plaintiff would have discovered that each box contained 2 baby carriages and he should have released that 100 cases could not have contained more than 200 baby carriages, thus his claim of more than those number cannot be said to be innocent.

Then there is the case of Exhibits P&R and evidence of the second witness for the Defendant. The witness who has a claim manager of American International Insurance Co. related to the story of a claim for short delivery of baby carriages carried in a vessel "Ocean Strength" at the same time with the baby carriages relevant to this case. The American International Insurance Company claim was by a company known as Omoniyi Ishola & Co. of the same address 38, Idoluwo Street, Lagos, as the present Plaintiff. The bill of lading of baby carriage was KENK 5003.Just two numbers more than one of the bill of lading of the present case. It was 100 cases of baby walkers involved. The witness stated very categorically that 1.P.W was dealing with his company In respect of the claim and he was not cross examined on this issue.

Then there is Exhibit R Paragraph 20F which says: "We have come out of a thorough Investigation with the documents enumerated above and shockingly our findings was a wanton discrepancy bordering on forgery.

Before we proposed to elaborate, we like to mention that this Vessel also carried other Consignment of baby walker belonging to your sister companies and Yusuf Yisawu Brothers, both of the same address with your own company".

The Exhibits went in paragraphs to give details of inconsistencies and dubious practices discovered. The two paragraphs read: - “A copy of the tally Sheet you gave to us indicates that 42 cases only were landed and were conveyed by lorry with registration number LA-513-W driven by one N. Oladele. Regrettably, this does not in any way appear in N.P.A's records you equally gave us a form T-38 which. States that one pallet landed in loose condition with 21 cartons from the ship. If this is correct, then where did the Lorry No LA 513-W get 42 cases to carry?

These two documents were submittedby you and they are conflicting in details and facts The bill of lading talks of, 100 cases and then from 7 38 talks of pallet again, these are conflicting we like to also draw your attention to palm line's tally slip No 16604 covering the landing of this consignment It states clearly that 44b has 2 pallets, Oluwanishola 3 pallets and Omosola 3pallets (extended totally ship No 16568). Again, Palm Line Agencies who conducted the landing of these Cargoes talks of pallets while the Bill of Ladin and the two certificates you brought to us talk of cases. We do not understand these discrepancies. In a written statement which you signed for us, you indicated that the Nigerian General Insurance Company Limited was the insurer of YB and Oluwanisola, yet the document sighted gave a different insurer this is another dement of the perpetrated on the shipments "A contract of Marine Insurance is a contract based upon the utmost good faith and if the utmost good faith is not observed by either Party, the contract may be avoided by the other party" quantity of your consignment discharged ex the subject vessel. The only one case outstanding should be referred to the Shipping Company concerned for settlement".

In effect the N.P.A denied that 37 cases were short landed in your shipment and equally denied that the cases landed discrepant. Of course, your shipping company is issued a short landing certificate No-09a1l dated 23rd July 1982 to cover the only one case short landed".

I went on this length to give details of discrepancies or misrepresentation or fraud established by the Defendant. The incident related by 2.D. W and showed by Exhibit R cannot in my opinion be a mere coincidence but part of an elaborate system to deceive and commit fraud. I present these evidence also to show that whatever degree the onus on the Defendant might be expected to discharge they have discharged it beyond reasonable doubt "And thirdly I have highlighted these facts to show that the plaintiff was fully aware of the true fact and chose to present a false one to the Defendant. It is an Undisputed fact that the plaintiff cannot be held liable for not disclosing what it did not know, that which it could not be reasonably be expected to know at the material time; but with evidence before me, I am convinced that the Plaintiff knew when he was taking up the policy that resulted in Exhibit A that he ordered for 200 baby carriages was for more less than the amount he told the defendant When he was taking up the policy. What then is the effect of this misinterpretation?

Insurance Contract especially Marine one as the present one is based on good faith and S. 19 of the Marine Insurance Act 1961 is very categorical about it the section. Says: -

The invoices you used in insuring this consignment gave a price of US $500,000.00 for 4,000 pieces, yet the documents which we sighted gave a different price sadly enough too, the customs bill of entry which you submitted thus gave a different version from that when we were also privileged to sight and which clearly indicates that we are not supposed to be the only victims of this fraud, it was apparently extended beyond.

However, we have approached for clarification, the Nigerian Ports Authority and have received a letter from them in response to that approach of Paragraph 2 of that letter states, and we quote; “We don't give out our records except on extra service form backed with approval of Traffic manager. In any cases we have delivered the total.

From the analysis of the evidence in this case, it cannot be said that the Plaintiff acted in utmost good faith and by virtue of this the defendant cannot avoid the Contract.

On the issue of disclosure, Section 20 of the 1961 Act states:

(1) Subject to the provision of this section, the assured shall disclose to the insurer before the contract is concluded, every material circumstance which is known to him and the assured shall be deemed to Know every circumstance which, in the ordinary Course of business, ought to be known by him if the assured fails to make such disclosure, the insurer may avoid the contract.
(2) Every circumstance is material which may influence the judgment of a prudent Insurer in fixing the premium or determining whether he will take the risk.

Looking at these two subsections. He has been found through evidence that the Plaintiffs did not disclose all the material facts he actually knew when he was taking the policy if the Defendant knew the full facts they would not have Insured non-existent goods nor would they have connived at a criminal act of attempting to export more money abroad than was due. On this ground also the Defendant can avoid the contract.

(3) The Invoice sent by Percentum Ltd in Taiwan was the true Invoice of the baby carriages from when the Court could glean the fact that 200 pieces of baby carriages costing 4,740.00 pounds were ordered by the Plaintiff and not 10,000 Pieces costing 300,000 pounds as claimed by it.
(4) In disproving a Plaintiff's claim, the Standard of the proof required of a defendant must be commensurate to the gravity and the allegation against the Plaintiff.

The defendant, in this case has discharged the standard beyond reason able doubt by giving detailed evidence of discrepancies or misrepresentation and fraud perpetrated by the plaintiff in connection with the marine Insurance policy

(5) By virtue of 519 and 520 of the Marine Insurance contract is based on utmost good faith required full disclosure of all material facts to the transaction by parties
(6) Based on the evidence adduced, the Plaintiff did not disclose all the material facts he actually knew when he was taking out the Insurance policy and thereby did not act in utmost good faith and by virtue of which the Defendant could avoid the contract.

Whether circumstances are material or not are issues of fact to be determined through evidence, thus to one as a fact not material case may be material to another

A case of Lonicles v Pender 1874 L•R.9 QB 531 where over valuation of the assured good was held as material to enable the insurer to avoid the contract will not to be compared with the case of Berger and Light diffusers Pty Ltd V Pollock 1973 2 Lloyd Rep-442 where over-valuation was heed to be matter of opinion and that It could not allow the insurer to avoid the contract.

These may be regarded as borderline cases unlike the present one which is a clear cut case of misrepresentation and attempted fraud

I have no doubt that the misrepresentation is very material and it is of such nature that can allow the defendant to avoid the contract. In that circumstance the Plaintiff's claim must fail and it is dismissed.

16.4 REMARKS

Marine Insurance policy. Fraudulent Misrepresentation of Materials Fact is a critical factor that the Court relies on in taking its decision.

16.5 REFERENCES

1. Berger & Light Diffusers Pty Ltd v. Pollock 1973 2 Lloyds Pp 442 iondies i Pencher /18747 LR908 531 153.
2. Slattery v. Mance 1962 1QB 676.
3. State v. Fagbolu & Ors | LRNIN Williams Atlantic Assurance Co Wa 1932 ALLER (Rep) 23.

STATE HIGH COURT

17.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: High Court Lagos State

Date: 22nd April 2023

Suit Number: LD/ADR/3149/2020

Judge: Jose, J.

Alhaja Shafi Ahmed Mogaji (Claimant)

vs.

AIICO Insurance Plc (Defendant)

17.2 REPORTS/FACTS/ISSUES

Claimant claims that he is a bona-fide subscriber of the Defendant's Insurance Policy as it reflects on the official receipt of the Defendant's Company, dated 23/10/2019 under the policy number 101/00311019/TO/IS. The Claimant declared that he is entitled to claims under the Insurance policy number 101/0031101/TO/IS. She (Claimant) also declared that he has been through a very difficult situation as a result of non- compliance of the Defendant to fulfil its' obligation to the Claimant as a result of the Insurance Policy with the Defendant. Claimant asked the Court to grant the following orders.

(i) Court to direct the Defendant to pay her (Claimant) the sum of ₦7,500,000.00 (Seven Million, Five Hundred Thousand Naira) being the value of the vehicle belonging to the Claimant which got burnt and was insured with the Defendant.

(ii) An order of the Honourable Court directing the Defendant to pay to the Claimant the sum of ₦1,200,000.00 (One Million, Two Hundred Thousand Naira) as special damages being money expended daily for logistics as a result of unavailability of the Claimant's vehicle.

(iii) An order of the honourable court directing the Defendant to pay to the Claimant as general damages, the sum of ₦5,000,000.00 (Five Million Naira) for putting the Claimant through the trauma of hiring a vehicle to run his business.

(iv) An order of the honourable Court directing the Defendant to pay as cost the sum of ₦2,000,000.00(Two Million Naira) to him (Claimant).

17.3 COURT DECISION

The Defendant filed an amended statement of defence dated 28th of June, 2022. At the trial, the claimant called one witness, while the Defendant called three witnesses.

The Claimant was his own witness (PW1), and he testified vide witness statements on oath dated 5th of August, 2020, 8th of march, 2022 and 30th of June, 2020 as follows in October 2020, he purchased a Mercedes Benz C3100 saloon car with registration number KEY366RP (the car) at the sum of ₦7,500,000.00. He thereafter approached the Defendant and took up a comprehensive insurance policy on the car at a premium sum of ₦262,500.00 (Two Hundred and Sixty-two Thousand. Five Hundred Naira). The insurance policy was to commence on the 22nd of October, 2019 and expire on the 21st of October, 2020. The nature of the claimant's business was that he dealt in cows and travelled frequently at night between cow markets. On the 8th of December, 2019 at around 1.00am in the night, the Claimant and one of his associates by name Alhaji Abdulateef Ahmad were on a business trip within Kwara State when his car was overtaken by a trailer which was emitting heavy smoke. The smoke being emitted made it difficult for the claimant to see ahead and the trailer was also driving recklessly with no chance for the claimant to overtake it. Eventually, the trailer swayed towards the claimant's car pushing it off the road upon which the car caught fire while the trailer speed off due to the time of the incident there was no one to assist the claimant and his associate, that the claimant's associate tried to move closer to the car to put out the fire but there was a sudden blast which caused him serious injuries and he lost his sight on spot. The claimant and his associate had to abandon the burning car and find way to the nearest hospital. A report was made at the Divisional Headquarters of the Nigerian Police Force in Ilorin Kwara State on the 12th of December, 2019 and on the 19th of December, 2019, two police officers followed the claimant to the scene of the accident. The claimant's associate, Alhaji Abdul Lateef Ahmad was flown to Dubai to receive treatment for his eyesight though the damage could not be remedied. The claimant subsequently field a claim with Defendant for the car. The Defendant carried out an inspection on the car after requesting the claimant to give it the location of where the car was towed but he did not

hear from the Defendant after having put services calls to it. The Claimant consequently started to incur expenses of having hire vehicle at a sum of ₦25,000.00 (Twenty -Five Thousand Naira) daily to continue his business. The Claimant communicated this fact to the Defence and demanded for his claim to be promptly attended to but the Defendant refused to heed his demand. The Claimant caused his Solicitor to write demand letters dated 13th of February, 2020 and 20th of May, 2020 to the Defendant for the settlement of his insurance claims but the Defendant refused to settle same.

In his statement made in response to the defence the Claimant said he had been dealing with the Defendant for about twenty years and he was at the Defendant's Isolo branch where he was attended to by one Abayomi Olarinde not Sheriff, who assisted in filling the form and the payment of the premium from the Claimant's ATM card and the car was thereafter installed with a car tracker at the Defendant's office. He gave a reasonable time which exceeded seven months for investigation by the Defendant before coming to court. The car was not towed from the accident scene until 19th December 2019 after the police officers visited the scene and upon their instruction that the car should not cause an obstruction to other road users. He did not insure the car with Royal Exchange Assurance (Royal Exchange) as although he made payment to this company, he could not fulfill as requirement hence he demanded for refund of the money he paid to it but the refund was not made. The Defendant did not at any time ask for the address or phone number of his associate and all the original documents of the car were submitted to the Defendant.

The requested information was given to the Defendant's investigator and the original documents of the insured car were submitted at the point of registration of the car. He cooperated with the Defendant's investigator and provided all necessary information such as where the accident happened, the hospital that treated him and his associate before his associate was flown abroad. He did not know the policemen who attended to him until he got to the police station and his associate had travelled before the police investigation began. The alleged document from Royal Exchange was prepared during the pendency of this suit.

PWI tendered documents which were admitted and marked as follows:

(i) S.K Hassan & Associates' letters to the Defendant dated 13th of February, 2020 and 20th of September, 2020 Exhibits P1 & P2.
(ii) Vehicle papers. Exhibit P3.
(iii) Receipt Issued to the Claimant by Alhaja Musilimat Igbin dated 12th October, 2020 Exhibit P4.
(iv) Defendant's Insurance Motor Vehicle Certificate Exhibit P5
(v) Defendant's Insurance official Exhibit P6
(vi) Nigerian Police Force investigation Report dated 19th of December. 2019 Exhibit P7

Under cross-examination PW1 stated that the incident occurred at about 1.00a.m. and an unknown person helped him and his associate down to Ilorin. He agreed that there was no proof before the court that his associate was injured in the accident but the medical report was sent to the Defendant. He confirmed that he drove the car on the night of the incident but that he did not put cows in the car. When asked about his history with the Defendant, PW1 responded that he had been the Defendant's client for 20 years as he had been insuring his trailer, lorries and car with it but this was the first time he was making an insurance claim. He stated that he purchased the car in Lagos, made enquiries about where the Defendant's office was located and went there with the car where it was inspected and he was given the amount to be paid which he paid. He said he had to come to the Defendant's office the next day for installation of tracking device which lasted for about two hours. He agreed that he took a cover note from Royal Exchange but said he did not make any claim with this company. He agreed that he made payment to Royal Exchange and later requested for a refund which was not obliged but he did not have any evidence in proof of this. He stated that the Defendant did not reject his insurance claim but it did not attend to it timeously. When asked the reasonable time to attend to the claim, he stated that three months were sufficient.

The Defendant's first witness was Oluwatoyin Dada (DW1),its Head of Non-life Retail Claims who testified in chief vide her witness statement of 22nd of March, 2022 as follows the Claimant approached the Isolo branch of the Defendant to purchase car insurance policy. He claimed he had no experience with insurance and that it was one Sheriff who introduced him to the car seller that handled the insurance for him using his ATM to withdraw money for

payment. The Chairman did not however come to the Defendant's office and when he was asked for Sheriff's contact details he failed to provide same. Abayomi Olarinde the independent marketer/agent who placed the policy for the Claimant Claimed that the claimant called him and said he got his number from Sheriff and that the claimant visited the Defendant's office and brought the car for inspection. The Claimant paid the sum of ₦262,500.00 as premium he did not disclose the nature of the business he intended to use the car for when he took the policy.

His statement on oath was full of contradiction with previous statement that he had made to the Defendant. The Claimant procure the police report for the purpose of making a claim against the Defendant as the report was a hearsay narration of the incident to the police and the police did not visit the scene of the accident. During investigation, the claimant did not give details of his associate Alhaji Abdullateef Ahmad who he claimed was with him at the time of the alleged accident. The Claimant upon filing his claim form with the Defendant was interviewed he was not discreet nor was he requested to take the inspector to where his car was towed and abandoned. The Claimant failed and refused to cooperate with the Defendant's investigation as he did not provide the necessary information required for concluding the investigation rather, he instituted this suit while investigation was ongoing in insurance policies of this nature the Defendant needed time to investigate the claim of the inspired so that if the claim was found to be true. It would be settled but the Claimant did not provide time as he wanted to stampede the Defendant into paying him. The Claimant did not hire vehicles on a daily basis at the rate of ₦25,000.00 and although he listed receipt/evidence of hired vehicle no such receipt/evidence was frontloaded by him. The insurance contract did not also provide for payment for any inconvenience he might suffer while his claim was being investigated. The Claimant's solicitors did write the Defendant but his uncooperative attitude to the investigation made it impossible to settle his claim as the solicitor's letter could not take the place of investigation. The incident occurred seven weeks after the insurance policy was taken by the Claimant and a fire accident private investigator was appointed to investigate the claims upon report of the accident.

Under cross-examination, DW1 stated that she was aware that the Claimant took out the insurance policy through Olamide, and agent of the Defendant who acted for the Claimant. She agreed that when the accident happened, the policy was

still subsisting but investigation needed to be carried out to ascertain if the car that got burnt was the same one that was insured. When asked if it was the car that was insured that got burnt, she agreed that it was the same car. DW1 explained that in making claim in auto insurance, the insurance company must be notified thirty days (30) days before the process of claims commences. She stated that when investigation was carried out, it was revealed that there was an inconsistency which caused the delay in payment. She continued that if the claim being made is covered, then the company acknowledges the claim and a reference number is issued to signify that action is being taken. Afterwards, due diligence would be conducted wherein the insured will be asked to produce documents, if needed, which would be used for investigation.

After investigation, if the claim of the insured is verified, then an offer is made to the insured but where the company intends to repudiate the claim, another investigation is carried out and communicated to the insured. DW1 stated that the Claimant filled the policy form appropriately and thus, a certificate was issued to him. DWw1 said that the Defendant sent a mail to the Claimant after he produced the documents for the investigation. When questioned about what she meant by the uncooperative attitude of the Claimant, DW1 stated that the Claimant did not cooperate with the investigation at the hospital and the police station, he did not make initial report at the police station when the incident occurred and he did not also produce the required documents.

The Defendant's 2nd witness was Bayo Omololu (DW2) who testified in chief vide a witness statement on oath dated 29th of January, 2021 as follows: that he is the Managing Director of DBY Recovery Agency, a firm of insurance consultants employed by the Defendant to investigate the insurance claim of the Claimant. The accident occurred on the 8th of December, 2019 but the Claimant reported it to the police on the 12th of December, 2019 after towing the burnt vehicle away from the scene of the accident. The Claimant revealed during investigation that he went to Mariga, Niger State to buy cows on the 8th of December, 2019 with his 70years old assistant, Abdullateef Ahmed, and left Mariga at about 4:15pm with his car being hit by a trailer which resulted in the engine of his car going up in flames and there was no fire extinguisher in the car. The Claimant also revealed that his assistant was unconscious and he had to bring him out of the car and the assistant sustained serious injury afterwards which led to him being flown out of the country for medical attention. The

Claimant informed the investigator that he purchased the car and obtained the insurance with the help of one Mr. Sheriff and that he did not visit the Defendant's office. Investigation from cash receipts and police request for medical attention showed that the Claimant and his passenger were treated at Premium Hospital, Kwara State but upon interview of one Dr. Saliba Balakale of Premium Hospital, it was revealed that the Claimant had no physical injury but the passenger who was a 20years old man had some burns which could not be properly treated at the hospital, Investigation also revealed that the car was also insured with Royal Exchange and the Insurance was paid for and subsist at the time of the accident but no claim was lodged by the claimant with Royal Exchange on the fire incident. A search from AutoCheck Vehicle History Report revealed that the car was a 2011 Model Mercedes C Class C300 worth ₦5,500,000.00 (Five Million, Five Hundred Thousand Naira). The Police confirmed to DW2 that the Claimant was a neighbor which was why they issued him a report three days after the incident and that the alleged passenger was not seen by them Claimant who said the passenger was 70years old failed to give details of the passenger and also refused to produce the original vehicle documents as requested but only furnished DW2 with coloured photocopies. DW2 tendered document which were admitted and marked as follows:

i. DBY Recoveries Agency Ltd. Fire Incident Private Investigation Report - Exhibit D1.
ii. Proof of ownership certificate - Exhibit D2.
iii. Vehicle licence - Exhibit D3.
iv. Certificate of Road worthiness - Exhibit D4.
v. Ministry of Works & Transport Referral Note - Exhibit D5.
vi. Kwara State Road Taxes Payment Advice - Exhibit D6.
vii. Alhaja Musilimat Igbin cash receipt dated12/10/2019 - Exhibit D7.
viii. Defendant's Vehicle Inspection report - Exhibit D8. (ix)Customer Risk Profile - Exhibit D9.
ix. Defendant's official receipts dated 23/10/19 - Exhibit D10&D11.
x. Defendant's Motor Vehicle Certificate - Exhibit D12.
xi. Defendant's Insurance Claim form - Exhibit D13.
xii. Premium Hospital Cash receipt dated 9/12/19 - Exhibit D14.
xiii. Police case request for medical treatment & report - Exhibit D15.

xiv. Claimant's Drivers License - Exhibit D16.

xv. Nigerian Police Force Investigation Report dated 19/12/19 - Exhibit D17.

xvi. The Defendant's form filled by the Claimant - Exhibit D18.

xvii. Nigeria Customs Service Declaration Form - Exhibit D19.

xviii. DBY Recoveries Agency Limited Certificate of Compliance dated 6/2022 – Exhibit 20.

Under cross-examination, DW2 stated that his firm was appointed in December 2020 to investigate the incident and it visited the scene of the accident. He stated that the investigation took a while because the Claimant did not produce the requested documents and his firm had to submit a report in April, 2021 DW2 agreed that during investigation, it was revealed that the Claimant bought the car for the amount claimed by him and he paid for the insurance policy with the Defendant. He agreed that the Claimant was involved in an accident and it was reported to the Police. The Defendant's 3rd witness was its retail underwriter, Bello Abiodun Emmanuel (DW3) who testified in chief vide a written statement on oath dated 17th of June, 2022 as follows; the claimant took out the insurance policy which is the subject of this suit, filled the application form with details which was the representation the Defendant relied on to issue the policy. When the private investigator gave its report on the circumstances that led to the claimant's loss. the Defendant contacted Royal Exchange to confirm that the claimant's car insurance was indeed subsisting but no claim has been lodged by the Claimant. After the investigator had submitted his report stating that the original copies of the Claimant's vehicle particulars were not submitted with the claim forms, the Claimant sent the original of said documents.

The Defendant's practice was to insist on collecting such original particulars to avoid a situation where an unscrupulous insured will make a claim elsewhere without disclosing that he had earlier insured the car with the Defendant.

DW3 tendered documents which were admitted and marked as follows:

(i) Defendant's Auto Insurance Plan Flier - Exhibit D21.

(ii) Defendant's Private Motor Individual Insurance Policy dated 22/10/2019 to 21/10/2020 - Exhibit D22.

(iii)Document issued by Royal Exchange dated 15/2/2022 - Exhibit D23.

Upon cross-examination, DW3 affirmed that the Claimant filled the policy for and paid the requisite premium. He restated that the Claimant did not lodge any claim with Royal Exchange.

At the end of trial, counsel on both sides filed final addresses which they adopted before the court.

In his address, Okechukwu Charles Okereke Esq. Counsel to the Defendant raised a sole issue for determination: whether the claimant has met the standard of utmost good faith to warrant the settlement of his insurance claim in this matter. On same, Counsel argued that the Claimant has failed to satisfy the requirement of utmost good faith to warrant the settlement of his claim. Counsel noted that the distinction between the contract of insurance and other contracts is the doctrine of uberrimae fidei, the requirement of good faith that demands that parties to an insurance contract, particularly the insured, must disclose all material facts. He cited section 54(1) of the Insurance Act and provision 10 of the Defendant's insurance policy, by which the truth of statements and answers in the proposal was the condition precedent to any liability of the Defendant to make any payment under same. Counsel noted that the Claimant admitted in the application form that he had no tracking device in the car so his attempt to reverse the information by stating to the contrary in his witness statement in reply to the Defendant's amended statement of defence was against the principle of filing a reply. On this Counsel cited APC v. PDP (2015) 15 NWUR (pt. 1481) 1 at 118. Counsel noted further that the Claimant admitted in the application for that he was not the sole owner of the car but the evidence before the Court showed that he was sole owner and so, the credibility of the Claimant was put to question. The Claimant also stated in the form that he did not hold any insurance policy on the car but Exhibit D1 revealed that the car was insured with Royal Exchange and the policy was active and valid though no claim was made by the Claimant. Counsel further noted that the Claimant in a bid to escape the consequences of not making full disclosure allege that he did not fill the application form by himself. He submitted however that the inscription on the application form that an insurance agent who assists an applicant to complete an application or proposal form for insurance will be deemed to have done so as the agent of the applicant, prevented the Claimant from escaping liability. Counsel

submitted further that the fact that the Claimant admitted that he had been dealing with the Defendant for over 20years showed that he was well informed about insurance and so, should not be allowed to escape the consequences of his misstatement. he cited ROYAL EXCHANGE ASSURANCE NIGERIA LTD. V. CHUKWURAH (1976) LPELR 2962. Counsel noted that the investigation revealed that the Claimant was not forthcoming with information that would have enable complete investigation and throughout the trial of this case, the Claimant did not produce the associate who was in the car with him. Counsel argued that the Claimant's narrative of the accident put serious doubt in the Defendant's mind, a doubt that an eye witness would have cleared Counsel submitted on the reliefs claimed by the Claimant that: the value of the car was ₦5,500,000.00 as opposed to ₦7,500.000.00 claimed by the Claimant it was also noted that provision 8 of the policy provided that the Defendant shall not be liable to pay for any loss if there is another insurance covering the same loss whilst Provision 9 of the policy allowed for the appointment of an arbitrator to determine the differences arising out of the policy in respect of amount to be paid. It was submitted that no particular of special damage was given as there was no evidence before the court to show that the Claimant hired a vehicle to run his business and even if he did, it could be presumed to be the natural or probable consequences of the Defendant's act and not as damages.

In his address, counsel to the Claimant Sulaimon Kolo Kadiri raised two issues for determination as follows:

(i) Whether the Claimant had given the Defendant enough time to carry out her investigation with respect to the car fire incident and supplied necessary information to assist the Defendant in doing same.

(ii) Whether with the facts and circumstances surrounding the instant suit, the Claimant was entitled to the reliefs sought as endorsed on his writ dated 5th day of August, 2020.

On issue one, it was submitted that the Claimant allowed the Defendant to conduct its investigation for a period of seven months which was enough time as Section 74 of the Insurance Act allows for just 90days from when a claim is made for the insurer to either accept liability or refused same thus the Defendant had failed to comply with the law.

On the 2nd issue, counsel submitted that the Claimant put relevant facts and documents before the court to be entitled to the reliefs sought. It was noted that the Claimant complied with the rules and procedures of the Defendant thus Defendant was duty bound to settle that Claimant's claim. On the issue of car tracker, Counsel referred to the Claimant's statements on oath and his evidence in the witness box to the effect that he drove the car to the Defendant's Isolo branch where a tracker was installed and this fact was not disputed. On the ownership of the car, Counsel noted that Exhibit P4 was proof that the Claimant was the sole owner of the car. He noted further that according to Section 59 of the insurance Act. where there was contradiction in Exhibit D22, it must be fundamental and material, to warrant the Defendant not to settle the Claimant's claim citing the case - ABIODUN V F.R.N (2018) II NWLR (Pt1629)86. Counsel submitted that in this case the alleged contradiction by the Defendant was not weighty and did not occasion miscarriage of justice. On the policy held with Royal Exchange, Counsel submitted that the Claimant did not intend to have any binding contract with Royal Exchange and could not be held responsible for the unilateral decision of Royal Exchange to pro-rate the payment made by him into premium despite his demand for same to be refunded. Counsel noted the Claimant did not sign any document with the Royal Exchange Insurance and also did not make any claim from there after the accident.

The Defendant's Counsel filed a reply on point of law wherein it was noted that Section 74 of the insurance Act cited by the Claimant deals with advertisement and that the appropriate section 70 of the Act. it was further noted that the Defendant had not accepted the Claimant's claim else, it would have issued a discharge voucher. Counsel submitted that the Claimant could not invoke section 70 of the insurance Act because the Defendant was yet to conclude its investigation of the Claimant's claim and even if the Section was breached, the Claimant should have approached the Insurance Commission as provided in the Act rather than the Court. Counsel asserted that the Act provides for trial, conviction and penalty when the Defendant contravenes the provision of Section 70 in which case the Commission would have been the prosecutor. Counsel argued on issue of the tracking device, that the Claimant did not disclose who invited the installer of the tracker and that after premium was paid, whatever happened after could not be part of the insurance contract. He cited the case of NGILLARI V. NICON (1998 NWLR (PT. 560)1.

In the Court's view although all the Issues raised by Counsel on both sides are relevant, same can be distilled into one issue and this is whether the Claimant has proved his claims against the Defendant. It is well settled that in civil cases the initial burden of proof lies on the Claimant or the party making an assertion. See the case of ITAUMA V. AKPE-IME, (2000) 12 NWLR (T. 680) 156, where the Supreme Court per Katsina- Alu JSC as then, was restated the settled the settled principle of law that in civil cases the initial burden of proof lies on the Plaintiff or Claimant. The Court however stated that the burden of proof is not static, while the burden of proof initially lies on the plaintiff, the proof or rebuttal of issues which arise in the course of proceedings may shift from the plaintiff to the Defendant and vice versa until all issue are finally resolved.

It is also settled that proof of civil matters is on the balance of probabilities. See MOGAJI VS ODOFIN (1978) LPELR.SC.372/1976 where Fatayi Williams JSC as he then was said.

".....before a judge before whom evidence is adduced by the parties before him in a civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier not by the number of witness called by each party, but by the quality or the probative value of the testimony of those witness. This is what is meant when it is said that a civil case is decided on the balance of probabilities"

Having these settled principles of law at the back of its mind the Court will look at the evidence tendered by each side to determine the sole issue raised.

In YADIS NIGERIA LIMITED VS GREAT NIGERIA INSURANCE COMPANY

LIMITED (200) LPELR-3507(SC) the Supreme Court per Akintan JSC stated that "*The position of the law is thatin a contract of Insurance, there must be an unqualified acceptance by the other party. A prima facie contract of insurance only comes into existence the moment an insurance proposal in the normal form is accepted unequivocally without qualification by the Insurers: See NGILLARI VS N.I.C.O.N (1998) 8 NWLR (PT. 560) 1; NORTHERN ASSURANCE CO. LTD.*

WURAOLA (1969) 1 ALL NLR 14; ROYAL EXCHANGE v. CHUKWURAH (1976) 11 SC 295." per AKINTAN, JSC (Pp.36-37).

Here there is no dispute that indeed the Claimant took out a comprehensive policy with the defendant on his car which policy was still subsisting at the time his car allegedly got burnt and that he made a claim on the Defendant based on the policy. The Defendant has however given several reasons as to why it has not paid on the Claimant's claim. I intend to look at these reasons one by one to see if they can constitute a reason or defence not to pay on the insurance policy.

First, the Defendant said that the Claimant's on oath was full of contradictions with previous statements that he made to the Defendant in material particulars. The exact contradiction between what he said in court and what he said in his previous statement was not stated. The Defendant further alleged that the Claimant procured the police report as the policeman who wrote same was a neighbor of the Claimant and the police did not visit the scene of the accident. This was denied by the Claimant who said he did not know the policeman and that the police were indeed at the scene and were the one who instructed that his car be towed so that it would not be an obstruction to other road users.

As noted earlier, civil cases are decided on the balance of probabilities putting the evidence of both sides together and weighing them to see which is heavier in probative value. Here, putting both evidence together I find the Claimant believable when he said he did not procure the police report and he explained at length how the police visited the scene, the Defendant who said the report was procured did not produce any evidence to back up this assertion and the evidence of Dw2 that he was told that the Claimant and the policeman were neighbours would appear to be nothing but hearsay as it is based on what Dw2 was told by a policeman who was not called as a witness. SEE OGIDI V. STATE (2014) LPELR-23535(CA) (PP-29-30 PARAS. B) The said policeman not having been called as a witness and subject to the rigours of cross examination, then the truth of what he told Dw2 cannot be ascertained. The Court will also note that Defendant's witness also confirmed under cross examination that it was the insured car that got burnt. The Court does not therefore accept the Defendant's defence that the police report was procured to make the claim.

The Defendant also stated that the Claimant did not produce the associate who was in the car with him. On this, Claimant has said that there was no time Defendant asked him for details of his associate. Again I find the evidence of the Claimant on this believable as his entire demeanor in Court showed him as a truthful witness. I do not believe the Defendant's witness when they said the Claimant did not give the Defendant details of the said associate. Dw2 further said the Claimant said his associate was a man of about 70 years old whereas the doctor told him (Dw2) that the Claimant's associate was a man of about 20 years. On this I would say that the Claimant's evidence about the age of the associate is direct and believable.

The evidence of the Defendant is based on what the doctor told Dw2 which also amounts to hearsay and has no probative value. Therefore, if what the Defendant is trying to do with this piece of evidence is to show that the Claimant was not truthful it has not succeeded.

The Claimant's claim (e) and (f) are for ₦1,200,000.00 as special damages and ₦5,000,000.00, as general damages. As regards claim (e) the Claimant claimed to have spent ₦25,000.00 per day on hiring vehicles and said he would provide evidence to this effect but I have to agree with the Defendant that the Claimant did not provide evidence of the hire of such vehicle which he said he would produce in Court. This claim would appear to be in the nature of special damages which is required to be proved by the special adduction of substantial and ascertainable evidence which must be particularized. If expenses are involved, the details of such must be stated. See MAYALEKE & ANOR V. OKENLA (2015) LPELR-41700(CA) (PP,30-31 PARAS. B) Here no such proof was forthcoming so the Claimant cannot be regarded as having proved this head of claim. As regards the claim for general damages the Court of Appeal in KREST INVESTMENT LTD. V. WEST AFRICAN PORTLAND CEMENT (2016) LPELR-42254(CA) (PP.54-55 PARAS. A) per Abubakar JCA as he then was stated "General damages are presumed damages from a breach of contract, they are damages in respect of breach of duty or contract need not necessarily be pleaded or proved where there is breach or violation of legal right. The law therefore naturally presume that damages naturally flow. See: GARI V. SEIRAFINA (NIGERIA) LTD (2008) 2 NWLR (PL. 1070) 1. This settled position of the law has been recurring in endless judicial. decisions, it is no longer an issue for discourse.

In INCAR (NIG) LTD. V BENSON TRANSPORT LTD. (1975) 3 SC. (REPRINT) 81. (197) LPELR-1512 (SC) pg. 4-4, Paras. G-C the Supreme Court Per Sowemimo JSC (of blessed memory) held that *"...General damages such as the law will presume to be the natural or probable consequence of the Defendant's act need not be specially pleaded. It arises by inference of law, and need not, therefore, be proved by evidence, and may be averred generally..."* The Claimant will therefore be entitled to this claim even if same is not specifically proved or even where the agreement of parties did not provide that the Claimant could hire vehicles where he is not paid on his policy as it can be presumed that the failure to pay on the policy will lead him to hire vehicles to use in place of his car that got burnt. Coming back to other assertions made by the Defendant one of same was that the car was insured with Royal Exchange. The Claimant denied the said insurance but agreed that he had paid some money to the company to insure his car but later demand for a refund which was paid to him and he did not know the money had been used as premium to insure the car. Based on the evidence proffered by both sides on the issue, it is my view that indeed it was shown that there was insurance on the car offered by Royal Exchange. The Defendant's Counsel in this respect referred to some sections of the insurance policy being provisions 8 and 9 as disallowing another policy and also providing for arbitration. However, the said Provision 8 does not disallow another policy. All it says is that if *at the time any claim arises under this policy and there is any other insurance covering the same loss, damages or liability, the company shall not be liable to pay or contribute more than its rateable proportion of any loss/damage compensation cost or expenses. provided always that nothing in this condition shall impose on the company any liability from which but for the condition, it would have been relieved under provision (iii) of Section 11-2(a) of this policy.*

The above shown that the policy is not invalidated just because there is another policy and although it was shown that there was another subsisting insurance on the car with Royal Exchange the Defendant clearly stated that no claim was made on this company so the said section cannot arise and in any case no evidence was led on what could be the Defendant's rateable proportion of the alleged loss.

As regards the provision for the appointment of Arbitrator what the relevant part of provision 9 says is that *"all differences arising out of the policy in respect of*

the amount to be paid shall be referred to the decisions of an arbitrator to be appointed by the parties in difference.....".

Here there was no issue of difference on the amount to be paid as the Defendant never said it would pay any amount so the said provision cannot apply in this case.

I must note that some things were said in the address of the Defendant's Counsel which were not part of the evidence before the Court. This included Counsel stating that the claimant admitted in the application form that he had no tracking device in the car so his attempt to revert the information by stating in his witness statement in reply that the he did so was of no effect. Counsel also assorted that Claimant admitted in the application form that he was not the sole owner of the car but evidence shows that he was the sole owner and so, the credibility of the Claimant is put to question. It is well settled that the address of a Counsel is not the place for evidence neither is it a substitute for evidence which could and should have been in evidence, neither is it a substitute for evidence which could and should have been led. See IWUCHUKWU & ANOR V. AG OF ANAMBRA STATE &ANOR (2015) LPELR-24487)(CA) (PP, 17 PARAS. C). Here the Defendant did not in its pleading/evidence speak about a tracker, it was the claimant who said that a tracker was installed by the Defendant after he insured his car with it and this evidence was never challenged or rebutted by the Defendant. So, the issue of whether or not he stated that he had a tracker in his car is irrelevant. As regards whether the Claimant said in the form that he was not the sole owner of the car, this does not arise on the pleadings. Counsel further stated that the Claimant in his bid to escape the consequences of not making full disclosure alleged that he did not fill the supplication form by himself. With respect to this it is my view that the issue of who filled the form is not important as there is no dispute that the parties entered into a contract of insurance whether or not the form was filled by the Claimant or the agent.

Counsel to the Defendant also submitted that by Section 54 of the Insurance Act and Provision 10 of the Defendant's insurance policy, the truth of statements and answers in the proposal was the condition precedent to any liability of the Defendant to make any payment under the policy. On this Section 55 (2) of the insurance Act says:

(2) Notwithstanding any provision in any written law or enactment to the contrary, where there is a breach of term of a contract of insurance, the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless.

(a) the breach amounts to a fraud or (b) it is a breach of fundamental term of the contract.

I must note here that the Defendant has not shown that the Claimant was untruthful in answers he gave to the Defendant in his proposal as no proposal or form filled by the Claimant was brought before the Court. The Defendant did not also show that the Claimant breached the terms of the policy as it did not point out any specific terms breached. Most importantly however the Defendant did not show any breach which amounts to a fraud or which was fundamental to the terms of the policy.

The final thing I want to look at is the claim of the Defendant that it did not pay on the Claimant's claim because it was investigating the claims of the Claimant. The Claimant's Counsel however referred to Section... of the Insurance Act which the Defendant's Counsel corrected and said it should be section 70 which reads as follows:

(1) Subject to Section 69 of this Act, in every case where a claim is made in writing by the insured or any other party entitled thereto under insurance policy, the insurer shall. (a) where he accept liability, settle the claim not later than 90 days after the issuance of discharge voucher:

(b) Where any claim remains unpaid as provided in (a) above, the insured may request the Commission to effect the payment from the statutory deposit of the insurer and the commission shall have power to effect such payment, or

(c) Where he does not accept liability, deliver a statement in writing stating the reason for disclaiming such liability to the person making the claim or his authorised representative not later than 90 days from the date on which the person delivered his claim to the insurer.

(2) Any insurer who contravenes this section commits an offence and on conviction is liable to a fine of ₦500,000.00.

The above provision shows that indeed an insurer ought to pay on a claim or repudiate same within fifty (50) days. I therefore agree with the Claimant when he said he gave it a reasonable time when he gave the Defendant over seven months after making his claim before filing this suit in Court. The Defendant who said it was carrying out investigation as at 2020 when this suit was filed has still not said that it has concluded its investigation now in 2023 which is about four years after the accident. The net effect is that it has put the Claimant in limbo all these years. The Defendant's Counsel has submitted that the above provisions can only be used to file a criminal suit against the Defendant and that this can only be done by the insurance body. The Court would agree this is not a criminal case but it is of the view that the Claimant can rely on above provisions to show that the Defendant did not pay him on his claim within a reasonable time even though it did not disclaim liability. This is certainly not good enough as the whole essence of taking out insurance policy has been lost by the Defendant who refused to take up its responsibility to pay when a claim was made on it and yet refused to repudiate liability.

Based on all the above findings, the Court must hold that the Claimant has proved his entitlement to the declaration sought in reliefs a-c which are hereby granted as follows:

(a) A declaration is made that the Claimant is a bona-fide subscriber of the Defendant's insurance policy as it reflects on the official receipt no: 15/01oGI/101086596 dated 23/10/2019 under the policy number 101/00311019/TO/15.

(b) A declaration is made that the Claimant is entitled to claims under the insurance policy number 101/003311019/TO/15 contracted with the Defendant.

(c) A declaration is made that the Claimant has been through a very difficult situation as a result of non-compliance of the Defendant to fulfill its obligation to the Claimant as a result of the insurance policy with the Defendant.

(d) Relief d is for an order of the honourable court directing the Defendant to pay the Claimant the sum of ₦7,500,000.00 (Seven Million, Five Hundred Thousand Naira) being the value of the vehicle belonging to the Claimant which got burnt and was insured with the Defendant. On this the Claimant's

evidence is that he bought the car at the sum of ₦7,500,000.00 and insured it. DW2 on his part said he conducted a search from what he called the Auto-Check Vehicle history report which revealed that the car was a 2011 Model Mercedez-Benz C Class C300 worth ₦5,500,000.00 (Five Million, Five Hundred Thousand Naira). When cross examined however he agreed that during investigation. It was revealed that the Claimant bought the car for the amount claimed by him. This therefore shows that the value of the particular car in question was ₦7,500,000.00 as opposed to a general value seen in the search conducted by DW2. The Court will therefore hold that the Claimant is entitled to relief (d) as he showed that this is the sum at which he purchased the car.

(e) Relief (e) is for an order of the honourable court directing the Defendant to pay to the Claimant the sum of ₦1,200,000.00 (One Million, Two Hundred Thousand Naira) as special damages being money expended daily for logistics as a result of unavailability of the Claimant's vehicle. I have earlier said that this claim falls into the realm of special damages and same was not proved by the Claimant. Relief (e) is therefore dismissed.

(f) Relief (f) is for an order of the honourable court directing the Defendant to pay to the Claimant as general damages, the sum of ₦5,000,000.00 (Five Million Naira) for putting the Claimant through the trauma of hiring a vehicle to run his business. I have already said that the Claimant will be entitled to general damages for the policy contract by the Defendant not paying on his claim. I will therefore hold that the Claimant has proved his claim for general damages and award the sum of ₦2,000,000.00 to him under this head.

(g) Relief (g) is for an order of the honourable court directing the Defendant to pay as cost the sum of ₦2,000,000.00 (Two Million Naira) to the Claimant. in IMPERIAL HOMES MORTAGAGE BANK V. D-VAR CONSULTING LTD. (2016) LPELR-40319(CA) PP. 14-15 PARAS. E, Nimpar JCA stated the settled principle on costs when milord stated that: "Costs follow the events....." See also Order 53 Rule 1 of the High Court of Lagos State (Civil Procedure). Rules 2019 which says: (1) in fixing the amount of costs, the principle to be observed is that the party who is in the right is to be indemnified for the necessary expenses he has incurred in the course of proceedings and compensated for his time and effort in coming to Court. Here the Claimant having succeeded mainly in his claims against the Defendant will be awarded the sum of ₦1,000,000.00 as costs of the action.

17.4 REMARKS

Uberrimae fidei – Utmost good faith is an essential condition for a valid Insurance Contract.

17.5 REFERENCES

1. Royal Exchange Assurance Nig. Ltd. v. Chukwurah (1976) LPELR 2962.
2. Abiodun v. F.R.N (2018) II NWLR (pt1629)86.
3. Mogaji v. Odofin (1978) LPELR.S.C372/1976.
4. Yadis Nig. Ltd. v. Great Nigeria Insurance Company Limited (200) LPELR3507(SC).
5. Wuraola (1969) ALL NLR 14 and Royal Exchange v. Chukwurah (1976) IISC 29.
6. Iwuchukwu & Anor v. A.G of Anambra State (2015) LPELR-24487) (CA) (PP 17 PARAG. C).
7. Imperial Homes Mortgage Bank v. Dvar Consulting Ltd. (2016) LPELR40319(CA) PP 14-15.

18.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: High Court, Lagos State.

Date: February 6, 2023

Suit Number: LD/ADR/2919/2020

Judge: Pedro, J.

Anthony Bassey Nyong (Claimant/Applicant)

vs.

Standard Alliance Insurance Plc (Defendant/Respondent)

18.2 REPORTS/FACTS/ISSUE

See Judgement below.

18.3 DECISION OF COURT

The Claimant filed this suit on 8th January 2020 vide Write of Summons and Statement of Claim dated 6th January, 2020. The Claimant's claim as per Paragraphs 30 (a) – (f) of the Statement of Claim dated 6 th January, 2020 against the Defendant is as follows:

a. A DECLARATION that the continued refusal of the Defendant to pay the Claimant his entitlements resulting from the insurance contract between the parties is tantamount to breach of contract and as such illegal and unlawful.

b. AN ORDER compelling the Defendant to pay the Claimant the sum of ₦29,383,619.92 (Twenty-Nine Million, Three Hundred and Eighty-Three Thousand, Six Hundred and

   Nineteen Naira, Ninety-Two Kobo) being the Claimant's entitlements resulting from the insurance contract between the parties.

c. AN ORDER awarding the sum of ₦3,000,000.00 (Three Million Naira Only) as general damages for breach of contract against the Defendant.

d. AN ORDER awarding the sum of ₦2,000,000.00 (Two Million Naira Only) against the Defendant as exemplary damages for the unlawful refusal of the Defendant to pay the Claimant his entitlements.
e. Interest on the Judgment sum at the rate of 21% before the Judgment and 15% post Judgment until the Judgment sum is liquidated fully.
f. The sum of ₦5,000,000.00 (Five Million Naira only) being the cost of prosecuting this suit.

By Motion on Notice for Summary judgment filed along with the Writ of summons and brought pursuant to Order 13 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 2019 and under the inherent jurisdiction of this Honourable Court, the Claimant/Applicant prays this Court for the following orders:

1.AN ORDER OF COURT entering summary Judgment for the Claimant and against the Defendant as per the writ of summons and statement of claim to wit:

(a). A DECLARATION that the continued refusal of the Defendant to pay the Claimant his entitlement resulting from the claimant's Learned Counsel argued that on the issue of the Claimant's Motion for Summary judgment, the rules of this court allows contending parties to a dispute some latitude to make applications to the Court within the framework of the action and that once such applications are filed, the Court has a mandate to hear and dispense with the same one way or another. He relied on the case of Nalsa Team Associates vs. NNPC (1991) 8 NWLR (Pt. 212) 652.

Learned Counsel to the Applicant submitted that the Claimant/Respondent failed to comply with the Rules of this Court. He referred to Paragraphs 3, 4 and 8(a) of the affidavit in support. He argued that the motion for summary Judgment is incompetent and liable to be struck out with cost. He submitted that the Claimant/Respondent should not be heard to argue that non-compliance with the rules of this Court would nullify proceedings since the reliefs sought by the respondent falls within the province of the discretion of the Court which must be exercised judicially and judiciously and that the Respondent is not entitled to the grant of same.

He submitted that upon a claim perusal of the alleged facts contained in the affidavit in support of the Claimant's application, it demonstrates that not only were such facts not within his personal knowledge, but he failed in giving the facts and circumstances with reasonable particulars forming the grounds of his belief and thereby offends the provisions of Section 115 (3 & 4) of the Evidence Act 2011. He referred to Paragraph 8(b) of the affidavit. He urged the Court to refuse the application.

In their written address in opposition to the Notice of Preliminary Objection, the Learned Counsel to the Respondent raised a sole issue for determination. Whether this Honourable Court has the jurisdiction to entertain this suit. Learned Senior Counsel to the Claimant/Respondent argued that in determining whether or not a court has jurisdiction to entertain an action, it is the Claimant's originating process i.e. a writ of summons or Statement of Claim that has to be considered by the Court. He cited the case of Okorocha v. United Bank for Africa Plc. (2011) 1 NWLR (Pt. 1228) 348 at Page 373 Paras E. The Learned silk further argued that the Court of Appeal has held in the case of Senate President V. Nzeribe (2004) 9 NWLR (Pt. 878) page 251 at 274 paras D.F that "procedural requirement that an issue of jurisdiction should be resolved first, does not mean that it must be heard separately. It can be taken along with arguments on the merits of the case. What is important is that the Court should first deal with the issue of jurisdiction before considering the merits of the case".

Learned Senior Counsel to the Respondent submitted that all Court processes filed along with the originating process of this Court can only be served by the Sheriff of this Court, as it is the Originating process that gives life to a suit. She submitted that service of the originating process that gives life to a suit. She submitted that service of the originating process as well as other processes, including the Motion for Summary Judgment was duly filed and served in accordance with Order 9 Rule 9 of the Rules of this Honourable Court.

She further submitted that all the Four (4) polices are matured, including the two (2) policies that are originally to be due in 2021, having been duly terminated by documentary evidence already before this Honourable Court. She argued that assuming (without conceding) that the two (2) policies have not been validly terminated, it cannot be an issue at this stage and does not nullify the proceedings because it is only the claims of the Claimant that the Court will

examine in order to determine if there is a reasonable cause of action. She cited the case of Holec Projects (Nig) Ltd. V Dafeson International Ltd (1999) 6 NWLR (Pt. 607) 490 at 500, paras G.H and the Supreme Court case of Thomas v. Olufosoye (1986) 1 NWLR Pt. 18 Page 669 at 682 paras G.H.

Learned Senior Counsel to the Respondent submitted that contrary to the averment of the Defendant that there was no endorsement of the Commissioner for Oaths on the exhibits attached, that is not the true position of things. She further argued that assuming (without conceding) that there was no endorsement of the Commissioner for Oath on the exhibits at the Registry of this court. She argued that if the court is satisfied that filing fee was duly paid for, the Court has jurisdiction to make and order that the exhibits be properly endorsed at the Registry of the Court and not an order striking out the suit.

She further argued that if the defendant feels that there is any document which was pleaded by the Claimant and not frontloaded or exhibited, the proper thing is to object to its admissibility for non-service at the trial stage as it is premature to do so at this stage of this proceedings. Learned Silk for the Respondent submitted that there is not misjoinder of cause of action in this suit as the parties are the same, the subject matter is the same, there is a direct nexus in the transaction of the Claimant with the Defendant as contained in the Statement of Claim and the Court with requisite jurisdiction is the same.

She finally submitted that the application of the Defendant is frivolous, vexatious and filed with the intention of wasting the precious time of the Court. She humbly urged the Court to dismiss the application with substantial cost.

Resolution

I have carefully considered the application, the affidavit evidence and the written addresses before this court. The Applicant brought this application challenging the jurisdiction of this Court to hear and determine this suit on the ground that there is a misjoinder of cause of action. He has equally contended that this suit is premature and an abuse of Court process. The sole issue for determination following the issue formulated by parties is; “Whether this Court has jurisdiction to entertain this suit”.

The grounds upon which the Applicant has premised this application are as earlier reproduced in Grounds 1-3 of the objection which I will consider in determining the sole issue.

The Learned Counsel for the Applicant has contended that the action of the respondent is not sustainable and incompetent in view of the fact that the four (4) Policies/Agreements which the Claimant set out in his Statement of claim are separate and distinct from each other and therefore amounts to a misjoinder of cause of action. He argued that this suit is premature in view of the fact that two (2) of the policies that were pleaded will only mature in 2021 and that there is no evidence of their being validly terminated before maturity. He further contended that this suit is an abuse of Court process in that while the Claimant/Respondent pleaded Four (4) policies he only exhibited one (1) policy.

The Learned Silk for the Respondent on the other hand contended that the suit is competent in that at this stage, the Court will only look at the Statement of claim before the Court and not the defence. They have argued that this Court has jurisdiction to entertain this suit.

Undoubtedly, jurisdiction of a Court is fundamental and a threshold issue in a proceeding and as such, it can be challenged at any time or stage even for the first time at the Supreme Court. See the case of Madukolu v Nkemdilim (1962) 2 All NLR 581. In the case of Oloba v. Akereja (1988) 3 NWLR (PART 84) 508 At 520 C-E, Per Obaseki JSC stated that:

"The issue of jurisdiction is very fundamental as it goes to the competence of the Court or Tribunal. If a Court or Tribunal is not competent to entertain a matter or claim or suit, it is a waste of valuable time for the Court to embark on the hearing and determination of the suit, matter or claim. It is, therefore, an exhibition of wisdom to have the issue of jurisdiction or competence determined before embarking on the hearing and determination of the substantive matter. The issue of jurisdiction being a fundamental issue can be raised at any stage of the proceedings in the court of first instance or in the Appeal courts".

A court will be competent to assume jurisdiction on a matter where:

a. The court is properly constituted as regards number and qualification of the members of the bench

b. The subject matter of the action is within the jurisdiction of the court, and The case before the court is initiated by due process of law, or that the condition precedent to exercise of jurisdiction is complied with. See the cases of Madukolu v. Nkemidilim (1962) 2 All NLR 581: Chris v. Ononuju (2008) 9 NWLR (Pt. 1093) 642 at 651), Per Tsamiya J.C.A.

In determining whether a court has jurisdiction in a matter or not, the court will examine or consider the nature of summons and statement of claim. See the case of Abdul-Raheem V. Oloruntoba-Oju (2007) WRN (Vol. 2) 28 At 67 Pages 10-20., 71-72 Pages 30-25 (CA).

The Learned Counsel for the Applicant submitted that the action of the Claimant/Respondent is not sustainable in view of the fact that the Four (4) Policies/Agreement s which the claimant referred to and as set out in his statement of claim are separate and distinct from each other and so amounts to a misjoinder of cause of action.

Now Order 16 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 2019 provides as follows:

"Subject to the provision of this Order, the Claimants may join several cause of action in the same action, but if it appears that they cannot be conveniently tried or disposed of together, a judge may order separate trial of such causes of action or make such order as may be necessary or expedient for the separate disposal of the action"

From the above provision, it is clear that a Claimant may join several causes of action in the same action and it is only where it appears to the judge that they cannot be conveniently disposed together that the judge orders separate trial of such causes of action. See Mkpedem v Udo (2000) 9 NWLR) Pt 673) 631 at 647 Paras C-D.

In this instance, I have carefully gone through the claim, and from the averments in the Statement of claim, I find that this action is found on breach of contract and by virtue of Section 272 (1) of the Constitution of the Federal Republic of

Nigeria 1999 (as amended), this Court is vested with the jurisdiction to entertain this suit.

I find that there is no misjoinder of cause of action in this suit as the parties are the same, the subject matter is the same and there is a direct nexus in the transaction of the Claimant with the Defendant. I find that the Court with requisite Jurisdiction is the same. I find that it is only where it appears to the Court that they cannot be tried together that the Judge may order separate trial of such causes. I hold that this suit does not amount to a misjoinder of cause of action.

On whether this suit is not premature based on the claim that two (2) of the policies are to mature in 2021 and there is no evidence of the policies being validly terminated.

Learned Counsel has also contended that this suit is premature in that two (2) of the policies are meant to mature in 2021 and there is no evidence of their being validly terminated before maturity. I find that the claimant has disclosed in paragraph 9 of the averment in the Statement of Claim that it was consequent upon the Defendant's failure, refusal and neglect to pay up the Claimant's entitlements flowing from the maturity of the two (2) earlier policy that he was compelled to terminate Policy No SFP/12/0001090/IKJ and Policy No. SFP/12/0001159/IKJ and so demanded for his entitlements in that respect from the Defendant. Paragraph 9 is hereby reproduced as follows:

"Consequent upon the Defendant's failure, refusal and/neglect to pay up the claimant's entitlements flowing from the maturity of policies IPP/10/0008670/IKJ and IPP/10/0009449/IKJ, the Claimant was compelled to terminate Policy No. SFP/12/0001090/IKJ and Policy No. SFP/12/0001159/IKJ respectively whose maturity dates were ordinarily in 2021 respectively and accordingly demanded for his entitlements in that respect from the Defendants."

He has further disclosed in Paragraph 10 that the Defendant requested for the original copies of the four policy documents to enable it process his claims, but the Defendant has refused to pay, Paragraph 10 is hereby reproduced as follows:

"The Claimant states that the Defendant requested for the original copies of the four policy documents to enable it process the Claimant's claims and the Claimant availed the Defendants with the original copies of the policy documents and yet the Defendant refused to pay the Claimant's entitlements".

I hold that the decision on whether the two (2) policies are premature or not is not a matter for this stage of proceedings. I hold that the issue of whether only two policies are matured while the two other policies are premature does not arise at this stage. This is borne out of the fact that at this stage of contesting the competence of this Court to entertain this suit, it is only the claims of the Claimant that the Court can look into.

On whether this suit constitutes an abuse of Court process, Learned Counsel has urged the Court to hold that this suit is an abuse of Court process. He has also contended that although the Claimant pleaded Four (4) policies in their claim, he has only exhibited One (1) policy. In answer, they have urged the Court to defy that issue at least to the relevant stage of proceedings.

Now the concept of abuse of Court process involves circumstances and situations of improper use of Judicial process by a party to the irritation and annoyance of his opponent in litigation to interfere with due administration of Justice. See Orji v Amara (2016) 14 NWLR (Pt.1 1531) 21 at 57 paras F-G.

What constitutes an abuse of Court process lies in both proper and improper use of the Judicial process in litigation, such as when a party uses the issue of Judicial process to the irritation and annoyance of his opponent and the efficient administration of Justice. This includes instituting of multiplicity of actions on the same issues. The term abuse of Court process also applies to a proceeding which is wanting in bonafide and is frivolous, vexatious and oppressive. See the case of Saraki v Kotoye (1992) 9 NWLR (Pt. 264) 156 at 188 paras E. F.

It is trite law that the issue of abuse of Court process being an issue of jurisdiction can be raised at any stage of a case, be it at the trial or on Appeal. See Usman v Babs (2005) 5 NWLR (Pt. 917) 113 at Pp. 127 Paras A-C 132 Paras F-G 134; Orji v Amara

(2016) 14 NWLR (Pt. 1531) 27 at 57 Paras F-G; See also Okorocha v PDP (2014) 7 NWLR Pt. (1406) 213, 290 Paras B-D.

I have carefully gone through the claim before the Court and I find that the Defendant has failed to show the fact of abuse or where the abuse lies in this suit.

I hold that this suit is competent before this Court and that allegations have been made against the Defendant in the Statement of claim which requires the Defendant's answers. The Application fails and it is dismissed.

And I so hold.

Per Hon. Justice Jumoke Olusola Pedro

31/05/2022

18.4 REMARKS

The Court does not avail or help the indolent.

18.5 REFERENCES

1. Nalsa Team Assiciates v. NNPC (1991) 8NWLR (Pt212) 652.
2. Evidence Act. 2011. Section 115(324).
3. Okorocha v. United Bank for Africa Plc. (2011) I NWLR.
4. Holec Projects (Nigeria) Limited vs. Dafeson International Limited (1999) 6 NWLR (pt 607) 490 at 500.
5. Madukolu v. Nkemdilim (1962) 2 ALL NLR 581 v Ononuju (2008) 9 NWLR (pt 1093) 642 at 651.
6. Order 16 Rule 1 of the High Court of Lagos State.
7. Mkpedem v Udo (2000) 9 NWLR) pt 6 73) 631 at 647.

19.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: High Court of Lagos State.

Date: 3rd October, 1971

Suit Number: UCH/37/71

Judge: Ogbobine, J.

Akene

vs.

British American Insurance Co. Ltd

19.2 REPORTS/FACTS ISSUES

Where an insurer under a life insurance policy expressly agrees to pay over the benefit under a life Insurance policy to a third party on the death of the life insured, the deceased insured is in the position of Trustee and the third-party beneficiary is entitled to call upon the insured to pay the insurance money to him, and upon their failure to do so he can sue the insurer directly as a beneficiary.

The Plaintiff had been named as a beneficiary under a life insurance policy effected by his father where under the defendant undertook to pay the sum assured under the policy to the plaintiff so named therein in the event of the Assured dying before maturity of the policy. This claim arose when the deceased died and the defendant insurer offered to the plaintiff, an amount lesser than that stipulated in the policy as payable. The insurer argued that the plaintiff could not enforce the insurance contract as there was no privity of contract between them and the Plaintiff.

19.3 DECISION OF THE COURT

Held, applying the trust concept, the deceased assured stood in the position of a trustee to the plaintiff and the latter could therefore sue on the contract as a cestui que trust even though he was not stricto sensus a party to the contract.

Per, OGBOBINE, J.

When a party to a contract has deliberately in plain words agreed to confer some benefit on a third party, he cannot go back on his plighted word and disregard the undertaking. This is certainly one of those cases where a third party can take advantage of a contract made for his benefit.

In the present case, Exhibit A is a life policy in which the plaintiff has been specially named as a beneficiary. However indifferent the company may be to the destination of the policy moneys or benefits, it is impossible to regard the deceased as having been indifferent to them in relation to the event whose possibility, was the primary reason for effecting the insurance.

The event is the death of the deceased by a contingency insured against leaving the son (Plaintiff) surviving him. Exhibit A was an agreement by the deceased with the company in which the company undertook to pay the insurance money to the beneficiary named therein. The equitable principle which is involved in the case is that the deceased acted on behalf of the son. When taking out the policy; it is also clear that the company recognized that position when they accepted the proposal of the deceased to take out a life policy. The agreement was then entered into in settlement of the whole question of the insurance, resulting in an undertaking and agreement by the company to pay the insurance benefits on the death of the entitled to call upon the insured to pay the insurance money to him, and upon their failure to do so he can sue the insurer directly as a beneficiary.

The Plaintiff had been named as a beneficiary under a life insurance policy effected by his father where under the defendant undertook to pay the sum assured under the policy to the plaintiff so named therein in the event of the Assured dying before maturity of the policy. This claim arose when the deceased died and the defendant insurer offered to the plaintiff, an amount lesser than that

stipulated in the policy as payable. The insurer argued that the plaintiff could not enforce the insurance contract as there was no privity of contract between them and the Plaintiff.

19.4 REMARKS

Life Insurance Trusteeship

20.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: High Court

Date: October 21, 2005

Suit No: ID/254/1998

Judge: Okuwobi, J.

Mr. Popoola Olayinka Okeowo

vs.

Niger Insurance Plc (formerly Yorkshire Nigeria Limited)

20.2 REPORTS/FACTS/ISSUES

High Court of Lagos State, in the Ikeja Judicial Division on Friday, 21st day of October 2005 Suit Number ID/254/1998.

Life assurance policy contracted in the United Kingdom.

Issues:

(1) Whether or not the contract is a Nigerian contract.

(2) If issue number (i) is in the affirmative, whether or not the Plaintiff should not be paid in Naira upon maturity of the policy.

20.3 DECISION OF THE COURT

Judgements

The Plaintiff, a retired civil servant endorsed writ of summons as follows: for the sum of £3,200.00 or its equivalent in Naira (i.e. ₦416,000.00) as at the date of maturity of the assured sum being claim due from the Defendant to the Plaintiff for Life Insurance Policy Number 885764 which the Plaintiff placed with the Defendant in managing the Plaintiff Investment. The Plaintiff filled a statement of claim dated 3rd February 1998; amended by the further Amended Statement of Claim made pursuant to an order of Court dated 8th November 2000. Upon the

delivery of those pleadings, the defendant exchanged and filed a Statement of Defense dated 4th July 2002. The Plaintiff is the sole witness for his case and the defendant also called just one witness. The Plaintiff testified that he got to know one Mr. Osundeko in Britain in 1967 who was then an agent of Yorkshire Insurance Company Limited who introduced him to his company, He then took up a life assurance policy with them while he was still a student in the United Kingdom. He claimed to have paid a premium of £21.10s.6p by cheque he issued to the company and put the cheque stub in evidence and was admitted as exhibit "P1". It was after the payment of this premium that he returned to Nigeria. He continued paying the premium to the defendant in Nigeria summing up to £516.60 in Pounds Sterling. The Federal Government of Nigeria however changed its currency from Pound to the Naira. On that conversion, he stated that the Defendant advised him that he would now pay his other premiums in Naira, which when computed was ₦45.05k per quarter. He put his evidence as exhibit (P2) He continued paying the premium on the policy until maturity in 1997. In December 1996, he remembered that he received a form from the Defendant which he had to complete in preparatory to maturity of the policy. He thereafter received a letter inviting him to come over to collect ₦6,447.00 (Six Thousand, Four Hundred and Forty-Seven Naira) put in evidence as "P4". He claimed that he immediately reacted by writing the Defendant that the sum assessed did not represent the equivalent of premium and bonuses. The policy he stated was for £2,000.00 and he was entitled to a bonus of £1,200.00, the two in the Naira equivalent as at 1998 he testified was N640,000.00. The Defendant alleged re-affirming his entitlement to ₦6,447,00 He stated that for the first 6 years he paid £516.00 and with 5% interest rate he would be entitled to £1,985.37 with 2% bonus for 2 years assessed at £240.00. It was also admitted that it was not until 1970 that the defendant took over the Yorkshire Insurance. He was shown exhibit "D1" which stated that the policy is worldwide but that did not detract from it being a Nigerian policy and that Nigeria was one of the countries where Yorkshire Insurance operates. He agreed that the Nigerian Pound was equivalent to ₦2.00 which was the basis of their conversion of the £2,000.00 to ₦4,000.00. The participating involvement he described is like shareholding which means that surplus will determine the share of bonus. The surplus for the 30 years which the Plaintiff participated earned him ₦1,200.00.

At the close of evidence, Learned Counsel for parties filed written address with that of the Defendant dated 21st March 2005 and Plaintiff's dated 13th April 2005. In the Defendants address, Learned Counsel substituted that the onus of

proof lies on the person who assets (See *Sections 135, 136 and 137 Evidence Cap 112 LFN. Igwe vs. AIC (1994) 8 NWLR Part 363 page 459,Ogundipe vs. Kwara State (1993) 8 NWLR Pt 313 Pg 558 at 568 B-C.* He submitted that it is common ground between the parties that the claimant took a life policy from the Defendant under Yorkshire Insurance company in 1967 (see exhibit "P3". The policy was preceded by a proposal from "D2". At some point in time the Plaintiff made payments on the policy in Naira at the rate of N43.50k per quarter. All said facts being admitted required no further proof. He saw two issues for determination:

(1) whether or not the contract is a Nigerian contract.

(2) If issue number (1) is in the affirmative, whether or not the Plaintiff should not be paid in Naira upon maturity of the policy.

For the Naira component of the premium, which totaled ₦4,132.00 and interest of 5% was ₦7,111.00 and 2% bonus summed up would be ₦8,630.00. The policy he exclaimed was a participatory policy and it is stated at page 4 of exhibit "P3" which in effect is an investment which brings profits to the Defendant of which he takes a share. He claimed that he was not at any time notified of the depreciation of his investment. He prayed the Court to grant him his claim of £3,200.00 or its equivalent in Naira. At cross-examination, he admitted signing a proposal form in evidence as exhibit "D1". He admitted that in exhibit "D1", the document stated that the contract he had with the Defendant would be governed by Nigerian law and all monies paid would be in Nigerian currency and in Lagos. He also admitted that exhibit "D1" was issued for the Lagos office of the Defendant. He also confirmed from exhibit "P3" clause 4 that monies paid would be in Nigerian currency, He also agreed that he was preparing to return to Nigeria when he took up the policy. He admitted that the only premium paid in England was the very first one. At that time, a British pound was equivalent to a Nigerian pound. The premium he paid until 1972 in pounds were paid in Nigerian pound. He admitted that the Nigerian pound in 1972 was the equivalent of ₦2.00 and it was upon this calculation that he paid premium of ₦43.00 instead of £21.10s.6p He also agreed that there was nothing in the premium, which specifically converted the premium to the prevailing rate of the naira as he continued to pay ₦43.00 as premium. He also confirmed that the stamp duty on exhibit "P3" was paid in Nigeria. The address on the premium he agreed to bears an Ijebu-Ode address of the claimant. He also conceded that reference to pound in exhibit "P3" did not state that it was Sterling. He confirmed that the rate from the policy was compound interest. He denied the suggestion that he did not pay his premium regularly.

"DW1": Anuge Timothy Omoakhion is a staff of the Defendant who joined the company in 1982. He got to know the Plaintiff as an assured person with the Defendant Company. In 1967 when he took up the policy, he stated the Plaintiff completed their proposal form which was admitted in evidence as exhibit "D2". He identified exhibit "P3" as the Plaintiff's policy in 1973 when the Nigerian currency was changed to the Naira. It was due to that change that the Plaintiff had to pay his premium in Naira until 1997 when the policy matured. At the maturity of the policy, he identified exhibit "P4" which the Plaintiff received from the Defendant but the former rejected it and made demand for ₦640,000.00 as sum due to him on his policy. The witness stated that there is nothing in the policy to support the claim. He further testified that the Defendant did not assure the claimant in British pounds because the British pounds is not legal tender in Nigeria and the contract also that they have with him was a Nigerian contract. The claimant he alleged paid Nigerian pounds as premium between 1967 - 1973.

At cross-examination, the witness admitted that he joined the defendant in 1982 and all evidences he gave were record.

On issue number 1, the burden of proving this rests squarely on the Plaintiff. He referred to exhibit "P2" payment receipt of the first premium, exhibit "P3", the policy which was stamped in Nigeria and exhibit "D2". He conceded that the Plaintiff paid his first premium in London but the pounds then had the same value as the Nigerian pound which was ₦2.00. He referred to exhibit "P2" issued by the Manager for the Nigerian branch of Yorkshire Insurance Company Limited. And in fact the pound referred to in the receipt did not state it was pound sterling value to the English one. He later continues payment of his premium in Naira.

On the issue of number 2, he submitted that the claim of the Plaintiff that the pound had value of ₦130.00 to one pound is unsupported by evidence. The Defendant therefore had no obligation to pay the Plaintiff what the arrangement did not stipulate. The Court dismiss the claim.

In the Plaintiff's address, Learned Counsel saw the sole issue for determination as the quantum of the sum assured and payable by the Defendant to the assured

Plaintiff vide policy number 885764. He submitted that it goes without contest that a contract of insurance exists between the parties. Exhibit "P3" therefore is the only document to look into for the terms of the contract. *See Crusader Insurance Company Limited vs. Amunike (1975) vol. 9, NSCC page 82.* He argued further that no extrinsic evidence should be allowed to vary, add tom or alter the document. *SeeS131 of the Evidence Act Cap 112 LFN, Exhibits "D1" and "D2"* therefore are not relevant for consideration of the terms. The sum assured from what is stated in the policy is £2,000.00 and also that the Defendant was liable to pay participatory bonus of £1,200.00. He contended that the initial contract was an English contract and the amount stated can be found in the policy. *See National Insurance Company of Nigeria vs. Power Industrial England Company Limited (1986) NWLR Part 14 page 1.* He argued that there was no novation of the contract and the plaintiff was at no time informed that the policy ceased being in pounds notwithstanding the conversion of the Nigerian currency to Naira. The Defendant he submitted could not change the term of the contract without consulting the Plaintiff. The insurer at the time of the contract was an international corporation. The Plaintiff therefore is entitled to be paid at the exchange rate of the Pound to the Naira as at the date of maturity of the policy. He urged the Court to grant the claim.

The above is the summary of the case of the parties from the pleadings evidence and submissions of Counsels for parties. This being a civil case, the onus placed on the Plaintiff are set out in Sections 134, 135 and 136 Act Cap 112 LFN judicially interpreted that a Plaintiff is to succeed on the strength of his case and not on the weakness of the defendant's case. As both the Plaintiff and the Defendant testified in their cases before reaching a conclusion, the Court is enjoined to set up an imaginary scale and put the evidence adduced by the defendant on the other side of the scale and put the evidence adduced by the defendant on the other side of the scale and then proceed to weigh them to see where the scale tilts. The consideration not being the number of witness called but the criteria being evidence of probative value for ascribing weight is meant that a civil case is decided on evidence of probability.

Applying the above principle to this case, the Plaintiff's relief is for the sum of £3,200.00 or its equivalent in Naira (₦416,000.00) at the date of maturity of the assured sum being due from Defendant to the Plaintiff vide life policy number 885764 and/or the alternative claim. This claim therefore is governed by the

ordinary common law of contract wherein the Defendant had undertaken to pay a sum certain to the assured plaintiff in consideration of an agreed sum, the evidence of the Plaintiff is that the sum in question is £2,000.00 which fact is not challenged or controverted by the Defendants sole witness. The issue however goes to whether the £2,000.00 agreed upon and the bonus on the investment of £1,200.00 is payable in pound sterling. I refer to the evidence of the Plaintiff and exhibit "P2" which shows that the first premium was paid on 7th February 1967 in the United Kingdom at the rate of £21.10s.6p quarterly. Exhibit "P" which supports the view that the contract was entered into in London in the Yorkshire Insurance branch there states that the policy is for the Lagos, Nigeria branch. This fact is hardly contested because the Plaintiff admitted returning to Nigeria where he paid subsequent premiums in pounds, the area of divergence however goes to the intention of the parties as to the policy being a foreign one or whether it is a Nigerian policy. The intention of parties in this instance can only be looked into from their agreement, which is the policy exhibit "P3" now before the Court. The Court therefore is faced with the construction of exhibit "P3". It is settled law that where the language of a document is clear, the Court must give it the ordinary meaning in the plain language in which it is written. It is only where ambiguous that the Court will give effect to the intentions of parties. I have perused exhibit "P3" which shows the policy to be one of Popoola Olayinka Okeowo of 15, Imagbon Street, Ijebu-Ode who has obligation to pay £21.10s6p quarterly for a period of 30 years and duly entered into with Yorkshire Insurance Company Limited Manager for Nigeria and his subordinates. /it therefore is without any doubt that the contract is a Nigerian contract. The only other issue goes to the payment made by the Plaintiff between 1967 to 1973 in pounds. I accept the testimony of the Plaintiff that he paid the first premium in pound sterling as evidenced by exhibit "P1" and "P2" but cannot believe him on his testimony that the subsequent payments he made until 1973 is in Nigerian pounds or its equivalent of the British Pound of £516.00. I make this finding because of his admission at cross examination that he signed exhibit "D1" the proposal form from where he confirmed that the contract entered into would be governed by Nigerian law and all monies paid in Nigerian currency in Lagos and the pound in the document not having reference to sterling. He further made admission regarding exhibit "P3" clause 4 which stated that all monies payable by the company shall be payable in Nigerian currency at the company in Lagos. These admissions are definitely evidence of facts asserted against and have watered down the probative value of the evidence of this Plaintiff on his claim. I see the aim of cross-examination which

is to defeat or weaken the case of a party properly achieved in this instance, and the defendant has been given the opportunity to present its case through "PW1".

In the circumstance I therefore prefer the evidence of "DW1" who I find a witness of truth on those issues. I find also that the Plaintiff has not furnished evidence on paragraph 11 of amended statement of claim on the conversion of £1.00 at the ₦130.00. in the absence of evidence on this crucial fact I find his claim unproven.DW1's testimony to the effect that in 1973 when Nigeria changed its currency from pound to Naira, the value of the pound was equivalent to ₦2.00 was not debunked at cross-examination but was confirmed. I have no difficulty therefore in finding that at no time did the parties intend the contract to be a foreign contract although the initial steps in the contract were taken in London. Exhibit "P3", "D1" and "D2" in the suit are patiently clear and established the fact that the contact is a Nigerian contract and I so hold. I say so having found the said exhibits admissible and documents which deserve to be given due weight. The burden of proof of the existence of a term of an agreement squarely rest on the party asserting such term. This is clearly a matter of evidence and the onus imposed on the Plaintiff in law has not been discharged.

Upon applying the principle in *Mogaji vs. Odofin's* case, I find as of fact that there is no agreement between parties that the contract of the parties was intended to be an English contract. Evidence has already been shown above proved the contract to be a Nigerian contract. I also do not find any agreement between the parties that the sum paid to the tune of £516.00 was paid in pound sterling nor evidence placed before the Court on the conversion rate of the pound to Naira as ₦130.00 to £1.00sterlinghaving placed all oral and documentary evidence alongside the evidence of the witness for Plaintiff and Defendant I find the evidence tilts more in favour of the defence. For which reason, the claim is hereby found unproven and accordingly hereby dismissed.

On the alternative claim for negligence of the Defendant in managing the Plaintiff's investment.

A person is said to be negligent if he omits or fails to do something which a reasonable man under similar circumstances would do or the doing of something which a reasonable and prudent man will not do. Negligence therefore may

consist in a failure to exercise due care in a case in which a duty to take care exists. There must have been a breach of duty which the law recognises. In establishing a case, a Plaintiff must confine himself to pleaded facts. I have perused facts in the "amended statement of claim" and cannot find any averment where the Plaintiff has pleaded that the Defendant owe him a duty of care in the management of his investment which was breached and/or what loss he suffered. The claim therefore on payment of the sum claimed on grounds of negligence has no basis to stand upon. I equally find the alternative claim without facts of negligence pleaded and any iota of evidence to sustain the claim as also lacking in merit and I accordingly hereby dismiss the alternative claim as well. This is the judgement of the Court. I shall hear the counsel on costs.

20.4 REMARKS

Life Insurance Policy and Jurisdictional Issues.

20.5 REFERENCES

1. Secton 135, 136 and 137 Evidence Act Cap 112 LFN.
2. Ogundipe vs. AG Kwara State (1993)8 NWLR Pt 313 page 558

21.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: Lagos State High Court

Date: July 2, 1991

Suit Number: LD/644/86

Judge: Segun, J.

Hengrace Nigeria Limited (Plaintiff)

vs.

Crusader Insurance Company Limited (Defendant)

21.2 REPORTS/FACTS/ISSUES

Plaintiff took out an insurance policy with the defendant company in respect of the assignment of goods it imported from Holland. The policy provided cover for loss of the goods while in transit from Amsterdam to Apapa Port/Lagos on to the plaintiff's warehouse in Ibadan.

The consignment arrived in Apapa Port on 19/1/83, but owing to a delay occasioned by the board of customs and exercise, the same was finally cleared from the port on 2/2/83. On 4/2/83, 2 containers out of the consignment containing "Peak Milk" purportedly valued at ₦14,000.00 were stolen by the driver of the vehicle conveying the container to the plaintiff's warehouse in Ibadan.

The driver was convicted for the felony but plaintiff never recover the stolen goods. Plaintiff claimed indemnity for the loss from Defendant who repudiated liability whereupon the plaintiff instituted an action in court claiming the insured sum with interest.

In court, the defendant contended that its liability under the policy had been excluded owing to the plaintiff's breach of a "port delay clause" in the policy

which required the plaintiff to clear the consignment from the port within 14 days.

21.3 DECISION OF THE COURT

Held:

By virtue of Section 14(1) of the Insurance Act 1976, the standard "port delay clause" in an insurance policy cannot be modified by an insurer except with the consent of the Director of Insurance; here Defendant did not adduce evidence to show that it had obtained such consent to modify the "port delay clause" from 60 to 14 days.

1. Plaintiff cleared its consignment of goods from the Apapa port within 14 days as stipulated in the Insurance policy.
2. Where a contract is silent as to the tune for the performance of an obligation, the law implies that the obligation should be performed within a reasonable time, such time to be determined according to the circumstance of the case, and with particular reference to the means and ability of the person by whom the contract is performed.
3. There was an implied term in the Insurance policy that the consignment should be collected within a reasonable time. The implied term was fundamental which the plaintiff did not breach and the defendant cannot rely on an exclusion clause in the policy as a basis for repudiating liability for any claim thereon.
4. There was an implied term in the insurance policy that if any delay in clearing the consignment from the ports beyond 14 days is caused by government agents such a delay must not be counted against the plaintiff. Here, the plaintiff has adduced evidence showing that if there was any delay at all, it was caused by officials of the board of customs.
5. Loss of the plaintiff's goods didn't occur at Apapa port when the goods were collected but when en route to the plaintiff's warehouse in Ibadan. Consequently, Defendant continues to be liable for the loss as the Insurance cover extended till when the goods were safely delivered in plaintiff's warehouse.

6. The value of the missing container is ₦31,407.14 which is deducted from the former sum and would leave a balance of ₦28,261.89 as being the insured value of the container.
7. Judgement debt of ₦28,261.00 was awarded and would bear interest at the rate of 14% per annum from the date of judgement till final liquidation.

JUDGMENT

Per Segun, J.

The plaintiff's claim against the Defendant is for the sum of ₦44,500.00 being the insured value of two containers of evaporated tinned "peak milk" short delivered under the contract of insurance policy no. CLM82/0202. The two containers were lost in Lagos and Ibadan on or about the 4th day of February 1983. The plaintiff is admitted liability company carrying on the business of importer, exporter manufacturer representative, food and builder merchant.

The plaintiff was fully interested in a policy of Marine Insurance dated the 13th day of December 1982 whereby the Defendant insured the following cargo (see exhibit 4) "Unsweetened evaporated tinned milk "peak" brand packed in the container as per certificate No C.I. No. 75. This policy covers all risks from Holland to Apapa, Lagos, and thence to the Insured's warehouse at Ibadan, via Apapa, Lagos. After payment of the premium of ₦3,088.65 the Defendant gave to the plaintiff, Insurance Policy No CIM82/0202/LA and Insurance Certificate No CIN 075.

The policy of the insured covers all risks from one warehouse to the other. The idea is to provide Insurance cover from the time the goods insured under the policy took off from the port of embarkation to the final warehouse of the Insured, the Defendant agreed to cover not only the sea but the inland transit from Apapa port, Lagos to Insured's warehouse at Ibadan.

The vessel carrying the said consignment arrived in Apapa port with the consignment on the 19th day of January, 1983. The plaintiff engaged the services of a clearing agent to clear the consignment were discharged from the vessel on or about the 31st day of January, 1983. The clearing agents, however, engaged the services of some transporters to convey five containers to Ikeja and the other

ten to plaintiffs' warehouse in Ibadan. The five containers for Ikeja got there safely but two containers out of the ten sent to Ibadan never reached there, amongst the vehicles that were used in the carriage of the consignment was vehicle with registration number LA 4631 A which carried containers No Scpu 2374061 and WAJU 261124-1. The said vehicle left Lagos to Ibadan on the 4th day of February, 1983 but the containers were stolen along Lagos/Ibadan Expressway. Each of the containers contained 800 cartons of "peak Evaporated Milk" value at ₦44,500.00.

A report of the theft was immediately made to the police who carried out intensive investigation but could not recover the said container of milk. About two and half year later, the driver of the lorry carried the two containers was tracked down by the police and charged for stealing the milk. He was tried, convicted and jailed for 5 years. He was however given an option to pay a fine of ₦3,000.00.

The judgment was tendered as Exhibit C.

The plaintiff through its insurance broker informed the defendant about the loss and subsequently wrote several letters of demand for settlement of the plaintiff's claims but the defendant declined liability to the claims. The plaintiff also engaged the service of a solicitor who wrote the Defendant but still refused to settle the claims. The Defendant called no witness but relied on the case for the plaintiff.

The first question for determination is whether the Insurance policy was still in force at the time the plaintiff suffered the loss. At the back of Exhibit, A are the following endorsements under "conditions".

1. "port delay clause attached"
2. "warranteed all cargo cleared within 14 days of discharge from the overseas carrying vessel".

In Exhibit B under "port delay clause" the cargo has to be cleared within 60 days. These are standard clauses that provide that the Insurance shall terminate on the expiry days from the midnight of the day of arrival of the vessel. But because of the pilferages rampant in Apapa port, the Insurer inserted the imitation of 14 days. It would appear therefore that there is confusion in the

policy. There is, however, no evidence before this court that the defendant obtained the permission of the Director of Insurance as required under section 14 (1) of the Insurance Act 1976 to modify the standard "port delay clause" from 60 to 14 days. However, the consignment was cleared on 2nd February 1983 from the port. They actually arrived on 19th January, 1983. Even if the conditions in the policy were ignored, the 14 days requirement would expire exactly on February 2nd (See Re Hector Whaling Ltd (1936) Ch. 208; Section 15 (2) of the Interpretation Act 1964 and other 47 High Court of Lagos State (civil procedure) Rules (1972). It is therefore clear that the goods were cleared within 14 days from the port.

However, where a contract is silent as to the time for the performance of an obligation, the Law implies that the obligation should be performed within a reasonable time. This has been the law since the Decision in Hick V Raymond (1983) A.C 22 at page 32 which statement of the Lord Herschel adopted in the House of Lords in Orion Steamship Co. Ltd V The Castle Mail Packets Co Ltd (1988) A.C. 486 at pages 490-491 where he said "my lords, the judgment of his house in Hick V Raymond appears to me to have laid down very clearly what are the elements to be considered it was there held that "where a bill of Lading is silent as to the time within which the consignee is to discharge the ship's cargo his obligation is to discharge within a reasonable time" and of course, the same principle applies to loading as to unloading. And that obligation is performed if he discharges the cargo within a time which is reasonable under the existing circumstance, assuming that those circumstances, in so far as they involve delay, are not caused or attributed to him". In that case my noble and learned friend states the law thus. The rule" (that is to performance within a reasonable time) is not confirmed to contracts for carriage of goods by sea. In the case of other contracts, the condition of reasonable time has been frequently interpreted and has invariably been held to mean that the party upon whom it is incumbent duly fulfill his obligation, notwithstanding prorated delay, so long as such delay is attributable to causes beyond his control and he has neither negligently nor unreasonably".

It becomes trite law therefore that where a contract has to be performed within no specified time which connotes a reasonable time such time will have to be determined according to the circumstances of the case and with particular reference to the means and ability of the person by whom the contract is to be performed.

In any event, any ambiguity regarding the provision of an insurance policy must be resolved against the insurer in accordance with the well-established rule of construction known as the contract proferentum. In the case here it seems to me that upon the true construction of a true policy, a reasonable time within which the consignment would be collected from the port provided. This was an essential fact that went to the root of the contract and as such, it was a fundamental term of the policy. This is a question of law, and this Court is therefore entitled to construct the terms of the policy to collect the consignment within a reasonable time was a fundamental term of the policy, and for the plaintiff not to have committed a breach of that fundamental term, the Defendant cannot rely on the limitation of liability and exception clauses under the policy to absolve it from the consequences. This is the principle formulated by Scruton L.J in Gibaud V Great Eastern Railway (1921) 2 K.B 426 at page 435, where he said:

"The principle is well known and perhaps Lilly V Doubeday is the best illustration, that if you understand to do a thing in a certain place, with certain conditions, protecting it and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way which you had contracted to do it".

It follows from the foregoing that reputation of liability by an insurer amounts to a fundamental breach disentitling it to rely on limitation of liability and exception clauses in the Insurance policy.

In the case herein, the plaintiff has satisfactorily established the pre ponderance of evidence that if there is any delay at all, it was caused by the board of customs who insisted on examining the containers. It is my view that there must be am implied term in the contract that if any delay beyond fourteen days caused by Government functionaries such a delay must not be counted against the plaintiff Liverpool City Council V Twin and Another (1979) 2 ALL E.R. 39 at pages 43-44, where Lord Wilberforce said inter alia; "…… but there are varieties of implications which the courts think fit to make and they do not necessarily involve the same process where there is, on the face of it, a complete bilateral contract, the Courts are sometimes willing to add terms to it, as implied terms:

this is very common in mercantile contracts where there is an established usage: in that case. The Courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. In other cases, where there is apparently complete bargaining, the courts are willing to add a term on the ground that without it the contract will not work this is the case, if not of the Moorock (1886-1890) ALL E. R Rep 530 itself on its facts at least of the doctrine of the Moorock as usually applied.

At page 45 of the report, the noble judge went further to discuss a test of necessity as an implied term of the contract. In the case herein, it is in my view, a necessity to have regard to the power of the Government or its agencies to insist on delaying the release of the goods until they are completely satisfied (see also Lister V Ramford Ice & Cold storage Company Limited (1957) 1 ALL E.R 125).

A perusal of page 1 of exhibit A shows that this particular policy insured the goods from the country of origin to the warehouse of the plaintiff. They are insured from one warehouse to the other. The policy was there in force between Lagos and Ibadan. The loss in this case did not occur at Apapa Port and was on its way to Ibadan.

The defendant continues to be liable until all goods were safely delivered at the warehouse. The claim for loss was within the cover provided by the policy.

What is the main purpose of this contract? The main purpose of this Insurance contract is that the plaintiff wanted its goods to be covered from one warehouse to another. It is, however, pertinent at this juncture to refer to the dicta of Aniagolu J.S.C in National Insurance Corporation of Nigeria V Power and Industrial Engineering Co. Ltd (1986) 1 N.W.L.R (page 14) 1 at page 29: *"equity as we all know inclines itself to conscience, reason, and good faith and implies a system of law disposed to a just regulation of mutual rights and duties of men, in a civilized society it does not envisage sharp practice and undue advantage of a situation and a refusal to honor reciprocal liability arising there from; it will demand that a person will enter a deal as a package enjoying the benefits thereof and enduring at the same time, the liabilities therein.*

Because equity frowns at the un-conscionable use of persons right at common law, it generally acts in conscience, hence it is stated in Earl of oxford case (1615) 1 rep. ch1 that "when a judgment is obtained by oppression, wrong and a hard conscience, the Chancellor will frustrate and set it aside, not for any error or defect in judgment but for the hard conscience, the chancellor will frustrate and set it aside, not for any error or defect in judgment but for the hard conscience of the party".

It is upon this basis that equity looks at the intent rather than the form and will impute an intention to fulfill an obligation *(see: Ross VArmy and Havy Hotel Co (1886) 3y ch. D.43;Re-fire proof Doors Ltd. Umney V Fireproof Doors Ltd (1916) 2 Ch.142; cox V Dublincity Distillery (No.2) 1 L4.345)* clearly in the instant case on appeal, equity will impute an intention that the Appellant, far from cutting away from its valid obligation to the respondent, will fully honour its agreement, entered into in January 1978, to indemnify the Respondents, upon its loss on the voyage of M/V "Eastern Saturn". It runs against all accepted notions of Justice that the appellant should pocket the premium and turn round to jettison the liability".

It is also pertinent to refer to section 2(2) of the Insurance (special provisions) Decree 1988, Decree No. 40) which provides: "notwithstanding any provision in any written law or enactment to the contrary, where there is a breach of a term of a contract of insurance, the Insurer shall not be entitled to repudiate the whole or any part of the contract of Insurance, the Insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the ground of the breach unless:

(a) The breach amounts to Fraud; or

(b) It is a breach of a fundamental term (whether or not it is called a warranty) of the contract"

(c) I could not have adopted the provisions of this decree but for the fact that it was promulgated after this suit was instituted. The Courts have always leaned against giving a statute is a retrospective effect and usually regard then as applying to facts or matters which come into existence after the statutes were promulgated unless it is clearly shown that a retrospective effect was intended by the legislature.

This is a fundamental rule of English Law which Nigeria has adopted in *Oxford vs. Universal Insurance Co. Ltd (1936) 2 K. B. 253.* Scott L. J discussing the principle of law, asset out in Maxwell on interpretation of statutes, stated that: "that page (of Maxwell) seems to me to contain almost perfect statement of the principle that you do not give a statute retrospective operation unless there is perfectly clear language showing the intention of parliament that it shall have a retrospective application". Other Nigerian authorities as *Adegbenro vs. Akintola(19631) 1 ALL N.L.R 299 at 301 -302*are no less empathetic uploading that principle. The Supreme Court in *F.S Uwaifo V Attorney General Bendel State and others (1982) 7S.C.124at 193-194* specifically dealt with the effect at common Law, of a repeal of a statue and approved the statement of *Tenderden L.J and L.J in suites V Aillson 9E.A.C. 750 at 752.* In *Edwin Johnson & Another V The state (1981) 2 S. C. 29 at 33,* the Supreme Court (per Aniagolu J.S.C) supported the decision of the English Court in the *Colonial Sugar Refining Co. Ltd. vs. Irving (1905) A.C 369* that statues are not to be held to act retrospectively to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right unless a clear intention to that effect was manifested. Equally supportive of the principle is the Supreme court Judgement in The *Swiss Air Transport Co. Ltd The African Continental Bank Ltd (1971) 1 ALL N.L.R 37 at page 48 (See also Afolabi & Others V Governor of Oyo State and Others (1985) O.S.C.C (Vol 16) 1151 at 1165).*

I am told the 16 containers were valued at ₦235, 570.73. The evidence is that two of the containers were missing. By simple arithmetic, loss of the two containers would be ₦31,401.43. The Insurance policy itself (Exhibit A) contains a policy excess of ₦500.00 or 10% is greater than ₦ 500.00 and amounts to ₦3,140.14. When this deducted from the value of the containers lost which ₦31,401. 43, the balance would be ₦28,261.29.

This is the amount to which the Plaintiff would be entitled. I regret to say that the amount of ₦44,500.00 presented to the Court as its claim cannot be correct having regard to the figures supplied by it and the total value of the whole consignment.

There will therefore be judgment for the Plaintiff for the sum of ₦28,261.29 being the Insured value of two containers lost in transit and which was covered

by Insurance by the Defendant. Defendant shall pay interest at the rate of 14% per annum from today until the whole amount is fully paid.

The Defendant shall pay of ₦850.00 assessed in favour of the Plaintiff.

21.4 REMARKS

Insurance Matters and the Regulatory Body. The business of Insurance is highly regulated.

21.5 REFERENCES

Statuses referred to in the judgement are:

1. High Court of Lagos State (Civil Procedures) Rules, 1972.
2. Insurance Act 1976.
3. Insurance (Special Provisions) Decree No- 40, 1988.
4. Interpretation Act 1964.

Cases Referred to are:

1. Adegbenro vs. Akintola (1963) I ALL N. L. R 299.
2. Afolabi & Others vs. Governor of Oyo State & ORS (1985) A. C 369).
3. Edwin Johnson & Anor V the State (1981(25. C. 29.
4. Colonial Sugar Refining Co. Ltd. Irving (1905) A.C 369.
5. Croxford vs. Universal Insurance Co Ltd (1936) 2 K.B 253.
6. Edwin Johnson & Anor V. The State (1981) 2S. c. 29.
7. F. S Uwaifo vs. attorney General of Bendel State & Ors (1982) 75. C. 124.
8. Gibaud vs. Eastern Railway (1921) 2 K. B 426.
9. Hick vs. Raymond (1983) A.C.22.
10. Lister vs. Ramford Ice & Cold Storage Ltd (1957) ALL E. R 125.
11. National Insurance Corporation of Nigeria vs. Power & Industrial Engineering Co. Ltd (1986) 1 N.W.L.R (PT 14) 1.
12. Orion Steamship Co. Ltd vs. The Castle Mail Packets Co Ltd (1988) A.C 486 Re-hector Whaling Ltd (1936) 1 CH. 208.

13. Surtees V Auison 9 E.A.C 750.

14. Swiss Air Transport Co. Ltd vs. African Continental Bank (1971) All N.L.R 37.

22.1 ARRANGEMENT OF MATTERS, COURT, DATES

Court: High Court

Date: 3rd June 1999

Suit Number: FHCLR 452

Judge: Sanyaolu, J.

Prestige Assurance Plc (Plaintiff)

vs.

M. V. Clara Maersk (Defendant)

22.2 REPORTS/FACTS/ISSUES

Subrogation; the Insurer subrogated to the Insured's right brings the action in the name of the Insured and not in the Insurer's name. Doctrine of subrogation does not confer a new and independent right of action on the Insurer, but merely gives him the benefit of any personal right that the Insured himself has against the third party.

Under a contract of carriage, the shippers: Jaykai Exparte PVT Ltd had placed goods on board for the ship of the Defendant ship owners for shipment by the bill of lading, the goods were consigned to "Order" which implied that no particular person had been specified as its consigners, Ausbros Nigeria Enterprises was however named as a "notify party" therein.

Subsequently, Ausbros Nigeria Enterprises endorsed the goods to Markwell Ventures Limited via the bill of lading. The Plaintiff Insurance Company, having indemnified Ausbros Nigeria Enterprises for the loss of the goods sought to recover from the Defendants ship owners by this action instituted in its own name and in reliance on a letter of subrogation which Ausbros, the Insured had issued to it. The Defendants challenged the locus stand of the Plaintiff on the ground that the right of action arising on its bill of lading had become exercisable only by Markwell Ventures Ltd by reason of the endorsement on the

bill of lading and also argued that the action could only be brought in the name of the Assured and not in the Insurer's name.

22.3 DECISION OF THE COURT

Held; the action was incompetent. The insured who passed the right of subrogation to the Plaintiff had already divested itself of any rights of action on the bill of lading by reason of the endorsement thereon. An Insurer who seeks to enforce a right of subrogation must do so in its own name.

Per Sanyaolu, J.

As stated earlier, Prestige Assurance Plc in whose name the present action has been instituted is nowhere mentioned on the bill of lading Exhibit "A". by the provisions of the Section 131 of the Evidence Act, a bill of lading must be in writing and no extrinsic evidence will therefore be allowed to alter or modify the terms of the bill of lading. The Plaintiff having pleaded the bill of lading, it becomes part of the pleading and is open to the Court not only to look into its terms but also to give them their true legal meaning and effect irrespective of whatever term is used in the pleading. Moreover, it is trite that an Insurer who exercises rights of subrogation against a third party must do so in the name of the Assured. This requirement of the Law has not been complied with by the Plaintiff in the instant case.

The Defendants Applicant's motion therefore succeeds in that the Plaintiff has no locus stand to institute the present action.

22.4 REMARKS

Insurer but to give him the benefit of any personal right that the Insured himself has against the third party.

22.5 REFERENCES

1. NICON v. Power & Industrial Eng Co. Ltd 1986 I N.W.L.R part 14 page 1.

2. Prestige Assurance Pl vs. Owners/Charters of MV Weiniawsk 1996 FHCLR page 452.
3. Halsburys Laws of England 4th Edition Vol 25 page 218.

ABOUT THE BOOK

Insurance aims to financially restore the insured to a pre-loss state, acting as a safety net against unforeseen events in our unpredictable world. In the complex framework of contemporary society, insurance stands as a pivotal mechanism, offering a fortification against the vagaries of fate and the unforeseen uproars that life, with its intrinsic unpredictability, may hurl at us.

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