



**COURTS' JUDGEMENTS ON
INSURANCE AND RELATED
CASES IN NIGERIAN
COURTS – AIDE MEMOIRS
FOR MEMBERS
(Volume 2)**

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(VOLUME 2)**

**ARRANGED IN ORDER OF
SENIORITY OF COURTS**

**CONSULTING PARTNERS:
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FOREWORD

Insurance, at its core, seeks to financially restore the insured to the position they were in before a loss, serving as a critical safety net against life's uncertainties. In an increasingly unpredictable world, it stands as a cornerstone of economic stability, offering protection against unforeseen disruptions and reinforcing the resilience of individuals, businesses, and societies alike.

Within the intricate fabric of modern society, insurance plays a pivotal role, not only as a commercial transaction but also as a mechanism of social justice. This compilation of insurance-related judgments from Nigerian courts is more than a mere archive of legal decisions, it is a guiding beacon for stakeholders navigating the often complex and evolving terrain of insurance law in Nigeria.

It captures the dynamic interplay between the judiciary and the insurance industry, a dialogue that continuously shapes the contours of financial security and legal accountability in the country. Nigeria's rich legal heritage and vibrant insurance market provide a unique context for the development of robust jurisprudence in this field. This compilation encompasses a diverse array of rulings from the Supreme Court, Court of Appeal, Federal High Court, National Industrial Court of Nigeria and State High Courts. The cases touch on critical themes such as Policy interpretation, breach of contract, claims settlement, and regulatory compliance, spanning both Life and Non-Life insurance matters.

Each case presented herein tells its own story, offering a nuanced window into the challenges and legal reasoning that underpin dispute resolution in the insurance sector. Through them, we gain not only judicial precedents but also valuable insights into the application of legal doctrines and the practical realities of enforcement.

This volume has been meticulously curated to serve a wide and diverse audience, including legal practitioners, judges, insurance professionals, scholars, and policymakers. It aims to illuminate the current state of insurance law in Nigeria while offering foresight into its future trajectory. At the heart of every decision lies the enduring principle of *uberrima fides*—utmost good faith, which remains the bedrock of all insurance contracts.

As you delve into these pages, may you find not only the analytical depth and precision characteristic of a serious legal text but also inspiration, an encouragement to appreciate the vital role of law in structuring fair economic relationships, safeguarding rights, and protecting the vulnerable. The judiciary's interpretations herein remind us of the law's power not only to preserve order but to adapt and advance the cause of justice in an ever-changing world.

This Foreword serves not merely as a preface but as a call to thoughtfully engage with the dynamic landscape of Nigerian insurance law—an ever-evolving framework that adapts to emerging challenges, establishes progressive benchmarks, and reinforces the foundational principle of trust that underpins every insurance contract.

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SUPREME COURT

1.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT, LAGOS

DATE: 3rd January, 1986

SUIT NO: S.C. 194/1984

JUDGES: Hon. Andrews Otutu Obaseki, J.S.C.
Hon. Anthony Nnaemezie Aniagolu, J.S.C. Hon. Mohammed Lawal
Uwais, J.S.C. Hon. Boonyamin Oladiran Kazeem, J.S.C. Hon.
Chukwudifu Akunne Oputa, J.S.C.

NATIONAL INSURANCE CORPORATION OF NIGERIA
(Defendant/Appellant)

vs.

POWER & INDUSTRIAL ENGINEERING COMPANY LIMITED
(Plaintiff/Respondent)

1.2 REPORTS/ FACTS/ ISSUES

The Plaintiff ordered 86,612 bags of rice from Bangkok, shipped aboard M.V. *Eastern Saturn* on 30/12/77, which departed on 3/1/78. Upon receiving shipping documents on 9/1/78 and discovering no insurance cover, the Plaintiff approached the Defendant for marine insurance. A Marine Insurance Open Cover was issued on 15/2/78 for shipments from 1/2/78 onward. A certificate of insurance was issued on 23/2/78, and the premium paid, insuring the goods for ₦1,231,459.00.

However, the ship sank without a trace on 10/2/78, resulting in a total loss. The Plaintiff filed a claim on 9/5/78, but the Defendant repudiated liability, citing that the shipment occurred before 1/2/78. The premium was refunded but rejected by the Plaintiff.

The Plaintiff sued and obtained judgment for the insured sum at the Federal High Court, affirmed by the Court of Appeal. The Defendant appealed to the Supreme Court, arguing non-disclosure of material facts and that, without a formal marine Policy, the marine open cover was not an enforceable contract.

1.3 DECISION OF COURT

HELD:

1. A marine insurance Policy must be tendered to prove the existence of a contract. A marine open cover qualifies as a floating Policy under Sections 2(1), 24(1), and 25 of the Marine Insurance Act, 1961.
2. A Policy need not strictly follow the prescribed form under the Act; modifications are acceptable if they substantially resemble the prescribed format.
3. The certificate of insurance issued on 23/2/78 is not a standalone Policy but indicates the existence of a marine Policy with the respondent.

4. Under Sections 24, 25, and 26 of the Act, the *marine open cover* and certificate of insurance together constitute valid evidence of a marine insurance contract. The insurance covered the January 1978 shipment, and the February 1978 commencement date was unilaterally set by the appellant.
5. The respondent was not guilty of material non-disclosure, as the appellant was fully aware of the risk being insured, based on uncontroverted evidence.
6. Sections 23 and 32(1) of the Act acknowledge that *a* marine insurance contract can be validly concluded before premium payment.
7. *The* appellant is liable to pay the insured sum of ₦1,231,490.00 with 10% interest *from* 23/5/78. Appeal dismissed.

JUDGEMENT

OBASEKI, J.S.C.

This appeal deals with a claim brought under a marine insurance contract between the Appellant and the Respondent and raises the important question of what constitutes a “Policy” of marine insurance within the terms of the Marine Insurance Act, 1961.

The Respondent, in pursuance of its desire to contribute its quota to the “Feed the Nation Campaign” or campaign against hunger in 1977, ordered 86,612 new double jute bags of rice from Bangkok in the Far East.

The consignment which had an insured value of ₦1,231,459:00 was loaded onto the vessel “Eastern Saturn” for transportation by sea from Bangkok to Port Harcourt and or Lagos State on the 30th day of December, 1977 (See Exh. L7) and the ship set sail on the 3rd day of January, 1978 (See Exhs. “L”, “L1” and “L2”). This information was conveyed to the Respondent by Exh. “L” and Exh. vvi Bill Note dated 26/1/78. By Exh. S2, Exh vvi the Respondent was advised by the United Bank for Africa that the Bank had received for the account of the Respondent documents for goods sent per “M.V. Eastern Saturn”, including B/L No. Option-1 dated 30/12/77 by Continental Enterprises (Bermuda) Limited. covering 86,612 bags of Thai Parboiled Rice. The Respondent was requested to collect the documents. Following the advice, the Respondent collected the documents and on receipt of Exhs. “L”, ‘L1’ to ‘L7’ and discovering that the consignment had no insurance cover, the Respondent approached the Appellant for insurance cover. The Appellant agreed to issue a marine insurance open Policy, and on the 15th day of February, 1978, the Appellant did issue the Marine Open Cover No. MA/MAT/78/MOC/0021- Exh. ‘J’. This Marine Open Cover, Exh. ‘J’ was forwarded by letter No. GCGU/CAC/000/264/0AA/ABA dated 14th February, 1978, Exh. ‘M’.

Subsequently, Certificate of Insurance No. 16533 issued under the Open Contract No. MA/MAT/78/MOC/0021 Exh. “J” was issued and forwarded by letter Exh. ‘N’ dated 23rd February, 1978. By letter Exhibit ‘H’ dated April,13,1978, the shippers, “Continental Enterprises (Bermuda) Limited,” informed the Respondent that the vessel *M/V Eastern Saturn* had sunk without any trace and gone down to the bottom of the sea with all the consignments on board. But before then, AMC International Limited by letter dated 13th March, 1978- Exh. ‘C’ copied for the Appellant’s information, the letter dated 3rd March, 1978, received on 11/3/1978 from Polinia & Company Limited of

Hong Kong, reporting that the vessel Eastern Saturn had sunk. The Respondent, on this information, by letter dated 6th April, 1978, Exh. "D" conveyed the information to the Appellant and also forwarded to it photocopies of the report from the shippers sent to the shipping agents.

The Respondent then requested from the Appellant advice on the processing of the necessary claims. The Appellant reacted sharply and sent a letter Exh. "E" dated 11th April, 1978, disclaiming liability and complaining that, as no premium had been paid, there was no contract of insurance in existence between the Respondent and themselves. The Respondent then wrote Exh. "P" dated 21/4/78 drawing attention to the receipt Exh. "A" for payment. However, by letter Exh. "F" dated 27th April, 1978, the Appellant confirmed that the premium had been paid but disclaimed liability on their own interpretation of the Open Cover, contending particularly that they were not liable for shipments made prior to 1st February, 1978. By letters Exh. 'Vi' dated 9th May, 1978, the Respondent formally claimed the insured value of N1,231,359.00 and requested early settlement.

This was followed by a visit and a letter Exh. "V2" dated 10th May, 1978, asking for action to be taken on Exh. "V". This was also followed by letter Exh. "V3" dated 26th May, 1978, sent by the Respondent, forwarding copies of the Master's Statement of protest with respect to the sinking of the vessel.

In reply, the Appellant by letter Exh. "W" claimed that "no risk ever attached to them under the Open Cover" because although the declaration was made after the 1st February, 1978, the actual date of sending was before the inception of the Cover, the vessel having sailed from Bangkok, the port of shipment on the 3rd day of January, 1978.

This sounded the bell for litigation over the matter, which was commenced in the Federal High Court, Lagos. From the Federal High Court, it went on appeal to the Court of Appeal, from whence it has come to this Court on appeal. By their amended particulars of claim filed in the Federal High Court by the Respondent.

"The Plaintiff's claim against the Defendant is for the sum of ₦2,231,359:00 (Two Million, Two Hundred and Thirty-one Thousand, Three Hundred and Fifty-Nine Naira Only) being special and general damages for breach of contract, whereof the sum of ₦1,231,359:00 represents special damage and ₦1,000,000:00 represents general damages".

Pleadings on the order of the Federal High Court were settled, amended, filed and exchanged by the parties and the issues joined went to trial before Belgore, J. At the hearing, only two witnesses testified. They were T. Ifeanyi Nzegwu, a Director of the Respondent company and Sule Bamidele Balogun, the Manager of the Respondent company. The Appellant called no evidence and rested its case on the evidence adduced by the Appellant's witnesses. After the conclusion of evidence and the addresses of counsel, the learned trial judge, Belgore, J. delivered a well-considered judgement in which he awarded the Respondent as special damages ₦1,231,359:00 with interest at 10% from 23/5/78 and ₦2,000:00 costs.

The Appellant was naturally not satisfied with the judgment and so appealed to the Court of Appeal. After hearing submissions of counsel of both sides, the Court of Appeal (Ademola, Mohammed and Kutigi, JJCA. concurring), commented:

"All insurance contracts involve the taking of risk and therefore, the occurrence of the event insured against cannot frustrate the contract. It is ludicrous to say the

least, to tell the Respondent that the loss of goods on the *M/V Saturn* has put an end to the contract he concluded with the Appellant, for that was the very thing that brought them together in the first instance.”

The Appellant was still not satisfied with the decision of the Court of Appeal and so appealed to this Court. The questions raised before the Court of Appeal by the Appellant, which did not receive answers favourable to the Appellant, re-echoed in the grounds of appeal filed with the Notice of Appeal to this Court by the Appellant. The grounds of appeal in their final amended form read:

1. The learned justices of the Court of Appeal erred in law when they held that Exhs. “B” and “J” do not bind the Respondent.

Particulars of Error

- (1) The Respondent founded its cause of action on Exhibits. “B” and “J” and especially pleaded them.
 - (2) The Respondent tendered in evidence Exhibits. “B” and “J”.
 - (3) The Respondent gave evidence that Exhibit. “J” contains all the terms of the contract of insurance in question.
 - (4) Exh. “J” is in view of the evidence of the Plaintiff that it contains all the terms of the contract as a counteroffer.
 - (5) After receiving the Exhibit. “J”, Plaintiff accepted the counteroffer by paying a premium, evidenced by Exhibit. “B” on the terms considered in the said Exhibit. “J”.
 - (6) Exhibit “B” incorporates all the terms set out in Exhibit. “J”.
2. The learned justices of the Court of Appeal erred in law in holding that, because the issue of the necessity for a Policy was not raised on the pleadings, the Appellant cannot rely on the legal result of its non-production.

Particulars of Error

- (1) Only facts relied upon need be pleaded, but not the legal results of acts or omissions of the Plaintiff.
 - (2) Paragraph II of the Statement of Defense is a plea of the provisions of the Marine Insurance Act, 1961.
 - (3) It was pleaded that the contract was unenforceable.
 - (4) The Plaintiff’s claim did not ask for any particulars of any averment in the Appellant’s Statement of Defense.
3. The learned justices of the Court of Appeal erred in law when they acted upon parol evidence of the contract when the contract had been reduced into writing, to wit, the Open Cover, Exhibit “J”, which was specially incorporated into Exhibit. “B” the Certificate of Insurance.

Particulars of Error

- (1) Exhibit. L1 to Exhibit. L7 was not part of the Exhibit. “J” and they contradict the Exhibit. “J”.
 - (2) Oral evidence which contradicts Exhibit. “J” is inadmissible.
4. The learned justices of the Court of Appeal erred in law when they held that the failure of the Respondent to produce a Policy of Marine Insurance did not affect its enforceability.

Particulars of Error

- (1) In the absence of the Policy, all other evidence is, by section 24 of the Marine

Insurance Act, 1961, made inadmissible.

5. The learned Justices of the Court of Appeal erred in law when they held that “the doctrine of avoidance of contract because of common mistake has no place in insurance”.

Particulars of Error

- (1) If before the conclusion of the contract of insurance, the goods or the subject matter of the contract of insurance has ceased to exist either by destruction of the same or by death (although unknown to both parties), the contract will be void because the insured will then have no insurable interest.
6. The learned Justices of the Court of Appeal misdirected themselves on the facts and in law when they held that there was a valid contract subsisting between the Plaintiff and the Defendant in January, 1978.

Particulars of Error

- (1) By Section 23 of *Marine Insurance Act, 1961*, a contract of Marine Insurance shall be deemed to be concluded when the proposal of the assured is accepted, whether the Policy is then issued or not, and, to show when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract.
- (2) Plaintiff’s witness testified that the premium was paid on 23/2/78 and a Certificate or Cover/ Note was issued in respect thereof on 23/2/79 (see page 44, lines 30 and 31, of the record).
- (3) The Plaintiff’s witness agreed that the Open Cover is not a Policy or Certificate of Insurance and that declarations of shipments must be made and premiums paid on individual shipments (see page 22, lines 22 and 24-25).
- (4) Exhibit. “K”, a letter written by the Plaintiffs, admits that the contract of marine insurance was concluded by the acceptance of the premium.
- (5) The Plaintiff’s Managing Director gave evidence that he accepts that an Open Cover does not cover a particular shipment until a premium is paid on individual goods.
7. The learned Justices of the Court of Appeal misdirected themselves on the facts and came to a decision that is erroneous in law when they held that the Defendant was liable for the loss of goods which did not come within the period it agreed to insure the Plaintiff’s goods.

Particulars of Misdirection

- (1) The Defendant agreed to insure goods shipped on or after 1st February 1978;
- (2) The Plaintiff accepted the Defendant’s Counter-Offer and paid a premium on the 23rd February, 1978;
- (3) The goods which are the subject matter of this action were shipped in January, 1978.
8. The decision is against the weight of evidence.
The main questions for determination in this appeal, therefore, are:
 - (1) Whether there was a contract of marine insurance in existence between the Appellant and the Respondent in respect of 86,612 bags of parboiled rice valued at ₦1, 231,459:00 on board the ship *M/V Eastern Saturn*.
 - (2) Whether Exhibits. “B” and “J” together constitute the Policy of marine insurance.
 - (3) Whether Exhibit. “J” alone is a Policy of Marine Insurance.

- (4) Whether the loss of the 86,612 bags of rice when *M/V Eastern Saturn* sank on the 10th February 1978, before the premium was calculated, demanded and paid, removed the liability of the Appellant under the Marine Open Cover Exhibit. “J” and the Certificate of Insurance Exhibit. “B” issued under it.

It is desirable to consider the second and third questions for determination raised in this appeal before proceeding to deal with the other questions. Having given a short narration of the facts above, I shall turn to the *Marine Insurance Act, 1961*, No. 54, for the definition of a Policy of Marine Insurance that approximates to Marine Open Cover. I find the provisions of section 31 of the *Marine Insurance Act* apposite. The section deals with Floating Policy and reads:

- (1) A Floating Policy is a Policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.
- (2) The subsequent declaration or declarations may be made by endorsement on the Policy or in other customary manner;
- (3) Unless the Policy otherwise provides, the declarations shall be made in the order of dispatch or shipment. In the case of goods, they shall comprise all consignment within the terms of the Policy, and the value of the goods or other property shall be honestly stated; but any omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.
- (4) Unless the Policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the Policy shall be treated as an unvalued Policy as regards the subject matter of that declaration.

The basis of all insurance transactions is utmost good faith.

Most certainly, Exhibit “J” which shall receive more detailed treatment in the cause of this judgement, in my opinion, falls within the definition of a Floating Marine Insurance Policy. Exhibit “J” is titled “Marine Open Cover No.MA/MAT.78/MOC/0021” and Exhibit. “B” is titled “Certificate of Insurance No.16533 issued under Open Contract No.MA/MAT/78/MOC/0021”. Exhibit. “B” therefore, is not a certificate of insurance standing on its own. It is an endorsement of the Exhibit “J” and declares the name of the ship, the port of loading, and the port of discharge, the interest insured and the insured value. These were particulars omitted from the Exhibit “J”. The conditions therein stated were as per Marine Open Cover No.MA/MAT/78/0021 Exhibit” J” and Exhibit. “B” comes within the intendment of subsections (1) and (2) of Section 31 of the *Marine Insurance Act, 1961* No.54.

The declarations contained in Exhibit. “B” is those envisaged under subsections (1) and (2) of Section 31. Subsection (4) of Section 31 provides for a situation such as has not arisen in this case, where the declarations were not made till after the loss. This case is slightly more fortuitous in that the declarations were made before the loss and before the information about the loss of the subject matter was received by the Respondent and communicated to the Appellant.

The pleadings were not deficient in any material particular save that the words “Marine Insurance Policy” were not used to describe the document pleaded. For a better appreciation of the facts pleaded, I will proceed to set out fully paragraphs 3,4,6,7,8,9,10,12,18,19 and 21 of the amended Statement of Claim:

- “3 The Plaintiff ordered 4,000 metric tons (86,612 bags) of rice from Continental Enterprises (Bermuda) Limited in or about November/December 1977.
9. The said goods were shipped per M.V. “Eastern Saturn” which sailed from Bangkok on 3rd January 1978.
 10. The Plaintiff was sent the necessary shipping documents as per a letter dated 9th January 1978 addressed to the said Plaintiff by Messrs Tai Sae Company Limited.
 11. In consequence of the matters pleaded in paragraphs 5 and 6 of this further amended Statement of Claim, the Plaintiff on receipt of the said shipping documents in or about mid-January, 1978 approached the Defendant to arrange for the goods to be insured after showing the Defendant the said shipping and other documents and the Defendant agreed to do so and promised to confirm this and to advise the Plaintiff the premium payable after calculation.
 12. The Defendant confirmed the said agreement referred to in paragraph 7 above by the issue of a Marine Open Cover No. MA/MAT/78/MOC/0021 under its covering letter dated 14th February, 1978.
 13. After the Defendant had properly calculated the amount of the premium payable, it issued the necessary debit Note No. MA 6845 dated 23rd February, 1978 on which the amount of ₦12,776.39 was shown as the premium in respect of Certificate No. 16533, both of which were forwarded under the cover of its letter dated 23rd February, 1978, to the Plaintiff.
 14. On the payment of the amounts of premium payable as demanded by the Defendant, the Plaintiff was issued with a comprehensive receipt No. 002907 of 24th February, 1978.
 15. The said goods and all of them became a total loss by the perils insured against by the said Defendant.
 16. Formal demands for settlement of its claim were made by the Plaintiff by letters dated 9th May, 1978, 10th May, 1978 and 26th May, 1978 for the total value of the said goods amounting to ₦1,231,359:00.
 17. The Defendant wrongfully maintained its stand in its letter dated 22nd June, 1978 and offered to refund and did refund the premium of ₦12,776:39 paid on certificate No. 16533 relating to this claim, which said refund the Plaintiff rejected in its letter dated 20th July, 1978. The Plaintiff returned the Defendant’s said cheque.
 21. The Plaintiff suffered loss and damage as a result of the Defendant’s breach of contract as well as the profits it would have earned from the availability of the funds due to it on other business transactions”.

Equally, paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the further amended statement of defense are relevant, pertinent and material:

- “2 The Defendant denies paragraphs 1, 3, 5, 6, 7, 8, 11, 12, 13, 15, 17, 21 and 22 of the statement of claim and puts the Plaintiff to the strictest proof thereof.
22. The Defendant admits paragraphs 2, 4, 9, 10, 14, and 16 of the statement of claim.
 23. With reference to paragraph 15 of the statement of claim the Defendant avers that the

Plaintiff's claim was repudiated for many reasons, among which are the following namely:

- (a) Non-disclosure of material facts contrary to section 20 of the Marine Insurance Act No. 54 of 1961, e.g.
 - (i) that the boat carrying the goods had left the port of shipment on 3rd January, 1978, a date outside the date stipulated by the Open Cover;
 - (ii) that the boat had been abandoned by the crew on the 10th February 1978 and had been declared lost when he on the 23rd February 1978 made his declaration under the Open Cover and paid premium thereon.

- 24. With reference to paragraph 19 of the statement of claim, the Defendant admits that the Plaintiff has no right to the refund of the premium paid on the grounds of fraudulent non-disclosure of material facts.

Particulars

Failure to disclose with the Plaintiff based on absolute good faith and whether there was any incident or not, it felt bound in good faith to reject all declarations for shipments before the 1st February, 1978 which are outside the Open Cover.

- 25. The Defendant avers that by the Open Cover issued by the Defendant, only shipments or sendings on and after the 1st day of February, 1978, were that the ship had sailed long before 1st day of February, 1978;

Failure to disclose that the ship had been abandoned by its crew on the 10th February, 1978 and had been reported lost on the 15th February, 1978.

- 26. With reference to paragraph 20 of the statement of claim, the Defendant avers that it has dealt covered whereas the subject matter of the ship's claim was shipped on or before the 3rd day of January 1978 from Bangkok.
- 27. The Defendant will contend at the trial that the Open Cover was entered or obtained by the Plaintiff after the boat "Eastern Saturn" carrying the parboiled rice had been abandoned by its crew and master at 10:00 hours GMT on the 10th February 1978 and before any certificate of insurance or any contract of insurance covering or concerning the goods in question was issued or entered into.
- 28. The Defendant will contend at the trial that on the 23rd day of February 1978, when the Plaintiff obtained a certificate of insurance in respect of the goods a broadcast had gone out to all ships of the loss of the ship "Eastern Saturn"
- 29. The Defendant avers that the goods which form the subject of Plaintiff's claim were not shipped *within the time* expressly limited by the Open Cover and the Certificate of Insurance issued as a result of the declaration purported to be made under the said Open Cover is *void* and the Defendant cannot be made liable thereunder.
- 30. The Defendant will at the trial rely on the provisions of the *Marine Insurance Act, 1961*, Laws of Nigeria and contend that the contract of Marine Insurance is not enforceable.
- 31. The Defendant will at the trial rely on the Open Cover dated the 15th day of February 1978, the Certificate of Insurance No.16533 dated the 23rd of February, 1978, Plaintiff's letter dated 6th April, 21st April, 1978, 9th May, 1978 and 26th June, 1978".

At the trial, the Plaintiff/Respondent called evidence in support of its claim. As mentioned earlier above, Defendant called no evidence to prove and establish the facts pleaded in paragraphs 4, 5, to 8, 9 and 10 of the Statement of Defence. The Plaintiff called two witnesses, T. Ifeanyi Nzegwu (P.W.1), Director of Plaintiff/Respondent company and Sule Bamidele Balogun (P.W.1) the Manager of the Plaintiff/Respondent company to testify.

They testified and tendered in evidence the documents pleaded. These include:

- (1) Exhibit 'J', Marine Open Cover No. MA/MAT/78/MOC/0021 dated 15th February 1978 issued by the appellant.
- (2) Exhibit 'B' Certificate of Insurance No.16533 dated 23rd February 1978 issued under Open Contract No. MA/MAT/78/MOC/0021.
- (3) Exhibit 'A' – receipt for ₦13,552.53k being premium paid on Marine Insurance Certificates No. 16532 and 16533 dated 24th February, 1978.
- (4) Exhibit 'L', letter dated 9/1/78 forwarding shipping documents from Tai Sae Company Ltd. to the appellant to wit Exhibit 'L' freight list, Exhibit 'L2', manifest dated 3/1/78, Exhibit 'L3' Bills of Lading dated 31/12/77;
Exhibit 'L4' Invoice dated 6/1/78; Exhibit 'L5' Invoice dated 6/1/78;
Exhibit 'L6' Certificate of Origin dated 30/12/77; Exhibit 'L7' Bill of Lading dated 30/12/77.

Mr. Nzegwu, P.W.1, in his testimony, categorically asserted that Exhibit 'B' is a certificate of insurance and that Exhibit 'J' contains all the letters (sic) (terms) of the contract. He also asserted that his transaction with the appellant did not start with Exhibit 'B' and that he had an Open Cover Exhibit 'J' issued earlier by the appellant. It was on the advice of the manager of the appellant company against taking an individual Policy that he opted for an open cover. He then made the proposals, which were accepted by the appellant in January 1978. Exhibit 'J', the Marine Open Cover, was later issued and forwarded.

On the issue of the existence or non-existence of a Policy of marine insurance, Belgore, J., in his judgement said:

“The last point raised by the Defendant was that section 24 of the *Marine Insurance Act* made other evidence on the marine Policy inadmissible except the Policy itself. The Defendant did not make this point an issue in his pleadings; references were made in the statement of defense of the marine Policy not being enforceable because of one reason or another, but the issue of non-existence of the Policy was never mentioned. Though I agree with the learned counsel for the Defendant that legal points should not be pleaded, the existence or non-existence of marine Policy was an issue of fact known to the Defendant because they were to prepare the document which must be pleaded ... Furthermore, the marine insurance Policy document was still with the Defendant, they did not release it and now they were accusing the Plaintiff of not producing it.

The principle laid down in section 14B(d) of the *Evidence Act* should apply to the action of the Defendant..... The practice had been for the Defendant in such a case to produce the document. In *Chitty on Contracts Vol 2*, Specific Contracts, 24th Edition footnote 46 to paragraph 3938, it is stated:

“However, underwriters will as a matter of course, issue a Policy to enable the assured to bring an action, even if they deny liability”.

The issue of the existence or the non-existence of a Policy was raised in the Court of Appeal. Dealing with this question, Ademola, J.C.A. (with whom Mohammed and Kutigi, J.C.A. concurred) observed:

“There was a submission to the effect that the respondent cannot, in any event, succeed since the Policy of insurance has not been pleaded and other documents Exhibits ‘A’, ‘B’ & ‘J’ tendered showing the existence of a contract could not take its place. I think that the learned Judge has dealt very well in his judgement by pointing out that this issue was not raised on the pleadings and that the practice of underwriters such as the appellant in this appeal, is to supply a stamped Policy to the respondent to maintain an action as noted in *Chitty on Contract vol.2* Specific Contracts, 24th Edition paragraph 3938 footnote 46. I cannot improve on that”.

The answer to this question is not far to seek and I think that both the learned trial Judge and the learned Justices of the Court of Appeal evaded the question and unfairly castigated the appellant. Undoubtedly, the statutory provisions as contained in section 24(1) of the *Marine Insurance Act 1961* constitute an absolute bar on the admissibility of evidence of marine insurance contracts in civil proceedings unless embodied in a Policy of marine insurance and unless any statute otherwise provides. More particularly, the section reads:

“Subject to the provisions of any statute, a contract of marine insurance shall not be admissible in evidence unless it is embodied in a marine Policy in accordance with the form in the first schedule to this Act or the like effect. The Policy may be executed and issued either at the time when the contract is concluded or afterward, and subject to the provisions of this Act and unless the context of the Policy otherwise requires, the terms and expressions mentioned in the said first schedule shall be construed as having the scope and meaning in that schedule assigned to them”.

On what the Policy must specify, section 25 of the *Marine Insurance Act* stipulates that:

“A Marine Policy shall specify the name of the insured or some person who effects the insurance on his behalf”.

A Policy may be either valued or unvalued (Section 29(1) of the *Marine Insurance Act*). An unvalued Policy is a Policy that does not specify the value of the subject matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained in the manner specified in Section 18 (See Section 30 of the *Marine Insurance Act, 1961*).

Mr. Molajo, SAN, learned counsel for the Appellant, rightly, in my view, submitted that the necessity for evidence of a Policy of marine insurance to prove a contract of marine insurance cannot be waived. I agree with him completely as the provisions of Section 24(1) of the *Marine Insurance Act* is couched in mandatory terms. (See *Abolade Agboola Alade v. Salawu Jagun Olukade* (1976) 2 SC. 183 at 189).

While not disagreeing with that submission, Mr. Sofola, SAN, learned counsel for the Respondent, countered by submitting that Exhibit ‘J’ and Exhibit ‘B’ constitute the Policy. In particular, he drew the Court’s attention to certain clauses in the Exhibit. “J”, where the document was described as a Policy of marine insurance.

Mr. Molajo disagreed with the submission that Exhibit “B” and Exhibit “J” constitute a Policy to prove the contract of marine insurance. He submitted that Exh. “B” being a certificate of insurance, is inadmissible and cited in *Diamond Alkali Export Corporation v. Bourgeois* (1921) All ER Rep. 283 at 291;

Scott v. Barclays Bank Limited 14 Lloyd L. Rep 142 at pages 114 & 115, English Insurance Com. Ltd. v. National Benefit Insurance Co. Limited (1928) All ER. Rep 441 at pp. 443-444; (1929) AC 114 at 119 & 121.

An examination of Exhibit “J” shows that it contains all the details required of a Policy under sections 24 and 25 of the Marine Insurance Act, 1961 and the First Schedule to the Act. Its contents (in part) read:

“It is hereby agreed to hold covered Messrs. Power & Industrial Engineering Co. Limited hereinafter called the Assured, subject to the terms and conditions hereunder for an open amount not exceeding ₦3,000,000.00 (Three Million Naira) per any one vessel or conveyance or in any one location ESTIMATED ANNUAL TURNOVER 30 MILLION TERMS AND CONDITIONS REFERRED TO: As per attached clause OPEN COVER always open for the full amount irrespective of the declaration made for all shipments and /or sendings on and after 1st February 1978 but subject to cancellation by either Assured or the Assurers giving notice in writing as hereinafter provided”.
“INTEREST...Rice in jute bags...

BASIS OF VALUATION:

In the event of loss, accident or arrival prior to declaration, it is hereby agreed that the basis of valuation shall be C & F (invoice value) plus the percentage to be declared by the clients.

PER: Any approved steamer and/or steamers and/or conveyances as per Institute classification clause or held covered.

VOYAGES: Worldwide – Apapa/Lagos/ Port Harcourt.

CONDITIONS OF INSURANCE:

Subject to the Cargo Clauses (all risks)

Subject to the Institute's war, striker, riots and civil commotion clause. Subject to the Institute classification clause.

Subject to the Port Delay Clause

Subject to an excess of ₦950:00 for every loss except total loss

Warranted name of the vessel advised prior to sailing or within a reasonable period thereafter and any coverage.

Additional premium paid before arrival

Warranted goods cleared within 15 days of discharge

Warranted discharge supervised by Lloyd's or other professional handling agent and any loss or damage suffered immediately thereafter by the same agent Subject to the replacement clause

Excluding electrical and mechanical derangement Excluding rust, oxidation and discolouration

PREMIUM PAYABLE:

Marine = 1% + War Scale
Cement = 375% + War Scale

DECLARATIONS TO BE ADVISED TO:

The Managing Director, The National Insurance Corporation of Nigeria, Marine Department, 118/120 Broad Street,
P.O. Box 1100, Lagos State, Nigeria.

CANCELLATION: This open cover is subject to cancellation by either the Assured or the Assurers, giving thirty days' notice in writing in respect of Marine risks, seven days' notice in respect of war and strikes risks, and forty-eight hours' notice for a strike in respect of shipments to and from Canada or the United States of America."

The detailed provisions in Exhibit 'J' are even more than those set out in the form of the first schedule.

The opening words of the Institute War Clauses, which read:

"1. This Policy covers....." Cannot help but lead to the conclusion that Exhibit 'J' is a Policy. It therefore fully satisfies the description in section 24(1) of the *Marine Insurance Act* 1961 and can be termed a Policy to the like effect as the form of Policy in the first schedule. Exhibit 'B', being a document issued under Exhibit 'J', has no independent existence. It is not a Policy. It is a certificate of insurance showing that the Policy, Exhibit 'J', exists in the hands of the respondents in favour of the respondent.

The case of *Diamond Alkali Corporation v. Bourgeois*, relied on by counsel for the appellant in support of his contention that Exhibit 'B' and Exhibit 'J' are inadmissible, can be distinguished on the facts. In that case, only the certificate of insurance was tendered and sued upon, unlike this case, where both exhibits 'J', the marine open cover which I have classified as a Floating Policy and Exhibit 'B', the certificate of insurance issued under Exhibit 'J', are in evidence.

McCardie, J., brought this out clearly when on page 209 he observed and commented:

"In the *Wilson Holgate Case* (19) Bailhache, J. said (1920/2 KB at Pg 7):

It must be borne in mind that in dealing with certificates of insurance, I am not referring to American Certificates of Insurance, which stand on a different footing and are equivalent to policies, being accepted in this country as policies".

It will be observed that Bailhache, J., used the word "accepted" and not the word "bound to accept". The sellers here rely on that passage and also on the notes to *Scrutton and Mackinnon on Charterparties* (10th Edition) Pg.185, where it is said:

"A certificate of insurance issued by an insurance company under a floating Policy, upon which documents the company can be sued, would suffice in any case".

The buyer strongly challenges that view, and his counsel requires me to express an independent opinion on the point. I do so with the greatest diffidence and reluctance in view of the weight carried by even the dicta of such experienced and distinguished Judges as Scrutton, LJ and Bailhache, J. *I feel bound to express my view, not upon the strict law of the matter. I assume that this document (which is not stamped) was given under a floating Policy issued by the insurance company to D.A. Horan. Now, the certificate is not a Policy. It does not purport to be a Policy. This is conceded by counsel in his able argument for the sellers. It is a certificate that a Policy was issued to D.A. Horan and it incorporates the terms of that Policy. Those terms I do not know, nor is there anything before me to indicate that the buyers knew them. The certificate does show whether that Policy was in the recognized or usual form or not. The certificate, therefore, does not contain all the terms of the insurance. Those terms have to be sought for in two documents -namely, the original Policy and the certificate... if he sued simply on the certificate, he could put in a part only of the contract for the other terms of the contract namely, the conditions of the actual Policy would be contained in a document not in his control and to the possession of which he is not entitled.*

In the case of *English Insurance Co. Limited v. Official Receiver of National Benefit Assurance Co. Limited* 1928 All ER Rep. 441, there was no dispute about the facts and the parties agreed that no insurance policies were ever issued to the Appellant company by the National Company in respect of risks accepted by the latter under the terms of the agreement. The only question to be decided was whether the English Insurance Company Limited was disentitled from proving in the liquidation of the National Assurance Company Limited because no stamped policies of marine insurance were issued by the English Company to the National Company regarding any matters coming within the agreement in the participation agreement.

The House of Lords (Lord Hailsham, L.C., Viscount Sumner and Lord Atkin), held that the agreement was a “contract for sea-insurance” within Section 93 (1) of the *Stamp Act*, 1891 and a “contract of “marine insurance” within Section 22 of the *Marine Insurance Act*, 1906 and the transactions under it not having been embodied in any marine Policy was invalid and inadmissible, in evidence, so that the claim failed.

It is also quite clear that under our law, the *Marine Insurance Act*, 1961, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine Policy. In view of the importance of this question, I called for Exhibit ‘J’ in its original form. I have now examined Exhibit ‘J’ in its original form as admitted in evidence. My findings are most revealing. I am sure that counsel for the Appellant is unaware of the clear indication at the back of the document and in the document that it is a marine Policy.

The footnote at the back reads:

“This Policy should be read carefully and its terms noted.”

Above that are printed:

“Policy No.....

Name.....

Due date... ..”

There can therefore be no question about Exhibit ‘J’ not being a Policy, and I hereby reject the submission of Mr. Molajo, SAN, learned counsel for the appellant, that Exhibit ‘J’ is not a Policy. I hold that it is a Policy within the meaning of marine Policy under the *Marine Insurance Act* 1961, section 2(1), section 24(1) and section 25.

The failure of the High Court, Belgore, J. and the Court of Appeal to address themselves to these two questions gave the impression that they did not consider Exhibit ‘J’ a Policy of marine insurance and has led counsel for the appellant to so contend forcefully before us. I am at a loss to understand how this simple fact, which appears in bold letters on exhibit ‘J’, escaped the notice of both counsels throughout the course of argument in all the courts. These dispose of grounds 2 and 4 of the grounds of appeal and questions 2 and 3 of the questions for determination.

Turning to question 1, whether there was a concluded contract, the existence of exhibits ‘B’ and exhibit ‘J’ enables me to answer the question unequivocally in the affirmative. The law is settled and stipulates that the Policy may be executed and issued either at the time the contract is concluded or afterward (section 24(1) of the *Marine Insurance Act* 1961). At the High Court, the learned trial Judge, Belgore, J., dealing with this question in his judgement said:

“From the moment the proposal was made, accepted and demanded premium

paid, a valid contract was subsisting between the Plaintiff and the Defendant”.

Earlier, the learned trial Judge said:

“I do accept the Plaintiff’s evidence that he went to the Defendant to insure his cargo being carried by “M.V. Eastern Saturn” in January 1978 and that it was on that basis that the Plaintiff was given a Marine Open Cover /Note/ No.MA/MAT/78/MOC/0021 as alleged in paragraph 8 of the statement of claim”.

The Court of Appeal (Ademola, Mohammed and Kutigi, J.C.A.) answered the question in the affirmative as well. For Ademola, JCA, in his lead judgement said:

“In my view, the answer to the argument is simple. The learned trial Judge has rightly found on the uncontradicted evidence before him that the respondent ordered 4,000 metric tons of rice; that the ship carrying the rice left Bangkok by 3rd January 1978 and the respondent agreed to insure the goods on it. That there was an insurance effected in January 1978 between the parties and cover note Exhibit ‘J’ issued thereby satisfying section 23 of the Marine Insurance Act 1961.

Exhibit ‘J’ was erroneously referred to in the judgement as a cover note. It is Marine Open Cover, a floating Policy of marine insurance.

The Appellant’s complaints in ground 1 of the grounds of appeal that the learned Justices of the Court of Appeal erred in law when they held that exhibits ‘B’ and ‘J’ do not bind the respondent are founded. But the erroneous opinion has made no difference to the fortune of the appellant in this appeal. The context in which the statement was made is innocuous. The whole statement reads:

“It is necessary to state that both **exhibits** ‘B’ and ‘J’ are not documents inter parties by the appellant and the respondent. Both documents are acts of the appellant alone and are in no way binding on the respondent. The rule of exclusion under section **1319(1)** of the *Evidence Act* or oral evidence to contract, alter, add to, or vary the content of Exhibits ‘B’ and ‘J’ does not apply, see section 133 of the *Evidence Act*. Therefore, the case of *Oshikoya v. Salvador Hurtado Soley* 4 WACA 91, relied on by counsel for the appellant, has no relevance”.

The Court of Appeal was considering the argument that parole evidence had been given by the appellant’s witness to vary the contents of exhibits ‘B’ and ‘J’. The contents of exhibits ‘B’ and ‘J’ reflect the agreement between the appellants and the respondent and having founded its claim on exhibit ‘B’ and exhibit ‘J’ and pleaded to them, it cannot, in my opinion, be contended without contradictory evidence that the respondent is not bound by them. There are conditions and warranties, express and implied which bind the assured. See sections 34 to 50 of the *Marine Insurance Act*, 1961.

A careful study of the pleadings filed and the cases presented to the court shows that the appellant abandoned the vital areas of the defense set up in its dealings.

Parties are bound by their pleadings and are not allowed to set up a case different from that set out in their pleadings. The main defenses set up and contained in paragraphs 4,5,6,7,8,9 and 10 are:

- (1) Non-disclosure of material facts;
- (2) Fraudulent non-disclosure;
- (3) Rejection of shipments before 1st February, 1979;
- (4) That the contract of insurance was concluded after the boat *M.V.*

- Eastern Saturn* with the goods had been lost at sea;
- (5) That the certificate of insurance issued as a result of the declaration purported to be made under the marine open cover is void;
 - (6) That the contract of marine insurance is not enforceable under the Marine Insurance Act, 1961.

Whereas the appellant's witness gave evidence destroying the above defenses, the appellant failed to adduce any iota of evidence in support of any of the above defenses and as such, none of the defenses was made out. The evidence adduced by the respondent through its witnesses does not support the defenses. Further, the allegation that the "contract of marine insurance is not enforceable" does not, in my view, amount to a pleading that the "contract of marine insurance is admissible". A contract can be admissible and yet be unenforceable. This arises where facts making the contract void or voidable are pleaded and proved by evidence. Fraudulent non-disclosure of material facts easily comes to mind as a ground that, when established, entitles an insurer to avoid the contract. A contract of marine insurance may be perfectly valid, but because it is not embodied in a marine Policy, it remains inadmissible by virtue of section 24(1) of the *Marine Insurance Act* 1961. Being inadmissible, the court cannot take cognisance of its existence. *Alade v. Olukade* (1974) 6 SC 183.

It is therefore in the interest of parties to note that pleadings must be strictly adhered to in the conduct of their cases. See *African Continental Seaways Limited v. Nigerian Dredging, Roads and General Works Limited* (1977) 5 SC. 235, 243, 247-250; *Emegokwe v. Okadigbo* (1973) 4 SC. 113 at 117. *Akpapuna v. Obi Ezeka II* (1983) 7 SC. 1 at 24 and 62. *Ferdinand George v. The United Bank for Africa* (1972) 8-9 SC. 264 at 273-274; (1972) 1 ALL NLR (Part II) 347 at 353. *George & Others v. Dominion Flour Mills Limited* (1963) 1 ALL NLR. 71 at 77.

Grounds 5 raises a hypothetical and an academic question. It must be restated with emphasis that the courts of law in this country are not established to deal with hypothetical and academic questions. They are established to deal with matters in dispute between parties and consequently, their functions involve dealing with all relevant questions arising therefrom to enable them to decide on the matter. See section 6(6)(b) Constitution of the Federal Republic 1979 as amended. Ground 5, therefore fails.

With regard to the contention of learned counsel for the appellant in ground 6, the content of exhibit 'B' is revealing. It states, inter alia,

"Certificate of Insurance No.16533
Insured under Open Contract Number
MA/MAT/78/MOC/0021."

This is to certify that the Corporation has insured the under-mentioned for the voyage(s) and value(s) stated on behalf of Power & Industrial Engineering Company Limited.

PER EASTERN SATURN

From Bangkok to Port Harcourt and/or Lagos.

INTEREST: 86,612 parboiled rice in new double jute bags

INSURED VALUE: ₦1,231,459:00 (One Million, Two Hundred and Thirty-One Thousand Four Hundred and Fifty-Nine Naira Only)

CONDITIONS: As per Marine Open Cover Number MA/MAT/78/MOC/0021.

The Certificate of Insurance is therefore by its express terms an affirmation that there

was in existence an open contract embodied in exhibit 'J' under which it was issued and certified that the insurance was in respect of the voyage per *M.V. Eastern Saturn* from Bangkok to Port Harcourt and/or Lagos in respect of 86,612 new double jute bags of parboiled rice valued ₦1,231,459.00.

The question may then be asked whether this insurance was not referable to:

- (1) the boat;
- (2) the rice; and
- (3) the voyage

mentioned in exhibits 'L', 'L1' to 'L7', which, according to the evidence, were shown to the appellant to indicate the goods, the boat and the voyage in respect of which the insurance was sought. The answer is undoubtedly in the affirmative and this lays the defense of non-disclosure finally to rest.

In *Marine Insurance Company Limited v. Grimmer* (1944) 2 All ER.197, Scott, LJ. Said at 199:

“Even if the Policy sued on had been an original insurance effected by the shippers of the sugar, it is indisputable that on its true interpretation, it would have operated retrospectively to the loading of the insured goods on the carrying ship. That is inherent in every voyage Policy in the old Lloyd's form (now scheduled to the Act)”.

There is here sufficient uncontradicted oral and documentary evidence to establish that the insurable interest or subject matter was to the knowledge of the appellant, being conveyed by *M.V. Eastern Saturn*, which sailed from Bangkok on 3rd January 1978. The acknowledgement of this fact in Exhibit 'B' constitutes a necessary variation.

With much elaboration, the respondent, by pleading the documents exhibits 'B' and 'J' and tendering them in evidence, is simply saying that their contents represent the agreement entered into between the appellant and itself, the respondent. A contract of marine insurance is a contract of indemnity and hence the Policy and or insurance certificate bears the signature of the insurer only. The proposals bear the signature of the respondent so that the respondent cannot properly disclaim its obligations under the contract, and there are many.

Ground 3 complains of the Court of Appeal acting on the parole evidence of the contract when the contract had been reduced into writing, exhibits 'J' and exhibit 'B'. Learned counsel for the appellant complains that exhibits 'L1' to 'L7' were not part of exhibit 'J'. He then submitted that oral evidence contradicting Exhibit 'J' was inadmissible. The question may be asked whether exhibits 'L1', to 'L7' contradict exhibit 'J'. I do not think so. The appellant has been unable to show that the Rules of Evidence preclude the respondent from adducing evidence to show that exhibits 'J' and 'B' were issued by the appellant in respect of the bags of rice covered by the document, including bills of Lading exhibits 'L1' to 'L7'. The fact that exhibit 'J' limited the time the risks insured against attach to shipments and sendings after 1st January 1978, which is a reflection of the Appellant's choice cannot constitute a barrier when exhibit 'B', which was issued after declarations were made lifted the insured interest from exhibit 'L7'. I find no substance in this ground. It is also to be observed that the insured interest in the evidence led was very much in existence on board "M.V. Eastern Saturn" at sea on 1st February 1978.

Since the Open Cover Exhibit 'J' is a Policy embodying the contract, the question of

counteroffer does not arise. Exhibit “B” conclusively shows that the parboiled rice in 86,612 new double jute bags valued at ₦1,231,459:00 on board the M.V. Eastern Saturn in transit from Bangkok to Port Harcourt and/or Lagos was insured as per Marine Open Cover Number MA/MAT/78/MOC/0021.

The complaint in ground 5 is based on the erroneous assumption that the subject matter of the contract, i.e., 86,612 bags of parboiled rice, had ceased to exist before the contract was concluded. There is no basis for such an assumption given the evidence on record. It is undoubtedly the law that if the subject matter of the contract of insurance had ceased to exist before the contract of insurance is concluded, even though unknown to both parties, the contract is void.

- (1) Pritchard v. Merchant and Tradesmen’s Mutual Life Assurance Society 140 ER 885 at 892.
- (2) Couturier v. Hastie (1843-60) All ER. Rep. 280 at 28
- (3) Oceanic Steamship Co. v. Fabar (1907) 23 TLR. 673.
- (4) Scott v. Coulson (1903) 2 Ch. 249.
- (5) Joseph Constantine Steamship Line Limited v. Imperial Smelting Corp. Limited (1941) 2 All E.R. 165 at 170.

The evidence established that the boat M/V Eastern Saturn sank on the 10th day of February, 1978, that the risks or perils insured against by Exhibit “J” attached from the 1st day of February 1978 and more importantly, that the contract was concluded in late January 1978.

In Exhibit “J”, the Institute Cargo Clauses (all risks) in clause 1 stipulate that: “This insurance attaches from the time the goods leave the warehouse or place of storage at a place named in the Policy for the commencement of the transit, continues during the ordinary course of transit and terminates either on delivery

- (a) to the consignee.....
- (b) to any other warehouse.....

OR

- (c) on the expiry of 15 days after completion of discharge over the side of the goods hereby insured from the overseas vessel at the final port of discharge, whichever first occurs”.
and in clause 5

“The insurance is against all risks of loss of or damage to the subject matter insured.....”

Exhibit “M” – the letter dated 14th February 1978 under whose cover Exhibit “J” was forwarded, makes it reasonable to presume, even without evidence, that the contract of marine insurance was concluded before that date. The letter reads:

“The Manager,
Power & Industrial Engineering Co. Limited
P.O. Box 3869,
Lagos State.

Dear Sir,

Marine Open Cover No. MA/MAT/78/MOC/0021

We forward herewith in duplicate our Marine Open Cover No. MA/MAT/78/MOC/0021, which we trust you will find in order.

Yours faithfully,

Signed: A. Komolafe
Marine & Aviation Manager”

Exhibit “J” is not a proposal as erroneously submitted by counsel for the Appellant. It contains all the terms of the contract of marine insurance. The contention of learned counsel for the Appellant that if exhibit “J” is an insurance of every shipment that it is a void contract of insurance, is untenable in the face of the express provision of the *Marine Insurance Act*, Section 24(1), 29, 30 and 31 which allow for Floating Policy and Unvalued Policy.

Exhibit “J” ex facie shows that the perils or risks insured against attach from 1st February, 1978, whereas Exhibits “C” “G” and “H” show that the ship went down with the subject matter and was lost on 10th February, 1978.

Learned counsel for the Appellant has, by his arguments, called on us to reverse the concurrent findings of fact. Having examined the submissions of counsel for the Appellant, carefully, I find no basis on which this court can disturb the findings of fact made by the Federal High Court, Belgore, J. and the Court of Appeal that Exhibit “J” and Exhibit “B” were issued by the Appellant in respect of shipment made on board *M.V. Eastern Saturn* (covered by Bill of Lading Exhibit “L7”) which sailed from Bangkok to Port Harcourt and or Lagos on 3rd January, 1978.

One disturbing feature in this appeal is the failure of the Federal High Court and the Court of Appeal, and indeed, counsel for the parties, to observe that Exhibit “J” is a marine Policy as declared on the face of it. It was pleaded along with Exhibit “B” and on them, the action of the Plaintiff/Respondent was found. If this fact had been appreciated, the reasons for the judgments of the two courts below would have borne a different orientation.

With regard to the 4th question raised, which has been implicitly answered above, I would, in particular, draw attention to the agreement under the head: “Basis of Valuation” in Exhibit “J”. It has been set out above but a repetition here of the agreement will forcibly bring out and emphasize the extent of liability undertaken by the Appellant. It reads:

“In the event of loss, accident, or arrival prior to the declaration, it is hereby agreed that the basis of valuation shall be C&F (Invoice Value) plus a percentage to be declared by the clients”.

The voyage covered is from any port in the world to Apapa Lagos/Port Harcourt from the 1st of February, 1978.

Payment of Premium:

Learned Counsel for the Appellant contended that as the premium was not paid till

the 24th of February, 1978, the contract of insurance was void. I am unable to accept this submission in view of clause 4 of the Institute Cargo Clauses (All Risks) in Exhibit “J”. That clause reads:

“Held covered at a premium to be arranged in case of change of voyage or any omission or error in the description of the interest, vessel, or voyage”.

And when Exhibit “B” was issued, it was accompanied by Debit Note Exhibit “O” dated 23rd February 1978, which demanded payment in these terms:

“Unless otherwise stated, this account must be settled within 14 days”.

The Respondent, on the 24th day of February, 1978, did pay the premium and obtained receipt Exhibit “A”.

Section 53 of the *Marine Insurance Act*, 1961 Number 54, dealing with the time when the premium is payable, states:

“Unless otherwise agreed, the duty of the assured or his agent to pay the premium and the duty of the insurer to issue the Policy to the assured or his agent are concurrent conditions, and the insurer shall not be bound to issue the Policy until payment or tender of the premium”.

The words ‘premium to be arranged’ have been held to mean premium to be agreed. *Libercan Insurance Agency Inc. v. Moss* (1977) 2 Lloyd’s Rep. 560 Q.B.D. at p.568. The clause does not contemplate any alteration in the terms of the insurance other than in respect of premium.

A contract of insurance may involve merely a promise to pay the premium. It is not the law that there must be implied in a contract of insurance a provision that the right of indemnity by the assured is conditional on his previous payment of the premiums. In support of and to emphasize this point, I need only to refer to the case of *Wooding v. Monmouthshire and South Wales Mutual Indemnity Society Ltd.* (1939) 4 All E.R. 570 at 581 where Viscount Maughan said:

“My Lords, I am not sure that I understand the view of Grier and Mackinnon L.JJ. as to the facts regarding the payment of premiums by the company. The former states that the company had failed to pay the premium in respect of Wooding and James and was in default in regard to it. I think McKinnon, L.J. takes the same view. Both the Lords Justices appear to think that this being so, the Society was released from the risks in respect of the men. With the greatest respect, I am unable for reasons above stated, to agree that the company is shown to have committed any default whatsoever. They never separate premiums payable after the five years in respect of the men.

There was a final call to be paid on 28th February 1930, which was assumed to cover all the 1923 cases. There is nothing to show that it was not paid either in cash or in an account, and not long afterward, namely, after completing the accounts up to the end of 1933 – we find that the Society is paying a large sum to the company. Even if the call or some other call was not paid, however, I do not know why the majority of the Court of Appeal should assume that the Society was “off the risk”. There is, I think, no principle of law that there must be implied in a contract of insurance a provision that the right to indemnity by the assured is conditional on his payment of the premiums. As a matter of commercial good sense, there is a great deal to be said for a terse phrase enunciated by counsel for the Society – “no premium, no cover”. It is doubtless for that reason that insurance companies usually require that the consideration for which they undertake to indemnify the assured must be paid before the risk attaches.

There is, however, no doubt that a contract of insurance may involve merely a promise by the assured or his broker to pay the premium and this is implicitly acknowledged in such marine insurance cases as Roberts Security Co (1897) 1 QB 111 66 L.J. QB. 119; 75 L.T. 531 Universo Insurance Co. v. Merchants Marine Insurance Co. (1897) 2 Q.B. 93; 66 L.J. Q.B. 564; 76 L.T. 748 and Bhugwandass v. Netherlands India Sea & Fire Insurance Co. of Batavia (1888) App Cas 88”.

In the instant appeal, the contract involved merely a promise to pay the premium when ascertained and demanded. When it was calculated, ascertained and demanded, then it was paid. The Appellant is therefore bound to indemnify the Respondent in respect of the 86,612 bags of parboiled rice.

The Appellant having agreed on terms as to payment of the premium with the Respondent, there is no substance in the submission that the premium paid when it was demanded was late and avoided the contract of insurance. The evidence adduced by the witnesses called by the Respondent stands uncontradicted, and the Court is entitled to give it the full weight and value. See *Nwabuo v. Ottih* (1961) 1 All NLR. 487 at 490 *Odulaja v. Haddad* (1973) 11 SC. 3457 *Nigerian Maritime Services Limited v. Alhaji Bello Afolabi* (1978) 2 SC. 79.

Unless there is a statutory prohibition against the admission of such evidence, evidence admitted without objection can be made use of by the Court in arriving at its decision. I find no basis for the contention of the Appellant’s counsel that the loss of the subject matter on the 10th of February, 1978, entitles the Appellant company to avoid liability under Exhibit “J” and Exhibit “B”. The payment of the premium on the 24th day of February, 1978, was in compliance with the terms of the agreement between the parties. The anger that the non-issuance of a Policy by the Appellant could have generated was dispersed by the discovery that Exhibit “J” was a Policy and Exhibit “B” was issued under it.

However, the absence of a cover note or slip to indicate the time the contract of insurance was concluded, which was sometime before the issuance of the Policy Exhibit “J”, is a matter for concern and highly deprecated. Nevertheless, 25% with which Exhibit “J” was issued is highly commendable.

In conclusion, I find that the learned trial Judge, Belgore, J. was perfectly justified in giving judgment against the Appellant in the sum of ₦1,231,459:00 with costs. Likewise, the Court of Appeal properly dismissed the Appellant’s appeal as being without substance. All the grounds of appeal failed. I, too, would and I hereby dismiss the Appellant’s appeal to this Court and affirm the decision of the Court of Appeal and the Federal High Court. The Appellant shall pay costs in this appeal assessed at ₦300:00 to the Respondent.

ANIAGOLU, JSC

The background facts of this appeal have been so fully dealt with in the judgement of my learned brother, Obaseki, J.S.C., which I have had the privilege of reading in the draft and with which I am in agreement that no useful purpose will be served in recapitulating them here, except portions of them as are necessary for an understanding of points being made in this judgement.

After wallowing through a welter of legal authorities and listening to a gamut of forceful and incisive arguments on either side, the answers to two questions that arise

from the facts of this appeal will determine the appeal and the side on which the scale of justice must fall. The questions are:

- (1) Was there a contract or insurance between the parties, having regard to Section 23 of the *Marine Insurance Act*, Number 54 of 1961?
- (2) If the answer is in the affirmative, then when did the contract begin?

The facts of the case have been made easy by the fact that the Defendant did not give evidence, leaving the evidence of the Plaintiff uncontradicted and unchallenged. From this evidence, which was accepted by the trial Judge, emerges the fact that Plaintiff went to Defendant in mid-January 1978 and they agreed on the contract of insurance. The contract, by *section 23 of the Act*, simply means the acceptance by the Insurer of the insurance proposal of the Assured.

“Whether the Policy is then issued or not”

On the accepted evidence, therefore, the contract, as a valid and binding contract, came into being in mid-January 1978.

The Respondent has argued that although negotiations might have started in January 1978, the formal contract was not concluded until February 1978 – 23rd February 1978 to be precise – being the date the Respondent inserted on the Certificate of Insurance No. 16533. In mid-January 1978, when the Assured (Plaintiff) proposed to the Insurer (Defendant) both parties knew that the goods in question were on board the ship which sailed from Bangkok on 3rd January 1978. They knew that the goods both were talking about were already on board a ship in the high seas.

It strikes one as naive that the Appellant should argue that on 23rd February, 1978-the date inserted by the Appellant on the Insurance Certificate – the goods insured had already been destroyed and therefore, non-existent, with no insurable interest existing as a basis of the insurance. In the first place, in mid-January 1978, when the parties agreed and the contract came into being, the goods were safe and intact on board *M/V Eastern Saturn*. In the second place, the insurance both parties were talking about and agreed upon in January 1978, was in respect of the goods on *M/V Eastern Saturn*.

Thirdly, the insurer is not entitled to fix an arbitrary date for himself for which his responsibility to the assured will attach. To be allowed to do that will be to be allowed to escape liability in all cases which the insurer chooses, since the insurer, to escape liability, may simply fix a date outside the period for which he should be liable to the assured. That will strike against the whole principle of insurance, which is based on *indemnity*, destroying the *utmost good faith*, which is also the legal basis on which insurance is built. Anything to the contrary is unworthy of a reputable insurance company.

Exhibits ‘B’ and ‘J’, having regard to *sections 24, 25 and 26 of the Marine Insurance Act, 1961*, together constitute the insurance Policy with all the terms of the contract clearly set out. Section 24(1) of the Act requires, in drawing up the contract, either for the form in the First Schedule to be used or some other form “to the like effect”.

But whatever form one uses, the essential thing is that the contract must contain those essential ingredients specified in the *Marine Insurance Act, 1961*, sections 25 and 26.

Attention must be drawn to exhibits ‘Q’, ‘R’, ‘S’, and ‘T’, which were tendered by the respondent and which showed similar transactions between the appellant and the respondent. Of special importance is exhibit ‘T’, which is dated 23rd February 1978 and

is a certificate of insurance issued under an open cover contract for 5000 bags of parboiled rice from Thailand to Lagos valued at ₦74,808.00. The insurance for that was paid on the same receipt, Exhibit 'A'. No claim was made by the appellant on that, as apparently, the rice arrived from Thailand without mishap. The position then was that in respect of the said receipt, the appellant was prepared to pocket the premium in respect of the 5000 bags of rice which was part of the same exhibit 'A' but would not honour its liability in respect of the matter in dispute for which the premium was also paid on the same receipt and upon the same date, 23rd February 1978. The appellant was thus prepared to take when there was a gain but to renounce responsibility when there was a loss, a rather inequitable and unjust approach to things.

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 man in a civilized society. It does not envisage sharp practice and undue advantage of a situation and a refusal to honour reciprocal liability therefrom; it will demand that a person will enter into a deal as a package, enjoying the benefits thereof and enduring, at the same time, the liabilities therein.

Because Equity frowns at the unconscionable use of a person's rights at common law, it generally acts in conscience. Hence, it is stated in the *EARL of Oxford's case (1615) 1 Rep. Ch. 1* that:

“When a judgement is obtained by oppression, wrong and hard conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgement 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 fulfil an obligation. (See *Ross v. Army and Navy Hotel Co.* (1886) 34 Ch.D. 43. *Re-Queensland Land and Coal Co.* *Davis v. Martin* (1894) 3 Ch. 181; *Re- Fireproof Doors Ltd.* *Umney v. Fireproof Doors Ltd.* (1916) 2 Ch. 142; *Re: Cox v. Dublin City Distillers (No.2)* 1 I.R 345.

Clearly, in the instant case on appeal, equity will impute an intention that the appellant, far from scuttling away from its valid obligation to the respondent, will fully honour its agreement, entered into in January 1978, to indemnify the respondent, 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 around to jettison the liability.

There is no doubt that when P.W.1, on behalf of the respondent, went to the appellant with his shipping papers in Mid-January, 1978, and the appellant verbally agreed to insure the goods, the appellant knew that the goods were already on board the vessel, which had already set sail, on 3rd January, 1978, and was already on the high seas. The real issue was whether, by the verbal agreement in mid-January 1978, the contract had been attached. As already stated, Section 23 of the *Marine Act*, 1961 had.

A similar situation arose in *S.S. Ardennes (Cargo Owners v. S.S. Ardennes Owners)* (1951) I.K.B.D. 55, where mandarin oranges were shipped by exporters from Cartagena in Spain and the ship owners agreed verbally to travel straight to London. They instead first travelled to Antwerp and before they eventually reached London, import duties had been increased and the price of mandarin oranges had fallen.

On a claim for damages, the ship owners relied on a Bill of Lading made subsequent to the oral agreement. It was held that the oral agreement prevailed and that the exporters were entitled to give evidence showing that the oral agreement differed from the contents

of the Bill of Lading.

Entering judgement for the Plaintiffs, Lord Goddard emphasised the oral agreement being the binding factor, saying:

“it is, I think, well settled that a Bill of Lading is not in itself the contract between the ship owners and the shipper of goods, though it has been said to be excellent evidence of its terms: *Sewell v. Burdick*, per Lord Bramwell and *Crooks v. Allan*. The contract has come into existence before the Bill of Lading is signed; the latter is signed by one party only, and handed by him to the shipper, usually after the goods have been put on board. No doubt if the shipper finds that the bill contains terms with which he is not content, or does not contain the term for which he has stipulated, he might, if there were time, demand his goods back; but he is not, in my opinion for that reason, prevented from giving evidence that there was in fact a contract entered into before the Bill of Lading was signed different from that which is found in the Bill of Lading or containing some additional term. He is no party to the preparation of the Bill of Lading; nor does he sign it. It is unnecessary to cite authority further than the two cases already mentioned for the proposition that the Bill of lading is not itself the contract; therefore, in my opinion, evidence as to the true contract is admissible”.

The same principle was applied in a case of reinsurance in, where Scott, L.J. at Pg. 199 described as an “insurance fallacy,” the notion that the reinsurance attached from the date (June 3rd) of an amendment slip, holding that:

“It is indisputable that on its true interpretation *it would have operated retrospectively to the loading of the insured goods upon the carrying ship*”.

It is based on the same footing that, in the instant case on appeal, the verbal agreement of mid-January 1978 operated retrospectively to 3rd January 1978, being the date of the loading of the parboiled rice.

One other matter needs to be mentioned as adding to the justification for the dismissal of this appeal, namely that there are concurrent findings of fact of the two courts below in favour of the respondent. The practice of this court remains not to disturb such concurrent findings of fact, or even allow them to be reopened, unless those findings are wrong and are unmistakably so. (*Lamal v. Chief Orbih* (1980) 5-7 S.C. 28; *Ukpe Igbodo v. Enarofia & Others* (1980) 5-7 S.C. 42 at 55.) Nothing has been said by the appellant either in their oral argument or in their brief to warrant a disturbance by this court of the findings of fact of either of the two courts below in this appeal.

In the result, for the above reasons and the additional reasons which have been elaborately detailed by my learned brother, Obaseki, J.S.C., in his lead judgement, this appeal must be and is hereby dismissed with costs to the respondent hereby fixed at ₦300:00.

OPUTA, J.S.C.

I have had the privilege of a preview of the lead judgement just delivered by my learned brother, and presiding Justice Obaseki, J.S.C. After reading that judgement, I heaved a great sigh of relief that at last justice has come out victorious. After listening to Mr. Molajo’s carefully reasoned and almost unanswerable arguments about section 24 of the *Marine Insurance Act* No. 54 of 1961, I became apprehensive that this appeal might well be, yet, another fine example of what Lord Penzance in *Combe v. Edwards* (1879) L.R.3 P.D. 142 aptly described as “the picture of law triumphant and justice prostrate”.

It is correct that this Court must look hardships in the face rather than break down the rules of law or fail to give effect to any Statutory provision (here section 24 of Act No. 54 of 1961); see Lord Eldon, C. in the *Berkeley Peerage case (1811) 4 Camp 419*. Insurance companies have too often managed to get away with it on mere legal technicalities. But here we are not dealing with a mere technicality. We are dealing with the express provision of a statute. And in such a case, all arguments on the hardship of the case on the assured (here the respondent) must be rejected when we are pronouncing on what Section 24 of the *Marine Insurance Act 1961* means and what effect the compliance with or otherwise of the section will have on the assured who sets out as the Plaintiff to sue an Insurance Company as a Defendant.

After reading the lead judgement, I felt that I could hardly add anything to its lucid statement of the facts; it's careful handling of the pleadings, its correct identification of the real issues in controversy, its accurate and exhaustive exposition of the law presented with remarkable precision and succinctness, and its incisive analysis of the authorities cited.

After all these, I cannot but agree with my learned brother that this appeal ought to be dismissed and for the reasons so ably advanced in the lead judgement.

For the sake of further emphasis, however, I would like to comment on sections 23 and 24 of the *Marine Insurance Act* Number 54 of 1961. The marginal heading of Section 23 is "*When contract deemed to be concluded*". That Section stipulates: -

"S.23 A contract of marine insurance shall be deemed to be concluded when the proposal of the assured is accepted by the insurer whether the Policy is then issued or not, and, to show when the proposal was accepted, reference may be made to the slip or cover-note or other customary memorandum of the contract".

The first live issue on appeal was whether a contract of marine insurance existed between the parties. Specifically, did they negotiate and agree that the Defendant/appellant would insure 86,612 new double jute bags of rice (4,000 metric tons) ordered by the Plaintiff/respondent from Continental Enterprises (Bermuda) Ltd, shipped on the *Eastern Saturn* from Bangkok on 3rd January 1978? If so, the next issue was: When was the contract concluded? Based on the pleadings and evidence, the trial judge made findings on this issue at page 71 of the record.

"I do accept the Plaintiff's evidence that he went to the Defendant to insure his cargo being carried by the *M/V Eastern Saturn* in January 1978, and that it was on that basis the Plaintiff was given a marine open cover note No. MA/MAT/78/MOC/0021. The Defendant admitted that after proper calculation, they demanded a necessary premium to cover the insurance of the cargo and they admitted further that the Plaintiff paid this demanded premium and he was issued a receipt. From the moment the proposal was made, accepted, and demanded premium paid, a valid contract was subsisting between the Plaintiff and the Defendant. This view is supported by Section 23 of the *Marine Insurance Act 1961*".

The Court of First Instance found that there was a contract of marine insurance between the parties in accordance with the terms and tenor of Section 23 of the *Marine Insurance Act, 1961*.

What of the Court of Appeal, did it also so find? At P.172 of the record of proceedings, Ademola, J.C.A. in his lead judgement commented:

"The learned trial judge has rightly found on the uncontradicted evidence before

him that the respondent ordered 4,000 metric tons of rice; that the ship carrying the rice left Bangkok by 3rd January 1978 and the respondent agreed to insure the goods on it; that there was insurance effected in January 1978 between the parties and cover note exhibit 'J' issued thereby satisfying S.23 of the *Marine Insurance Act, 1961*. These findings have not been faulted by Mr. Molajo in his submission".

It is here significant to note that both courts- the Trial Court and the Court of Appeal have made concurrent findings in favour of the respondent that there was a Marine Insurance between the parties to this appeal. Consequently, the present appellant is confronted with the rather uphill task of upsetting the concurrent findings of these two courts.

On solid authority, this Court does not normally disturb such concurrent findings unless there is some miscarriage of justice or some violation of some principle of law or procedure. *Anang v. Adu (1981) 11-12 S.C. 28, Okagbue v. Romaine (1982) 2 S.C. 133 at Pg. 170/171; Lokoyi v. Olojo (1983) S.C. 61 at Pg. 68-73; Ojomu v. Ajao (1983) 9 S.C. 22 at Pg. 63.*

Was there any miscarriage of justice or violation of law or procedure?

The answer will be yes if in the two courts below there had been a wrong interpretation or a wrong and mistaken application of the provisions of section 24 of the *Marine Insurance Act, 1961* on which Mr. Molajo relied.

This is where Section 24 of the *Marine Insurance Act, 1961*, comes in for scrutiny. But before discussing that section, I might as well dispose of paragraph 4 of the Defendant's (now Appellant's) statement of defense. In that paragraph, the Defendant pleaded: -

"4 With reference to paragraph 15 of the Statement of Claim, the Defendant avers that the Plaintiff's claim was repudiated for many reasons, among which are the following, namely: -

- (a) Non-disclosure of material facts contrary to section 20 of the *Marine Insurance Act No.54 of 1961*, e.g.
 - (i) that the boat carrying the goods had left the port of shipment on 3rd January 1978, a date outside the date stipulated by the Open Cover;
 - (ii) that the boat had been abandoned by the crew on the 10th February 1978, and had been declared lost when he, on the 23rd February 1978, made his declaration under the Open Cover and paid the premium thereon.

Insurance contracts are *uberrimae fidei* and voidable on special grounds, including failure to disclose a material fact. Such non-disclosure makes the contract voidable, not void *ab initio*; it remains valid until avoided. In this case, mere pleading of non-disclosure was insufficient; the Defendant bore the burden of proving it.

The Defendant failed to discharge the burden of proving non-disclosure. Furthermore, based on the Plaintiff's evidence and tendered exhibits, both the trial court and the Court of Appeal held that the Defendant was fully aware of the risk it was to insure, and that the Plaintiff was not guilty of any material non-disclosure. Ordinarily, this would have ended the appeal, were it not for Section 24 of the *Marine Insurance Act No. 54 of 1961*, which provides that:

"S.24(1)

Subject to the provision of any statute, *a contract of marine insurance shall not be admissible in evidence unless it is embodied in a marine Policy in accordance with the form in the First Schedule to this Act or the like effect. The Policy may be executed and issued either at the time when the contract is concluded or afterward; and subject to the provision of this Act and unless the context of the Policy*

otherwise requires, the terms and expressions mentioned in the said first schedule shall be constructed as having the scope and meaning in that Schedule assigned to them”.

Apparently, then, it looks as though what has been given with one hand by Section 23 has been taken away with the other hand by Section 24. This is what led the two courts below to take a mistaken view of Mr. Molajo’s valid submissions. For example, the learned trial Judge M.B. Belgore, J., on pages 77/78 of the record of proceedings commented as follows: -

“The last point raised by the Defendant was that S.24 of the *Marine Insurance Act* made other evidence on Marine Policy inadmissible except the Policy itself. The Defendant did not make this point an issue in the pleading...the issue of non-existence of the Policy was never mentioned... Furthermore, the Marine Policy document was still with the Defendant, they did not release it and now they are accusing the Plaintiff of not producing it. The principle laid down in section 148(a) *Evidence Act* should apply to the action of the Defendant”.

With the greatest respect, the learned trial Judge got it all wrong. Section 23 merely dealt with a specific issue, namely, *when a contract of Marine Insurance shall be deemed to have been concluded*. Section 24 dealt with another distinct and specific issue, namely, *how a contract of marine insurance is to be proved* and in express terms, it specifies the

Policy as the only authentic method of proof allowed. There is, therefore, a statutory obligation on anyone suing on marine insurance to rely solely on the Policy as evidence in proof of such contract, as any other evidence “shall not be admissible”. Mr. Molajo was here on a very strong wicket.

It is not a question of pleadings; (and I must hasten to add that one does not plead law), it is not an issue of presumption so that section 148 of the *Evidence Act* becomes inapplicable. It is a simple issue of complying with the unambiguous words of a statute. Section 24 can, in an appropriate case and with an unscrupulous Insurance Company, create problems for an assured if the Insurance Company withholds the Policy, thus making it impossible for the assured to prove the contract of marine insurance. But that is no reason why a court should refuse to enforce the clear provisions of that section. All arguments on hardships of a case either on one side or the other must be rejected when we are pronouncing what the law is; for such arguments are only quicksands in the law, and, if indulged will soon swallow up every principle of it – *Yates v. Hall (1785) 1 T.R. 80*. If Section 24 of the *Marine Insurance Act* 1961 is thought to be oppressive or inconvenient, application to correct or amend it or repeal it must be made elsewhere and not to Judges who are bound to interpret and uphold the law as it is and not as it ought to be: - *Bishop of London v. Ffytche (1800) 1 List 495*. In this appeal, the appellant will lose if and only if there was a Policy tendered as proof of marine insurance as required by Section 24 of Act No.54 of 1961.

Was there such a Policy? Fortunately for the respondent, the answer is yes. Exh. ‘J’ as copied in pp. 93-97 of the Record of Proceedings may cast some doubt as to whether or not it was a Policy. But in its original form in the case file, it is apparent and beyond doubt that Exh. ‘J’ is a Policy as defined by Section 24 of the *Marine Insurance Act* of 1961. What is rather surprising is that this fact seems to have eluded learned counsel on both sides and the trial court and the court below. With Exh. ‘J’ satisfying the requirement of Section 24, the main thrust of Mr. Molajo’s spirited attack has been effectively and completely neutralised and demolished. The appeal based solely on that section is thus doomed to fail.

In the final result, for the reasons given above, and for the fuller and more comprehensive reasons given in the lead judgement of my learned brother Obaseki, J.S.C., which I now adopt as mine, I too will dismiss the appeal with ₦300:00 costs to the Respondent.

UWAIS, J.S.C.

I have had a preview of the draft judgment read by my learned brother, Obaseki, J.S.C. I entirely agree with the reasoning and conclusion therein.

The point that I found irksome in this appeal, and which the lower courts failed to determine, is whether or not the Certificate of Insurance (Exhibit ‘B’) and the Marine Open Cover (Exhibit ‘J’) together or separately constitute a marine insurance Policy. These documents were issued to the respondent by the appellant.

By the provisions of Section 23 of the *Marine Insurance Act*, 1961, the issuance of a Policy is not necessary before the existence of a contract of marine insurance can be established. The section reads:

“23 A contract of marine insurance shall be deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the Policy is then issued or not, and to show when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract”.

It is not in dispute, as both the trial Court and the Court of Appeal had concurrently found, that a contract of marine insurance existed between the parties. To prove the terms of the contract, it is necessary, as provided by Section 24 of the *Marine Insurance Act*, 1961, to put in evidence the Policy of marine insurance. The question then is: what is a Policy of marine insurance? Section 2 of the *Marine Insurance Act*, 1961, vaguely defines “Policy” as “a Marine Policy” and Section 3 of the Act defines marine insurance as follows:

“A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure”.

By Sections 25 and 26 of the Act, it is mandatory that a marine insurance Policy should specify the name of the insured or of some person who effects the insurance on his behalf. If the insurer is a corporation, it is sufficient to append the seal of the corporation. Now, a close examination of the Marine Open Cover (Exhibit ‘J’) and the Certificate of Insurance (Exhibit ‘B’) will show that both documents satisfy the definition in Section 3 and contain the requisites given by Sections 25 and 26.

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 a Policy? Exhibit ‘B’ does not on the face of it purport 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 on the bottom of page 1 of the Exhibit – “This company (i.e., 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.

This accords with the present-day practice of marine insurance – *Arnoulds Law of Marine Insurance and Average 16th Edition*, paragraph 166 at p. 108. Furthermore, in form, Exhibit ‘B’ does not correspond, even in a modified manner, with the form of marine insurance Policy prescribed by the *Marine Insurance Act*, 1961.

In contrast, Exhibit “J” is described on its last page as a Policy. The sentence in which it is so described reads: “This Policy should be read carefully and its terms noted”. Attached to Exhibit “J” are slips containing clauses in respect of the following subjects: -

1. Institute Cargo Clauses (All Risks)
2. Institute War, Strikes, Riots and Civil Commotion Clauses.
3. Institute Classification Clauses.
4. Institute Replacement Clauses.

These Clauses constitute, among others, the conditions of the insurance. Now Section 24 subsection (1) of the *Marine Insurance Act*, 1961 provides:

“24 (1) Subject to the provisions of any statute, a contract of marine insurance shall not be admissible in evidence unless it is embodied in a marine Policy in *accordance with the form in the first effect...*”.

It needs to be mentioned that we are not here concerned with the admissibility of Exhibit “J”, as a matter of fact, Exhibit “J” is already in evidence. The point in issue is: is Exhibit “J” a marine Policy in the form prescribed by the *Marine Insurance Act*, 1961? It is very clear, even from a cursory examination of the first Schedule to the Act, that Exhibit “J” is not in the form prescribed by the Act. However, Exhibit “J” need not conform with the prescribed form because the statute provides that it is sufficient if it is “to the like effect”. The words “to the like effect” simply mean, similar or resembling the prescribed form – See *R. v. Harwick*, 22 L.J.Q.B. 216 and *R. v. General Medical Council*, (1897) 2 Q.B. 203 at pp. 207 and 208. So that the prescribed form can be modified to suit a purpose.

Let us now see if the essentials of the prescribed form have been met by Exhibit “J”. The form prescribed by the *Marine Insurance Act*, 1961, is the same in every respect as the form of marine Policy prescribed by the *English Marine Insurance Act*, 1906. The requisites of the English form, which are therefore the same as those of our prescribed form, are examined on page 27 of *Arnould’s Law of Marine Insurance and Average*, 16th Edition, paragraphs 29 to 46. Briefly, these are:

1. The name of some party, either real or nominally insured.
2. A description of the voyage or risk insured.
3. The subject insured.
4. The perils insured against.
5. The name of the ship (except where the insurance is on ship or ships or cargo to be carried by the ships unknown).
6. The premium or consideration for the risk.
7. The sums insured.
8. The subscription of the underwriter.

There is no doubt that all the foregoing particulars are contained in Exhibit “J”.

Finally, apart from the fact that section 24 subsection (1) of the *Marine Insurance Act*, 1961 has made the allowance for deviation from the prescribed form, Exhibit “J” would still have been valid as a Policy of marine insurance in view of the provisions of section 22 of the *Interpretation Act*, 1964, which states:

“Where a form is prescribed by an enactment, a form which differs from the prescribed form shall not be invalid *for the purpose of the enactment by reason only of the difference* if the difference is not in a material particular and is not calculated to mislead”.

See also the decision of this Court in *Bucknor Maclean v. Inlaks Limited*. (1980) 8-9 S.C. 1 at pp 17-23 and 31-38. In my opinion, therefore, Exhibit “J” qualifies as a Policy of

marine insurance and I hold it to be. It is for these and the fuller reasons contained in the judgement of my learned brother, Obaseki, J.S.C., that I, too would dismiss this appeal with ₦300.00 costs in favour of the Respondent.

KAZEEM, J.S.C.

I have had the opportunity to read the draft of the judgment just read by my learned brother, Obaseki, J.S.C. It has succinctly dealt with all the issues raised in this appeal, and I entirely agree with, and endorse all the reasons and conclusions arrived at therein. However, I wish to add the following few points.

In both his brief and oral submissions before us, Mr. Molajo, S.A.N., learned counsel for the Appellant stressed the point that both Exhibits “B” and “J”, the Certificate of Insurance and the Marine Open Cover respectively, could not operate as a marine Policy and that they were therefore, inadmissible by virtue of section 24 of the *Marine Insurance Act*, 1961. The point was also made that when Exhibit “J” was issued, it was not meant to be a Policy, but it was a *Counteroffer*, offering to issue a Policy if the goods were shipped “*On or after 1st February 1978*” and of payment of the consideration (i.e.) *premium*). The question, therefore, is: Could Exhibit “J” have been a Counteroffer? The answer is that it could not.

Firstly, the Appellant’s case in their pleadings and at the trial was not based on that assertion. See paragraphs 7 and 8 of the Amended Statement of Defence, which did not raise such an issue. Secondly, no evidence was led by the Appellant in support of the Exhibit being a Counter-offer; and, the issue was never raised in the Court of Appeal. It is therefore doubtful whether it can be raised in this Court for the first time. What then is Exhibit “J”? The answer to this question has been provided in the lead judgment that it was for all intents and purposes “a Marine Open Cover, a floating Policy of marine insurance,” and when taken along with Exhibit “B”, they constitute the contract of Marine Insurance in this case.

It is to be noted that Exhibit “L7”, the Bill of Lading, contains all the relevant particulars from which those shown on Exhibit “B”, the Certificate of Insurance, were obtained. There was also uncontradicted evidence that it was one of the documents Exhibit ‘L-L7’ which the Respondents handed over to the Appellants at the time when the contract was being effected in January 1978. (See the evidence of P.W.1 on pages 37, 38, and 46 of the Record). If that was the case, then the Appellants must have been aware that the ship carrying the consignment of parboiled rice, which formed the basis of the contract of marine insurance, had left Bangkok on the 3rd of January, 1978. It is therefore strange, to say the least, that when Exhibit “J” was eventually issued by the Appellants on 15th February 1978, it bore the expression “for all shipments and or sendings on or after February 1978”.

Even assuming without agreeing, that it is true that Exhibit “J” was issued in respect of shipments made “on or after 1st February 1978” and the Appellants had no documents on or before 15th February 1978 when Exhibit “J” was issued, to indicate that the consignment of parboiled rice had already been shipped since 3rd January 1978, at what point in time did they receive Exhibits L-L7. When the appellants also became aware of the facts of shipment from 3rd January 1978, after receiving Exhibits L-L7, why did they not repudiate the contract of Marine Insurance on the basis that:

- (i) there was a breach of the condition that the goods should be shipped “on or after 1st February 1978,” or
- (ii) there was non-disclosure of the material fact that the ship had already set sail by 3rd January 1978 instead of the time shown on Exhibit “J”?

Rather than do those things; the Appellants proceeded to demand the premium payable on the Policy by their letter Exhibit “N” dated 23rd February 1978, and that premium was duly paid on 24th February 1978 as per the Receipt of that date – Exhibit “A”. It is therefore untenable in my view for the Appellants to submit that at the time Exhibit “J” was issued on 15th February 1978, there was no longer any insurable interest since the ship had sunk with everything on board on 10th February 1978.

Moreover, it is equally inconceivable for the Appellants to contend that since the premium was not paid at the time the contract was concluded, there was no consideration and as such there was no valid contract of marine insurance. For it is within the intendment of sections 23 and 32(1) of the *Marine Insurance Act*, 1961 that a Policy of marine insurance can necessarily be concluded before the payment of premium; and that view was supported by the fact that Exhibit “B”, the Certificate of Insurance, which says that the Appellant has *insured* the Respondent for the risks, was issued on 23rd February 1978 whereas the premium was not paid until a day after, on 24th February 1978. In the circumstances, I will also dismiss the appeal with costs assessed at ₦300.00 to the Respondents.

1.4 REMARKS

The Supreme Court’s decision in the case concerning the Marine Open Cover, classified as a floating marine Policy, marked a significant departure from the previously established insurance practice, which held that a Marine Open Cover was not an enforceable contract.

However, it appears the Court may not have given due consideration to the long-standing principle of the *sanctity of contract* in reaching its conclusion.

1.5 REFERENCES

1. *Abolade Agboola Alade v. Salawu Jagun Olukade* (1976) 2 SC. 183 at 189.
2. *Diamond Alkali Export Corporation v. Bourgeois* (1921) All ER Rep. 283.
3. *English Insurance Company Limited. v. National Benefit Insurance Company Limited* (1928) All ER. Rep 441 (1929) AC 114.
4. *African Continental Seaways Ltd. v. Nigerian Dredging, Roads and General Works Limited.* (1977) 5 SC. 235.
5. *Emegokwe v. Okadigbo* (1973) 4 SC. 113.
6. *Akpapuna v. Obi Ezeka II* (1983) 7 SC. 1.
7. *Ferdinand George v. The United Bank for Africa* (1972) 8-9 SC. 264; (1972) 1 ALL NLR (Part II) 347.
8. *George & Others v. Dominion Flour Mills Limited.* (1963) 1 All N.L.R. 71.
9. *Pritchard v. Merchant and Tradesmen’s Mutual Life Assurance Society* 140 ER 885.
10. *Couturier v. Hastie* (1843-60) All ER. Rep. 280.
11. *Oceanic Steamship Co. v. Fabar* (1907) 23 T.L.R. 673.
12. *Scott v. Coulson* (1903) 2 Ch. 249.
13. *Joseph Constantine Steamship Line Limited v. Imperial Smelting Corp. Limited* (1941) 2 All E.R. 165.
14. *Liberian Insurance Agency Inc. v. Moss* (1977) 2 Lloyds Rep 560 Q.D.B. 568.
15. *Wooding v. Monmouthshire and South Wales Mutual Indemnity Society Limited* (1939) 4 All E.R. 570.
16. *Nwabuke v. Ottih* (1961) 1 All NLR. 487.
17. *Odulaja v. Haddad* (1973) 11 SC. 3457.
18. *Nigerian Maritime Services Limited. v. Alhaji Bello Afolabi* (1978) 2 SC. 79.

19. *Ross v. Army and Navy Hotel Co.* (1886) 34 Ch.D. 43.
20. *Re-Queensland Land and Coal Co. Davis v. Martin* (1894) 3 Ch. 181.
21. *Re- Fireproof Doors Limited Umney v. Fireproof Doors Limited* (1916) 2 Ch. 142.
22. *Cox v. Dublin City Distillers (No.2)* 1 I.R 345.
23. *S.S. Ardennes (Cargo Owners v. S.S. Ardennes Owners)* (1951) I.K.B.D. 55.
24. *Earl of Oxford Case* (1615) 1 Ref. Ch. 1.
25. *(Lamal v. Chief Orbih)* (1980) 5-7 S.C. 28.
26. *Ukpe Igbodo v. Enarofia & Others* (1980) 5-7 S.C. 42 at 55.
27. *Bucknor Maclean v. Inlaks Limited.* (1980) 8-9 S.C. 1.
28. *R. v. Harwick*, 22 L.J.Q.B. 216.
29. *R. v. General Medical Council*, (1897) 2 Q.B. 203.
30. *Bishop of London v. Ffytche* (1800) 1 List 495.
31. *Anang v. Adu* (1981) 11-12 S.C. 28.
32. *Okagbue v. Romaine* (1982) 2 S.C. 133.
33. *Lokoyi v. Olojo* (1983) S.C. 61.
34. *Ojomu v. Ajao* (1983) 9 S.C. 22.
35. *Combe v. Edwards* (1879) L.R.3 P.D. 142.
36. *Marine Insurance Co. Limited. v. Grimmer* (1944) 2 All E.R. 197.
37. *Berkeley Peerage Case* (1811) 4 Camp. 419.

2.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT OF NIGERIA

DATE: 17th December, 1976

SUIT NO: SC 490/1975.

JUDGES: Sowemimo, J.S.C.
Idigbe, J.S.C.
Obaseki, Ag. J.S.C.

A. ACHONU
(Plaintiff/Appellant)

vs

NATIONAL EMPLOYMENT MUTUAL INSURANCE COMPANY (NIGERIA)
LIMITED
(Defendant/Respondent)

2.2 REPORTS/FACTS/ISSUES.

COMMERCIAL LAW – CONTRACT- Comprehensive Insurance on motor vehicle- Plaintiff claiming £700 but accepting £175 as full and final settlement – Action brought after collection of £175 – Defense of waiver of rights – How treated.

INSURANCE AND REINSURANCE – Comprehensive Insurance on motor vehicle - Plaintiff claiming £700 but accepting £175 as full and final settlement – Action brought after collection of £175 – Waiver of rights.

MOTOR INSURANCE LAW – Insurance of motor vehicle – Comprehensive motor insurance – Acceptance of a sum lower than the actual claim – Whether deemed waiver of rights to claim of full entitlement.

TRANSPORTATION LAW – Motor vehicle transport – Insurance of motor vehicle - Comprehensive insurance – Entitlement of insurance Policy holder – Whether it can be waived by payment and acceptance of a lower sum.

COMMERCIAL LAW – CONTRACT: Comprehensive motor insurance – Plaintiff initially claimed £700 but later accepted £175 as full and final settlement – Subsequent legal action initiated after receiving the £175, issue of whether such acceptance constitutes a waiver of further rights, Judicial interpretation of waiver in contract law.

INSURANCE LAW – Comprehensive Motor Insurance: Claim for £700 settled for £175 – Whether acceptance of reduced settlement extinguishes the right to pursue the full claim – Legal treatment of waiver in insurance contracts.

MOTOR INSURANCE – Claims and Settlement: Comprehensive motor insurance Policy – Acceptance of a lesser amount than the claimed sum – Whether such acceptance amounts to a waiver of the insured's right to claim the full amount.

TRANSPORTATION LAW – Vehicle Insurance: Insurance of motor vehicles under a comprehensive Policy – Rights of the policyholder – Whether accepting a lower settlement constitutes a valid waiver of entitlement under the Policy.

2.3 DECISION OF COURT.

JUDGEMENT

SOWEMIMO, J.S.C

The Plaintiff, who is the appellant before us, appealed against the judgement of J.A. Phil-Ebosie, J. (as he then was) delivered on 20th December 1973 in suit E/29/-1 at the High Court of the East Central State (now Anambra State) sitting at Enugu wherein the claim of the Plaintiff against the Defendant now respondent, was dismissed with costs. The claim in the writ of summons reads:

“The Plaintiff’s claim against the Defendant, a Company incorporated in Nigeria, is for:

- (i) the sum of ₦700:00 being the value of the Plaintiff’s Volkswagen Saloon Car No. E.1921 was insured with the Defendant at Enugu in December 1966, but was damaged in an accident within Enugu on 27th September 1967, which sum remains unpaid, despite the Plaintiff’s repeated demands.
- (ii) or in the alternative, the sum of £400 being the balance of the cost of replacement spare parts for the said Volkswagen Saloon No. E.1921 insured with the Defendant at Enugu in December 1966 but damaged in an accident within Enugu on 27th September 1967, which sum remains unpaid, despite the Plaintiff’s repeated demands.”

The Plaintiff insured his car E1921 with the Defendant, an insurance company, for a comprehensive cover on a stated value of ₦700 and a Policy Number 118889 dated 29th December 1966 was issued to expire on 30th November 1967. On 27th September 1967, the Volkswagen car was involved in an accident. The car, on the authorisation of the Defendant, was taken to the garage of the Mandillas and Karaberis, Enugu, where an estimated cost for the repairs was obtained. Owing to the pending civil war, nothing could be done until 1970. When the car was inspected in 1970, it had been tampered with and several parts removed. The risks of what happened during the civil war were not covered by the Policy. The Defendant then offered £175 (Plaintiff being responsible for the first £25) as the cost for the repairs. This offer, as stated in Ex. 11, was made as a full and final settlement of their liability to the Plaintiff under the Insurance Policy.

The Defendant accepted the cheque on the conditions contained in Ex.11. As per Ex.15 Defendant still reminded the Plaintiff that the offer in Ex.11 is a full and final settlement of the liability for the claim under the Insurance Policy. The Plaintiff never rejected the offer but converted the cheque. For reasons which did not appear clear, the Plaintiff instituted this action, without returning the cheque for £175 which was sent to him in “full and final settlement” of his claim.

In the lower court, learned counsel for the Plaintiff submitted that the Defendant company did not plead the defense of ‘accord and satisfaction’ and that, therefore such a defense was not opened to it. The learned trial Judge examined this submission, and after referring to paragraphs 8 and 10 of the Statement of Defence, held that the Defendant specially pleaded the special defense, as provided by the relevant rule of court. The Judge then said: -

“Exhibits 11 and 15 show that the Plaintiff did not return the cheque to him, knowing that the offer was made on the condition that it was in full and final settlement of his claim. The Defendant must therefore be presumed to have accepted the terms of the offer and so cannot claim again in respect of the same damage. I therefore dismiss the

Plaintiff's claim with costs."

The appellant has appealed to this court on the solitary ground that the "judgement is against the weight of evidence".

The principle of law governing this case is set out thus in Volume 2 of MacGilvray on Insurance, Page 1150, paragraph 1150: -

"SETTLEMENT BY COMPROMISE. If a claim under a Policy is disputed and afterwards compromised by payment to the claimant of a lesser sum, which sum is acknowledged by the claimant to be received in full discharge and satisfaction of all claims whatsoever against the office, the settlement is binding on the claimant if he understood or being a person of ordinary intelligence must be presumed to have understood the nature of the transaction, but... any settlement of the kind should be scrutinized with care to see whether there has been any unfair pressure exercised on the part of the company's agent or ignorance on the part of the claimant of relevant circumstances or any misunderstanding on his part of the nature of the transaction, and where such elements exist the settlement may be set aside and in a proper case the claim allowed in full notwithstanding that the receipt given may be in the form of an unambiguous discharge."

On appeal before us, learned counsel for the appellant only submitted that although the offer of £175 was made to the appellant and which he did not reject as final settlement and discharge of his claim under the Insurance Policy, he could still claim the balance, the total amount he previously claimed. There was no evidence on which this submission was made. There was no complaint that the appellant did not accept the cheque for £175 as a final settlement and full discharge of his claim – see Ex.. 11. When by Ex. 15 the Defendant company asked him to return the cheque, he did not accept it on the condition stipulated, he refused to return the cheque. It is therefore difficult to appreciate on what basis learned counsel made his submission. No argument of substance has been addressed to us on the ground of appeal canvassed, to justify this court in disturbing the decision of the lower court. We did not call on learned counsel for the respondent to reply. The appeal was there and then dismissed.

The respondent will be entitled to the cost of this appeal, which we assess at ₦160:00 (One Hundred and Sixty Naira).

2.4 REMARKS

Comprehensive Insurance of Motor Vehicle. Can the entitlement of the policyholder be waived by the payment of a lower sum? The Supreme Court said no, it cannot be waived, but if the Insured, under the principle of settlement by compromise, agrees, so be it.

2.5. REFERENCE

1. *MacGillvray on Insurance – Page 1150, paragraph 1150. Volume 2. (1976) NSCC 728.*

3.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT OF NIGERIA

DATE: 14th January, 1966

SUIT NO: SC 106/1964.

JUDGE: Sir Lionel Brett, J.S.C.
Charles Dadi Onyeama, J.S.C.
Michael Oguejiofo Ajegbo, J.S.C.

GENTY ADEROUNGBOYE
(Defendant/Appellant)

vs.

THE NATIONAL BANK OF NIGERIA, (N.B.N) LIMITED
(Plaintiff/Respondent)

3.2. REPORTS/FACTS/ISSUES.

INSURANCE AND RE-INSURANCE LAW – Sum for property assured, whether guided by price in the open market.

BANKING AND FINANCE LAW – Banking practices, granting of loans and credit facilities. Whether it makes Bank a moneylender under the Money Lenders Act.

REAL ESTATE AND PROPERTY LAW – Valuation of property pursuant to a sale, sum for which the property is insured. Whether a reliable guide.

PRACTICE AND PROCEDURE – PLEADINGS – Plaintiff claiming to be a moneylender in the claim, Defendant asserting otherwise. Defendant later admitted that the Plaintiff is a moneylender. Whether such a shift in position is permissible.

3.3. DECISION OF COURT.

JUDGEMENT

AJEGBO, J.S.C

The Plaintiffs sued the Defendant in the High Court of Western Nigeria for a sum of £9,390.12s.11d being the balance of a loan they granted to the Defendant sometime in 1954. The Defendant, on the other hand, counterclaimed for a sum of £10,000, which, he said, was the value of the property he mortgaged to the Plaintiffs as security for the loan and which property, according to him, the Plaintiffs sold by auction; alternatively, he wanted an account of the sale rendered to him. Delumo, J., who tried the case, gave judgement for the Plaintiffs and dismissed the counterclaim. The Defendants have appealed from the judgement.

Three grounds of appeal were filed and argued and they are as follows: -

- (1) The learned trial Judge erred in law in not dismissing the Plaintiffs' claim as moneylenders when they have failed to comply with provisions as to account, interest and period of limitation under the Moneylenders Ordinance.

- (2) The learned trial Judge erred in law in not awarding damages on the counterclaim when on the exhibits, the fact of sale was admitted and they were not denied in the pleadings.
- (3) Judgement against the weight of evidence.”

Arguing the appeal for the Defendant, Mr. Akinrele submitted in respect of the first ground that although the Plaintiffs were bankers, they elected to sue as moneylenders and the transaction should, therefore, be governed by the provisions of the Money Lenders Act.

It is true that for some unknown reason the Plaintiffs pleaded in paragraph 1 of their Statement of Claim that they were moneylenders whose head office was at 82/84 Broad Street, Lagos, but instead of exploiting the situation created by the averment, the Defendant, rather unwisely, denied in paragraphs 1 and 7 of his Statement of Defence that the Plaintiffs were moneylenders. Having denied the Plaintiffs’ status as money-lenders, the Defendant cannot call in aid the Money-Lenders Act; he cannot approbate and reprobate, Mr. Okunnu, for the Plaintiffs, has rightly pointed out that throughout the evidence the Plaintiffs were referred to as “the bank” and not as money lenders, and that according to Section 2(c) of the Money-Lenders Act “money-lenders” shall not include “any person bona fide carrying on the business of banking”. With this submission, we agree and this ground of appeal, therefore, fails.

On the 2nd and 3rd grounds of appeal, which were argued together, Learned Counsel submitted that because the Plaintiffs themselves insured the property for £10,000, that was the value of the property. He argued that the houses were sold by the Plaintiffs and that no account of the sale was rendered to the Defendant; he referred to the evidence of the 3rd witness for the Defendant, Erastus Oyeniyi, who testified that he bought a house in 1958 at Ondo for £250. The Plaintiffs denied selling any of the Defendant’s houses; there was no evidence of sale, nor was there anything to connect the house that Oyeniyi said he bought with Exhibit G or with any of the mortgaged houses in Exhibit E1. The house was not conveyed to Oyeniyi.

It is a notorious fact that the sum for which property is insured is no guide to the price which it will fetch in the open market. If, on the Defendant’s own showing, one of the houses was sold for £250, one fails to understand the basis for the claim of £10,000 for the three houses under mortgage. The learned trial Judge did not believe the story about the sale and we agree with him that the counter claim should be dismissed.

3.4. REMARKS

Will the price of property in the market be decided or guided by the Insurance Premium (Sum) for the property. Supreme Court says No.

3.5. REFERENCE

1. 3 PLR|1966|11|SC.

4.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT OF NIGERIA

DATE: 16th June, 1978

SUIT NO: SC 260/1975.

JUDGE: Fatai Williams, J.S.C.
Irikefe, J.S.C.
Obaseki, J.S.C.

AJARBOR AND OTHERS
(Defendant/Appellant)

vs

AJUFO
(Plaintiff/Respondent)

4.2. 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 a 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 Defendant 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 the 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 contended that his joinder to the action at the Lower Court was wrong in law as there was no privity of contract between it and the Plaintiff third party.

4.3. DECISION OF COURT.

JUDGEMENT

IRIKEFE, J.S.C

On 11th April, 1970, a Mercedes-Benz lorry No. WB 4760, in which the Respondent herein was a fare-paying passenger, careered off the highway near Ubulu-Uku Town in Bendel State, into a ditch and landed on its side. The Respondent got trapped in the front compartment and had to be freed with the aid of some other passengers. On being freed, he complained of a smarting sensation in his two eyes as some fluid, the nature of which was not disclosed by evidence, had got into the eyes while he was still trapped in the vehicle. He also complained of reduced visibility at the scene of the accident, resulting in a short space of time in total loss of sight in both eyes.

At the time of the accident, the vehicle was under the control of the 2nd Defendant, its driver, who has not appealed.

The Respondent commenced the present proceedings on 30th November, 1972, at Asaba in the Asaba Judicial Division of the then Mid-Western State initially against the two persons – namely:-

- (a) one of the alleged co-owners of the lorry, and
- (b) the driver.

The Plaintiff reads:-

“The Plaintiff claims from the Defendants jointly and severally the sum of £30,000 (Thirty thousand pounds) being general and special damages for negligence. On or about the 11th day of April, 1970, at UBULU-UKU within the jurisdiction of this Honorable Court, a lorry No. W.B. 4760 owned by the 1st Defendant and driven by the 2nd Defendant who was the servant of the first Defendant was so negligently driven on the public highway by the said second Defendant, having regard to all the circumstances of the case including the nature, condition and use of the highway and the amount of traffic which actually was at the time or which might reasonably be expected to be on the highway, that it fell into a pit on the wrong side of the road and severely injured the Plaintiff who as a result suffered great pains and personal injuries and lost his two eyes and became blind.

Particulars of Injury

- 1. Loss of two eyes.
- 2. Deep cuts and wounds at back and shoulder.
- 3. Pains and suffering.

Particulars of Special Damages

(a)	Transport and hospital expenses	£100
(b)	Loss of earning capacity due to loss of two eyes	£10,000
	And GENERAL DAMAGES for personal injuries	£19,900
	Total damages claimed	£30,000

Later, two additional Defendants were introduced into the case. The third Defendant, one N. NNONYELI, of 48, Forestry Road, Benin City, was added upon the application of the respondent.

The Appellant’s affidavit in support of his motion to amend the Writ to include the 3rd Defendant alleged inter alia as follows:-

- (a) That investigations made by me have revealed that although the said vehicle was owned and managed by the 1st Defendant at the material time insured in the name of one N. NNONYELI by the Mercury Insurance Company Limited, whose Head Office is at No.17, Marina Street, Lagos State.
- (b) That in the interest of justice, it is necessary to bring in the insured as a co- Defendant.
- (c) That in the interest of justice, both the ostensible owner, that is the 1st Defendant, and the insured, N. NNONYELI, should be of great assistance to the court to arrive at the Justice of this case.”

As the 3rd Defendant took no part in the proceedings throughout, we shall from time to time set out all that was said about him, since, in our view, he was the principal party to whom the judgement in this case was directed as he was, who took out the insurance Policy on the strength of which the appellant it was brought into the proceedings.

Service of the writ on the 3rd Defendant was made by an order of substitution, that is by pasting the writ of summons on his last known address, namely, No. 48, Forestry Road, Benin City.

The Appellant’s affidavit in support of the motion for substituted service stated inter alia:-

- (d) That all efforts to get at the 3rd Defendant at Benin to effect service on him proved abortive.
- (e) That I have once consulted the 3rd Defendant at the said address viz: 48, Forestry Road, Benin and he wrote me through the said address but the said letter got missing.
- (f) That I verily believe that the 3rd Defendant is deliberately evading the service of the summons.”

On 29th June, 1973, when the lower court made the order for pleadings, the learned trial Judge made the following note in his record book: -

“3rd Defendant duly served on 11/6/73.”

We take the above note to mean that the order for substituted service had been complied with on that date. As against the 1st, 2nd and 3rd Defendants the Respondent averred inter-alia as follows: -

- (a) On 11/4/70, the first Defendant and the third were transporters of goods and passengers and owners of commercial vehicle Number WB 4760 used for this purpose.
- (b) On 11/4/70, the vehicle No. WB 4760 was insured with the fourth Defendant in the name of the third Defendant and was physically and personally managed by the 1st Defendant and the 2nd Defendant at the Agbor/ Ubulu-Uku/ Asaba road.
- (c) On 11/4/70, the second Defendant was the driver employed and paid by the first Defendant and the third Defendant to drive vehicle No. WB 4760.
- (d) The Defendants carried on their business along most roads of Nigeria, including AGBOR/UMUNEDE/UBULU-UKU/ASABA road.
- (e). On 11th April, 1970, the 2nd Defendant in the course of his employment accepted the Plaintiff as a passenger to be by him (2nd Defendant) safely carried in Vehicle WB. 4760 along the public highway from Agbor via Ubulu-Uku to Asaba for reward.
- (f) The 2nd Defendant did not safely carry the Plaintiff but drove Vehicle W.B. 4760 with such circumstances of negligence that it moved from the left-hand side of the road to the right-hand side at a bend near Ubulu-Uku within the Asaba Judicial Division and fell into a ditch and injured the Plaintiff.
- (g) At that time, Nigeria was driving on the left-hand side of the road.
- (h) The vehicle fell into the ditch and injured the Plaintiff through the negligence of the second Defendant.”

The 1st Defendant, in addition to the general traverse, averred inter alia as follows:-

- (a) The first Defendant avers that he is an agent of the third Defendant at all material times and that the second Defendant was the driver.
- (b) The first Defendant admits paragraph three but avers that the accident occurred, but denies that it was a result of the negligence of the second Defendant.”

The first Defendant next applied that the appellant be joined as the 4th Defendant and this application was granted. The above notwithstanding, the record does not indicate that an amended writ of summons was ever filed, nor for that matter, an Amended Statement of Claim setting out in clear terms the nature of the claim, if any, that the respondent had against the appellant, although he (the Respondent) did aver in paragraph 2(b) of his amended statement of claim as follows:

“On 11/4/70, the vehicle No. WB 4760 was insured with the fourth Defendant in the name of the third Defendant and was physically and personally managed by the 1st Defendant and the 2nd Defendant at Agbor/Ubulu-Uku/Asaba Road.” In the light of the foregoing, the appellant merely averred inter alia as follows:

- (c) Except for having a business transaction with the 3rd Defendant, the 4th Defendant denies having a transaction with the Plaintiff or other Defendants in this case.

- (d) The 4th Defendant avers that one Mr. N. NNONYELI insured the vehicle Registration Number WB 4760 subject to conditions stipulated in the Insurance Policy. These conditions shall be relied upon, if necessary, at the trial.”

At the hearing before the lower court, the respondent gave evidence on oath and called witnesses. He did not, however, say a word about the 3rd Defendant. The latter, as we had pointed out earlier, did not put in an appearance throughout the hearing. It is equally significant that even the 1st Defendant, at whose instance the 3rd Defendant was joined in the action, had very little to say about him. When asked about him by the court, he deposed thus:- “I know one NNONYELI. He is from the East Central State (Igbo). I do not know the town he comes from in the East Central State. He was living in that State when the accident took place. I have never visited his place of abode there.

Court Question - Did you tell your lawyer he lived in the East Central State?
I did not tell him.

Court Question - You did not know you should tell him?
I did not know I should.

Court Question - Did your lawyer ask you?
He did, and I told him I did not know where he lived.

In answer to questions put to him on his relationship with the 3rd Defendant, he had this to say:-

“I took only what he gave me. Nnonyeli gave me no fixed commission. He only gave some money (dash) from time to time.”

One Mrs. Theresa Momodu (Nee Omashor), the Area Representative at Agbor of the appellant, testified on its behalf. She denied ever being known as Miss Ogun as alleged by the 1st Defendant and insisted with much emphasis that it was the 3rd Defendant in person with whom she dealt when the insurance Policy in this case was taken on 3rd January, 1970. She denied any prior knowledge of the existence of the 1st Defendant until the time when she came to court to testify in this case. She added that, having no prior knowledge of his existence, she was in no position to confirm or deny that the (1st Defendant) was the agent of the 3rd Defendant.

The 2nd Defendant admitted being the driver of vehicle Number WB. 4760 on the date of the accident and also that he was employed to drive the said lorry by the 1st Defendant, who paid him a salary of £8 per month. He also denied knowing anyone going by the name of the 3rd Defendant.

After a very careful evaluation of all the evidence, the learned trial Judge (Uche-Omo, J. (as he then was) allowed the claim of the respondent and awarded him the total sum of ₦11,300:00 as damages against all the Defendants (amongst whom the appellant is the 4th Defendant) jointly and severally.

The learned trial Judge’s decision rests entirely on a finding of negligence against the 2nd Defendant. He dealt with this in the following words:-

“I therefore hold that negligence by the 2nd Defendant has been duly proved. The vicarious liability of his master/employer for the consequences of this negligence has not been denied. On that day the 2nd Defendant was in the employment of the 1st Defendant, acting for and on behalf of the 3rd Defendant – the actual owner of the

vehicle vide – **Shamonda v. James (1960) L.L.R. 47**. 3rd Defendant remains an “owner” who has throughout the whole transaction, in my finding, not put in any appearance.

The 2nd Defendant was also going to ASABA FROM AGBOR in the course of his lawful employment. The 1st and 3rd Defendants are therefore vicariously liable for the negligence of the 2nd Defendant, and I so find.

Contrary to the submission of counsel for the 4th Defendant company, I am satisfied that the link between the 4th and the 1st, 2nd and 3rd Defendants has been fully established. The onus is on the 4th Defendant company, in order to avoid the Policy, to establish that the accident was not reported within 30 days vide **Jia Enterprises (Electrical Limited) vs. British Commonwealth Insurance Co. Limited. (1965) N.M.L.R. 147**. This, has failed, in my finding, to establish. The 4th Defendant company is therefore liable to satisfy any damages that may be awarded in favour of the Plaintiff in this action.” Before the above finding, the learned trial Judge had rejected in unequivocal language the testimony of the Appellant’s sole witness in this case, on the question whether the Insurance Policy with which the action is concerned was taken up by the 1st Defendant or by the 3rd Defendant. As to this, he observed as follows:-

“The 4th Defendant’s only witness denied any knowledge of the 1st Defendant.

She said she dealt only with the 3rd Defendant. She further denied ever being informed orally or in writing by the 1st Defendant or anyone else about the accident. The 1st Defendant said he reported the accident to one Theresa Ogun, the then representative of the 4th Defendant company at Agbor, and that he was the one who took out the Policy on 3/1/70, in the name of N. Nnonyeli – the owner. Mrs. Theresa Omashor was, in the witness box, a very self-confident and articulate witness. She is a capable woman. However, I have no doubt whatsoever that she was not telling this Court the whole truth.

I am satisfied and so find that the same person now known as Theresa Momodu, and previously as Theresa Omashor, was known to the 1st Defendant in January, 1970 as Theresa Ogun.

If the actual owner of the vehicle is from the East Central State, and was in that enclave during the war (which ended on 15th January, 1970), which facts I believe to be true, then it is very unlikely that he was at Agbor, and negotiating on Insurance Policy for vehicle Number BW. 4760 on the 3rd January, 1970. I believe and find as the truth, that the 4th Defendant’s witness on that date, with full knowledge of the true position, and anxious to do some lucrative insurance business, carried out the negotiation for the Policy, as a result of which Exhibits G and H were issued, with none other than the 1st Defendant – Christopher Ajarbor.

This appeal is against the foregoing decision and learned counsel appearing on behalf of the appellant rested his case on the only ground argued before us, which reads:

“The learned trial Judge erred in law and misdirected himself when, as at that stage of the proceedings in the High Court, he was considering the vicarious liability of the 3rd Defendant (N. NNONYELI) as against the 2nd Defendant–driver Mr. OKAFOR DIBIA, when the evidence disclosed the fact that the said 3rd Defendant did not employ or had any notice whatsoever of the employment of the 2nd Defendant/driver in the driving and management of the vehicle Registration Number WB. 4760, the subject matter of the action insured by the 3rd Defendant with the appellant.”

Particulars of Error and Misdirection

- (a) It is an error of law on the part of the learned judge to have considered jointly and severally the liability of the appellant as an insurer with the liabilities of the 1st, 2nd, and 3rd Defendants and that of the Plaintiff.
- (b) The learned trial Judge failed to consider the provisions of Section 10 of the Motor Vehicles Third Party Insurance Act (Cap. 126-Laws of the Federation) in that no evidence was led, and the Plaintiff did not plead that the appellant was served with the usual statutory notices under the above section before instituting the proceedings.
- (c) The learned trial Judge misconstrued the statutory provisions and the interpretation of:
 - (i) Section 10 of the Motor Vehicles Third Party Insurance Act (Cap.126 – Laws of the Federation of Nigeria and Lagos) by his failure to strike out the appellant and dismissing the Plaintiff's claim against it both at Common Law and in Equity;
 - (ii) The learned trial Judge misinterpreted the principles laid down by this Honorable Court in the case of Sun Insurance Coy (Nigeria) Limited vs. Victoria Ojemuyiwa – (1965) N.M.L.R. p.451 when he held (at page 108 of the record) it was to join the appellant on the application of the 1st Defendant when the evidence disclosed that it was the 3rd Defendant who owned vehicle WB 4760 and who did not employ the 2nd Defendant, the driver.

In arguing the above ground of appeal, learned counsel submitted that, as the cause of action was clearly set out in the writ of summons, and further as the statement of claim did no more than merely allege that the appellant was the insurer of vehicle Number WB. 4760, it was a misconception in law for the trial court to hold the appellant vicariously liable in negligence. This was the more so, as the writ of summons was neither amended to incorporate the appellant, nor in the circumstances, could any averment of negligence be made against it.

Counsel argued that a contract of insurance was one of indemnity and that, in any case, if there were such a contract, it was only between the appellant and the 3rd Defendant. The 1st and 2nd Defendants, who were undoubtedly strangers to the contract, counsel submitted, could not derive any benefit under it, unless, of course, the 3rd Defendant constituted a trust in their favour. As between the 3rd Defendant and the appellant, counsel submitted that the obligation to indemnity would not arise until judgement had been obtained against the 3rd Defendant. Counsel then submitted that, under no circumstances could the appellant be made a party to these proceedings upon the application of the 1st Defendant.

In support of these submissions, counsel relied on:-

- (a) Post Office v. Norwich Union Fire Insurance Society Limited (1967) 1 A.E.R. p.577;
- (b) Odubanjo and Ors. vs. New India Assurance Company Limited – S.C. 85/69 (unreported Supreme Court decision – delivered on 8/10/71);
- (c) Section 10 Motor Vehicles (Third Party Insurance Act) Cap.126 Laws of the Federation of Nigeria.

For the Respondent, it was submitted that no objection was taken to joinder by the Appellant. Learned counsel was, however, prepared to concede that the Appellant was joined in the case as an insurer and that it had not been sued in negligence.

As we had shown earlier in this judgement, the respondent who had applied that the 3rd

Defendant be joined in these proceedings, gave no testimony touching him. All he did was to describe him in his Statement of Claim as a co-owner with the 1st Defendant. The 1st Defendant, on the other hand, denied being a co-owner with the 3rd Defendant and asserted on oath that he was the 3rd Defendant's agent.

The 3rd Defendant, though served by substitution, took no part in the proceedings, and the court was thus deprived of the opportunity of discovering from him on oath what connection, if any, he had with vehicle No. WB.4760 and the Insurance Policy, relating to it (Exhibits G and H).

In view of the learned trial Judge's findings that the 3rd Defendant could not have taken up the insurance Policy (Exhibits G and H) as on 3rd January, 1970 and that the same was done, by the 1st Defendant, the question that immediately arises is why did the 1st Defendant have to use the 3rd Defendant's name?

Assuming that the 3rd Defendant was indeed the principal of the 1st Defendant (and there was no finding to that effect), what evidence was there of the scope of the latter's agency or that the 3rd Defendant authorised the taking up of the Policy aforesaid in his name? The record is completely silent on these matters.

Even if it were established that an identifiable person, i.e., the 3rd Defendant, took up the Policy of Insurance (Exhibits G and H) with the appellant, we are satisfied that a third party, such as the respondent, could 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 Section 10 of the Motor Vehicles (Third Party Insurance) Act, Cap.126 Laws of the Federation of Nigeria, it would still be inappropriate to bring in the insurer as a party, except, perhaps, by way of the third party proceedings based on a contract of indemnity, if any – See *Post Office vs Norwich Union Fire Insurance Society Limited*. (supra) and *Odubanjo vs New India Assurance Company. Limited* (supra).

We think it was an error on the part of the learned trial Judge to have joined the Appellant in these proceedings and to have proceeded to 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.

In *Odubanjo* case, this Court ruled that the insurer be struck out from the claim. We propose to adopt the same course on this occasion.

Accordingly, this appeal succeeds and it is allowed. The judgement of Uche-Omo, J., (as he then was) in Suit No. A/35/72 delivered in the Asaba High Court on 31st January, 1975, (including the order as costs), in so far as it applied to the appellant (4th Defendant) only, is set aside. Instead, we order that the claim against the 4th Defendant be struck out and this shall be the judgement of the court. Costs in favour of the Appellant are assessed at N55 in the court below and this Court at ~~N~~463.00.

4.4. REMARKS

The Court will not avail a negligent party in a motor accident case. However, the Court frowns at the unnecessary Joinder of an Insurer in such matters.

4.5. REFERENCES

1. *Shamonda v. James* (1960) L.L.R. 47.
2. *Jia Enterprises (Electrical Limited) vs. British Commonwealth Insurance Company Limited*. (1965) N.M.L.R. 147.
3. *Sun Insurance Company (Nigeria) Limited. vs. Victoria Ojemuyiwa* – (1965)

- N.M.L.R. p.451.*
4. *Post Office v. Norwich Union Fire Insurance Society Limited. (1967) 1 A.E.R. p.577.*
 5. *Odubanjo and Ors. vs. New India Assurance Company. Limited. – S.C. 85/69.*
 6. *Section 10 Motor Vehicles (Third Party Insurance Act) Cap.126 Laws of the Federation of Nigeria.*

5.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT (FEDERAL)

DATE: 30th December, 1957.

SUIT NO: F.S.C 24/1957

JUDGE: Sir Stafford Foster-Sutton, F.C.J.
M. C. Nageon Lestang, F.J.
Myles John Abbott, F.J.

NNAJUBA
(Defendant/Appellant)

vs.

AZUKEMU
(Plaintiff/Respondent)

5.2. REPORTS/FACTS/ISSUES.

TORT AND PERSONAL INJURY LAW: Fatal accident– Liability of insurance company for damages arising from a vehicular accident involving a vehicle under an insurance Policy, Liability for injury or death of passenger and how it is treated.

INSURANCE AND REINSURANCE LAW: Construction of a Policy of Insurance“Limitations as to use”. When the insured is entitled to indemnify in respect of any risk covered by the Policy, “User permitted” is distinguished from “risks covered” by the Policy. Extent of liability of an insurer to damages arising from a vehicular accident.

CHILDREN AND WOMEN LAW: Women and Justice Administration, Widows and Fatal Accident proceedings, claim in respect of deceased/husband by wife, Assessment of damages and liability to pay same – How treated.

5.3. DECISION OF COURT.

JUDGEMENT

FOSTER-SUTTON, F.C.J. (delivering the Judgement of the Court):

These proceedings were brought by the widow of one Titus Azukemu, deceased, claiming damages for the negligence of the 1st Defendant’s driver which resulted in the death of her husband. It would appear from the 1st Defendant’s evidence that he never received a Policy of insurance pursuant to this proposal form, but I think the actual cover given by the Company in respect of it can be reconstructed from the documents before us.

The proposal form is headed “Policy No. MA 232460,” and the 2nd Defendant tendered in evidence a document, said to be a carbon original, headed “Policy No. MA (MB) 232460 The Schedule.” The other relevant document is a Certificate of Insurance, tendered in evidence, Exhibit “D4”, which was issued by the 2nd Defendant in respect of Policy No. 232460, valid for the period 18th February, 1954, to the 17th

February, 1955, and I think it is beyond doubt that the document relates to a Policy of insurance effected by the 2nd Defendant pursuant to the proposal form, Exhibit “D5,” and the payment by the 1st Defendant of the premium of a £3.10s.

I do not think that there can be any doubt that the contract between the 1st Defendant and the 2nd Defendant was to give the former cover in respect of insurance required to be effected under the provisions of the Motor Vehicles (Third Party Insurance) Ordinance, generally referred to as an “Act Policy.”

The appellants contended that on the day of the accident, the 1st Defendant was not covered for liability in respect of injury or death occurring to the person being carried in his vehicle unless such person was being so carried because of or in pursuance of a contract of employment, and it was not suggested that the exception applied to the deceased.

The learned trial Judge took the view that the Certificate of Insurance, Exhibit “D4,” and the Schedule, Exhibit “D7,” precluded the appellants from denying liability, but did not appear to have directed his mind to the question whether an “Act Policy” covers the risk we are dealing with here.

The relevant portion of Section 6(1) of the Motor Vehicle (Third Party Insurance) Ordinance provides:

- (a) “A Policy of insurance for the purposes of this Ordinance must be a Policy which. –
is issued by an insurer approved by the Governor in Council; and
 - (b) insures such persons or classes of persons as may be specified in the Policy in respect of any liability which may be incurred by them in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor vehicle covered by the Policy.
- Provided that such Policy shall not be required to cover –
- (ii) save in the case of a passenger vehicle or where persons are carried because of or in pursuance of a contract of employment liability in respect of the death of or body injury to persons being carried in or upon or entering or getting on to or alighting from a motor vehicle at the time of the occurrence of the event out of which the claims arise; and it is relevant to observe that the proposal form, Exhibit “D5,” signed by the 1st Defendant, expressly provides that the cover required is in respect of a vehicle to be used for “carriage of own goods only.”

The learned trial Judge may have been misled by the words to be found on the Certificate of Insurance, Exhibit “D4” “Limitations as to use: use in connection with the Policy holders’ business; whilst the vehicle is being so used the carriage of passengers (other than for hire or reward) is permitted,” construing them to mean that injury to a passenger on the vehicle, not proved to have been carried for reward, was covered, but I do not think that is the construction to be placed upon them. All I understand those words to mean is that if an accident, loss or liability occurs whilst the insured vehicle is being used to carry passengers, other than for hire or reward, the insured will still be entitled to indemnity in respect of any risk covered by the Policy. In other words, they relate to user-permitted, not to risks covered by the Policy.

It seems to me clear that the 1st Defendant could have been under no illusion as to the

cover he would obtain as a result of his proposal form, Exhibit “DS,” because on the 15th March, 1954, he signed another proposal form, Exhibit “D6,” and paid a further premium, for a Policy of insurance which would have given him cover for precisely the liability which arose in this case, but unfortunately the cover he asked for in that proposal form was for six months only, that is to say, from the 15th March, 1954, to the 14th September, 1954. The 1st Defendant indeed stated in his evidence that when he received the Policy which was issued to him pursuant to this proposal form, Exhibit “D3,” he complained about the period it was issued for and was told by a Clerk of the C.F.A.O. that he would be issued with another Policy, but I find it difficult to believe that evidence since the Policy issued covered the exact period he had asked for in his proposal form.

On the evidence before us, I am satisfied that the 1st Defendant was not covered by a Policy of insurance issued by the 2nd Defendant for the liability which arose in this case and that the learned trial Judge erred in holding that he was. That being so, I would allow this appeal, and amend the judgement of the Court below by entering judgement for £1,000 damages, and costs assessed at 50 guineas, in favour of the Plaintiff against the 1st Defendant only.

Mr. Mitchell, Counsel for the appellant, stated that if his clients were successful on this appeal he would only ask for an order of 50% of their costs in the Court below, such order to be against the 1st Defendant upon whose motion his clients were joined, and that they would not ask for any costs on this appeal.

The appellant is undoubtedly entitled to an order for costs in the Court below. I would accordingly further amend the judgment by including an order against the 1st Defendant, awarding the 2nd Defendant 50% of its taxed costs in the Court below; and in the circumstances, I would make no order as to costs on this appeal.

5.4. REMARKS

This matter was about proceedings brought by the widow of the deceased for the negligent killing of her husband in an accident with a vehicle under an Insurance Policy.

5.5. REFERENCES

1. *Section 6 (1) Motor Vehicle (Third Party Insurance) Ordinance.*
2. *3 PLR| 1957| 22 (SC).*

6.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT (FEDERAL)

DATE: 15th June, 1962.

SUIT NO: F.S.C 328/1960

JUDGE: Sir Lionel Brett, F.J.
John Idowu Conrad Taylor, F.J.
Sir Vahe Bairamian, F.J.

BRITISH AND FRENCH BANK LIMITED
(Plaintiff/Appellant)

vs.

JIA ENTERPRISES (ELECTRICAL) LIMITED AND ANOR
(Defendant/Respondent)

6.2. REPORTS/FACTS/ISSUES.

INSURANCE AND RE-INSURANCE LAW: Insurable interest– Need to show the existence of as proof of locus standi to bring suit, debenture and floating charges generally. Meaning of whether sufficient to ground an interest in land under S.2 and 9 of the Land Registration Act to be admissible evidence of insurable interest. Relevant considerations, insurance combined in several persons having different interests in the subject matter of the insurance, and legal effects.

BANKING AND FINANCE: Banking practices, Creation of debentures or floating charges over property, which may vary between real and personality nature of interest. Whether it can sustain a claim based on proof of insurable interest.

COMMERCIAL LAW: DEBTOR AND CREDITOR Floating charge. Nature of interest created within the meaning of the Land Registration Act. Distinction between a floating and a fixed charge. Whether proof of the existence of a floating charge can furnish locus standi for a creditor bank to be joined as a co-insured with insurable interest in a suit relating to properties to which the floating charges applied.

PRACTICES AND PROCEDURE – ACTION: – *Res Judicata* – Issue estoppel - Application to decide a fact not directly in issue in a previous case- When a judgement is deemed conclusive or res judicata – S.53 of the Evidence Act – Need for judgement cited to among other things, relate to facts directly in issue in the case.

PRACTICES AND PROCEDURE – EVIDENCE: – Debenture – Not registered - Admissibility of EVIDENCE – Res judicata – What constitutes.

WORDS AND PHRASES – “Joint insurance”, “Debenture”- Meaning of.

6.3. DECISION OF COURT.

JUDGEMENT

BRETT, F.J. (*Delivering the Judgement of the Court*):

The circumstances giving rise to these appeals are as follows. The first Respondent, Jia Enterprises (Electrical) Limited (hereinafter referred to as Jia), brought an action in the High Court of Lagos against the second Respondent, the British Commonwealth Insurance Company Limited (hereinafter referred to as the Insurance Company), claiming the sum of £22,450, as money due on an insurance Policy in respect of goods and a building destroyed or damaged by fire. The Appellants, the British and French Bank Limited (hereinafter referred to as the Bank), brought a motion asking to be joined as Plaintiffs, under Order IV, rule 5 of the Supreme Court (Civil Procedure) Rules, which provides for the joinder of additional persons as Plaintiffs or Defendants where it appears to the Court “that all the 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”.

In the supporting affidavit sworn by M.J.C. Young it is stated that the deponent believes that the claim is brought under a Fire Policy No. 163189, taken out by Jia with the Insurance Company, and that under that Policy the Bank are joint insurers with Jia and accordingly have an interest in any monies paid under the Policy, including monies awarded in the action. The reference to joint insurers means persons who are jointly insured. A copy of the Policy was not annexed to the affidavit, but the original appears to have been tendered in the suit already and its terms were referred to by counsel for Jia in the course of proceedings in this Court, so that we are at liberty to look at it. It names the persons insured as Jia Enterprises (Electrical) Limited and the British and French Bank Limited “for their respective rights and interests”.

The Insurance company neither assented to nor resisted the Bank’s application and has remained equally aloof both from the subsequent applications to which I shall refer later and from these appeals. Jia, however, opposed the application, and a director of Jia named Jamil Tayar swore in an affidavit that the Bank was simply a creditor of Jia and had no interest whatsoever in the property insured. No further affidavit was filed by the Bank, and the motion was heard by Bellamy, J., who gave his decision on the 17th May, 1960, dismissing the motion on the ground that the Bank, being simply a creditor of Jia’s could not prove an insurable interest in the property insured.

On the 27th May, 1960, the Bank filed notice of a fresh motion in identical terms, supported by a new affidavit by M.J.C. Young to which was annexed a Debenture issued by Jia in favour of the Bank to secure an overdraft not exceeding £3,000, in which Jia as beneficial owner, charges with the payment of the overdraft its undertaking, all its property and assets of every description (including uncalled capital, book debts and goodwill) by way of floating security. The debenture contains the usual provision that the principal money secured shall become immediately repayable on demand or the occurrence of any of various events, and the Bank is empowered to appoint a receiver and manager at any time after the principal has become payable, but it was not alleged in Young’s affidavit that the principal had become payable.

This application was dismissed by Bellamy, J., on the 22nd June, 1960, not on the merits but on the ground that the question whether the Bank had an insurable interest was res judicata by virtue of his decision on the former application.

On the 23rd June, 1960, the Bank filed notice of yet another motion, supported by an affidavit and the Debenture, and to avoid being barred by the plea of res judicata this application was brought under Order IV rule 2, which refers to the case where a person has jointly with other persons a ground for instituting a suit. This application was no more successful than the others and was dismissed by Bellamy, J., on the 4th July, on the

ground that the Debenture was an instrument within the meaning of the Land Registration Act and that S.15 of that Act made it admissible in evidence as affecting land for want of registration under the Ordinance.

The present appeals are brought against all three decisions, though the Bank will, no doubt, be satisfied if they succeed on any one of them. The substance of the grounds is, as regards the first application, that the Judge has only to decide, at that stage, whether they had shown a *prima facie* interest, and that they had done this; as regards the second application that the question whether they had shown a *prima facie* interest was not *res judicata* and as regards both the second and the third that the debenture should have been received as evidence of an insurable interest, and that it was not registrable under the Land Registration Act.

As regards the first application I am not prepared to hold that on the material before him the Judge was wrong in refusing to join the Bank as Plaintiff, though I agree that he went further than was necessary for the determination of the application in coming to a positive finding that the Bank had no insurable interest, and that it would have been enough if he had held that in the face of Jamil Tayar's uncontradicted affidavit the bank had failed to make it appear to the court that it might be entitled to a share or interest in the subject matter of the suit; an authority for holding that a simple creditor has no insurable interest in *Macaura v. Northern Assurance Company Limited*. (1925) A.C. 619. The Bank indeed claimed such a share or interest, but having held that on the material before him it did not appear that the claim could have any substance in law, the Judge was not required by Order IV, rule 5, to grant the application. I would dismiss the appeal as regards the first application on these grounds.

Turning to the second application, the facts of which S.53 of the Evidence Act makes a judgement conclusive proof must among other things be facts directly in issue in the case, and if, as I have already held, it was unnecessary on the first application for the Court to decide whether the bank actually had an insurable interest, the question whether it had such an interest was not a fact directly in issue. I would hold, therefore, that the Judge was wrong in treating his previous decision as concluding the matter, and that he should have considered the second application on its merits. However, if he was right in holding, on the third application, that the debenture could not be given in evidence the second application in which the existence of the debenture was the only fresh fact, must necessarily have failed like the first. The third application likewise could not succeed unless the debenture was admitted in evidence, and it will be convenient from this stage to deal with the second and third applications together in considering whether the debenture was admissible in evidence and whether, if so, it shows either that the Bank may be entitled to a share or interest in the subject matter of the suit or that the bank has a ground jointly with Jia for instituting the suit.

As Mr. Ferguson, who appears for the Bank, has pointed out, the question whether a debenture containing a floating charge is admissible in evidence and it will not be enforceable in law unless it is admissible, is one of great importance to the business community, from the point of view both of those who wish to raise loans on this convenient form of security and of those whose business it is to grant loans on adequate security. The nature of a floating charge was described in the following terms by Sir Wilfrid Greene, M.R., in **General Accident and Life Assurance Corporation Limited v. Midland Bank Limited (1940) 2 K.B. 388, 400**, to which Mr. Ferguson referred us "it floats over and comprises all the property, whatsoever it may be at any given moment, of the person giving the charge.

If one piece of property is replaced by another piece of property, the first piece of property drops out, and the new piece of property comes in”, and, as was pointed out by Lord Halsbury in *Illingworth v. Houldsworth* (1904) A. C. 355, a floating charge enables the grantor to carry on its business in the ordinary way. If the property includes any interest in land, as it admittedly does in the present case, the question is whether the floating charge is a document affecting land whereby the person giving it confers, transfers, limits, charges or extinguishes in favour of the holder any right or title to, or interest in land. If it is, then it would appear to come within the definition of an instrument in S.2 of the Land Registration Act, and to be inadmissible in evidence as affecting land if it is not registered. It is perhaps material to point out that the first provision to S.15 of the Ordinance makes it clear that an equitable mortgage requires registration under the Ordinance.

The difficulty which arises is that S.9 of the Land Registration Act provides that no instrument other than a Power of Attorney shall be registered unless it contains a proper and sufficient description and, subject to the regulations, plan of the land affected by such instrument, and that since the nature of a floating charge is such that the property over which it extends may vary from day to day it is impossible for the instrument creating the charge itself to contain such a description or plan. Sections 101(1)(f) and 114 of the Companies Act assume that a company registered in Nigeria has power to create a floating charge on the undertaking or property of the company, and it is significant that in classifying the various kinds of Mortgage or charge to which S.101(1) applies, a distinction appears to be drawn between a Mortgage or charge on various specific kinds of property, as set out in paragraphs (b) to (e), and a floating charge. Paragraph (d) expressly refers to a mortgage or charge on land, and paragraph (c) to a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale.

In my opinion, to hold that a floating charge creates an interest in land within the meaning of the Land Registration Act is to ignore the essential characteristics of a floating charge as a charge comprising property which may vary between realty and personality according to the commercial needs of the owner of the property at any given time. Shortly before the passage in his judgement which I have already quoted, Sir Wilfrid Greene, M.R., distinguishes between a floating and a fixed charge and refers to a floating security as one which had not yet crystallized. Later in his judgement, at page 411, he held that in circumstances very similar to those in the present case.

“The bank had no claim whatsoever, because they had suffered no loss in respect of the buildings. The damaged building was pro tanto replaced by the claim under the Policy, which itself came under the floating charge.”

I would therefore hold that in this case S.15 of the Land Registration Act did not prevent the debenture from being given in evidence and that it was an error in law to exclude it. It is thus necessary to consider the effect of the debenture in deciding whether the Bank has established a right to be joined as Plaintiff.

On this issue, the decision in **General Accident Fire and Life Assurance Corporation Limited vs Midland Bank Limited (supra)**, on which Mr. Ferguson has relied for the effect of a floating charge, is conclusive against the Bank’s claim, whether under rule 2 or rule 5 of Order IV. In that case, an insurance Policy had been issued in the names of a limited company, the company’s landlords and the Bank for their respective rights and interests, and the Master of the Rolls, at pp. 404-5, used the following words in rejecting the submission that the parties had a joint interest:

“That there can be a joint insurance by persons having a joint interest is, of course, manifest. If A and B are joint owners of property and I use that phrase in the strict sense, an undertaking to indemnify them jointly is a true contract of indemnity in respect of a joint loss which they have jointly suffered. Again, there can be no objection to combining in one insurance a number of persons having different interests in the subject matter of the insurance, but I find myself unable to see how an insurance of that character can be called a joint insurance. In such a case, the interests of each of the insured are different. The amount of his loss, if the subject matter of the insurance is destroyed or damaged, depends on the nature of his interest, and the covenant of indemnity which the Policy gives must, in such a case, necessarily operate as a covenant to indemnify in respect of each different loss which the various persons named may suffer. In such a case, there is no joint element at all.”

During the course of the argument, it was suggested to counsel for Jia that if Jia did not dispute their indebtedness to the bank, there was no purpose in their opposing the application, and counsel undertook to take further instruction from his clients. After doing so, he has informed us that Jia would be prepared to withdraw their opposition, but there has been no formal application for judgement by consent and having regard to the view which I have formed as to the law applicable, I can see no advantage to the Bank in allowing the appeals. The Bank has sufficient power under the floating charge to safeguard its interests and I would dismiss the appeal with costs assessed at 25 guineas.

6.4. REMARKS

Insurable Interest is key to any Insurance Contract, and the need to show this before a suit on an Insurance Contract can succeed.

6.5. REFERENCES

1. *Macaura vs Northern Assurance Company Limited (1925) A.C. 619.*
2. *General Accident and Life Assurance Corporation Limited vs Midland Bank Limited (1940) 2 K.B. 388, 400.*
3. *Lord Halsbury in Illingworth v. Houldsworth (1904) A. C. 355.*

7.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT

DATE: 2nd July, 1965.

SUIT NO: F.S.C 132/1963

JUDGE: Ademola, C. J.N.
Bairamian, J.S.C.
Coker, J. S.C.

BRITISH INDIA GENERAL INSURANCE COMPANY LIMITED
(Plaintiff/Appellant)

vs

ALHAJI KALLA
(Defendant/Respondent)

7.2. REPORTS/FACTS/ISSUES.

INSURANCE AND REINSURANCE LAW:– Right of Subrogation– Meaning and nature of – When insurer’s right is deemed to have arisen as to step into the shoes of the insured person in relation to a suit to recover damages from a Defendant – Whether the right does not arise until the insurers have admitted their liability to the assured, and have paid him the amount of the loss – When right is deemed to have expired – Relevant considerations.

PRACTICE AND PROCEDURE – APPEAL: - Appeals to Supreme Court (Civil-Leave to appeal Application by non-party claiming subrogation – How treated.

7.3. DECISION OF COURT.

JUDGEMENT

BAIRAMIAN, J.S.C. (delivering the Judgement of the Court):

Following the judgement of the Court on their earlier application, the Insurers have applied for leave to appeal in their name from the decision of the Lagos High Court awarding Alhaji Kalla damages against Jarmakani Transport Limited (hereinafter referred to as Jarmakanis) which was given on 20th November, 1961; and they have also applied for extension of time within which to appeal. The Insurers state in their affidavit that when the claim arose, they repudiated it because in their view Jarmakanis had broken a condition of their Policy, and kept aloof from the litigation; that afterwards, in the second half of 1962, there was an arbitration; that at the arbitration Jarmakanis said that if they were paid the damages they would pursue the appeal they had lodged with vigour, and in fact they completed a bond for the costs of appeal on the 9th July, 1962; that in consequence of the arbitration award, on the 15th September, 1962 the Insurers paid Jarmakanis the amount decided by the High Court; that they obtained a letter of subrogation, which has been mislaid; and that it was only in January, 1965 that they came to learn of the agreement made between Jarmakanis and Alhaji Kalla on the 8th January, 1962 settling the case out of court on certain terms.

The terms were that Jarmakanis would pay a portion down and the balance in four

monthly installments and their vehicles were to be released from attachment and not be seized so long as the agreement was not violated. Alhaji Kalla's solicitor states in his counter affidavit, based on the information given him by Alhaji Kalla, that Jarmakanis made that settlement because they failed to obtain a stay of execution; that they said, when agreeing, that they would no longer pursue their appeal; and that they finished payment in or about May 1962.

In our view, the Insurers are tied down to the argument of subrogation as giving them a right to step into the shoes of Jarmakanis when they paid the amount of the judgement debt on 15th September, 1962. The Court rejects the argument that upon payment, the Insurer's interest related to the date of the judgement against Jarmakanis, despite their repudiation of liability. It will be enough to cite from paragraph 513 (on the nature of the right of subrogation) at p. 261 of Halsbury's Laws of England (3rd ed.) Vol. 22, the last sentence, which reads:

"The right does not arise until the insurers have admitted their liability to the assured, and have paid him the amount – of the loss."

The argument of subrogation was advanced in the first application of the Insurers for leave to carry on the appeal lodged by Jarmakanis against Alhaji Kalla in November, 1961. In its judgement of 5th March, 1965, the Court said as follows:

"But Jarmakanis do not wish to prosecute their appeal against him: in fact, they gave it up in January, 1962."

Thus, there were no longer any rights of appeal which could have been subrogated, and the Insurers cannot ask for leave to appeal in their name. the present motion is dismissed with fifteen guineas costs to the respondent, Alhaji Kalla.

7.4. REMARKS

When does the right of the Insured arise to press for his claims? Subrogation is a principle that the Court will consider.

7.5. REFERENCES

1. *Halsbury's Laws of England (3rd edition). Vol. 22.*
2. *3 PLR| 1965| 26 (SC).*

8.1 ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT

DATE: 14th February, 2014

SUIT NO: Sc|138|2004

JUDGE: John Inyang Okoro, J.S.C.

**CORPORATE IDEAL INSURANCE LIMITED
(Plaintiff/Appellant)**

Vs

**AJAOKUTA STEEL COMPANY LIMITED & ORS
(Defendant/Respondent)**

8.2 REPORTS/FACTS/ISSUES.

Payments of Premium as provided in Section 50 of the Insurance Act 1997.

8.3 DECISION OF COURT.

JUDGEMENT

JOHN INYANG OKORO, J.S.C.:

The Appellant herein, as Plaintiff at the Federal High Court, sitting at Abuja, by a Writ of Summons and Statement of Claim dated 18th December 2000, claimed against the Respondents as follows:

- i. A Declaration that the Plaintiff is legally entitled to the sum of ₦226,000,000.00 specifically appropriated, set aside and earmarked for payment to the Plaintiff as arrears of insurance premiums in accordance with the provisions of the Appropriation Act, 2000.
- ii. An Order of perpetual injunction restraining the Defendants whether by themselves, their agents, servants, and or privies howsoever from transferring, spending for any other purpose, virement of, misapplying, misusing, diverting, wasting, diminishing, lapsing, retiring or causing to lapse the sum of ₦226,000,000.00 as the said sum has been specifically appropriated in the APPROPRIATION ACT 2000 for payment of arrears of insurance premium owed the Plaintiff by the Defendants.

An order awarding the sum of ₦50,000,000.00 as special and General Damages against the Defendants jointly and severally in favour of the Plaintiff...”

At the trial court, the Respondents were the 4th, 2nd and 56 Defendants respectively. The 1st and 2nd Respondents filed their respective statements of Defense, while the 3rd Respondent entered a conditional appearance/ filed a Notice of Preliminary Objection and Motion for Extension of Time within which to file its defense. While the said motions were still pending, the Appellant filed a motion for Judgment against the 1st Respondent upon an admission of its claims by the 1st Respondent in its Statement of Defense.

Judgment was entered against the 1st Respondent accordingly by the Learned Trial judge who thereafter adjourned the other motions for “whatever it is worth”.

Dissatisfied with the said judgment, the 1st Respondent, as 4th Defendant, filed Notice of Appeal against it to the lower court upon obtaining the requisite leave to do so. Having filed the appeal, the 1st Respondent (as Appellant at the court below) sought and was granted leave to argue fresh issues relating to the illegality of the insurance contract which were not raised at the trial court. In its judgment, the Court of Appeal held as follows: -

“In the event, I find that the contracts of insurance between the parties, the subject of the Appellant’s Claim before the Lower Court, were in breach of Sections 50 and 93 of the Insurance Decree Number 2 of 1997 and accordingly illegal. I therefore resolve issue I in favour of the Appellants. This court is duty-bound now to refuse to enforce it.

Accordingly, I refuse to enforce it. Having found the agreement between the parties illegal and void, I hereby set aside the judgment of the Federal High Court, Abuja in Suit No. FHC/ABJ/CS/425/2000 delivered on 14th February, 2001. In its stead dismiss the claim of the Plaintiff.”

Aggrieved by the decision of the lower court, the Appellant has now appealed to this Court. That is a brief history of the case.

A synopsis of the facts will suffice. On 17th January, 1996, the 1st Respondent requested the Appellant to provide Insurance cover for their equipment for the insurance period from 1996 to 2000. It was understood between the parties that the insurance premium would not be paid immediately by the 1st Respondent to the Appellant. In other words, parties agreed that the “no premium, no cover” provision in the Insurance Act would not apply to the contract. They agreed that the Insurance Contract would be binding on the parties as if the insurance premium had been fully paid. That the total indebtedness by the 1st Respondent to the Appellant was ₦226 Million, being arrears of Insurance Premium for the provision of Insurance cover from 1996 to the year 2000 to cover a total risk borne by the Appellant for the 1st Respondent in the total sum of ₦39.85 billion. That the 1st Respondent was able to cause to be appropriated the sum of ₦226 Million in the year 2000 Budget of the Government of Nigeria, which was enacted into law as the Appropriation Act 2000 for the payment of the insurance premium owed by the 1st Respondent to the Appellant.

The Statement of Claim of the Appellant further reveals that when the said sum was released pursuant to the Appropriation Act, the 1st Respondent refused, neglected, or failed to pay the said sum despite several demands and reminders. The Appellant took out a Writ of Summons against the Respondents, making claims as earlier set out in this judgment.

The 1st Appellant’s Statement of Defense was essentially an admission of all the claims of the Plaintiff, but denied that the said sum of ₦226m was released to it. The Appellant, whereupon the admission, moved the court for judgment on the pleadings.

The Learned Trial Judge thereupon entered judgment for the Appellant against the 1st Respondent based on the admissions in its statement of defense. This is the judgment which was set aside by the Court of Appeal.

Notice of appeal against the judgment of the lower court was filed on 29th June, 2004, against the judgment which was delivered on 29th April, 2004. Four grounds of appeal are contained in the said Notice of Appeal, out of which the Appellant has distilled two issues for the determination of this appeal. I shall reproduce the two issues which are contained in the Appellant's brief of argument filed on 28th April, 2006 and adopted by Learned Counsel for the Appellant on 19th November, 2013, when;

1. Was the Court of Appeal right in granting the Respondent leave to raise and argue for the first time on appeal alleged breach of Sections 50 and 93 of the Insurance Act, and in considering that defense?
2. Did the purported violation of Sections 50 and 93 of the Insurance Act No. 2 of 1997 by the Insurance Contract between the parties render the said Insurance Contract unlawful, illegal, null and void?

In their respective briefs also adopted at the hearing of this appeal, the 1st, 2nd and 3rd Respondents adopted the two issues formulated by the Appellant verbatim. I shall therefore determine this appeal based on the said two issues.

I now commence the treatment of this appeal with issue one in the Appellant's brief of argument. In proffering argument under this issue, the learned counsel for the Appellant submitted that by Order 26 Rule 6 of the Federal High Court (Civil Procedure) Rules 2000, a party shall plead specifically any fact showing illegality which, if not specifically pleaded, might take the opposite party by surprise. That a Defendant, in a case where illegality is a defense, must raise the illegality in his Statement of Defense, alleging facts which made up the illegality itself and citing the relevant statutory provisions. He relied on the case of *George V. Dominion Flour Mills (1963) 3 NSCC, 54 at 59* and also the case of *Ibrahim V. Ozim (1988) 1 NSCC 1184*. He opined that the Respondents failed to plead the fact of illegality in their statement of defense and that it was fatal to their case, relying on the case of *Alao V. ACB (1998) 3 NWLR (Pt.542) p.339*.

Learned counsel further submitted that the lower court proceeded with the assumption that the insurance contract in this case was on "the face of it illegal or void." He contended that the contract was not ex facie illegal. That it was purely a contract of insurance or at worst, an agreement for a contract of insurance. It was his contention that the lower court should not have granted the Respondents leave to raise the defense of illegality at this point without the relevant or necessary pleading to back it up. That in view of Order 6 Rule 1 of the Federal High Court (Civil Procedure) Rules 2000, the Court of Appeal erred and thereby came to a wrong decision. Learned Counsel however conceded that where a contract is ex facie illegal, the illegality need not be pleaded in view of the decision of this Court in *Sodipo vs Lemninkainen OY (1986) 1 NWLR (Pt.15) 220 at 232 paragraphs F – G*. He faulted Lower Court's decision that Insurance contract was ex facie illegal and its reliance on the case of *Scott v. Brown & Ors (1992) 2 KB 384*.

Finally, on this issue, the Learned Counsel for the Appellant submitted that any payment of premium without cover would have been illegal as it would have amounted to an offence under the ICPC Act. He also urged this Court to take judicial notice of the general practice in respect of the business of government in Nigeria that the government does not pay in advance due to the official procedures of budget appropriation, award of contract, completion, certification and payments in that order. He also urged this court to resolve this issue in favour of the Appellant.

In response, the Learned Counsel for the 1st Respondent submitted that the Respondent was entitled to raise new issues not raised at the trial court on appeal, having obtained the requisite leave of court. He submitted further that a fresh issue may be raised on appeal even without leave if it is on the question of jurisdiction, and that an appellate court can also raise suo motu issue involving a point of law which the court considers to be fundamental to the entire proceedings. He places reliance on these cases: *Djukpan V. Orovuyorbe* (1967) 1 ALL NLR 14; *Apene V. Barclays Bank of Nigeria* (1977) 1 SC. 47; *Din V. Attorney-General of the Federation* (1988) 4 NWLR (Pt.87) 147; *Oforlete V. State* (2002) 12 NWLR (Pt.681) 415. See also *Charles Udegbuma V. Fed. Cap. Dev. Authority* (2003) LLJR-SC.

It was a further contention of Counsel that it is too late in the day for the Appellant, who did not oppose the application for leave, to now do so, referring to the case of *Etowa Enan & Ors. V. Fidelis Ikor Adu* (1981) 11 – 12 SC 25. Also, whether leave was sought and obtained or not, it is the duty of this Court to give effect to the provisions of a statute. He cited the case of *Attorney General of Adamawa State V. Ware* (2006) 4 NWLR (pt.970) 399 at 411 paragraphs F-H & 412 paragraphs A-B.

Also relying on the case of *Alao vs ACB Limited (supra)*, he submitted that a contract forbidden by statute is ex facie illegal and that a party seeking to rely on it as a defense need not plead the same. Also cited by him is the English case of *Snell vs Unity Finance Company Limited* (1963) QB 203. It was his final submission that it is contradictory for the Appellant to contend that the parties opted to act in breach of the provisions of the Insurance Act just to comply with the ICPC Act. He urged this court to resolve this issue in favour of the Respondents.

The 2nd and 3rd Respondents, through their counsel, also made submissions on the 1st Issue, which submissions are in tandem with those espoused by the 1st Respondent. I do not intend to summarize them as doing so would amount to repetition of the exercise.

By Order 13 Rule 6 (1) of the Federal High Court (Civil Procedure) Rules 2009, (which is in pari materia with Order 26 Rule 6 of the 2000 version) “a party shall plead specifically any matter (for example, performance, release, any relevant statute of limitation” fraud or any fact showing illegality) which if not specifically pleaded might take the opposite party by surprise.” In our adjudicatory process, the law, rules of court, and even the court itself abhor elements of surprise on any party. That is why issues to be contested by parties before a court must be settled by pleadings to put all parties on notice of the case; they are to meet in court to enable them to prepare adequately for it. Thus, by the above Rule of the Federal High Court (supra) and in a long line of decisions by this court, where the Defendant relies upon the defense of illegality, he should specifically and succinctly raise that defense by his pleadings and should state the facts or refer to facts already stated in the Statement of Claim to show clearly what constitutes the illegality. See *Onwuchekwa V. NDIC* (2002) 5 NWLR (pt.760) 371; *George V. Dominion Flour Mills* (1963) 3 NSCC 54 at 59. It has to be noted that the consequence of not pleading it in the Statement of Defense would prevent the Defendant from raising or canvassing it at the trial.

It is now well settled that this court will not allow a party on appeal to raise a question or an issue which was not raised or tried at the court below without the leave of the court. This was set out by this court in the case of *SALATI vs SHEHU* (1985) 1 NWLR (Pt.15) 198. In other words, a Respondent is, however, entitled to raise new issues not raised at the trial court or the lower court only with the requisite leave of the court. In the instant appeal, leave was duly sought and obtained at the court below to raise the issues which are being ventilated

on appeal before this court.

I need to emphasise that this court would readily grant leave to a party to raise and argue new grounds or issues not canvassed at the court of trial or at the lower court where the new grounds involve substantial points of law, substantive or procedural, which need to be allowed to prevent an obvious miscarriage of justice.

It will also be granted if further evidence is not required. Thus, a party who seeks to file and argue fresh issue not canvassed in the lower court, whether the issue pertains to law or procedure, must seek and obtain the leave of the court first; else, such an issue must be struck out. See *Obiakor & Anor. vs The State* (2002) 10 NWLR (Pt.776) 10; *Apene vs Barclays Bank of Nigeria Limited*. (supra).

From what I have said above, as a general rule, a Defendant seeking to rely on illegality as a defense must plead the same, else he will not be allowed to rely on it. However, there is an exception to this general rule. Where a contract is ex facie illegal, whether illegality has been pleaded or not, the court would not close its eyes against that illegality. The rationale is that the court has a duty to refuse to enforce such a transaction even where illegality has not been pleaded. It was held by this court in *Sodipo vs Lemninkamen Oy* (supra) that illegality, once brought to the attention of the court, over-rides all questions of pleadings and that it is the duty of the court when asked to give judgment which is contrary to a statute to take the point, although the litigants may not have raised it. See: *Attorney General of Adamawa State vs Ware* (Supra); *Royal Exchange Assurance Corporation vs S. A. Vega* (1902) 2 KB 384.

In the instant case, both the Appellant and Respondents' counsel agree that where a contract is ex facie illegal, the illegality need not be pleaded. Whereas the Appellant contends that the contract of Insurance between it and the 1st Respondent was not illegal, the Respondents hold otherwise. The question may thus be asked. How does one identify or recognize an illegal contract or transaction? This question has since been answered by this court in a plethora of authorities. In *Alao V. ACB Limited* (1998) 3 NWLR (Pt.542) 339 at 370 paragraphs C – F, per Igu, JSC, this Court held as follows: -

“It is trite that a transaction or contract the making or performance of which is expressly or impliedly prohibited by statute is illegal and unenforceable. Where a contract made by the parties is expressly forbidden by statute, its illegality is undoubted and no court ought to enforce it or allow itself to be used for the enforcement of alleged obligations arising thereunder if the illegality is duly brought to the notice of the court...”

It is crystal clear that any contract or transaction entered into by parties, which contract or transaction is either expressly or impliedly prohibited by statute, is illegal and unenforceable. It is my view, therefore, that any contract or transaction which seeks to circumvent the provisions of a statute is ex facie illegal and no party can take benefit from it. For me, the contract of insurance between the parties herein, which was made in clear contravention of Section 50(1) of the Insurance Act 1997, is ex facie illegal and unenforceable. Accordingly, it is my well-considered opinion that the court below was right to have granted leave for the issue to be placed on the front burner. Issue one, as I see it, does not avail the Appellant at all. It is resolved in favour of the Respondents.

The second issue which both parties have adopted is whether the “purported” violation of Sections 50 and 93 of the Insurance Act No. 2 of 1997 by the Insurance contract between the parties renders the said insurance contract unlawful, illegal, null and void. Section 50 (1) of the Insurance Act states:

“The receipt of an Insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk unless the premium is paid in advance.”

According to the Appellant, the above provision is intended to protect the insurer and relates to the contractual validity of the insurance cover. He submitted that the section is not concerned with the illegality of an insurance contract but the issue of its validity, so that where the condition precedent to “a valid contract of insurance” is not met, then the insurance contract will be invalid and not illegal.

Learned Counsel for the Appellant contended that although the parties agreed on the non-applicability of the “no premium no cover” principle, there is nothing illegal about the insurance contract. The Appellant, having submitted that the said provision, i.e., Section 50(1) of the Insurance Act, inures in favour of the Insurer, contended that this statutory protection may be waived by the insurance company in whose favour it is made. He relies on the case of *Ariori V. Elemo (1983) ALL NLR 1* at 12. It is his view that the Appellant validly waived its right under section 50(1) thereof and that the lower court cannot be right to invalidate that waiver.

See also *The State V. Musa Danjuma (1997) LLJR-SC*.

Submitting further, Learned Counsel opined that the contract of Insurance is only invalid and merely voidable and not illegal or void. On the meaning of voidable contracts, he referred to Chitty on Contract 27th Edition, page 20, paragraph 2024 and on what amounts to an illegal contract, he cited the case of *Panbisbilder Nigeria Limited vs FBN (2001) 1 NWLR (Pt.642) 684 at 693 paragraph D*.

Relying on the case of *Ngilari vs NICON (1998) 8 NWLR (Pt.560) 1* at 15 paragraphs A – C, he submitted that there is no rule of insurance law that there can be no binding contract of insurance until the premium has been paid or the Policy has been issued. According to him, Section 50(1) (supra) does not exclude an agreement to enter into an Insurance contract and does not invalidate it. As regards Section 93(1) of the Act, Learned Counsel submitted that if the Respondents sought to avoid the contract on the ground of lack of consent of the Head of State, they have the onus to plead and prove this contention, referring to Section 135 of the Evidence Act. That the 1st Respondent has the duty to comply with Section 93(2) by obtaining the necessary waiver and not the Appellant. Learned Counsel then referred to Section 151 of the Evidence Act Cap. 112 LFN 1990 and also the case of *WAEF vs Akinwunmi (2002) 7 NWLR (Pt.766) 327 at 343 -344* on estoppel. He then urged this court to resolve this issue in favour of the Appellant.

In his response on this issue, the Learned Counsel for the 1st Respondent submitted that the Appellant wrongly stated the legal consequences that flow from an invalid contract and has narrowly defined what constitutes an illegal contract. According to him, an illegal contract is where its formation or performance is expressly forbidden by a civil or criminal statute or where a penalty is imposed for doing the act agreed upon, referring to Black’s Law Dictionary. He opined that a contract can still be illegal even where there is no sanction imposed. He relies on the case of *Adesanoye vs Adewole (2006) 14 NWLR (Pt.1000) 242, Alao vs ACB Limited (supra)*.

Learned Counsel submitted further that Section 50(1) of the Insurance Act has specifically forbidden entering into any insurance contract without the premium having first been paid and the non-compliance renders the contract between the parties illegal and unenforceable. He also relies on the case of *Eimskip v. Exquisite (2003) 4 NWLR (Pt.809) 88 at 118 – 119*

paragraphs H–A. That although trial courts are enjoined to enforce contracts voluntarily entered into by parties, such should not be the case if the agreement is illegal or contrary to public Policy, calling in support the case of *Onyeneyin vs Akinkugbe (2001) 1 NWLR (Pt.693) 40*.

As regards the cases of *Ngilari vs NICON (supra)* and *Irukwu vs Trinity Mills Insurance Brokers and Ors (supra)*, which were relied upon by the Appellant, the Learned Counsel for the 1st Respondent submitted that they do not apply in this case. Also submitted was that, had the legislature intended the insurer to waive any of its rights under the Act, it would have said so, but that there is none in this case. The use of the word “shall” in Section 50(1) of the Act shows that the provision is mandatory and cannot be waived, citing the case of *Odua Investments Limited vs Talabi (1994) 10 NWLR (pt.523) 1*.

On Section 93(1) & (2) of the Insurance Act, Learned Counsel contended that all the 1st Respondent needed to do in the circumstances was to make the allegation of lack of consent, which fact would stand automatically proved if no consent was produced or evidence led in rebuttal. That the burden of proof then shifted to the Appellant to rebut the same failing which judgment on that issue would be given against it.

The case of *Odukwe vs. Ogunbiyi (1998) 8 NWLR (Pt.561) 339* was cited in support. That, contrary to the position taken by the Appellant, all parties to the contract are duty-bound to ensure that Section 93 (1) is complied with before entering into the contract. Also, the Appellant was under a duty to diligently ensure compliance with the Section, as ignorance or mistake of the law or fault does not give a party the right to enforce an illegal contract. He relies on the case of *Nash vs Stevenson Transport Limited (1936) 2 KB 128*. He then urged this court to resolve the issue in favour of the Respondents.

In his contribution to the position of the 1st Respondent on this issue, the Learned Counsel for the 2nd Respondent submitted that the lower court rightly distinguished the present appeal from what happened in the case of *Ngilari (supra)* and *Irukwu (supra)*. There was no reference in the two cases to Section 50(1) of the Insurance Act, 1997, which is clearly opposed to the quoted dictum in *Ngilari’s* case. Also, a statutory provision cannot be waived where the interest of the public is at stake. His other submissions are in tune with those of the 1st Respondent. The 3rd Appellant’s Counsel has also made a submission which accords with that of the other Respondents already summarized. I shall now proceed to resolve the issue.

A proper resolution of this issue turns on the construction or interpretation of Sections 50(1) and 93(1) and (2) of the Insurance Act, 1997. The Appellant had contended that non-compliance with Section 50(1) of the Act renders the contract of insurance invalid and not illegal, whereas the Respondents think otherwise.

For ease of reference, let me bring to the fore the said provision. Section 50(1) of the Insurance Act provides:

“The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk unless the premium is paid in advance.”

Clearly, the above provision means no other thing than what it says. There shall not be any valid contract of insurance until and unless the premium is paid in advance. In other words, payment of the premium is a condition precedent to a valid contract of insurance. It is trite that a cardinal rule of interpretation of statute is that where the words of a statute are clear

and unambiguous, the courts are to give them their plain and ordinary meaning. It does not require any special or canon of interpretation. This has been the position of this court in several decided cases. See *Egbe v. Yusuf* (1992) NWLR (Pt.245) 1, *Olarenwaju v. Governor of Oyo State* (1992) 11/12 SCNJ 92.

The use of the word “shall” in section 50(1) (supra) is instructive here. It is now well settled that where the provisions of a statute are garbed with the word “shall” as in the instant provision, it connotes that it is imperative for the provision to be obeyed. The word “shall” makes the provision mandatory, imposes a duty and is a word of command. See *Onochie vs Odogwu* (2006) 6 NWLR (Pt.975) 65; *Omokeodo vs IGP* (1999) 5 SCNJ 71 at 81. What this means is that both the Appellant and Respondents were bound to obey the clear provisions of S.50 (1) of the Insurance Act 1997 without any discretion from any party. In other words, that section is concluded in mandatory terms and must be applied strictly.

There is therefore no doubt that section 50(1) of the Insurance Act 1997, specifically forbids entering into any insurance contract without the premium having first been paid “in advance.” Any non-compliance with the express provision of that section, as in this case, renders the contract of Insurance between the parties illegal and unenforceable. It is the view of this court that where a statute provides for a particular act to be done or performed in a particular way, failure to perform the act as provided will not only be interpreted as delinquent conduct but will also be interpreted as not complying with the statutory provision. It was held by this court in *Adesanoye vs Adewola* (2006) 14 NWLR (Pt.1000) 242 that in such a situation, the consequences of non-compliance follow, notwithstanding that the statute does not specifically provide for a sanction. This knocks the bottom off the submission of the Learned Counsel for the Appellant in this case, that because Section 50(1) of the Act does not provide for a sanction, the contract cannot be said to be illegal.

A contract which violently violates the provisions of a statute, as in this case, with the sole aim of circumventing the intendment of the lawmaker, is, to all intents and purposes, illegal, null and void and unenforceable. Such a contract or agreement is against public Policy and makes a nonsense of legislative efforts to streamline the ways and means of business relations.

This court, and any other court for that matter, would not be allowed to be used to enforce any obligations arising therefrom.

The summary of all that has been said above is that parties cannot be allowed to enter into a contract or transaction to circumvent the clear and unambiguous provisions of a statute. It has been the view of this court and I reiterate it here that a transaction or contract, the making or performance of which is expressly impliedly prohibited by statute is illegal and unenforceable or impliedly prohibited by statute, is illegal and unenforceable. See *Alao V. ACB Limited* (supra); *Eimskip Limited vs Exquisite Industries Nigeria Limited* (2003) 4 NWLR (Pt.809) 88 at 118 – 199 paras H–A.

See also *Busari Ayinde & Ors vs Adedokun Akanji & Ors* (1988) LLJR-SC. Although it is the duty of a trial court to enforce agreements between parties and not to speculate or question the reasons for their entering into any such agreement, where such an agreement is illegal or contrary to public Policy, such an agreement or contract should not be enforced by the court. See *Oyeneyin vs Akinkugbe* (supra).

One more thing before I move to another aspect of this issue. The Learned Counsel for the Appellant had relied heavily on the case of *Ngilari vs NICON* (1998) 8 NWLR (pt 550)

page 1, a case decided by this court on 5th June, 1998. Learned Counsel quoted from page 21 of the law report where Onu JSC, in his concurring judgment, quoted from a book titled *Mc Gillivray and Parkinson on Insurance Law 6th Edition*, page 86 as follows: -

“There is no rule of insurance law that there can be no binding contract of insurance until the premium has been paid or the Policy has been issued. Once the terms of the insurance have been agreed upon by the parties, there is a *prima facie* binding contract of insurance and the assured is obliged to pay a premium as agreed, while the insurer, for their part, must deliver a Policy containing the agreed terms.”

Relying on the above quotation, the Learned Counsel for the Appellant submitted on page 12 of his brief as follows: -

“This is, with all respect, the clearest statement on this point. To this extent, therefore, Section 50 of the Insurance Act cannot avail the 1st Respondent. It is also my submission that a contract of Insurance is still a contract, the Insurance Act notwithstanding. The legislature did not intend to change the law of contract so fundamentally from the position so eloquently stated by the Supreme Court in the case of *Ngilari vs NICON* (supra).”

I must quickly point out here that the facts of the case of *Ngilari* is quite different from those one in the instant appeal. In *Ngilari*’s case, the Plaintiff therein, as administrator of the Estate of Jesse James *Ngilari* issued his personal cheque on the instruction of the deceased to the agent of the Insurance Company as premium for the insurance cover. In other words, a premium was paid but in the instant case, no premium was paid. There was agreement between the parties herein that the “no premium, no cover” principle should not apply to their contract. In *Ngilari*’s Case, this Court held that since a premium was paid, although through an agent of the insurance company, there was a valid insurance contract.

The Learned Counsel for the Appellant failed to read the concurring judgment of Onu, JSC to the end, else he would have seen where His Lordship held on pp.21 G–H and 22 paragraph A as follows: -

“On the principle laid down in *National Insurance Corporation of Nigeria vs Power and Industrial Engineering Co. Limited* (supra) this Court quoting with approval from the decision of the trial judge said: “At the High Court, the learned trial judge *Belgore, J*, dealing with this question in his judgment said “from the moment the proposal was made, accepted and the demanded premium paid, a valid contract was subsisting between the Plaintiff and the Defendant.”

The principle laid down above, albeit coming as it does from the High Court, is, in my view, as solid as a rock, which I uphold as applicable to the instant case.

In the circumstances, I hold that although the quotation by this court from *Mc Gillivray & Parkinson* in *Ngilari*’s case tends to suggest that an insurance contract can be legally made without payment of premium, their Lordships in that case held that payment of premium cemented the contract of Insurance. At the time the case of *Ngilari* was decided in 1998, Section 50(1) of the Insurance Act 1997 was already operational. The case of *Ngilari* (supra) was decided on its peculiar facts and the facts therein are not the same here. Therefore, it is highly distinguishable. I so hold.

The argument of the Appellant that Section 50(1) of the Act inures to the Appellant and, as such, it can waive it, does not appeal to me at all. Had the Legislature intended to confer a

special right of waiver on the insurer, it would have said so. Moreso, and as already stated, the word “shall” used in the provisions of S.50 (1) of the Insurance Act clearly imposed a mandatory condition precedent to the making of a valid insurance contract on all the parties thereto, and does not seek by any stretch of interpretation to confer any right of waiver of same on the insurer or any other party at all.

The other and final aspect of this issue has to do with Section 93 (1) & (2) of the Insurance Act. The section states:

“S.93(1) – The responsibility for insuring all properties of government as defined in the National Insurance Corporation Act is vested in the National Insurance Corporation of Nigeria.”

“S.93(2) – Notwithstanding the provisions of subsection (1) of this Section and Sub Section (2) of Section 4 of the National Insurance Corporation Act, any such properties of Government may, with the approval in writing of the Head of State, Commander-in-Chief of the Armed Forces, be insured with any insurer.”

By the above provision, the responsibility for insuring all properties of the Government as defined in the National Insurance Corporation Act is vested in the National Insurance Corporation of Nigeria. However, notwithstanding this provision, any such property of the Government may, with the approval in writing of the Head of State, be insured with any insurer. The lower court held on this issue that contrary to the provisions of Section 93 of the Act, the approval of the Head of State was not obtained before the Appellant was contracted for insurance of Government property, since the Appellant was not NICON, the approved insurer under the Act. I agree with this view of the court below.

The argument of Counsel for the Appellant that it was the duty of the 1st Respondent only to obtain the consent of the Head of State is unimpressive. As was rightly pointed out by the learned counsel for the 3rd Respondent, the provisions of the Insurance Act are meant for the regulation of the Insurance business, and all parties involved in insurance contracts are expected to abide by those provisions. It does not, therefore, lie in the mouth of the Appellant in this case to say that it is the prerogative of the 1st Respondent to ensure the observance of any particular requirement of that Act except where it is so expressly stated. Due diligence in business requires that all parties must ensure the existence of the necessary prerequisites for the contract they intend to enter into.

Again, since the section states that approval of the Head of State must be in writing, it is not something to be presumed. As to who had the burden of proof as to the existence of consent, it is my view that it lies on the party against whom judgment would be given if no more evidence were adduced successfully until all the facts in the pleadings have been dealt with. See *Felix Osawora vs Simon Ezeiruka* (1978) 5 & 7 SC 135 at 145; *Odukwu vs Ogunbiyi* (1998) 8 NWLR (Pt.551) 339 at 353. The 1st Respondent in this matter had pleaded that there was no consent, which fact would stand proved if no consent was produced or evidence led in rebuttal. The burden of proof thereafter shifted to the Appellant to rebut the same, failing which judgment on that issue would be given against it. That is the truth and position of the law.

The tragedy of this issue is that the Appellant has failed to put up a strong argument for it to be resolved in its favour. It is accordingly resolved against the Appellant.

On the whole, the non-compliance of the parties herein with the provisions of Sections

50(1) and 93 (2) of the Insurance Act 1997 rendered their contract of Insurance illegal and unenforceable by either party. The Court cannot close its eyes to illegality, as it is the duty of every court to refuse to enforce such a transaction or contract.

The total of all I have said in this judgment is that this appeal lacks merit in its totality and is hereby dismissed. The judgment of the Court of Appeal is accordingly upheld. Parties are to bear their respective costs.

8.4 REMARKS

Section 50 of the Insurance Act 1997 has been canvassed as a major legislation for the development of Insurance in Nigeria. However, it remains to be seen if this Section contravenes the main issues in the Law of Contract.

8.5 REFERENCES

1. *George v. Dominion Flour Mills* (1963) 3 NSCC, 54 at 59.
2. *Ibrahim v. Ozim* (1988) 1 NSCC 1184.
3. *Alao v. ACB* (1998) 3 NWLR (Pt.542) p.339.
4. *Sodipo v. Lemninkainen OY* (1986) 1 NWLR (Pt.15) 220 at 232 paragraphs F – G.
Scott v. Brown & Ors (1992) 2 KB 384.
5. *Djukpan v. Orovuyorbe* (1967) 1. ALL NLR 14.
6. *Apene v. Barclays Bank of Nigeria* (1977) 1 SC. 47.
7. *Din v. Attorney-General of the Federation* (1988) 4 NWLR (Pt.87) 147.
8. *Oforlete v. State* (2002) 12 NWLR (Pt.681) 415.
9. *Udegbonam v. Fed. Cap. Dev. Authority* (2003) LLJR-SC.
10. *Etowa Enan & Ors. V. Fidelis Ikor Adu* (1981) 11 – 12 SC 25.
11. *Attorney General of Adamawa State v. Ware* (2006) 4 NWLR (pt.970) 399 at 411 paragraph F -H & 412 paras A – B.
12. *Snell v. Unity Finance Co. Limited* (1963) QB 203.
13. *Onwuchekwa V. NDIC* (2002) 5 NWLR (pt.760) 371.
14. *Salati v. Shehu* (1985) 1 NWLR (Pt.15) 198.
15. *Obiakor & Anor. V. The State* (2002) 10 NWLR (Pt.776) 10.
16. *Royal Exchange Assurance Corporation V. S. A. Vega* (1902) 2 KB 384.
17. *Ariori v. Elemo* (1983) ALL NLR 1 at 12.
18. *The State v Musa Danjuma* (1997) LLJR-SC.
19. *Panbisbilder Nigeria Limited v. FBN* (2001) 1 NWLR (Pt.642) 684 at 693 paragraph D.
20. *Ngilari v. NICON* (1998) 8 NWLR (Pt.560) 1 at 15 paragraphs A – C.
21. *WAEC v. Akinwunmi* (2002) 7 NWLR (Pt.766) 327 at 343 -344.
22. *Adesanoye V. Adewole* (2006) 14 NWLR (Pt.1000) 242.
23. *Eimskip v. Exquisite* (2003) 4 NWLR (Pt.809) 88 at 118 – 119 paragraphs H – A.
Onyeneyin v. Akinkugbe (2001) 1 NWLR (Pt.693) 40.
24. *Odua Investments Limited v. Talabi* (1994) 10 NWLR (pt.523) 1.
25. *Odukwe v. Ogunbiyi* (1998) 8 NWLR (Pt.561) 339.
26. *Nash v. Stevenson Transport Limited* (1936) 2 KB 128.

9.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT

DATE: 1st July, 2016

SUIT NO: Sc. 8|2005

JUDGE: Amiru Sanusi, J.S.C.

JOMBO UNITED COMPANY LIMITED
(Plaintiff/Appellant)

vs

LEADWAY ASSURANCE COMPANY LIMITED
(Defendant/Respondent)

9.2. REPORTS/FACTS/ISSUES.

The facts of the case, as could be gathered from the record, are briefly summarised below. The Appellant herein entered into an agreement with the Respondent on 7th of March 1997 for the insurance of 121 bales of Icelandic stockfish valued at 33,880US\$ dollars and 1907 bags of assorted Icelandic fish valued at 122,048.00US dollars for the duration of the voyage which commenced in Iceland to Port Harcourt. The contract agreement was backed or supported by two insurance policies, which were marked as Exhibits A and B. Before the execution of the contract agreement, the Appellant presented relevant shipping documents to the Respondent at the latter's request vide his letters marked Exhibit C, D and D1 which were the invoices, as well as Exhibits D2 and D3 which were the bills of lading, all these documents were submitted to the Respondent under a covering letter dated 8th April 1997 which was also exhibited at the trial and marked Exhibit D4.

9.3. DECISION OF COURT.

JUDGEMENT

AMIRU SANUSI, J.S.C.:

At the Federal High Court Port-Harcourt Division (Trial court), the Plaintiff, now Appellant, sued the Respondent as Defendant at the trial court for the under-listed reliefs as adumbrated in paragraph 19(5) of its Statement of Claim. The reliefs sought are as follows: The Plaintiff has suffered loss and damages as a result of the Defendant's breach of contract, as well as the profits it would have earned from the availability of funds due to it on other business transactions.

PARTICULARS OF DAMAGES SUFFERED

1. Loss of 121 bales of Icelandic stockfish.
2. Loss of 7907 bags of Assorted Icelandic fish.

Heads – USD 122,048 TOTAL = US\$ 756,02

USD 156,029 equivalent in Naira at the rate of ₦80 to USD1 = ₦12,482,240.00. Total Damages claimed = ₦20,000,000 (Twenty Million Naira Only) being damages against the Defendants jointly and severally.

The appellant has pursuant to the contract agreement, claimed that it paid the premium as agreed upon and sequel to that, the respondent issued the appellant with Insurance Policies, also exhibited at the trial and marked as Exhibits A and B. Part of the Insurance Policies, i.e., Exhibits A and B, read as below: -

“We, the Assurances Leadway Assurance Company Limited, hereby agree in consideration of the payment of a premium, to be agreed, to insure against loss, damages, liability or expenses in the manner hereinafter provided.”

On the 18th March 1997, the appellant received a fax message from the shippers that the ship carrying the consignment had been lost at sea. The fax message was tendered in evidence at the trial, admitted and marked as Exhibit F1 and the appellant immediately communicated this development to the respondent through a letter. Thereafter, the respondent wrote Exhibit C requesting shipping documents i.e. Exhibits D, D1, D2 and D3. It subsequently made a claim of 156,088USdollars, being the value of the insured goods. The respondent thereupon declined liability on the ground that the subject matter of the insurance had already been destroyed as at the date of insurance through Exhibit F2. It therefore refused to honour its obligation under the agreement despite repeated demands. As a last resort, appellant instituted an action against the respondent. Before the commencement of the hearing in the suit, the respondent filed a motion on notice seeking the dismissal of the suit/action on the following grounds:-

- (i) That by virtue of Section 50 of the Insurance Decree of 1997, there can be no valid contract of marine insurance without payment of a premium.
- (ii) That the goods were not in existence as at the time the contract was entered into. The trial court heard the motion and later dismissed same after it duly considered the applicable laws and finally entered judgment in favour of the appellant in the sum of ₦12,482,240.00, being the value of the consignment. Thus, the trial court in its judgment found in favour of the appellant at page 196 as below:

The Defendant undertook to indemnify the Plaintiff in the event of any loss, incident to marine adventure. The aforementioned amount, to my mind, was what was in contemplation of the parties at the time they made the contract as the probable breach of it, anything outside that amount was not, in my humble opinion, contemplated by the parties. The judgment is therefore hereby entered in favour of the Plaintiff against the Defendant in the sum of only ₦12,482,240.00.

Dissatisfied with the judgment of the trial court, the respondent successfully appeals to the Court of Appeal (the court below) which set aside the judgment of the trial court after allowing the appeal.

In its finding while allowing the appeal, the court below held thus:-

“In the event, I rule that no liability attaches to the appellant on the transaction and the contract of marine insurance between the appellant and respondent is void and unenforceable as no premium was paid before this coverage. The appeal succeeds; it is allowed. The judgment of the court below delivered on 1st November 2001 is set aside. I make no order as to costs”

Appellant herein became dissatisfied with the judgment of the court below; hence, it

appealed to this court by filing a notice of appeal dated 19th November 2004 containing three grounds of appeal. Briefs were later filed and exchanged in view of the practice and rules of this court. In the brief of argument filed on 17/3/2005 by the appellant, two issues for determination were encapsulated from the grounds of appeal by the appellant, which said issues are set out below: -

- (1) Whether the Court of Appeal was correct in holding that Section 50 of the Insurance Decree 1997 had impliedly repealed Section 23 of the Marine Insurance Act 1961, thereby voiding the contract of marine insurance between the parties.
- (2) Whether the Court of Appeal was correct in voiding the contract between the parties at the instance of the Defendant/Respondent.

Upon being served with the Appellant's brief of argument, the respondent also filed its brief of argument on 17/3/2005 and therein a sole issue for determination of the appeal was raised and the issue reads as follows:

"Whether in law, a valid contract of insurance could exist before 6th March 1997 or at all, when the cargo was lost, when no premium was paid before 10th and 12th March 1997"

Looking at the two sets of issues raised by the learned counsel for the parties, it is my view that it is apt to treat this appeal based on the two issues raised in the Appellant's brief of argument. They shall therefore guide me in determining this appeal, as they subsumed the lone issue raised in the appellant's brief and I will consider them together.

In arguing the first issue, the learned counsel for the appellant submitted that the court below was wrong in its findings because the Marine Insurance Act of 1961 is a special legislation that can derogate from the Insurance Decree of 1997. He stated that the trial court gave a reason for its decision that the provision of Section 50 of the Insurance Decree 1997 would not apply to a contract of Marine Insurance (See page 5 of the Appellant's brief. He also quoted a portion of the trial court's judgment at pages 5 to 6 of his brief of argument and submitted that the trial court referred to the decision in the cases of *Governor of Kaduna vs. Lawal Kagoma*, ANLR 160 at 172 and *Bamigboye vs. Administrator-General* 14 WACA 616 at 619. He argued that neither the respondent nor the Court of Appeal showed that the trial court was wrong in its application of the maxim of *specialia generalibus derogant* before coming to its conclusion. In further submission, learned counsel argued that the court below was wrong in its application of the above maxim as there was no ground of appeal or argument by the respondent at the court below requesting the specific and fundamental basis of the trial court's decision and consequently, he argued that there was no basis for setting aside the judgment of the trial court. He referred to Gregory's case (1596) 6 Cox Rep 195.

In a further submission, the learned counsel for the appellant argued that the Marine Insurance Act 1961 is a special provision/legislation dealing with insurance generally. He submitted that the Marine Insurance Act 1997 is a general provision. Section 50 of the Marine Insurance Decree could not rip up Section 23 of the Marine Insurance Act of 1961, which the lawmakers made specially and exclusively for contracts of marine insurance. He said the decision of the Court of Appeal was silent on the complaint of the appellant that had the law makers intended to repeal any provision of the Marine Insurance Act it would have done so the same way it did in

Section 95 of the Insurance Decree of 1997 where it was expressly stated that in case of conflict between the provisions of the Decree and the provisions of the Act, the provisions of the Decree will prevail. Based on these submissions, he urged this court to set aside the decision of the court below.

On the second issue for determination regarding the question whether the court below was right in voiding the contract between the parties at the instance of the Defendant/respondent, the learned counsel for the appellant submitted that the court below was wrong in law to have voided the contract between the parties at the Defendant's/appellant's instance because the respondent cannot turn round to seek the nullification of the contract based on non-payment of premium at the time of the contract.

He said the party cannot waive a statutory provision designed for its protection. He cited and referred to the cases of *AP vs Owodunni (1991)1 NWLR (Pt.210) 391 at 415/416* and *Ariori v Elemo*. He also argued that, the issuing Exhibits A and B without insisting on prior payment of premium, the Defendant/respondent is estopped from relying on her conscious act to void the contract she benefited from. He urged this court to reverse the decision of the court below and allow the appeal.

In reacting to the above submissions by the Appellant's learned counsel, the learned counsel for the respondent, especially on the core issue of non-payment of premium, referred to Section 24(1) of the Marine Insurance Act of 1961, which makes it mandatory that a contract of Marine Insurance be embodied in a Policy. He said a contract which was not so embodied is inadmissible as was held in the case of *National Insurance Corporation of Nigeria V. Power Industrial Engineering Company Limited (1986)1NWLR(Pt.14)1* where it was held that a court cannot take cognizance of a marine insurance contract not embodied in a Policy, even if it was admitted without objection.

Learned counsel contended that under the 1997 Decree, it is clear that until the premium is paid, there cannot be a valid and enforceable insurance contract, as the insurance contract is void and unenforceable. He again argued that, even if the parties had agreed in a contract of marine insurance before the sinking of the ship and a binding contract was formed, such a contract remains incomplete without the payment of the aforementioned premium and the party cannot benefit from the purported contract. In a further submission, the appellant's counsel cited Section 1 of the Insurance Decree 1997, which stipulates that the Decree shall apply to all insurance business and insurers other than the business carried on or by an insurer listed and described under the said provision. He added that the use of the word shall, in the said provisions is mandatory and that it applies to a marine insurance contract. By way of further expatiation, learned counsel for respondent stated that Section 2(1) of the Decree had classified insurance business into two, namely: -
(a) General Insurance business and (b) Life Insurance business.

He said the first category, i.e., General Insurance, was further subdivided into 14 classes. He added that Section 2(3)(f) of the Decree had also mentioned Marine and Aviation Business as the type of insurance business which is covered by Section 1 of the Decree, while Section 2[3] of the Decree listed goods in transit, insurance by road, water and sea. According to the learned counsel, the law is intended to apply to marine insurance and impliedly repeals that aspects of the 1961 law. With regard to the implied repeal enactment, the learned counsel argued that laws can be repealed

either expressly or impliedly because provisions of a later enactment are aimed at amending the earlier provisions in the repealed, or earlier, or previous law, especially where there exist provisions inconsistent with the earlier or previous Law. See the case of *Governor of Kaduna State v. Kagoma (1982) 6 SC 8*.

With regard to loss of cargo before the contract became complete, the appellant's counsel referred to the decided authority of the Power and Engineering case (*supra*), where it was held that a court cannot take cognizance of a Marine Insurance contract not embedded in a Policy even if it was admitted without objection.

As regards the construction of an insurance Policy, the appellant's counsel contended that mandatory provisions of a statute cannot be waived by a party. In his opinion, a court will not enforce a contract based on illegality and also will not permit a contract founded on illegality to be effective. See *Sodipo vs Lemminkainen & Anor (1986) 1 NWLR (Pt.14) 220*. He then concluded his submission by arguing that the Marine Insurance Decree of 1997 bears a mandatory provision which, in its very nature and language, may not be waived by a party to an insurance contract, including a contract for insurance of a marine nature. He finally urges this court to affirm the decision of the court below.

I will consider the second issue for determination proposed by the appellant which queries whether the court below was correct in voiding the contract between the parties at the appellant's instance. In dealing with this issue, I deem it apt to reproduce and consider the two provisions on which the arguments of the parties in this appeal revolve or on which their respective arguments on. Section 23 of the Marine Insurance Act 1961 reads thus: -

"A contract of marine insurance shall be deemed to be concluded when the proposal of the insured is accepted by the insurer, whether his Policy is then issued or not and for the purpose of showing when the proposal was accepted, reference may be made to ship, a covering note or other customary memorandum of the contract."

On the other hand, Section 50 (1) of the Insurance Decree 1997 provides:

"The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance, and there shall be no cover in respect of an insurance risk unless the premium is paid in advance" (underlined supplies by me).

The facts of the case are not in dispute that the agreement for the conveyance of the goods between the appellant and the respondent was entered into on 6th March 1997; hence, that was the date for the commencement of the contract as clearly shown in the two insurance policies, namely Exhibits A and B. It can be recalled that the relevant shipping documents were presented by the appellant to the respondent. The appellant did not, however, pay the agreed premium to the respondent during the period. Then on 18th March 1997, it was informed by the shippers vide a fax message that the ship carrying the Appellant's goods got lost at sea, even though the two marine policies were issued on 10th and 12th March 1997 respectively. Evidence, however, abounds that the ship left Iceland on 6th March 1997. I must stress here that a contract of insurance is created only in a situation where there exists an unqualified acceptance by one party of an offer made by the other party. Consequently, if the parties are still in the process of negotiation, then it can be said that there is no valid and enforceable contract.

It is my considered view that a contract of insurance should always contain the terms

and conditions of such a contract, including the rights and liabilities of the parties to the said contract. The important thing to consider in an action on a contract itself and for a Plaintiff to succeed in an action under such a contract, it/he must tie themselves within the terms and conditions of the Policy or contract. *See Yadis Nigeria Limited vs NIC Limited (2007) ALL (Pt.3700) 1348*. Consequently, the fundamental purpose of an insurance contract is to give cover for an insurance risk. In other words, where a law states that there is no insurance cover unless the premium is prepaid, then in effect it means that the contract is void if no premium is prepaid. *See Ajaokuta Steel Company Limited vs. Corporate Ideal Insurance Limited (2004) 16 NWLR (Pt.899) 369*.

Thus, from the contents of the provisions of Section 50(1) of the Insurance Act No.29, 1997 set out above, the premium is a condition precedent to a valid contract of insurance and there cannot be cover in respect of insurance risk UNLESS or EXCEPT the premium therefore is paid in advance. *See Ajaokuta Steel Co Limited vs Corporate Ideal Insurance Limited (supra)*, *Charles Chime vs. United Nigeria Company Limited (1972)2ECSLR808*; *IrukwuvsTMIB(1997)12NWLR(Pt.531)113*. In the instant case, the appellant did not pay any premium to the respondent, which is the amount of money to be paid for the insurance Policy before the risk of loss of the ship occurred; as such, the contract of insurance is ab initio void, as rightly held by the court below. As I stated earlier, a marine insurance contract must be covered by a Policy and if not so covered or embodied, it is not even admissible in evidence.

With regard to Section 23 of the Marine Insurance Act 1961, it is clear from the provision of Section 50(1) of the Insurance Decree 1997 that the latter provisions were meant to repeal or replace the provision of the former Act by providing that the premium must be prepaid before a marine insurance contract could be valid and enforceable. Once such a premium was not paid in advance, the contract becomes void and unenforceable. The Lower Court is therefore correct in so holding. Moreover, the latter Act or provision is later. I therefore hereby resolve this second issue against the appellant.

The first issue for determination is whether the court below was correct in holding that Section 50 of the Insurance Decree of 1997 had impliedly repealed Section 23 of the Marine Insurance Act of 1961. I have partially dealt with this issue when treating the second issue supra. For clarity, it can be said that Section 23 of the Marine Insurance Act permits a marine insurance Policy to be covered and valued upon oral transaction and also permits payment of premium to be made subsequently.

Conversely, Section 50(1) of the Insurance Decree of 1997 which is later in time of promulgation, makes a contract of marine insurance valid and enforceable ONLY upon condition precedent to the effect that the premium MUST be paid in advance, once such condition precedent of prepayment of premium is not met, the contract becomes void and unenforceable. To my mind, the provisions of the later Decree of 1997, which provides a condition contrary to the one in the provisions of Section 23 of the 1961 Act, one can say without any fear of contradiction, that the position provided in Section 23 of the 1961 Act is no longer tenable or applicable by reason that the legislature provides a contrary provisions which can be said to mean that the condition or position provided by Section 23 is no longer valid and no longer subsists. *See Crownstar & Co Limitedvs. M V Vali (2000) 1 NWLR (Pt.639) 37*. The intention of the legislature by promulgatingSection50 of the Marine Insurance Decree of 1997 to contradict or conflict with Section 23 of the 1961 Act, one can say that the

legislature intended to impliedly repeal Section 23 of the Act, which it has the power to do expressly or impliedly.

It is even trite that where two acts make conflicting or contrary provisions, the implication that the earlier statute is repealed is irresistible, as in the present case. *See Governor of Kaduna State vs. Kagoma (supra)*. My view on this is that the Lower Court finding that Section 23 of the Insurance Act of 1961 had been impliedly repealed by Section 50 of the Marine Insurance Decree of 1997 cannot be faulted or flawed. I therefore also resolve this first issue against the appellant.

Apropos of the above, having resolved the two issues raised by the appellant against him, I hold the view that this appeal is without any merit. It deserves to be dismissed and I accordingly do the same. I affirm the decision of the court below, which upturned and set aside the judgment of the trial court. Appeal is therefore hereby dismissed with ₦100,000.00 costs in favour of the respondent herein.

9.4. REMARKS

A party in a matter cannot waive statutory remedies designed for its protection. He, therefore, cannot rely on his own conscious Act to void a contract he has benefited from.

9.5. REFERENCES

1. *Governor of Kaduna vs. Lawal Kagoma* ANLR160 at 172.
2. *Bamigboye vs. Administrator-General* 14 WACA 616 at 619.
3. *AP vs. Owodunni* (1991) 1 NWLR (Pt. 210) 391 at 415/416.
4. *Crownstar & Co Limited vs. MV Vali* (2000) 1 NWLR (Pt. 639) 37.
5. *Ajaokuta Steel Co Limited vs. Corplus Limited* (2004) 16 NWLR (Pt. 899) 369.
6. *Charles Chime vs. United Nigeria Co Limited* (1972) 2 ECSLR 808.
7. *Irukwu vs. TMI B* (1997) 12 NWLR (Pt. 531) 113.
8. *Yadis Nigeria Limited vs NIC Limited* (2007) ALL (Pt. 3700) 1348.
9. *National Insurance Corporation of Nigeria V. Power Industrial Engineering Co. Limited* (1986) 1 NWLR (Pt. 14) 1.
10. *Governor of Kaduna State vs Kagoma* (1982) 6 SC 8.
11. *Sodipo vs Lemminkainen & Anor* (1986) 1 NWLR (Pt. 14) 220.

10.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT

DATE: 3rd January, 1986

SUIT NO: S.C. 194/1984

JUDGE: Andrews Otutu Obaseki, J.S.C.
Anthony Nnaemeka Aniagolu, J.S.C.
Muhammed Lawal Uwais, J.S.C.
Boonyamin Oladiran Kazeem, J.S.C.
Chukwudifu Akunne Oputa, J.S.C.

**NATIONAL INSURANCE CORPORATION OF NIGERIA
(Plaintiff/Appellant)**

vs

**POWER AND INDUSTRIAL ENGINEERING COMPANY OF NIGERIA LIMITED
(Defendant/Respondent)**

10.2. REPORTS/FACTS/ISSUES.

What constitutes a Policy of Marine Insurance within the terms of the Marine Insurance Act forms the major kernel of this case. The Appeal is about a Marine Insurance contract.

10.3. DECISION OF COURT.

JUDGEMENT

ANDREWS OTUTU OBASEKI, J.S.C

This appeal deals with a claim brought under a marine insurance contract between Appellant and the Respondent and raises the important question of what constitutes a 'Policy' of marine insurance within the terms of the *Marine Insurance Act, 1961*.

The Respondent, in pursuance of its desire to contribute its quota to the 'Feed the Nation Campaign' or campaign against hunger in 1977, ordered 86,612 new double jute bags of rice from Bangkok in the Far East. The consignment which had an insured value of ₦1, 231,459.00 was loaded onto the vessel "Eastern Saturn" for transportation by sea from Bangkok to Port Harcourt and or Lagos on the 30th day of December, 1977 see Exhibit L7 and the ship set sail on the 3rd day of January, 1978 (see Exhibits L, LI and L2) This information was conveyed to the respondent by Exhibit L and Exhibit VV1 bill note dated 26/1/78. By Exhibit S2 and Exhibit W1, the respondent was advised by the United Bank for Africa that the Bank had received for the account of the Respondent documents for goods sent per "M.V. Eastern Saturn", including B/L No. option - 1 dated 30/12/77 by Continental Enterprises (Bermuda) Limited covering 86,612 bags Thai Parboiled Rice. The Respondent was requested to collect the documents. Following the advice, the respondent collected the documents and on receipt of Exhibits L, L1 to

L7 and discovering that the consignment had no insurance cover, the respondent approached the appellant for an insurance cover.

The Appellant agreed to issue a marine insurance open cover Policy and on the 15th day of February, 1978, the Appellant did issue the marine open cover No MA/MAT/78/MOC/ 0021 - Exhibit J. This marine open cover, (Exhibit J, was forwarded by letter No GCGU/CAG/ 000/264/OAA/ABA dated 14th February, 1978, Exhibit M. Subsequently, certificate of Insurance No 16533 issued under the open contract No MA/MAT/78/MOC/0021 Exhibit J was issued and forwarded by letter Exhibit N dated 23rd February, 1978. By letter Exhibit H dated April 13, 1978, the shippers, "Continental Enterprises (Bermuda) Limited," informed the respondent that the vessel "M/V Eastern Saturn" had sunk without a trace and gone down to the bottom of the sea with all the consignments on board. But before then, AMC International Limited by letter dated 13th March, 1978, Exhibit C, copied for the Appellant's information, the letter dated 3rd March, 1978, received on 11/3/78 from Polinia & Company Limited of Hong Kong reporting that the vessel Eastern Saturn had sunk.

The respondent, on this information, by letter dated 6th April, 1978, Exhibit D, conveyed the information to the appellant and also forwarded to it photocopies of the report from the shippers sent to the shipping agents. The Respondent then requested from the Appellant advice on the processing of the necessary claims. The **Appellant** reacted sharply and sent a letter, Exhibit E, dated 11th April, 1978, disclaiming liability and complaining that, as no premium had been paid, there was no contract of insurance in existence between the Respondent and themselves. The Respondent then wrote Exhibit P dated 21/4/78, drawing attention to the receipt Exhibit A for payment. However, by letter Exhibit F dated 27th April, 1978, the Appellant confirmed that the premium had been paid but disclaimed liability on their own interpretation of the open cover, contending particularly that they were not liable for any shipments made prior to 1st February, 1978. By letter Exhibit V1 dated 9th May, 1978, the Respondent formally claimed the insured value of ₦1,231,359 and requested early settlement. This was followed by a visit and letter Exhibit V2 dated 10th May, 1978, asking for action to be taken on Exhibit V1. This was also followed by a letter Exhibit V3 dated 26th May, 1978, sent by the Respondent forwarding copies of the Master's Statement of Protest concerning the sinking of the vessel.

In reply, the Appellant by letter Exhibit W claimed that "no risk ever attached to them under the open cover" because although the declaration was made after the 1st February, 1978, the actual date of sending was before the inception of the cover, the vessel having sailed from Bangkok, the port of shipment, on the 3rd day of January, 1978. This sounded the bell for the litigation over the matter, which was commenced in the Federal High Court, Lagos. From the Federal High Court, it went on appeal to the Court of Appeal, from whence it has come to this court on appeal. By their amended particulars of claim filed in the Federal High Court by the respondent,

"The Plaintiff's claim against the Defendant is for the sum of ₦2,231,359.00 (two million, two hundred and thirty-one thousand three hundred and fifty-nine naira) being special and general damages for breach of contract, whereof the sum of ₦1,231,359.00 represents special damage and ₦1,000,000.00 represents general damages."

Pleadings on the order of the Federal High Court were settled, amended, filed and exchanged by the parties and the issues joined went to trial before Belgore, J. At the hearing, only two witnesses testified. They were T. Ifeanyi Nzegwu, a director of the

respondent company, and Sule Bamidele Balogun, the manager of the respondent company. The appellant called no evidence and rested its case on the evidence adduced by the appellant's witnesses. After the conclusion of evidence and the addresses of counsel, the learned trial judge, Belgore, J., delivered a well-considered judgment in which he awarded the respondent as special damages ₦1,231,359.00 with interest at 10% from 23/5/78 and ₦2,000.00 costs.

The Appellant was naturally not satisfied with the judgment and so appealed to the Court of Appeal. After hearing submissions of counsel for both sides, the Court of Appeal (Ademola, Mohammed and Kutigi, J.J.C.A.) unanimously considered judgment dismissed the appeal. Ademola, J.C.A., concluding his lead judgment (with Mohammed and Kutigi, J.J.C.A. concurring), commented:

"All insurance contracts involve the taking of risk and therefore the occurrence of the event insured against cannot frustrate the contract. It is ludicrous to say the least, to tell the respondent that the loss of goods on the *M/V Saturn* has put an end to the contract he concluded with the appellant, for that was the very thing that brought them together in the first instance."

The appellant was still not satisfied with the decision of the Court of Appeal and so appealed to this court. The questions raised before the Court of Appeal by the appellant, who did not receive answers favourable to the appellant, re-echoed in the grounds of appeal filed with the notice of appeal to this court by the appellant. The grounds of appeal in their final amended form read:

1. The learned Justices of the Court of Appeal erred in law when they held that Exhibits B and J do not bind the respondent.

Particulars of Error

- (1) The respondent founded its cause of action on Exhibits B and J and specifically pleaded them;
 - (2) The respondent tendered in evidence Exhibits B and J;
 - (3) The respondent gave evidence that Exhibit J contains all the terms of the contract of insurance in question;
 - (4) Exhibit J is in view of the evidence of the Plaintiff that it contains all the terms of the contract, a counteroffer.
 - (5) After receiving Exhibit J, the Plaintiff accepted the counteroffer by paying a premium evidenced by Exhibit B on the terms contained in said Exhibit J.
 - (6) Exhibit B incorporates all the terms set out in Exhibit J.
2. The learned Justices of the Court of Appeal erred in law in holding that, because the issue of the necessity for a Policy was not raised on the pleadings, the appellant cannot rely on the legal result of its non-production.

Particulars of Error

- (1) Only facts relied upon need be pleaded but not the legal results of acts or omissions of the Plaintiff.

- (2) Paragraph 11 of the statement of defence is a plea of the provisions of the Marine Insurance Act 1961.
- (3) It was pleaded that the contract was unenforceable.
- (4) The Plaintiff's claim did not ask for any particulars of any averment in the Appellant's statement of defence.
3. The learned Justices of the Court of Appeal erred in law when they acted upon parole evidence of the contract when the contract had been reduced into writing to wit, the open cover, Exhibit J, which was specifically incorporated into Exhibit B, the certificate of insurance:

Particulars of Error

- (1) Exhibits L1 to L7 were not part of Exhibit J and they contradict Exhibit J.
- (2) Oral evidence which contradicts Exhibit J is sic inadmissible,
4. The learned Justices of the Court of Appeal erred in law when they held that failure of the respondent to produce a Policy of marine insurance did not affect its enforceability.

Particulars of Error

- (1) In the absence of the Policy, all other evidence is, by *section 24 of Marine Insurance Act, 1961*, made inadmissible.
5. The learned Justices of the Court of Appeal erred in law when they held that 'the doctrine of avoidance of contract because of common mistake has no place in insurance'.

Particulars of Error

- (1) If before the conclusion of the contract of insurance, the goods or the subject matter of the contract of insurance has ceased to exist either by destruction of the same or by death (although unknown to both parties), the contract will be void because the insured will then have no insurable interest.
6. The learned Justices of the Court of Appeal misdirected themselves on the facts and in law when they held that there was a valid contract subsisting between the Plaintiff and the Defendant in January, 1978.

Particulars of Errors

- (1) By *section 23 of Marine Insurance Act, 1961*, a contract of marine insurance shall be deemed to be concluded when the proposal of the assured is accepted, whether the Policy is then issued or not, and, to show when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract.
- (2) Plaintiff's witness testified that the premium was paid on 23/2/78 and a certificate or

cover/ note was issued in respect thereof on 23/2/79.

- (3) The Plaintiff's witness agreed that the open cover is not a Policy or a certificate of insurance and that declarations of shipments must be made and premiums paid on individual shipments.
- (4) Exhibit K, a letter written by the Plaintiffs, admits that the contract of marine insurance was concluded by the acceptance of the premium.
- (5) The Plaintiff's Managing Director gave evidence that he accepts that an open cover does not cover a particular shipment until a premium is paid on individual goods.
7. The learned Justices of the Court of Appeal misdirected themselves on the facts and came to a decision which is erroneous in law when they held that the Defendant was liable for the loss of goods which did not come within the period it agreed to insure the Plaintiff's goods.

Particulars of Misdirection

- (1) Defendant agreed to insure goods shipped on or after 1st February, 1978;
- (2) The Plaintiff accepted the Defendant's counter-offer and paid a premium on the 23rd February, 1978;
- (3) The goods which are the subject matter of this action were shipped in January, 1978.
8. The decision is against the weight of evidence."

The main questions for determination in this appeal, therefore, are:

- (1) Whether there was a contract of marine insurance in existence between the appellant and the respondent in respect of 86,612 bags of parboiled rice valued at ₦1,231,459.00 on board the ship *M/V Eastern Saturn*.
- (2) Whether Exhibits B and J together constitute a Policy of marine insurance?
- (3) Whether Exhibit J alone is a Policy of marine insurance.
- (4) Whether the loss of the 86,612 bags of rice when *M/V Eastern Saturn* sank on the 10th February, 1978 before the premium was calculated, demanded and was paid removed the liability of the appellant under the marine open cover Exhibit J and the certificate of insurance Exhibit B issued under it. It is desirable to consider the second and third questions for determination raised in this appeal before proceeding to deal with the other questions raised. Having given a short narration of the facts above, I shall turn to the *Marine Insurance Act 1961 No 54* for a definition of a Policy of marine insurance that approximates to marine open cover. I find the provisions of *section 31 of the Marine Insurance Act* apposite.

The section deals with floating Policy and reads:

- (1) A floating Policy is a Policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by

subsequent declaration;

- (2) The subsequent declaration or declarations may be made by endorsement on the Policy or in other customary manner;
- (3) Unless the Policy otherwise provides, the declarations shall be made in the order of dispatch or shipment. In the case of goods they shall comprise all consignments within the terms of the Policy, and the value of the goods or other property shall be honestly stated; but any omission or declaration may be rectified even or arrival provided the omission or declaration was made in good faith;
- (4) Unless the Policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the Policy shall be treated as an unvalued Policy as regards the subject matter of that declaration." The basis of all insurance transactions is utmost good faith.

Most certainly. Exhibit J which shall receive more detailed treatment in the course of this judgment, in my opinion, falls within the definition of floating marine insurance Policy. Exhibit J is titled "Marine open Cover No MA/MAT. 78/MOC/0021" and Exhibit B is titled "Certificate of Insurance No 16533 issued under open contract No MA/MAT/78/MOC/0021." Exhibit B therefore is not a certificate of insurance standing on its own. It is an endorsement on Exhibit J and declares the name of the ship, the port of loading and the port of discharge, the interest insured and the insured value. These were particulars omitted from Exhibit J, The conditions therein stated were as per marine open cover No MA/MAT/78/MOC/0021 Exhibit J and Exhibit B comes within the intendment of *subsections (1) and (2) of section 31 of the Marine Insurance Act 1961 No 54.*

The declarations contained in Exhibit B are those envisaged under subsections (1) and (2) of section 31. Subsection (4) of section 31 provides for a situation such as has not arisen in this case, where the declarations were not made till after the loss.

This case is slightly more fortuitous in that the declarations were made before the loss and before information about the loss of the subject matter was received by the respondent and communicated to the appellant.

The pleadings were not deficient in any material particular save that the words "marine insurance Policy" were not used to describe the document pleaded. For a better appreciation of the facts pleaded, I will proceed to set out fully paragraphs 3,4,6,7,8,9,10,12,18,19 and 21 of the amended statement of claim which I consider very material for purposes of this judgment.

1. The Plaintiff ordered 4,000 metric tons (86,612 bags) of rice from Continental Enterprises (Bermuda) Limited in or about November/ December 1977.
2. The said goods were shipped per M.V. "Eastern Saturn" which sailed from Bangkok on 3rd January, 1978.
3. The Plaintiff was sent the necessary shipping documents as per the letter dated 9th January, 1978, addressed to the said Plaintiff by Messrs Tai Sae Company Limited;
4. In consequence of the matters pleaded in paragraph 5 and 6 of this further amended

statement of claim, the Plaintiff on receipt of the said shipping documents on or about mid-January, 1978 approached the Defendant to arrange for the goods to be insured after showing the Defendant the said shipping and other documents and the Defendant agreed to do so and promised to confirm this and to advise the Plaintiff the premium payable after calculation.

5. The Defendant confirmed the said agreement referred to in paragraph 7 above by the issue of a marine open cover note No MA/MAT/78/MOC/0021 under its covering letter dated 14th February, 1978.
6. After the Defendant had properly calculated the amount of the premium payable, it issued the necessary debit note No MA 6845 dated 23rd February, 1978 on which the amount of ₦12, 776.39 was shown as the premium in respect of certificate No 16533 both of which were forwarded under cover of its letter dated 23rd February, 1978 to the Plaintiff.
7. On the payment of the amounts of premium payable as demanded by the Defendant, the Plaintiff was issued with a comprehensive receipt No 002907 of 24th February, 1978.
8. The said goods and all of them became a total loss by the perils insured against by the said Defendant.
9. Formal demands for settlement of its claims were made by the Plaintiff by letters dated 9th May, 1978, 10th May, 1978 and 26th May, 1978 for the total value of the said goods amounting to ₦1, 231,359.00.
10. The Defendant wrongfully maintained its stand in its letter dated 22nd June, 1978 and offered to refund and did refund the premium of ₦12,776.39 paid on certificate No 16533 relating to this claim, which said refund the Plaintiff rejected in its letter dated 20th July, 1978. The Plaintiff returned the Defendant's cheque.
11. The Plaintiff suffered loss and damage as a result of the Defendant's breach of contract as well as the profits it would have earned from the availability of the funds due to it on other business transactions."

Equally, paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the further amended statement of defence are relevant, pertinent and material:

12. The Defendant denies paragraphs 1, 3, 5, 6, 7, 8, 11, 12, 13, 15, 17, 21 and 22 of the statement of claim and puts the Plaintiff to the strictest proof thereof.
13. The Defendant admits paragraphs 2, 4, 9, 10, 14 and 16 of the statement of claim.
14. With reference to paragraph 15 of the statement of claim, the Defendant avers that the Plaintiff's claim was repudiated for many reasons, among which are the following, namely:
 - (a) non-disclosure of material facts contrary to *section 20 of the Marine Insurance Act No 54 of 1961*, e.g.
 - (i) that the boat carrying the goods had left the port of shipment on 3rd January, 1978, a date outside the date stipulated by the open cover;

- (ii) that the boat had been abandoned by the crew on the 10th February, 1978 and had been declared lost when he, on the 23rd February, 1978, made his declaration under the open cover and paid a premium thereon.
15. With reference to paragraph 19 of the statement of claim, the Defendant admits that the Plaintiff has no right to the refund of the premium paid on the ground of fraudulent non-disclosure of material facts.

Particulars

Failure to disclose that the ship had sailed long before the 1st day of February, 1978;
Failure to disclose that the ship had been abandoned by its crew on the 10th February, 1978 and had been reported lost on the 15th February, 1978.

16. With reference to paragraph 20 of the statement of claim the Defendant avers that it has dealt with the Plaintiff based on absolute good faith and whether there was any incident or not, it felt bound in good faith to reject all declarations for shipments before 1st February, 1978 which are outside the open cover.
17. The Defendant avers that by the open cover issued by the Defendant, only shipments or sendings on and after the 1st day of February, 1978, were covered, whereas the subject matter of the ship's claim was shipped on or before the 3rd day of January, 1978, from Bangkok.
18. The Defendant will contend at the trial that the open cover was entered or obtained by the Plaintiff after the boat Eastern Saturn carrying the parboiled rice had been abandoned by its crew and master at 10.00 hours G.M.T. on the 10th February, 1978 and ' before any certificate of insurance or any contract of insurance covering or concerning the goods in question was issued or entered into.
19. The Defendant will contend at the trial that on the 23rd day of February, 1978, when the Plaintiff obtained a certificate of insurance in respect of the goods, a broadcast had gone out to all ships of the loss of the ship 'Eastern Saturn';
20. The Defendant avers that the goods which form the subject matter of the Plaintiff's claim were not shipped within the time expressly limited by the open cover and the certificate of insurance issued as a result of the declaration purported to be made under the said open cover is void, and the Defendant cannot be made liable thereunder.
21. The Defendant will at the trial rely on the provisions of the Marine Insurance Act 1961, Laws of Nigeria and contend that the contract of marine insurance is not enforceable.
22. The Defendant will at the trial rely on the open cover dated the 15th day of February, 1978, the certificate of insurance No 16533 dated the 23rd day of February, 1978, Plaintiff's letters dated 6th April, 21st April, 1978; 9th May, 1978, 10th May, 1978 and 26th June, 1978."

At the trial, the Plaintiff/Respondent called evidence in support of its claim. As mentioned earlier above, the Defendant called no evidence to prove and establish the facts pleaded in

paragraphs 4, 5 to 8, 9 and 10 of the statement of defence. The Plaintiff called two witnesses, T. Ifeanyi Nzegwu (P.W.1), director of the Plaintiff/appellant's company and Sule Bamidele Balogun (P.W.2), the manager of the Plaintiff/appellant's company, to testify.

They testified and tendered in evidence the documents pleaded. These included:

- (1) Exhibit J, marine open cover No MA/MAT/ 78/MOC/0021 dated 15th February, 1978 issued by the appellant;
- (2) Exhibit B, certificate of insurance No 16533 dated 23rd February, 1978 issued under open contract No MA/MAT/ 78/MOC/0021;
- (3) Exhibit A - receipt for ₦ 13, 552.53k being premium paid on marine insurance certificates No 16532, and 16533 dated 24th February, 1978;
- (4) Exhibit L, letter dated 9/1/78 forwarding shipping documents from Tai Sae Company Limited to the appellant, to wit Exhibit L1, freight list. Exhibit L2, manifest dated 3/1/78, Exhibit L3 bills of lading dated 31/12/77;

Exhibit L4, invoice dated 6/1/78;

Exhibit L5, invoice dated 6/1/78;

Exhibit L6, certificate of origin dated 30/12/77

Exhibit L7, bill of lading dated 30/12/77

Mr. Nzegwu, P.W.1 in his testimony, categorically asserted that Exhibit B is a certificate of insurance and that Exhibit J contains all the letters (sic) /terms/ of the contract. He also asserted that his transaction with the appellant did not start with Exhibit B and that he had an open cover, Exhibit J issued earlier by the appellant. It was on the advice of the manager of the appellant company against taking an individual Policy that he opted for an open cover. He then made the proposals, which were accepted by the appellant in January 1978.

Exhibit J, the marine open cover, was later issued and forwarded.

On the issue of the existence or non-existence of a Policy of marine insurance, Belgore, J., in his judgment said:

"The last point raised by the Defendant was that *section 24 of the Marine Insurance Act* made other evidence on marine Policy inadmissible except the Policy itself. The Defendant did not make this point an issue in his pleadings; references were made in the statement of defence of the marine Policy not to be enforceable for one reason or another, but the issue of the non-existence of the Policy was never mentioned. Though I agreed with learned counsel for the Defendant that legal points should not be pleaded, but the existence or non-existence of marine Policy was an issue of fact known to the Defendant because they were to prepare the document, which must be pleaded".

Furthermore, the marine insurance Policy document was still with the Defendant, they did not release it and now they were accusing the Plaintiff of not producing it. The principle laid down in section 148 Id) of the Evidence Act should apply to the action of the Defendant In fact, the practice had been for a Defendant in such a case to produce the document. In *Chitty on Contracts, Vol. 2, Specific Contracts, 24th Edition footnote 46 to paragraph 3938*, it is stated:

‘However, underwriters will, as a matter of course, issue a Policy in order to enable the assured to bring an action, even if they deny liability’.

The issue of the existence or non-existence of a Policy was again raised in the Court of Appeal. Dealing with this question, Ademola JCA. (with whom Mohammed and Kutigi, JCA. concurred) observed:

"There was a submission to the effect that the respondent cannot in any event succeed since the Policy of insurance has not been pleaded and other documents

Exhibits A, B, and J tendered showing the existence of the contract could not take its place. I think that the learned judge has dealt very well with it in his judgment by pointing out that this issue was not raised on the pleadings and that the practice of underwriters such as the appellant in this appeal is to supply a stamped Policy to respondent to maintain action as noted in Chitty on Contract Vol. 2 Specific Contracts 24th Edition paragraph 3938 footnote 46. I cannot improve on that."

The answer to this question is not far to seek and I think that both the learned trial judge and the learned justices of the Court of Appeal evaded the question and unfairly castigated the appellant. Undoubtedly, the statutory provisions as contained in *section 24(1) of the Marine Insurance Act 1961* constitute an absolute bar on the admissibility of evidence of marine insurance contracts in civil proceedings unless embodied in a Policy of marine insurance and unless any statute otherwise provides. More particularly, the section reads:

"Subject to the provisions of any statute, a contract of marine insurance shall not be admissible in evidence unless it is embodied in a marine Policy in accordance with the form in the First Schedule to this Act or to the like effect. The Policy may be executed and issued either at the time when the contract is concluded, or afterwards; and subject to the provisions of this Act and unless the context of the Policy otherwise requires, the terms and expressions mentioned in the said First Schedule shall be construed as having the scope and meaning in that schedule assigned to them." On what the Policy must specify *section 25 of the Marine Insurance Act* stipulates that: "A marine Policy shall specify the name of the insured or of some person who effects the insurance on his behalf." A Policy may be either valued or unvalued, *section 29(1) of the Marine Insurance Act*. An unvalued Policy is a Policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained in the manner specified in section 18, *see section 30 of the Marine Insurance Act 1961*.

Mr. Molajo, SAN. learned counsel for the appellant, rightly, in my view, submitted that the necessity for evidence of a Policy of marine insurance to prove a contract of marine insurance cannot be waived. I agree with him completely as the provisions of *section 24(1) of the Marine Insurance Act* are couched in mandatory terms.

See *Abolade_Agboola Alade v Salawu Jagun Olukade (1976) 2 S.C. 183 at 189*. While not disagreeing with that submission, Mr. Sofola SAN. learned counsel for the respondent countered by submitting that Exhibit J and Exhibit B constitute the Policy, in particular, he drew the court's attention to certain clauses in Exhibit J where the document was described as a Policy of marine insurance.

Mr. Molajo disagreed with the submission that Exhibit B and Exhibit J constitute a Policy for

the purpose of proving the contract of marine insurance. He submitted that Exhibit B being a certificate of insurance is inadmissible and cited *Diamond Alkali Export corporation v Bourgeois* (1921) All E.R. Rep. 283 at 289-291; *Scott v Barclays Bank Limited* 14 Lloyd L. Rep. 142 at pages 114 & 115; *English Insurance Co. v National Benefit Insurance Company Limited* (1928) All E.R. Rep. 441 at pp. 443-444; (1929) AC.114 at 119 & 121.

An examination of Exhibit J shows that it contains all the details required of a Policy under sections 24 and 25 of the *Marine Insurance Act 1961* and the First Schedule to the Act. Its contents (in part) read:

"It is hereby agreed to hold covered Messrs Power & Industrial Engineering Company Limited hereinafter called the Assured, subject to the terms and conditions hereunder for an open amount not exceeding 3 million (three million Naira) per any one vessel or conveyance or in any one location. Estimated Annual Turnover 30 million Terms and Conditions referred to: As per attached clause Open Cover always open for the full amount irrespective of declaration made for all shipments and/or sendings on and after 1st February, 1978 but subject to cancellation by either Assured or the Assurers giving notice in writing as hereinafter provided."

"Interest;..... Rice in jute bags

Basis of Valuation:

In the event of loss, accident, or arrival prior to declaration, it is hereby agreed that the basis of valuation shall be C & F (invoice value) plus a percentage to be declared by the clients.

Per: Any approved steamer and/or steamers and/or conveyances as per the institute classification clause or held covered.

Voyages; Worldwide - Apapa/Lagos/Port Harcourt

Conditions of Insurance: Subject to the Institute Cargo Clauses (All Risks), Subject to the Institute War, Strikes, Riots and Civil Commotion Clauses. Subject to the Institute Classification Clause, Subject to the Port Delay Clause, Subject to an excess of N950.00 each and every loss except total loss, Warranted name of vessel advised prior to sailing or within a reasonable period thereafter and any coverage.

Additional premium paid before arrival.

Warranted goods cleared within 15 days on discharge.

Warranted discharge supervised by Lloyd's or other professional handling agent and any loss or damage surveyed immediately thereafter by the same agent.

Subject to the replacement clause attached
Excluding rust, oxidation, and discolouration
Premium Payable: Marine = 1% + War Scale
Cement = 375% + Scale War
Declarations to be addressed to;

The Managing Director,
The National Insurance Corporation of Nigeria,
Marine Department,

118/120 Broad Street,
P.O., Box 1100,
Lagos State,
Nigeria.

Cancellation: This open cover is subject to cancellation by either the Assured or the Assurers, giving thirty days' notice in writing in respect of marine risks, seven days' notice in respect of war and strikes risks, and forty-eight hours' notice for strikes in respect of shipments to and from Canada or the United States of America."

The detailed provisions set out in Exhibit J are even more than those set out in the Form in the First Schedule.

The opening words of the Institute War Clauses, which read:

"1. This Policy covers..... "

cannot but lead to the conclusion that Exhibit J is a Policy. It therefore fully satisfies the description in section 24(1) of the Marine Insurance Act 1961 and can be termed a Policy to the like effect as the form of Policy in the First Schedule. Exhibit B, being a document issued under Exhibit J, has no independent existence. It is not a Policy. It is a certificate of insurance showing that the Policy Exhibit J exists in the hands of the appellant in favour of the respondent.

The case of *Diamond Alkali Corporation v Bourgeois* (supra), relied on by counsel for the appellant in support of his contention that Exhibit B and Exhibit J are inadmissible, can be distinguished on the facts. In that case, only the certificate of insurance was tendered and sued upon, unlike this case, where both Exhibit J, the marine open cover, which I have classified as a floating Policy and Exhibit B, the certificate of insurance issued under Exhibit J, are in evidence.

MC Cardie, J. brought this out clearly when on page 209, he observed and commented:

"In the *Wilson Holgate Case* (19) Bailhache, J. said (/1920/ 2 KB at p. 7):

'It must be borne in mind that in dealing with certificates of insurance, I am not referring to American certificates of insurance, which stand on a different footing and are equivalent to policies, being accepted in this country as policies'.

It will be observed that Bailhache, J., used the word 'accepted and not the words 'bound to accept'. The sellers here rely on that passage and also on the notes to *Scrutton and Mackinnon on Charter parties* (10th Edition), p. 185, where it is said:

‘A certificate of insurance issued by an insurance company under a floating Policy, upon which document the company can be sued, would suffice in any case’

“The buyer strongly challenges that view and his counsel requires me to express an independent opinion on the point. I do so with the greatest diffidence and reluctance in view of the weight carried by even the dicta of such experienced and distinguished judges as Scrutton, L.J. and Bailhache, J. I feel bound to express my view, not upon the strict law of the matter. I assume that this document (which is not stamped) was given under a floating Policy issued by the insurance company to D. A. Horan. Now the certificate is not a Policy. It does not purport to be a Policy. This is conceded by counsel in his able argument for the sellers. It is a certificate that a Policy was issued to D. A. Horan and it incorporates the terms of that Policy. Those terms I do not know, nor is there anything before me to indicate that the buyers knew them.

The certificate does not show whether that Policy was in the recognised or usual form or not. The certificate, therefore, does not contain all the terms of the insurance. Those terms have to be sought in two documents - namely, the original Policy and the certificate.

If he sued simply on the certificate, he could put in a part only of the contract for the other terms of the contract, namely, the conditions of the actual Policy would be contained in a document not in his control and to the possession of which he is not entitled.”

In the case of English Insurance Company Limited, vs Official Receiver of National Benefit Assurance Company Limited 1928 All E.R. Rep. 441, there was no dispute about the facts and the parties agreed that no insurance policies were ever issued to the appellant company by the National Company in respect of risks accepted by the latter under the terms of the agreement. The only question to be decided was whether the English Insurance Company Limited was disentitled from proving in the liquidation of the National Assurance Company Limited because no stamped policies of marine insurance were issued by the English Company to the National Company as regards any matters coming within the agreement in the participation agreement. The House of Lords (Lord Hailsham, LC., Viscount Sumner and Lord Atkin) held that the agreement was a "contract for sea-insurance" within section 93(1) of the Stamp Act 1891 and a "contract of marine insurance" within -section 22 of the Marine Insurance Act 1906 and the transactions under it riot having been embodied in any marine Policy was invalid and inadmissible, in evidence, so that the claim failed. It is also quite clear and I hold that under "our law the Marine Insurance Act 1961, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine Policy. In view of the importance of this question, I called for Exhibit J in its original form. I have now examined Exhibit J in its original form as admitted in evidence. My findings are most revealing. I am sure that counsel for the appellant is unaware of the clear indication on the back of the document and in the document that it is a marine Policy. The footnote at the back reads:

"This Policy should be read carefully and its terms noted."

Above that are printed:

“Policy No:

Name.....

Due Date.....”

There can therefore be no question about Exhibit J being a Policy and I hereby reject the submission of Mr. Molajo, SAN. learned counsel for the appellant that Exhibit J is not a Policy.

I hold that it is a Policy within the meaning of marine Policy under the Marine Insurance Act 1961, section 2(1), section 24(1) and section 25.

The failure of the High Court, Belgore, J and the Court of Appeal to address themselves to these two questions gave the impression that they did not consider Exhibit J a Policy of marine insurance and has led counsel for the appellant to so contend forcefully before us. I am at a loss to understand how this simple fact, which appears in bold letters on Exhibit J, escaped the notice of both counsel throughout the course of argument in all the courts.

This disposes of grounds 2 and 4 of the grounds of appeal and questions 2 and 3 of the questions for determination.

Turning to question 1, whether there was a concluded contract, the existence of Exhibit B and

Exhibit J enables me to answer the question unequivocally in the affirmative. The law is settled and stipulates that the Policy may be executed and issued either at the time the contract is concluded or afterwards, section 24 (1) of the Marine Insurance Act 1961.

At the High Court, the learned trial judge, Belgore, J., dealing with this question in his judgment said:

"From the moment the proposal was made, accepted and a premium paid, a valid contract was subsisting between the Plaintiff and the Defendant."

Earlier, the learned trial judge said:

"I do accept the Plaintiff's evidence that he went to the Defendant to insure his cargo being carried by 'M.V. Eastern Saturn' in January, 1978 and that it was on that basis that the Plaintiff was given a marine open cover note No MA/MAT/78/MOC/0021 as alleged in paragraph 8 of the statement of claim."

The Court of Appeal (Ademola, Mohammed and Kutigi, JJCA) answered the question in the affirmative as well, for Ademola, JCA, in his lead judgment said:

"In my view, the answer to the argument is simple. The learned trial judge has rightly found on the uncontradicted evidence before him that the respondent ordered 4,000 metric tons of rice; that the ship carrying the rice left Bangkok by 3rd January, 1978, and the respondent (sic) agreed to insure the goods on it; that there was insurance effected in January, 1978 between the parties and cover note Exhibit J issued thereby satisfying section 23 of the Marine Insurance Act 1961".

Exhibit J was erroneously referred to in the judgment as a cover note. It is a marine open cover, a floating Policy of marine insurance.

The Appellant's complaints in ground 1 of the grounds of appeal that the learned Justices of the Court of Appeal erred in law when they held that Exhibits B and J do not bind the respondent are founded. But the erroneous opinion has made no difference to the fortunes of the appellant in this appeal. The context in which the statement was made is innocuous. The whole statement reads: "It is necessary to state that both Exhibits B and J are not documents inter parties by the appellant and the respondent. Both documents are the acts of the appellant alone and are in no way binding on the respondent. The rule of exclusion under section 131(1) of the Evidence Act or oral evidence to contradict, alter, add to or vary the content of Exhibits B and J, does not apply. See section 133 of the Evidence Act. Therefore, the case of *Osikoya v. Salvador Hurtado Solaz* 4 WACA 91, relied on by counsel for the appellant, has no relevance."

The Court of Appeal was considering the argument that parol evidence had been given by the appellant's witnesses to vary the contents of Exhibits B and J. The contents of Exhibits B and J reflect the agreement between the appellant and the respondent and having founded its claim on Exhibit B and Exhibit J and pleaded them it cannot, in my opinion, be contended without contradictory evidence that the respondent is not bound by them. There are conditions and warranties, express and implied, which bind the assured. See sections 34 to 50 Marine Insurance Act 1961.

A careful study of the pleadings filed and the cases presented to the court shows that the appellant abandoned the vital areas of the defence set up in its pleadings.

Parties are bound by their pleadings and are not allowed to set up a case different from that set out in their pleadings. The main defenses set up and contained in paragraphs 4, 5, 6, 7, 8, 9 and 10 are:

- (1) non-disclosure of material facts;
- (2) fraudulent non-disclosure;
- (3) rejection of shipments before 1st February, 1978;
- (4) that the contract of insurance was concluded after the boat M.V. Eastern Saturn with the goods, had been lost at sea;
- (5) that the certificate of insurance issued as a result of the declaration purported to be made under the marine open cover is void;
- (6) that the contract of marine insurance is not enforceable under the Marine Insurance Act 1961.

Whereas the appellant's witnesses gave evidence destroying the above defenses, the appellant failed to adduce any iota of evidence in support of any of the above defenses, and as such, none of the defenses was made out. The evidence adduced by the respondent through its witnesses does not support the defenses. Further, the allegation that 'the contract of marine insurance is not enforceable' does not, in my view, amount to a pleading that 'the contract of marine insurance is inadmissible'. A contract can be admissible and yet be unenforceable. This arises where facts making the contract void or voidable are pleaded and proved by evidence. Fraudulent non-disclosure of material facts easily comes to mind as a ground that, when established, entitles an insurer to avoid the contract. A contract of marine insurance may be perfectly valid but because it is not embodied in a marine Policy, it remains inadmissible by section 24(1) of the Marine Insurance Act 1961. Being inadmissible, the court cannot take cognizance of its existence. *Alade v Olukade* (1974) 6 S.C. 183.

It is therefore in the interest of parties to note that pleadings must be strictly adhered to in the conduct of their cases. See *African Continental Seaways Limited v Nigerian Dredging, Roads and General Works Limited* (1977) 5 S.C. 235, 243, 247-250; *Emegokwe v Okadigbo* (1973) 4 S.C. 113 at 117; *Akpapuna v Obi Ezeka II* (1983) 7 S.C. 1 at 24 and 62; *Ferdinand George v The United Bank for Africa* (1972) 8-9 S.C. 264 at 273-274 (1972) 1 All NLR (Part II) 347 at 353; *Metalmpex vs A.G Leventis &Co. (Nig) Limited* (1972) 1 All NLR. (Part 1) 207; *George & ors. vs Dominion Flour Mills Limited.* (1963) 1 All NLR. 71 at 77.

Ground 5 raises a hypothetical and an academic question. It must be restated with emphasis that Courts of law in this country are not established to deal with hypothetical and academic questions. They are established to deal with matters in dispute between parties and consequently, their functions involve dealing with all relevant questions arising therefrom to enable them to decide on the matter. See section 6(6) (b) Constitution of the Federal Republic 1979 as amended. Ground 5, therefore, fails.

With regard to the contention of learned counsel for the appellant in ground 6, the content of Exhibit B is revealing. It states, *inter alia*.

"Certificate of Insurance No 16533 Issued under Open Contract No MA/MAT/78/ MOC/0021

This is to certify that the Corporation has insured the under-mentioned goods for the voyage(s) and value(s) stated on behalf of Power & Industrial Engineering Company Limited.

Per Eastern Saturn

From Bangkok to Port Harcourt and/or Lagos

Interest: 86,612 parboiled rice in new double jute bags

Insured Value: ₦1,231,459.00 (One million two hundred and thirty-one thousand four hundred and fifty-nine Naira only)

Conditions: As per Marine Open Cover No MA/MAT/78/MOC/0021."

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

The question may then be asked whether this insurance was not referable to:

- (1) the boat;
- (2) the rice; and
- (3) the voyage.

Mentioned in Exhibits L, L1 to L7, which, according to the evidence, were shown to the appellant to indicate the goods, the boat, and voyage in respect of which insurance was sought. The answer is undoubtedly in the affirmative, and this lays the defence of non-disclosure of facts and fraudulent non-disclosure finally to rest.

In *Marine Insurance Company Limited v Grimmer* (1944) 2 All ER.197 Scott, LJ. said at 199:

"Even if the Policy sued on had been an original insurance effected by the shippers of the sugar, it is indisputable that on its true interpretation, it would have operated retrospectively to the loading of the insured goods on the carrying ship. That is inherent in every voyage Policy in the old Lloyd's Form (now scheduled to the Act)".

There is here sufficient uncontradicted oral and documentary evidence to establish that the insurable interest or subject matter was to the knowledge of the appellant, being conveyed by M.V. Eastern Saturn, which sailed from Bangkok on 3rd January, 1978. The acknowledgment of this fact in Exhibit B constitutes a necessary variation. With much elaboration, the respondent, by pleading the documents Exhibits B and J and tendering them in evidence, is simply saying that their contents represent the agreement entered into between the appellant and itself, the respondent. A contract of marine insurance is a contract of indemnity and hence the Policy and or insurance certificate bears the signature of the insurer only. The proposals bear the signature of the respondent so that the respondent cannot properly disclaim its obligations under the contract and there are many.

Ground 3 complains of the Court of Appeal acting on the parol evidence of the contract when the contract had been reduced into writing. Exhibit J and Exhibit B. Learned counsel for the

appellant complained that Exhibits L1 to L7 were not part of Exhibit J and that they contradict Exhibit J. He then submitted that oral evidence that contradicts Exhibit J was inadmissible. The question may be asked whether Exhibits L1 to L7 contradict Exhibit J. I do not think so.

The appellant has been unable to show that the rules of evidence preclude the respondent from adducing evidence to show that Exhibit J and Exhibit B were issued by the appellant in respect of the bags of rice covered by the documents, including bills of lading Exhibits L1 to L7. The fact that Exhibit J limited the time the risks insured against attach to shipments and sendings after 1st February, 1978, which is a reflection of the Appellant's choice, cannot constitute a barrier when Exhibit B, which was issued after declarations were made, lifted the insured interest from Exhibit L7. I find no substance in this ground. It is to be observed that the insured interest on the evidence led was very much in existence on board "M.V. Eastern Saturn" at sea on 1st February, 1978.

Since the open cover Exhibit J is a Policy embodying the contract, the question of counter-offer does not arise. Exhibit B conclusively shows that the parboiled rice in 86,612 new double jute bags valued ₦1,231,459.00 on board the M.V. Eastern Saturn in transit from Bangkok to Port Harcourt and/or Lagos was insured as per Marine Open Cover No MA/MAT/78/MOC/0021.

The complaint in ground 5 is based on the erroneous assumption that the subject matter of the contract, i.e., 86,612 bags of parboiled rice, had ceased to exist before the contract was concluded.

There is no basis for such an assumption in view of the evidence on record. It is undoubtedly the law that if the subject matter of the contract of insurance had ceased to exist before the contract of insurance is concluded, even though unknown to both parties, the contract is void.

1. Pritchard v Merchant and Tradesmen's Mutual Life Assurance Society 140 ER 885 at 892.
2. Couturier v Hastie (1843-60) All E.R. Rep 280 at 284
3. Oceanic Steamship Co. v Faber (1907) 23 TLR. 673.
4. Scott v Coulson (1903) 2 Ch. 249
5. Joseph Constantine Steamship Line Limited, v Imperial Smelting Corp. Limited (1941) 2 All E.R. 165 at 170.

The evidence established that the boat M/V Eastern Saturn sank on the 10th day of February, 1978, that the risks or perils insured against by Exhibit J attached from the 1st day of February, 1978 and more importantly, that the contract was concluded in late January, 1978.

In Exhibit J, the Institute Cargo Clauses (All Risks) in clause 1 stipulate that:

"This insurance attaches from the time the goods leave the warehouse or place of storage at a place named in the Policy for the commencement of the transit, continues during the ordinary course of transit and terminates either on delivery

- (a) to the consignee or
- (b) to any other warehouse

(i)

(ii)

or

(c) on the expiry of 15 days after completion of discharge overseas of the goods hereby insured from the overseas vessel at the final port of discharge, whichever first occurs."

and in Clause 5

"This insurance is against all risks of loss of or damage to the subject matter insured....."
Exhibit M - the letter dated 14th February, 1978, under whose cover Exhibit J was forwarded, makes it reasonable to presume, even without evidence, that the contract of marine insurance was concluded before that date. The letter reads:

"The Manager,
Power & Industrial Engineering Company,
P. O. Box 3869,
Lagos.

"Dear Sir,

Marine Open Cover No MA/MAT/78/MOC/0021 Power & Industrial Engineering Company Limited

We forward herewith in duplicate our Marine Open Cover No MA/MAT/78/MOC/0021, which we trust you will find in order.

Yours faithfully

Signed

A. Komolafe

Marine & Aviation manager.

Exhibit J is not a proposal as erroneously submitted by counsel for the appellant. It contains all the terms of the contract of marine insurance. The contention of learned counsel for the appellant that if Exhibit J is an insurance of every shipment that it is a void contract of insurance, is untenable in the face of the express provision of the Marine Insurance Act section 24(1), 29, 30 and 31, which allow for floating Policy and unvalued Policy. Exhibit J ex facie shows that the perils or risks insured against attach from 1st February, 1978, whereas Exhibits C, G and H show that the ship went down with the subject matter and was lost on 10th February, 1978. Learned counsel for the appellant has, by his arguments, called on us to reverse the concurrent findings of fact. Having examined the submissions of counsel for the appellant, carefully, I find no basis on which this court can disturb the findings of fact made by the Federal High Court, Belgore J. and the Court of Appeal that Exhibit J and Exhibit B were issued by the appellant in respect of shipment made on board M.V. Eastern Saturn (covered by bill of lading Exhibit L7) which sailed from Bangkok to Port Harcourt and or Lagos on 3rd January, 1978.

One disturbing feature in this appeal is the failure of the Federal High Court and the Court of Appeal and indeed counsel for the parties to observe that Exhibit J is a marine Policy as declared on the face of it. It was pleaded along with Exhibit B and on them the action of the Plaintiff/respondent was founded. If this fact had been appreciated, the reasons for the

judgments of the two courts below would have borne a different orientation. With regard to the 4th question raised, which has been implicitly answered above, I would, in particular, draw attention to the agreement under the head: "Basis of Valuation" in Exhibit J. It has been set out above but a repetition here for the agreement will forcibly bring out and emphasise the extent of liability undertaken by the appellant. It reads:

"In the event of loss, accident, or arrival prior to declaration, it is hereby agreed that the basis of valuation shall be C & F (invoice value) plus the percentage to be declared by the clients." The voyages covered are from any port in the world to Apapa/Lagos/Port Harcourt from the 1st of February, 1978.

Payment of Premium:

Learned counsel for the appellant contended that as the premium was not paid till the 24th day of February, 1978, the contract of insurance was void. I am unable to accept this submission, given clause 4 of the Institute Cargo Clauses (All Risks) in Exhibit.

That clause reads:-

"Held covered at a premium to be arranged in case of change of voyage or of any omission or error in the description of the interest, vessel or voyage."

And when Exhibit B was issued, it was accompanied by debit note Exhibit 0 dated 23rd February, 1978, which demanded payment in these terms;

"Unless otherwise stated, this account must be settled within 14 days."

The respondent, on the 24th day of February, 1978, did pay the premium and obtained receipt Exhibit A. Section 53 of the Marine Insurance Act 1961 No 54, dealing with the time when the premium is payable, states:

"Unless otherwise agreed, the duty of the assured or his agent is to pay the premium and the duty of the insurer is to issue the Policy to the assured or his agent is are concurrent condition, and the insurer shall not be bound to issue the Policy until payment or tender of the premium."

The words 'Premium to be arranged' have been held to mean premium to be agreed. *Liberian Insurance Agency Inc. v Mosse* (1977) 2 Lloyd's Rep 560 QBD. at p. 568. The clause does not contemplate any alteration in the terms of the insurance other than in respect of the premium.

A contract of insurance may involve merely a promise to pay the premium. It is not the law that there must be implied in a contract of insurance a provision that the right of indemnity by the assured is conditional on his previous payment of the premiums. In support of and to emphasise this point, I need only refer to the case of *Wooding vs Monmouthshire and South Wales Mutual Indemnity Society Limited* (1939) 4 All ER. 570 at 581, where Viscount Maughan said:

"My Lords, I am not sure that I understand the view of Grier and Mackinnon L.JJ. as to the facts in regard to the payment of premiums by the company. The former states that the company had failed to pay the premium in respect of Wooding and James and was in default in regard to it. I think Mackinnon, L.J. takes the same view. Both the Lords Justices appear to think that this being so, the Society was released from the risks in respect of the men. With the greatest respect, I am unable, for reasons stated above, to agree that the company is shown to have committed any default whatsoever. They were never separate premiums payable after the five years in respect of the men. There was a final call to be paid on February 28, 1930, which was assumed to cover all the 1923 cases. There is nothing to show that it was not paid either in

cash or in account, and not long afterwards, namely, after completing the accounts up to the end of 1933, we find that the Society is paying a large sum to the company. Even if the call or some other call was not paid, however,

I do not know why the majority of the Court of Appeal should assume that the Society was of £ risk. There is, I think, no principle of law that there must be implied in a contract of insurance a provision that the right to indemnity by the assured is conditional on his previous payment of the premiums. As a matter of commercial good sense, there is a great deal to be said for the terse phrase enunciated by counsel for the Society -'no premium, no cover'. It is doubtless for that reason that insurance companies usually require that the consideration for which they undertake to indemnify the assured must be paid before the risk attaches. There is however no doubt that a contract of insurance may involve merely a promise by the assured or his broker to pay the premium, and this" is implicitly acknowledged in such marine insurance cases as *Roberts Security Co. (1897) 1 QB 111; 66 L.J. QB. 119; 75 L.T. 531 Universe Insurance Company vs Merchants Marine Insurance Co. (1897) 2 QB. 93, 66 L.J. QB 564 76 LT 748 and Bhugwan'dass vs Netherlands India Sea & Fire Insurance Co. of Batavla (1888) 14 App Cas 83.*"

In the instant appeal, the contract involved merely a promise to pay the premium when ascertained and demanded. When it was calculated, ascertained and demanded, it was paid. The appellant is therefore bound to indemnify the respondent in respect of the loss of the 86,612 bags of parboiled rice.

The appellant, having agreed on terms as to payment of the premium with the respondent, there is no substance in the submission that the premium paid when it was demanded was late and avoided the contract of insurance. The evidence adduced by the witnesses called by the respondent stands uncontradicted and the court is entitled to give it the full weight and value.

See *Nwaboku vs Ottih (1961) 1 All NLR. 487 at 490 Odulaja v. Haddad (1973) 11 S.C. 3457, Nigeria Maritime Services Ltd v. Alhaji Bello Afolabi (1978) 2 S.C. 79.*

Unless there is a statutory prohibition against the admission of such evidence, evidence admitted without objection can be made use of by the court in arriving at its decision. I find no basis for the contention of the Appellant's counsel that the loss of the subject matter on the 10th of February 1978 entitles the appellant company to avoid liability under Exhibit J and Exhibit B. The payment of the premium on the 24th day of February, 1978, complied with the terms of the agreement between the parties.

The anger that the non-issuance of a Policy by the appellant could have generated was dispersed by the discovery that Exhibit J was a Policy and Exhibit B was issued under it. However, the absence of a cover note or slip to indicate the time the contract of insurance was concluded, which was sometime before the issuance of the Policy, Exhibit J, is a matter for concern and highly deprecated. Nevertheless, the speed with which Exhibit J was issued is highly commendable. In conclusion, I find that the learned trial judge, Belgore, J, was perfectly justified in giving judgment against the appellant in the sum of ₦1,231,359.00 with costs. Likewise, the Court of Appeal properly dismissed the Appellant's appeal as being without substance. All the grounds of appeal fail.

I, too, would and I hereby dismiss the Appellant's appeal to this court and affirm the decision of the Court of Appeal and the Federal High Court.

The appellant shall pay costs in this appeal assessed at ₦ 300.00 to the respondent.

The anger that the non-issuance of a Policy by the appellant could have generated was dispersed by the discovery that Exhibit J was a Policy and Exhibit B was issued under it. However, the absence of a cover note or slip to indicate the time the contract of insurance was concluded, which was sometime before the issuance of the Policy, Exhibit J, is a matter for concern and highly deprecated. Nevertheless, the speed with which Exhibit J was issued is highly commendable. In conclusion, I find that the learned trial judge, Belgore, J, was perfectly justified in giving judgment against the appellant in the sum of N1,231,359.00 with costs. Likewise, the Court of Appeal properly dismissed the Appellant's appeal as being without substance. All the grounds of appeal fail.

ANDREW OTUTU OBASEKI, J.S.C.

The background facts of this appeal have been so fully dealt with in the judgment of my learned brother, Obaseki, J.S.C. which I have had the privilege of reading in draft and with which I agree, that no useful purpose will be served in recapitulating them here, except portions of them as are necessary for an understanding of points being made in this judgment.

After wallowing through a welter of legal authorities and listening to a gamut of forceful and incisive arguments on either side, the answers to two questions that arise from the facts of this appeal will determine the appeal and the side on which the scale of justice must fall. The questions are:

- (1) Was there a contract of insurance between the parties, having regard to section 23 of the Marine Insurance Act, 1961, No 54 of 1961?
- (2) If the answer is in the affirmative, then when did the contract begin?

The facts of the case have been made easy by the fact that the Defendant did not give Evidence, having the evidence of the Plaintiff contradicted and unchallenged. From this evidence, which was accepted by the trial judge, emerges the fact that the Plaintiff went to the Defendant in mid-January 1978 and they agreed on the contract of insurance. The contract, by Section 23 of the Act, simply means the acceptance by the insurer of the insurance proposal of the assured, "whether the Policy is then issued or not."

On the accepted evidence, therefore, the contract, as a valid and binding contract, came into being in mid-January 1978.

The appellant has argued that although negotiations might have started in January 1978, formal contract was not concluded until February 1978 – 23rd February 1978 to be precise - being the date the appellant inserted on the certificate of insurance No 16533 in mid-January 1978 when the assured (Plaintiff) proposed to the insurer (the Defendant) both parties knew that the goods in question were on board the ship which sailed from Bangkok on 3rd January 1978. They knew that the goods both were talking about were already on board a ship on the high seas.

It strikes one as naive that the appellant should argue that on 23rd February 1978 - the date inserted by the appellant on the insurance certificate - the goods insured had already been destroyed and, therefore, were non-existent, with no insurable interest existing as a basis for the insurance. In the first place, in mid-January 1978, when the parties agreed and the contract came into being, the goods were safe and intact onboard M/V "Eastern Saturn". In the second place, the insurance that both parties were talking about and agreed upon in January 1978 was in respect of the goods on M/V "Eastern Saturn".

Thirdly, the insurer is not entitled to fix an arbitrary date for itself on which its responsibility to the assured will attach. To be allowed to do that will be to be allowed to escape liability in all cases which the insurer chooses, since the insurer, in order to escape liability, may simply fix a date outside the period for which he should be liable to the assured. That will strike against the whole principle of insurance, which is based on indemnity, destroying the utmost good faith, which also is the legal basis on which insurance is built. Anything to the contrary is unworthy of a reputable insurance company. Exhibits B and J, having regard to sections 24, 25 and 26 of the Marine Insurance Act, 1961, together constitute the insurance Policy with all the terms of the contract set out. Section 24(1) of the Act requires, in drawing up the contract, either for the form in the first schedule to be used or some other form "to the like effect" But whatever form one uses, the essential thing is that the contract must contain those essential ingredients specified in the Marine Insurance Act, 1961, sections 25 and 26.

Attention must be drawn to Exhibits Q, R, S and T, which were tendered by the respondent and which showed similar transactions between the appellant and the respondent. Of special importance is Exhibit T, which is dated 23rd February 1978 and is a certificate of insurance issued under open contract for 5000 bags of parboiled rice from Thailand to Lagos valued at ₦74, 808.00. The insurance for that was paid on the same receipt. Exhibit A. No claim was made by the respondent on that as apparently the rice arrived from Thailand without mishap. The position then was that in respect of the said receipt, the appellant was prepared to pocket the premium in respect of the 5000 bags of rice which was part of the same Exhibit A but would not honour its liability in respect of the matter in dispute for which the premium was also paid on the same receipt and upon the same date, 23rd February 1978. The appellant was thus prepared to take when there was a gain, but to renounce responsibility when there was a loss - a rather inequitable and an unjust approach to things.

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 honour reciprocal liability arising therefrom; it will demand that a person will enter into a deal as a package - enjoying the benefits thereof and enduring, at the same time, the liabilities therein. Because equity frowns at the unconscionable use of a person's rights at common law, it generally acts in conscience. Hence, it is stated in the Earl of Oxford's case (1615) 1 Rep. Ch. 1 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 the 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 v Army and Navy Hotel Co.* (1886) 34 Ch. D 43. *Queensland Amp Coal Co. v Davis v Martin* (1894) 3 Ch. 181; *Re Fire Proof Doors Ltd. Umney v Fireproof Doors Ltd.* (1916) 2 Ch. 142; *Cox v Dublin City Distillery* (No 2) 1 IR 345. The instant case on appeal, equity will impute an intention that the appellant, far from scuttling away from its valid obligation to the respondent, will fully honour its agreement, entered into in January 1978, to indemnify the respondent, 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.

There is no doubt that when P.W.1, on behalf of the respondent, went to the appellant with his shipping papers in Mid-January 1978 and the appellant verbally agreed to insure the goods, the appellant knew that the goods were already on board the vessel, which had already set sail, on 3rd January 1978, and was already on the high seas. The real issue was whether, by the verbal agreement in mid-January 1978, the contract had attached. As already stated, by our section 23

of the Marine Insurance Act, 1961, it had. A like situation arose in *S.S. Ardennes (Cargo Owners) v S.S. Ardennes (Owners)* (1951) 1 K.B.D. 55, where mandarin oranges were shipped by exporters from Cartagena in Spain and the ship owners agreed verbally to travel straight to London. They instead first travelled to Antwerp and before they eventually reached London, import duty had been increased and the price of mandarin oranges had fallen. On a claim for damages, the ship owners relied on a bill of lading made subsequent to the oral agreement. It was held that the oral agreement prevailed and that the exporters were entitled to give evidence showing that the oral agreement differed from the contents of the bill of lading.

Entering judgment for the Plaintiffs, Lord Goddard emphasized the oral agreement being the binding factor saying: "It is, I think, well settled that a bill of lading is not in itself the contract between the ship owner and the shipper of goods, though it has been said to be excellent evidence of its terms: *Sewell v Burdick*, per Lord Bramwell (10) and *Crooks v Allan* (11).

The contract has come into existence before the bill of lading is signed; the latter is signed by one party only, and handed by him to the shipper, usually after the goods have been put on board. No doubt if the shipper finds that the bill contains terms with which he is not content, or does not contain the term for which he has stipulated, he might, if there were time, demand his goods back; but he is not, in my opinion, for that reason, prevented from giving evidence that there was a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term. He is no party to the preparation of the bill of lading; nor does he sign it. It is unnecessary to cite:

(10) (1884) 10 App. Cas. 74, 105

(11) 5 Q.B.D. 38

authority further than the two cases already mentioned for the proposition that the bill of lading is not itself the contract; therefore, in my opinion, evidence as to the true contract is admissible."

The same principle was applied in a case of reinsurance in *Marine Insurance Co. v Grimmer* (1944) 2 All E.R. 197 where Scott, L.J., at page 119 described as an "insurance fallacy" the notion that the reinsurance attached from the date (June 3rd) of an amendment slip, holding that

"It is indisputable that on its true interpretation, it would have operated retrospectively to the loading of the insured goods upon the carrying ship."

It is on the same footing that in the instant case on appeal, the verbal agreement of mid-January 1978 operated retrospectively to 3rd January 1978, being the date of the loading of the parboiled rice.

One other matter needs to be mentioned as adding to the justification for the dismissal of this appeal, namely, that there are concurrent findings of fact of the two courts below in favour of the respondent. The practice of this court remains not to disturb such concurrent findings of facts, or even allow them to be reopened, unless those findings are wrong and are unmistakably so (*Lamai v Chief Orbih* (1980) 5-7 S.C. 28; *Ukpe Igbodo v Enarofia & Others* (1980) 5-7 S.C. 42 at 55). Nothing has been said by the appellant either in their oral argument or in their brief to warrant a disturbance, by this court, of the findings of fact of either of the two courts below in this appeal.

In the result, for the above reasons and the additional reasons which have been elaborately detailed by my learned brother, Obaseki, J.S.C., in his lead Judgment, this appeal must be, and is hereby dismissed with costs to the respondent hereby fixed at N300.00.

MUHAMMED LAWAL UWAIS, J.S.C.

I have had a preview in of the draft judgment read by my learned brother Obaseki, J.S.C. I entirely agree with the reasoning and conclusion therein.

The point that I found irksome in this appeal, and which the lower courts failed to determine, is whether or not the certificate of insurance (Exhibit B) and the marine open cover (Exhibit J) together or separately constitute a marine insurance Policy. These documents were issued to the respondent by the appellant.

By the provisions of section 23 of the Marine Insurance Act, 1961, the issuance of a Policy is not necessary before the existence of a contract of marine insurance can be established. The section reads: "23. A contract of marine insurance shall be deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the Policy is then issued or not, and to show when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract."

It is not in dispute, as both the trial court and the Court of Appeal had concurrently found, that a contract of marine insurance existed between the parties. To prove the terms of the contract, it is necessary, as provided by section 24 of the Marine

Insurance Act, 1961, to put in evidence the Policy of marine insurance. The question then is: what is a Policy of marine insurance? Section 2 of the Marine Insurance Act, 1961 vaguely defines "Policy" as "a marine Policy"; and section 3 of the Act defines a marine insurance as follows: "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure." By sections 25 and 26 of the Act, a marine insurance Policy must specify the name of the insured or of some person who effects the insurance on his behalf. It should also be signed by the insurer or by someone on their behalf. If the insurer is a Corporation, it is sufficient to append the seal of the Corporation.

Now, a close examination of the marine open cover (Exhibit J) and the certificate of insurance (Exhibit B) will show that both documents satisfy the definition in section 3 and contain the requisites given by sections 25 and 26.

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 a Policy? Exhibit B does not, on the face of it purport 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 1 of the exhibit - "This Company (i.e., 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.

This accords with the present-day practice of marine insurance. See Arnould's Law of Marine Insurance and Average, 16th Edition, paragraph 166 at p. 108. Furthermore, in form, Exhibit B does not correspond, even in a modified manner, with the form of a marine insurance Policy prescribed by the Marine Insurance Act, 1961.

In contrast, Exhibit J is described on its last page as a Policy. The sentence in which it is so described reads - "This Policy should be read carefully and its terms noted." Attached to Exhibit J are slips containing clauses in respect of the following subjects:-

1. Institute Cargo Clauses (All Risks)
2. Institute War, Strikes, Riots and Civil Commotion Clauses.
3. Institute Classification Clause.
4. Institute Replacement Clause.

These clauses constitute, among others, the conditions of the insurance.
Now, section 24 subsection (1) of the Marine Insurance Act, 1961 provides:

“24. (1) Subject to the provisions of any statute, a contract of marine insurance shall not be admissible in evidence unless it is embodied in a marine Policy in accordance with the form in the First Schedule to this Act or to the like effect ”

It needs to be mentioned that we are not here concerned with the admissibility of Exhibit J. Exhibit J is already in evidence. The point in issue is: is Exhibit J a marine Policy in the form prescribed by the Marine Insurance Act, 1961? It is very clear, even from a cursory examination of the First Schedule to the Act, that Exhibit J is not in the form prescribed by the Act. However, Exhibit J need not conform with the prescribed form because the statute provides that it is sufficient if it is "to the like effect". The words "to the like effect" simply mean similar or resembling the prescribed form - see *R v Harwick* 22 L.J.Q.B 216 and *R v General Medical Council* (1897) 2 Q.B. 203 at pp 207 and 208. So that the prescribed form can be modified to suit a purpose.

Let us now see if the essentials of the prescribed form have been met by Exhibit J. The form prescribed by the Marine Insurance Act, 1961, is the same in every respect as the form of marine Policy prescribed by the English Marine Insurance Act, 1906. The requisites of the English form, which are therefore the same as those of our prescribed form, are examined on pages 27 to 34 of Arnould's Law of Marine Insurance and Average, 16th Edition, paragraphs 29 to 46. Briefly, these are:

1. The name of some party, either real or nominally insured.
2. A description of the voyage or risk insured.
3. The subject insured.
4. The perils insured against
5. The name of the ship (except where the insurance is on ship or ships or on cargo to be carried by ships unknown).
6. The premium or consideration for the risk.
7. The sums insured.
8. The subscription of the underwriter.

There is no doubt that all the foregoing particulars are contained in Exhibit J.

Finally, apart from the fact that section 24 subsection (1) of the Marine Insurance Act, 1961 has made allowance for deviation from the prescribed form. Exhibit J would still have been valid as a Policy of marine insurance, given the provisions of section 22 of the Interpretation Act, 1964, which states:

"Where a form is prescribed by an enactment, a form which differs from the prescribed form shall not be invalid for the enactment by reason only of the difference if the difference is not in a material particular and is not calculated to mislead" See also the decision of this court in *Bucknor-Maclean vs Inlaks Limited* (1980) 8-9 S.C. 1 at pp 17-23 and 31-38. In my opinion, therefore/ Exhibit J qualifies as a Policy of marine insurance and I hold it to be so.

It is for these and the fuller reasons contained in the judgment of my learned brother Obaseki, J.S.C. that I too, would dismiss this appeal with N300.00 costs in favour of the respondent.

BOONYAMIN OLADIRAN KAZEEM, J.S.C.

I have had the opportunity of reading the draft of the judgment just read by my learned brother Obaseki J.S.C. It has succinctly dealt with all the issues raised in this appeal, and I entirely agree with and endorse all the reasons and conclusions arrived at therein. However, I wish to add the following few points.

In both his brief and oral submissions before us, Mr. Molajo, S.A.N., learned counsel for the appellant stressed the point that both Exhibits B and J, the certificate of insurance and the marine open cover respectively, could not operate as a marine Policy and that they were therefore, inadmissible by virtue of section 24 of the Marine Insurance Act, 1961. The point was also made that when Exhibit J was issued, it was not meant to be a Policy, but it was a counter-offer, offering to issue a Policy if the goods were shipped "on or after 1st February 1978" and on payment of the consideration (i.e. premium), The question therefore is: Could Exhibit J have been a counter-offer? The answer is that it could not.

Firstly, the appellants' case in their pleadings and at the trial was not based on that assertion. See paragraphs 7 and 8 of the amended statement of defence, which did not raise such an issue. Secondly, no evidence was led by the appellant in support of the exhibit being a counteroffer; and, the issue was never raised in the Court of Appeal. It is therefore doubtful whether it can be raised in this court for the first time. What then is Exhibit-J? The answer to this question has been provided in the lead judgment that it was for all intents and purposes "a marine open cover, a floating Policy of marine insurance," and when taken along with Exhibit B, they constitute the contract of marine insurance in this case.

It is to be noted that Exhibit L7, the bill of lading contains all the relevant particulars from which those shown on Exhibit B, the certificate of insurance was obtained, there was also uncontradicted evidence that it was one of the documents Exhibits L- L7-which the respondents handed over to the appellants at the time when the contract was being effected in January, 1978. (See the evidence of P.W. 1 at pages 37, 38 and 46 of the record). If that was the case, then the appellants must have been aware of the fact that the ship carrying the consignment of parboiled rice, which formed the basis of the contract of marine insurance, had left Bangkok on the 3rd of January, 1978. It is therefore strange, to say the least, that when Exhibit J was eventually issued by the appellants on 15th February, 1978, it bore the expression "for all shipments and or sendings on or after 1st February, 1978." Even assuming without agreeing, that it is true

that Exhibit J was issued in respect of shipments made "on or after 1st February, 1978;" and the appellants had no documents on or before 15th February, 1978, when Exhibit J was issued, to indicate that the consignment of parboiled rice had already been shipped since 3rd January 1978, at what point in time did they receive Exhibits L-L7? When also the appellants became aware of the fact of shipment from 3rd January 1978, after receiving Exhibits L-L7, why did they not repudiate the contract of marine insurance on the basis that

- (i) there was a breach of condition that the goods should be shipped "on or after 1st February, 1978;" or
- (ii) there was non-disclosure of the material fact that the ship had already set sail by 3rd January, 1978 instead of the time shown on Exhibit J?

Rather than do those things, the appellants proceeded to demand the premium payable on the Policy by their letter Exhibit N dated 23rd February, 1978, and that premium was duly paid on 24th February, 1978 as per the receipt of that date - Exhibit A. It is therefore untenable in my view for the appellants to submit that at the time Exhibit J was issued on 15th February, 1978, there was no longer any insurable interest since the ship had sunk with everything on board on 10th February, 1978.

Moreover, it is equally inconceivable for the appellants to contend that since the premium was not paid at the time the contract was concluded, there was no consideration and as such there was no valid contract of marine insurance, for it is within the intendment of sections 23 and 32(1) of the Marine Insurance Act, 1961 that a Policy of marine insurance can necessarily be concluded before the payment of premium; and that view was supported by the fact that Exhibit B, the certificate of insurance, which says that the appellant has insured the respondent for the risk, was issued on 23rd February, 1978 whereas the premium was not paid until a day after, on 24th February, 1978.

In the circumstances, I will also dismiss the appeal with costs assessed at N 300 to the Respondents.

CHUKWUDIFU AKUNNE OPUTA, J.S.C.

I have had the privilege of a preview of the lead judgment just delivered by my learned brother, and presiding justice, Obaseki, J.S.C. After reading that judgment, I heaved a great sigh of relief that at last justice has come out victorious. After listening to Mr Molajo's carefully reasoned and almost unanswerable arguments about section 24 of the Marine Insurance Act No 54 of 1961, I became apprehensive that this appeal might well be, yet, another fine example of what Lord Penzance in *Combe v Edwards* (1878) L.R.3 P.D. 142 aptly described as "the picture of law triumphant and justice prostrate." It is correct that this court must look hardships in the face rather than break down the rules of law or fail to give effect to any statutory provision (here section 24 of Act No 54 of 1961): see Lord Eldon, C. in the *Berkeley Peerage Case* (1811) 4 Camp 419. Insurance companies have far too often managed to get away with it on mere legal technicalities. But here we are not dealing with a mere technicality. We are dealing with the express provision of a statute. And in such a case, all arguments on the hardship of the case on the assured (here the respondent) must be rejected when we are pronouncing on what section 24 of the Marine Insurance Act 1961 means and what effect the compliance with or otherwise of that section will have on an assured who sets out as the Plaintiff to sue an insurance company as a Defendant.

After reading the lead judgment, I felt that I can hardly add anything to its lucid statement of the facts; its careful handling of the pleadings, its correct identification of the real issues in

controversy, its accurate and exhaustive exposition of the law presented with remarkable precision and succinctness, its incisive analysis of the authorities cited after all these, I cannot but agree with my learned brother that this appeal ought to be dismissed and for the reasons so ably advanced in the lead judgment. For the sake of further emphasis, however, I would like to comment on sections 23 and 24 of the Marine Insurance Act No. 54 of 1961. The marginal heading of section 23 is "When contract deemed to be concluded". That section stipulates: - "S.23 A contract of marine insurance shall be deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the Policy is then issued or not, and, to show when the proposal was accepted, reference may be made to the slip or cover-note or other customary memorandum of the contract."

The first live issue in the case on appeal was. Was there any contract of marine insurance between the parties? In other words, did the parties negotiate and did they agree that the Defendant/appellant should insure 86,612 new double jute bags of rice weighing 4,000 metric tons, which the Plaintiff/respondent ordered from Continental Enterprises (Bermuda) Limited, which said rice was shipped per "M-V. Eastern Saturn" which sailed from Bangkok on 3rd January 1978? If the answer to the above question is yes, then a subsidiary question will arise: When was that contract concluded? From the pleadings of the parties and the available evidence, the learned trial judge on this issue found as follows at p.71 of the record of proceedings:-"I do accept the Plaintiff's evidence that he went to the Defendant to insure his cargo being carried by "M.V. Eastern Saturn" in January 1978 and that it was on that basis the Plaintiff was given a marine open cover note No MA/MAT/78/MOC/0021 ... The Defendant admitted that after proper calculation, they demanded a necessary premium to cover the insurance of the cargo and they admitted further that the Plaintiff paid this demanded premium and he was issued a receipt. From the moment the proposal was made, accepted and demanded premium paid, a valid contract subsisting between the Plaintiff and the Defendant. This view is supported by section 23 of the Marine Insurance Act 1961."

The court of first instance found that there was a contract of marine insurance between the parties by the terms and tenor of section 23 of the Marine Insurance Act of 1961.

What of the Court of Appeal, did it also so find? At p.172 of the record of proceedings, Ademola, J.C.A., in his lead judgment commented: -

"The learned trial judge has rightly found on the uncontradicted evidence before him that the respondent ordered 4,000 metric tons of rice; that the ship carrying the rice left Bangkok by 3rd January 1978 and the respondent (sic) agreed to insure the goods on it; that there was insurance effected in January 1978 between the parties and cover note Exhibit J issued thereby satisfying section 23 of the Marine Insurance Act 1961..... These findings have not been faulted by Mr Molajo in his submission."

It is here significant to note that both courts -the trial court and the Court of Appeal have made concurrent findings in favour of the respondent that there was a marine insurance between the parties to this appeal. Consequently, the present appellant is confronted with the rather uphill task of upsetting the concurrent findings of these two courts. On solid authority, this court does not normally disturb such concurrent findings unless there is some miscarriage of justice or some violation of some principle of law or procedure. *Enang v Adu* (1981) 11-12 S.C., 25 at p.42; *Okagbue vs Romaine* (1982) 5 S.C. 133 at pp.170/ 171; *Lokoyi vs Olojo* (1983) S.C. 61 at pp 68-73; *Ojomu vs Ajao* (1983) 9 S.C. 22 at p.63.

Was there any miscarriage of justice or violation of some principle of law or procedure? The answer will be yes if in the two courts below there had been a wrong interpretation or a wrong

and mistaken application of the provisions of section 24 of the Marine Insurance Act 1961 on which Mr. Molajo relied. This is where section 24 of the Marine Insurance Act 1961 comes in for closer scrutiny. But before discussing that section, I might as well dispose of paragraph 4 of the Defendant's (now appellant's) statement of defence. In that paragraph, the Defendant pleaded:-

- "4 With reference to paragraph 15 of the statement of claim, the Defendant avers that the Plaintiff's claim was repudiated for many reasons, among which are the following, namely:-
- (a) Non-disclosure of material facts contrary to section 20 of the Marine Insurance Act No 54 of 1961, e.g.
 - (i) that the boat carrying the goods had left the port of shipment on 3rd January, 1978, a date outside the date stipulated by the open cover;
 - (ii) that the boat had been abandoned by the crew on the 10th February, 1978, and had been declared lost when he on the 23rd February, 1978, made his declaration under the open cover and paid the premium thereon,"

Contracts of insurance are contracts uberrimae fidei. They are voidable on a number of special grounds. One of such special grounds is failure to disclose a fact material to the risk. Such non-disclosure renders the contract voidable. If a contract is voidable as opposed to void ab initio, then it is still a contract until it has been successfully avoided. In this case, it was not sufficient merely to plead non-disclosure - No - the onus was on the Defendant to adduce evidence to prove the alleged non-disclosure. This the Defendant failed to do. What is more, on the evidence of the Plaintiff and the exhibits he tendered, both the trial court and the Court of Appeal held that the Defendant knew exactly the risk it was called upon to insure and that the Plaintiff was not guilty of any material non-disclosure. This would, in normal circumstances (if there were no section 24) have been the end of this appeal. But then our Marine Insurance Act No. 54 of 1961 has a section 24.

That section stipulates:-

"S.24(1) Subject to the provision of any statute, a contract of marine insurance shall not be admissible in evidence unless it is embodied in a marine Policy in accordance with the form in the first schedule to this Act or to the like effect. The Policy may be executed and issued either at the time when the contract is concluded, or afterwards; and subject to the provisions of this Act and unless the context of the Policy otherwise requires, the terms and expressions mentioned in the said first schedule shall be construed as having the scope and meaning in that schedule assigned to them."

Apparently then, it looks as though what has been given with one hand by section 23 has been taken away with the other hand by section 24. This is what led the two courts below to take a mistaken view of Mr. Molajo's valid submissions. For example, the learned trial judge M. B. Belgore, J. at pages 77/78 of the record of proceedings commented as follows:-

"The last point raised by the Defendant was that section 24 of the Marine Insurance Act made other evidence on marine Policy inadmissible except the Policy itself. The Defendant did not make this point an issue in the pleading the issue of non-existence of the Policy was never mentioned

Furthermore, the marine Policy document was still with the Defendant, they did not release it and now they are accusing the Plaintiff of not producing it. The principle laid down in section 148 (a) Evidence Act should apply to the action of the Defendant."

With the greatest respect, the learned trial judge got it all wrong. Section 23 merely dealt with a specific issue, namely, when a contract of marine insurance shall be deemed to have been concluded. Section 24 dealt with another distinct and specific issue, namely, how a contract of marine insurance is to be proved and in express terms, it specifies the Policy as the only authentic method of proof allowed. There is therefore a statutory obligation on anyone suing on a marine insurance to rely solely on the Policy as evidence in proof of such contract as any other evidence "shall not be admissible". Mr. Molajo was here on a very strong wicket.

It is not a question of pleadings (and I must hasten to add that one does not plead law); it is not an issue of presumption so that section 148 of the Evidence Act becomes inapplicable. It is a simple issue of complying with the unambiguous words of a statute. Section 24 can, in an appropriate case and with an unscrupulous insurance company, create problems for an assured if the insurance company withholds the Policy, thus making it impossible for the assured to prove the contract of marine insurance, but that is no reason why the courts should refuse to enforce the clear provisions of that section. All arguments on hardships of a case either on one side or the other, must be rejected, when we are pronouncing what the law is; for such arguments are only quick-sands in the law, and, if indulged, will soon swallow up every principle of it - *Yates v. Hall* (1785) 1 T.R. 80. If section 24 of the Marine Insurance Act 1961 is thought to be oppressive or inconvenient, application to correct or amend it or repeal it must be made elsewhere and not to judges who are bound to interpret and uphold the law as it is and not as it ought to be:- *Bishop of London v Ffytche* (1800) 1 East 495. In this appeal, the appellant will lose and if there was a Policy tendered as proof of the marine insurance as required by section 24 No. 54 of 1961.

Was there such a Policy? Fortunately for the respondent, the answer is yes. Exhibit J as copied in pp. 93-97 of the record of proceedings, casts some doubt as to whether or not it was a Policy. But in its original form, in the case it is apparent and beyond doubt that Exhibit J is a Policy as defined by section 24 in the Marine Insurance Act of 1961. What is surprising is that this fact seemed to have eluded learned counsels on both sides and the trial court and the court below. With Exhibit J satisfying the requirement of section 24, the main thrust of Mr. Molajo's spirited attack has been effectively and completely neutralised and demolished. The appeal based solely on that section is thus doomed to fail. In the final result, for the reasons given above, and for the fuller and more comprehensive reasons given in the lead judgement of my learned brother Obaseki, J.S.C., which I now adopt as mine, I too will dismiss the appeal with ₦300.00 costs to the respondent.

10.4 REMARKS

All insurance contracts involve the taking of risk and therefore the occurrence of the event insured against cannot frustrate the contract. It is ludicrous to say the least, to tell the respondent that the loss of goods on the M/V Saturn has put an end to the contract he concluded with the appellant, for that was the very thing that brought them together in the first instance.

10.5. REFERENCES

1. *Abolade Agboola Alade v. Salawu Jagun Olukade* (1976) 2 S.C. 183 at 189.
2. *Diamond Alkali Export Corporation v. Bourgeois* (1921) All E.R. Rep. 283 at 289-291.
3. *Scott v Barclays Bank Limited* 14 Lloyd L. Rep. 142 at pages 114 & 115.

4. *English Insurance Co. v National Benefit Insurance Company Limited* (1928) All E.R. Rep. 441 at pp. 443-444; (1929) AC.114 at 119 & 121.
5. *Osikoya v. Salvador Hurtado Solaz* 4 WACA 91
6. *Liberican Insurance Agency Inc. vs Mosse* (1977) 2 Lloyds Rep 560 QBD. at p. 568.
7. *Wooding vs Monmouthshire and South Wales Mutual Indemnity Society Limited.* (1939) 4 All ER. 570 at 581.
8. *Nwaboku v. Ottih* (1961) 1 All NLR. 487 at 490.
9. *Odulaja v. Haddad* (1973) 11 S.C. 3457.
10. *Nigeria Maritime Services Limited v. Alhaji Bello Afolabi* (1978) 2 S.C. 79.
11. *Ross v. Army and Navy Hotel Co.* (1886) 34 Ch. D 43.
12. *Queens land Amp Coal Co. Davis vs Martin* (1894) 3 Ch. 181.
13. *Re FireProof Doors Limited. Umney vs Fireproof Doors Limited.* (1916)2 Ch. 142.
14. *Cox v Dublin City Distillery (No 2)*1 IR 345.

11.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT OF NIGERIA

DATE: 4th May, 2007

SUIT NO: S.C. 333/2001

JUDGE: Sylvester Umaru Onu, J.S.C.
Dahiru Musdapher, J.S.C.
Sunday Akinola Akintan, J.S.C.
Mahmud Mohammed, J.S.C.
Walter Samuel Nkanu Onnoghen, J.S.C.

YADIS NIGERIA LIMITED

(Plaintiff/Appellant)

vs

GREAT NIGERIA INSURANCE COMPANY LIMITED

(Defendant/Respondent)

11.2. REPORTS/FACTS/ISSUES.

This is an appeal against the judgment of the Court of Appeal holden at Lagos in appeal No. CA/L/390/99 delivered on 30th October 2000 in which it dismissed the appeal of the Appellant against the judgment of the Lagos State High Court in suit No. LD/960/93 delivered by O.O. Obadina J (as he then was) on the 14th day of November 1997.

11.3. DECISION OF COURT.

JUDGMENT

WALTER SAMUEL NKANU ONNOGHEN, J.S.C.

On the 8th day of October, 1992, the Appellant and the Respondent entered into an insurance contract by which the Appellant insured against fire, the Appellant's stock and materials in trade consisting of tyres of various sizes and contained in the sales shop, forming part of a building occupied as business premises by the Appellant at No. 32 Enu-Owa Street Lagos for the sum of ₦3.5 million.

It is the case of the Appellant that sometime between October and November, 1992, certain vandals also Known as "Area Boys" began acts of stealing and/or destruction of properties on Lagos Island where No 32 Enu-Owa Street is situate necessitating the appellant re-locating the insured goods from No 32 Enu-Owa Street Lagos to another location at Block 3 Ijegun Road, Ikotun-Egbe, Lagos State. Appellant contends that it wrote a letter dated 2nd November, 1992 to the Respondent informing the Respondent that the Appellant had moved the insured goods from No. 32 Enu-Owa Street, Lagos to Block 3, Ijegun Road, Ikotun-Egbe, Lagos State and that the said 'Letter was delivered to the office of the Respondent on the 7th day of December, 1992, Appellant further stated that during the night of 10th and 11th January, 1993 a fire incident occurred at the Appellant's new warehouse at Block 3 Ijegun, Ikotun-Egbe resulting in the destruction of the insured goods which incident was reported to the Respondent who denied liability.

On the other hand, the Respondent denied receipt of the letter allegedly informing it of

the movement of the insured goods from the insured premises to the new location but admitted receipt of the letter notifying it of the fire incident which resulted in the Respondent dispatching its surveyor and Claims Manager to No 32, Enu-Owa Street, Lagos where the insured goods were stored under the Policy to access the loss but the said officers reported that there had been no fire incident at the said address which information was conveyed to the Appellant vide a letter dated 13th January, 1993. On the 15th day of January, 1993, the Appellant wrote to inform the Respondent that the Appellant had changed the location of the goods from 32, Enu-Owa Street, Lagos to Block 3, Ijegan Road, Ikotun Egbe Lagos State and alleged that it had earlier informed the Respondent of the change through a letter of 2nd November, 1992.

It is the case of the Respondent that it got the information that the appellant had moved to another location for the first time from the Appellant's letter of 15th January 1993, to which a Photostat copy of the letter of 2nd November 1992 was attached. The Respondent contends that it never received the letter of 2nd November 1992. Appellant thereafter prepared a list of the properties burnt in the fire incident and forwarded the same to the respondent and thereafter instituted an action in suit No. LD/960/93, in which it claimed the following reliefs: -

“Whereof the Plaintiff claims from the Defendant the sum of ₦3, 003,610.00 (Three Million, Three Thousand and Six Hundred and Ten Naira) being the amount due and payable as at 11th January, 1993, to the Plaintiff as a claim due on Fire Policy No. FBP/1012369/L from the Defendant in result of the fire accident that destroyed the insured goods during the night of 10th and 11th January 1993.

And the Plaintiff also claims interest on the said sum of ₦3, 003,610.00 (Three Million, Three Thousand and Six Hundred and Ten Naira) at the rate of 30% per annum from 11th January, 1993 until judgment and thereafter at the rate of 30% per annum until final liquidation of the whole debt/claim together with costs.”

As stated earlier in this judgment, the appellant, as Plaintiff in the trial court, lost the action and consequently appealed to the Court of Appeal held in Lagos and lost. The present appeal is therefore a further appeal by the Plaintiff.

In the Appellant's brief of argument filed on 22/5/02 by learned counsel for the appellant, the following issues have been identified for determination: -

1. “Whether the Court of Appeal, Lagos, by failing to pay attention to or make a consideration of the Appellant's Reply Brief dated 27th April 2000 in the hearing and determination of the Appellant's appeal before it, had not denied the Appellant its right to a fair hearing, thus occasioning a failure of justice.
2. Whether the single issue formulated by the court below, upon which it determined the appeal truly captured and embraced the six germane issues formulated by the appellant and whether, in light of that, the court could be said to have done substantial justice in this case.
3. Whether the Court of Appeal, Lagos, was right in holding that the only credible evidence, which can fix the Respondent Company with the knowledge of the content of the original of Exhibit “D”, is the signature of the designated official of the company.
4. Whether because of the mere fact that the Respondent failed to give its consent to the relocation of the insured goods to a new location before the occurrence of the risk

insured against, the insurance Policy became vitiated by that fact.

5. Was the court below right in law to hold that the Appellant did not prove that the original of *Exhibit D* was delivered to the Respondent, notwithstanding the trial court's holding that the said *Exhibit D* is not a forgery, a holding the court below did not reverse."

It is important at this stage to mention the fact that the respondent has cross-appealed against the decision of the Court of Appeal and filed a cross-Appellant's Brief on 5th October 2006, in which learned counsel for the Respondent/cross-Appellant formulated a single issue for determination. The issue is as follows: -

"Whether in the light of clause 8(c) of *Exhibit C*, the Court of Appeal was correct in its pronouncement that "if *Exhibit "D"* has been signed by the official of the Defendant/Respondent that would have sufficed for proof that the original was delivered and the mere fact that the Defendant/ Respondent later failed or refused to sanction the re-location of the stocks by endorsing the Policy to that effect will not avail it." On the other hand, learned counsel for the respondent formulated the following issues for the determination of the main appeal-

- (i) Whether the failure of the Appellant to seek and obtain the leave of this Honourable Court to appeal against the concurrent findings of fact of the Court of Appeal and court of first instance and to disclose exceptional circumstances pursuant to which it may appeal against the concurrent findings of fact of the court below and the court of first instances renders this appeal incompetent.
- (ii) Whether the Plaintiff/Appellant was in breach of clause 8(C) of the Insurance Policy (*Exh. C*) by moving the insured goods from 32 Enu-Owa Street, Lagos (the location where the goods were insured) to No. 3 Ijegan Road, Ikotun, Egbe resulting in the breach of a condition of the insurance contract and thereby rendering the insurance contract void and unenforceable.
- (iii) Whether the Plaintiff/Appellant committed a breach of the Documentary Evidence Warranty in the insurance contract, thereby vitiating the insurance contract.
- (iv) Whether the Court of Appeal was right in formulating a single and "cardinal issue," which in its opinion exhaustively determined the appeal before it."

I have to observe that the Appellant's issue No. 1 does not arise from the grounds of appeal filed by the Appellant in this case. It is settled law that for an issue to be competent, it must have been formulated from the ground(s) of appeal filed in the appeal which ground(s) must attack the *ratio decidendi* of the case. The Appellant's issue No. 1 is more of a preliminary objection than an issue for determination. I have gone through the record and have seen no Notice of Preliminary objection filed by the Respondent upon which Appellant's said issue 1 could be predicated. In the circumstance, particularly as the said issue does not arise from the grounds of appeal and there being no preliminary objection on which the said issue could be grounded, I hold the view that Appellant's issue No. 1 is grossly incompetent and is consequently struck out. In arguing Appellant's issue 1, learned counsel for the appellant stated that appellant filed a reply brief before the lower court on the 27th day of April 2000 which was adopted in argument by learned counsel for the Appellant but complained that no reference whatsoever was made by the lower court to the argument in the said reply brief in the judgment of that court neither was any reason given by the court for

ignoring the argument canvassed therein; that the failure of the lower court to consider the argument in the reply brief amounts to a denial of its right to fair hearing as enshrined in *section 36(1) of the Constitution of the Federal Republic of Nigeria 1999*.

Learned Counsel also cited and relied on the following cases in support of his contention on the matter, namely *Onyemeh v. Eghuchulam (1996) NWLR (Pt. 448) 255 at 265*; *Tunbi v. Opawole (2000) 2 NWLR (Pt. 644) 275 at 288*. Learned Counsel for the Respondent addressed the argument in Appellant's issue No. 1 in his issue No. IV in the Appellant's brief of argument in which -learned counsel referred the court to the judgment of the lower court particularly the first line of the last paragraph of page 208 of the record to show that the lower court took cognizance of the reply brief in its judgment; that the proper issue is not whether the lower court considered all the issues but whether it was entitled to formulate a single issue in determining the appeal; the Appellant's reply brief was a repetition of its brief of argument.

It is the duty of the Appellant to demonstrate to the satisfaction of this Court the nature of or legal points canvassed in the reply brief and the possible effect they had or would have had on the appeal thereby leading the court to conclude that the failure of the lower court to consider the said points in its judgment resulted in a miscarriage of justice or, as canvassed by learned counsel for the appellant denial of the right of fair hearing. It is my considered view that it is not enough for a party to complain that its arguments were not considered in a judgment without going further to show how relevant or substantial the said argument is to the issues in controversy between the parties. I hold the further view that reply briefs are normally filed in answer to substantial point(s) of law or fact raised in the Appellant's Brief, not as an opportunity for the appellant to reargue his appeal. In the instant case, I have gone through the issues for determination before the lower court, the Appellant's and Appellant's Briefs, as well as the reply brief in question and have not seen any difference in substance between the argument in the Appellant's brief and that proffered in the Reply Brief.

The issues for determination before the lower court, as formulated in the Appellant's Brief, are as follows-

1. Whether the trial judge was in error to have held that the stamp print of the Defendant company on Exhibit D did not establish the *ipse dixit* that the original of *Exhibit D* was delivered by the Plaintiff company to the Defendant company.
2. Whether the learned Judge made a correct approach in law by applying *S. 91 of the Evidence Act* in determining whether or not the original of exhibit D was delivered to the Respondent company and the weight to attach to it.
3. Whether the learned trial judge on the proper evaluation of evidence led in this case erred in holding that the insurance contract ceases to attach as regards the property insured once the property insured is removed to any building or place other than that in which it is in the Policy stated to be insured unless the sanction of the Defendant company is obtained.
4. Whether the learned trial (sic) (judge) erred in holding that the original of exhibit D was not delivered to the Defendant company when the said Defendant company failed to prove that *exhibit D* was a forgery.

5. Whether in the circumstances of this case, it was the case of the Defendant/Respondent at the trial that the Plaintiff/Appellant breached the documentary evidence of warranty contained in the Policy *exhibit C*.
6. Whether the learned trial judge properly discharged his duty of dispassionately evaluating all the evidence adduced in this case and arrived at the correct decision.”

The submissions of learned counsel for the Appellant on the above issues by way of summary and as contained in the Appellant’s brief are as follows: -

1. The learned trial judge misdirected himself in holding that the stamp print of the Defendant’s company on exhibit D did not establish that the original exhibit D was delivered by the appellant and received by the respondent on 07/12/92. *Aeroflot Soviet Airline v. UBA Limited (supra)*.
2. The learned trial judge erred in law by applying *S. 91 of the Evidence Act* in determining whether or not the original of *Exhibit D* was delivered and received by the respondent, and therefrom held that because the maker was not called, it was not possible to determine what was received. *Aeroflot case (supra)*
3. The learned trial judge was in error when he failed to take into consideration the evidence led at the trial and facts established in determining the implication of the appellant relocating the insured goods exposed to losses not covered by the insurance on the contract of insurance between the parties. See *Yakubu v. Omaiboje (1998) 1 NWLR (Pt. 559) 708 at 719*.
4. The learned trial judge was in error when, after perfectly agreeing that the respondent failed to prove that exhibit D was forged nevertheless went on to hold that its original was not delivered to the respondent. *Nwobodo v. Onoh & ors (1983) 14 NSCC 470*.
5. The learned trial judge misdirected himself by setting up for the respondent in particular and, the parties generally, cases they did not make for themselves at the trial and on that basis found against the appellant. See *Omoborinola vs Military Governor, Ondo State (1998) 14 NWLR (Pt. 584) 89*.
6. The learned trial judge failed in his duty to dispassionately evaluate the evidence led at the trial and thereby occasioned a miscarriage of justice against the Appellant. *Onwuchuruba v. Onuchuruba (1993) 5 NWLR (Pt. 292) 85.*”

On the other hand, learned counsel for the Respondent submitted by way of conclusion in the appellant’s brief as follows: -

- (i) The Respondent submits that the Plaintiff at the lower court did not discharge the burden of proof on him in the action. Since the Plaintiff had admitted that the insured goods were moved from 32 Enu-Owa Street, Lagos to Block 3 Ijegan Road, Ikotun, Lagos State, it was its duty to prove that the conditions of exhibit C dealing with the change of location of the insured goods were fully complied with. Although the Plaintiff stated that the letters informing the Defendant about the change in location were delivered to the Defendant by hand, it did not call the person who delivered it, as from the pleadings it was clear that the Defendant had made the delivery of the said letter an issue.
- (ii) From the findings and decisions of the learned trial judge, it is clear that Exhibit C

was given a proper examination. All the learned trial judge did was to follow the known principles of law in interpreting provisions of the said exhibit.

The above submissions provoked the following submissions in the reply brief, which learned counsel complains have not been taken into consideration in the judgment of the lower court.

1. The Respondent conceded in paragraph 5.1 page 7 of the Appellant's Brief that this court can and should disturb the findings of the lower court if it is found by this court that the lower court's findings are perverse or that there is a miscarriage of justice or a violation of some important principles of law or procedure, which if corrected, the findings cannot stand. See *Ojibah v. Ojibah (1991) 5 NWLR (Pt. 191) 296 at 314*
2. It has been painstakingly shown that the trial court committed serious errors of law in that: -
 - (a) After holding that Exhibit D is not a forgery, it still denied it the evidential value due to it.
 - (b) It confused the meaning and purport of *S. 91 of the Evidence Act*, which only requires the production of the maker of a document as a witness and not the deliverer and used the section to hold that the non-production of the deliverer is fatal to the Appellant's case.
 - (c) While the said *section 91 of the Evidence Act* deals with the admissibility of a document upon the production of the maker, as a witness the court admitted exhibit D, the maker-PW1 having been called as a witness by the Appellant, the trial court veered off the ambit and purport of the section when it sought to use and did use it to deny the exhibit of its evidential value and weight even though the section does not deal with attachment of evidential weight.
 - (d) The trial court was in serious error to hold that the original of *exhibit D* was not received by the respondent despite its holding that *Exhibit D* is not a forgery.

It is respectfully submitted that the judgment is flawed in all material respects and is perverse and has consequently occasioned a miscarriage of justice to the prejudice of the appellant and should be overturned by this Court..." At page 208 the lower court stated thus- "When this appeal came before us on the 25 of September 2000 for argument, Chief Aribisala, learned counsel for the Plaintiff/Appellant adopted the Appellant's brief filed on 29th December 1999 and the reply brief filed on the 27th April 2000 and urged that the appeal be allowed. I have had a careful study of the issues formulated by the two parties for determination. It is my view that all the issues can be summarized into one cardinal issue or point: that is whether the Plaintiff/appellant could be said, on the evidence before the court below, to have noticed (sic) (notified) the Defendant/ Respondent of the relocation of the insured stock from 32, Enu Owa Street, Lagos to 3 Ijegun Road, Ikotun Egbe and obtained the sanction of the Defendant/company, the Respondent in this appeal, which sanction is signified by endorsement on the Policy document by or on behalf of the Company."

I have to go to this length to demonstrate clearly that the non-consideration or reference to the argument in the reply brief specifically has not resulted in a denial of the Appellant's right to fair hearing nor has it occasioned a miscarriage of justice, the arguments therein being nothing more than a further amplification of the points already raised and dealt with in the Appellant's brief and which points were duly taken

into consideration by the lower court in arriving at its single issue for determination and the decision now on appeal before this Court. It is therefore clear that the Appellant's issue 1 has no substance whatsoever and is consequently resolved against the Appellant.

On issue 2 learned counsel for the appellant reproduced the six issues submitted for determination by the lower court, which had earlier in this judgment been reproduced during the consideration of issue No. 1, and stated that the lower court ignored the said issues and proceeded to formulate a single issue which it proceeded to determine the appeal thereon; that it is the duty of the lower court to consider all the six issues raised and that the failure to so act occasioned denial of fair hearing to the appellant, relying on the case of *Katto v. C.B.N (1999) 6 NWLR (Pt. 607) 390 at 411-412*; that the single issue formulated by the lower court and on which it determined the appeal did not accommodate most of the six issues raised by the Appellant, particularly issues 2, 3, 4, 5, and 6. Learned Senior Counsel then proceeded to reargue issues 2, 3, 4, 5 and 6 and submitted that the parties understanding of clause 8(c) of the insurance contract is that what was required of the Appellant in event of relocating the insured goods was to notify the Respondent company by a letter which was duly done by the Appellant and that the trial court erred in holding otherwise; that the trial court erred in holding that the original of exhibit D was not delivered to the Respondent when the Respondent failed to prove that *exhibit D* was forgery which failure establishes the fact that exhibit D is credible, cogent and deserves the necessary weight without more, relying on *A-G - Oyo State v. Fairlakes Hotels Limited (1989) 5 NWLR (Pt. 121) 255*; *Yeni v. Dada (1978) 11 NSCC 147*; *Nwobodo v. Onoh (1983) 14 NSCC 470*; that if the lower court had not ignored the above submissions its decision would have been different. Learned Counsel for the Respondent responded to the argument in Appellant's issue No. 2 in the Appellant's issue IV and submitted that the only issue for determination is not whether the Court of Appeal considered all the issues raised by the Appellant but whether it was entitled to formulate a single issue in determining the appeal; that the lower court was right in formulating the single issue which was sufficient to decide and exhaustively dealt with the appeal before the court, relying on *Labiya v. Moberuagba (1992) 8 NWLR 139 at 158* and urged the court to resolve the issue against the Appellant.

Appellant's reply brief filed on 26/10/06 had nothing substantial to urge on the court on the issue. It is not disputed that the learned counsel for the appellant submitted six issues for determination by the Court of Appeal, which court, rather than adopt the said issues, formulated its single issue, which it used in determining the appeal. *It is settled law that an issue or issues formulated for the determination of an appeal must arise from the ground(s) of appeal filed in the appeal, which ground(s) must attack the ratio decidendi of the judgment of the lower court.* The question that calls for determination in the issue under consideration, in my opinion, is therefore whether the single issue formulated for determination of the appeal by the lower court and on which it proceeded to determine the said appeal arose from the grounds of appeal filed in the appeal by the Appellant. There is no disputing the fact that an appellate court has the right, indeed duty, where appropriate to formulate issue(s) for the determination of an appeal particularly where it is of the opinion that the issue(s) as formulated by learned counsel does/do not deal with the substantive issue in controversy in the appeal provided the issue(s) is/are consistent with the ground(s) of appeal filed in the appeal. It is not the complaint of the appellant that the single issue formulated by the lower court did not arise from the grounds of appeal.

What, therefore, is the issue formulated by the lower court? At pages 207 to 209 of the record, the lower court, in its judgment now on appeal referred to and reproduced the six issues formulated by learned counsel for the Appellant for determination and the two issues formulated by learned counsel for the Respondent and stated, inter alia, as follows: - "I have had a very careful study of the issues formulated by the two parties for determination. It is my view that all the issues can be summarized into one cardinal issue or point: that is whether the Plaintiff/Appellant could be said, on the evidence before the court below, to have notified the Defendant/ Respondent of the relocation of the insured stock from 32, Enu Owa Street, Lagos to 3 Ijegan Road, Ikotun Egbe and obtained the sanction of the Defendant/ company, the Respondent in this appeal, which sanction is signified by endorsement on the Policy document by on behalf of the company."

It must be kept in focus that the cause of action arose from a contract of insurance, which contract is supposed to contain the terms and conditions of the same, including the rights and liabilities of the parties thereto. It follows, therefore that the fulcrum of such an action is the contract itself and for a Plaintiff to succeed in an action under such a contract, he/it" must bring itself/himself within the terms and conditions of the Policy or contract. Looking at the facts of the case, the reasons for the judgment of the trial court, the grounds of appeal before the lower court and the issues formulated therefrom by learned counsel for the parties particularly that for the Appellant vis-a vis the single issue, formulated by the lower court, I hold the considered view that the said issue captured the crux of the matter and its determination completely disposes the appeal one way or the other.

I hold the further view that the single issue so formulated has not resulted in any miscarriage of justice, the substance of the dispute between the parties being substantially the interpretation to be given to the terms and conditions contained in clause 8(c) of the Insurance Policy/Contract and issues 2,3,4,5 & 6 are directed in aid of the version of interpretation preferred by the Appellant. I hold the view that whether *Exhibit D* is a forgery or not or whether it was received by the respondent or not, the issue remains whether, by the provisions of clause 8(c) of the Insurance Policy or Contract such a receipt without more is sufficient to invoke the liability of the Respondent in terms of the insured goods. I therefore resolve issue 2 against the appellant.

On issue 3 learned counsel for the Appellant submitted that the lower court was in error in holding that the only credible evidence which can fix the Respondent company with knowledge of the contents of the original of exhibit D is the signature of the designated official particularly as there was no provision in the said exhibit for the signature- of such an official and that the Respondent is legally responsible for the default of its staff, relying on the case of *Agbanelo vs UBN Limited (2000) 7 NWLR (Pt. 666) 535 at 550 - 551*; that the stamp print could only have found its way to exhibit D through the act of a staff of the Respondent who must have acted upon the receipt of the original of exhibit D; relying on *Aeroflot Soviet Airlines vs DBA Limited (1986) 17 NSCC (Pt. 1) 698 at 728*; that the Respondent is trying to take advantage of the absence of a signature on exhibit D to deny receipt of the original which learned counsel contends, is unconscionable; that though the onus of proof of the receipt of the original of exhibit D rests with the Appellant, once it has adduced a prima facie evidence to show delivery of the original of Exhibit D to the Respondent, the onus shifts to the Respondent to debunk the evidence; relying on *Nigerian Maritime Services Limited vs Afolabi (1978) 2 S.C 79*; *Elema vs Akenzua (2000) 13 NWLR (pt. 683) 93 at 104*; *Hauma vs Akpe Ime (2000) 12 NWLR (Pt. 680) 156 at*

I have carefully gone through the Appellant's Brief and have not found where the argument has been canvassed by learned counsel for the Respondent in answer to the arguments of learned counsel for the Appellant summarized above. The above notwithstanding, I hold the view that the issue as to whether a document is received or not is purely an issue of fact to be proved by evidence and that it is the primary duty of the trial court to evaluate evidence, make finding of facts, and apportion probative value thereto and not that of the appellate court to so do particularly where the findings of facts so made by the trial court had not been demonstrated to be perverse. In the instant case there is concurrent finding of fact to which learned counsel for the Appellant also agrees, that there is no signature of the staff who purportedly received the original of *exhibit D* and affixed the stamp of the Respondent to the said exhibit signifying the said receipt on the document, *exhibit D*. It is on this basis that the courts have held that **Appellant** has failed to prove the receipt of the original of *exhibit D*, which finding I find to be supported by the evidence on record and therefore very sound.

That apart, I had earlier stated that the substantive issue is really not whether Exhibit D was received by the respondent, but whether, by the provisions of *clause 8(c) of Exhibit C*, such a receipt was sufficient to attach liability to the Respondent with regard to the insured goods. It follows, therefore, that there is some aspects of this issue to be determined when considering issue 4. For now, I find no reason why I should disturb the concurrent findings of fact with regard to Exhibit D and therefore resolve the issue against the Appellant.

On issue 4 learned counsel for the Appellant submitted that the Court of Appeal erred in holding that appellant has to prove that before the occurrence of the destruction by fire of the goods insured, it had obtained the sanction of the Respondent signifying the endorsement on the Policy by the Respondent; that all that the Appellant is required to prove is that it notified the Respondent of the relocation of the insured goods from No. 32 Enu-Owa Street, Lagos to Ijegun. Road, Ikotun Egbe, Lagos State, before the occurrence of the loss; that upon notification, it became the duty of the Respondent to signify its consent by due endorsement on the Policy.

Learned counsel then referred to the evidence of DW1, DW2, DW3 and submitted that the parties understanding of clause 5(CJ) of the Insurance Policy, *exhibit C*, is that all that was required of the Appellant in event of relocation of the insured goods was notification of the respondent by a letter based on which the Respondent was promptly to act on the letter of notification by giving its consent by way of endorsement on the Policy and that the Appellant therefore was discharged of any further obligation to procure the necessary sanction and endorsement.

Learned counsel for the Respondent argued the issue as his issue 2 in the appellant's brief of argument. After reproducing *clause 8(C) of Exhibit C*, learned counsel for the Respondent submitted that a breach of clause 8(C) render the contract void and that the submission of his learned friend to the effect that what is required of the Appellant is notification of relocation of the insured goods is to read into the contract what was never there. Learned Counsel then submitted that the Appellant was in breach of clause 8(C), particularly as it had not discharged the burden of proof on it that it complied therewith.

What does *clause 8(C) of Exhibit C* state? It provides thus: -

"Under any of the following circumstances, the insurance ceases to attach as regards the property affected unless the insured, before the occurrence of any loss or damage, obtains the sanction of the company signified by endorsement upon the Policy by or on behalf of the company.

3. If the property insured is moved to any building or place other than that in which it is herein stated to be insured."

It is settled law that where parties are ad idem on the terms of a contract, the function of the court is to give effect to the terms without more, as it is the duty of the court to give effect to the intention of the parties. In the instant case, the contract is in writing, Exhibit C, and the court is faced with the construction of clause 8(C) supra. The question that consequently arises is not what the parties have intended to do by entering into Exhibit C but what is the meaning of the words as used in clause 8(C). *See Ladipo vs Lajide (1973) 5 S.C 207 at 225*. It follows, therefore, that the submission of learned counsel for the Appellant as to what the parties understood clause 8(C) of exhibit C to mean does not arise, the same being very irrelevant, the issue being the meaning of the words used in the said *clause 8(C) of exhibit C*.

It is clear that clause 8(C) is a condition in the Insurance Policy, a breach of which clearly gives the aggrieved party an excuse for non-performance of his side of the bargain- or contract. The aggrieved party may, however, decide to affirm the contract after being aware of the breach of the condition if he so desires - he has the election.

There is no dispute as to the fundamental nature of clause 8(C). What is being disputed is whether the said clause 8(C) is satisfied where there is only notification of the relocation of the insured goods from No. 32 Enu-Owa Street, Lagos where they were insured to Block 3 Ijegun Road, Ikotun, Egbe, in Lagos State where there were lost without approval or sanction of the Respondent first had and obtained by endorsement of same on the Policy document, exhibit C. In other words, does the Appellant need to do more than write to notify the Respondent of the relocation of the insured goods? There is no dispute that the Appellant relocated the insured goods as stated in this judgment but does the relocation comply with the provisions of clause 8(C) of Exhibit C? To my mind, the 8(C) are very clear and unambiguous. At pages 114 to 115 of the record, the learned trial judge, in dealing with the issues, stated thus: - "From clause 8(C) of Exh. C, if by any reason the Plaintiff should remove the insured goods from No. 32 Enu Owa Street to any other building, the insurance would cease to attach to the insured goods, unless the Plaintiff had obtained the approval or ratification of the Defendant in respect of the removal before the (sic) occurrence of any loss or damage. The approval or ratification shall be by endorsement of the Policy. A cursory look at *Exh. C* clearly shows that there is no approval or sanction by the Defendant, signified by any endorsement upon the Policy document *Exh. C*. The parties are bound by their agreement.

Having removed the insured goods from 32 Enu Owa Street, Lagos, to Block 3, Ijegun Road, Ikotun Egbe, I think the Plaintiff had a duty to see that the approval or sanction of the Defendant was obtained by the Defendant endorsing the Policy document-*Exh. C*. *Clause 8(C) of Exh. C* does not say that the Plaintiff should write to the Defendant informing the Defendant of the removal of the insured goods to another building or place. What clause 8(C) of the Policy document *Ex. C* says is that the Plaintiff must obtain the approval of the Defendant by endorsement upon the Policy.

Such endorsement could be obtained by the Plaintiff taking the Policy directly to the Defendant for endorsement: it may also be obtained by first writing and thereafter seeing that the Policy is endorsed by the Defendant..." The above findings by the trial court were affirmed by the lower court at pages 211 - 212, *inter alia*: -

"... Condition (e) of the insurance Policy quoted supra by interpretation provides, in substance, that, in the event of a breach of the warranty, the Policy shall be void, and the insurer (Defendant/Respondent) shall reserve the right to avoid the Policy... In short, the Plaintiff/appellant has to prove that before the occurrence of the destruction, by fire, of his commodities, he had obtained sanction of the Respondent signifying the endorsement on the Policy by the Defendant/Respondent..."

I hold the view that the lower courts are very correct in their interpretation of *clause 8(C) of exhibit C* and I cannot improve on their interpretation, which I therefore adopt as mine.

Learned Counsel for the Appellant has referred to the testimonies of certain witnesses, particularly DW1 - DW3 as regards *clause 8(C) of exhibit C*. I wish to say in that respect that *Exhibit C* is a document that legally speaking, speaks for itself and therefore cannot speak through the testimonies of DW1, DW2 or DW3 or any other person or witness for that matter. The court is concerned not with what these witnesses or parties alleged to be their understanding of *clause 8(C) of exhibit C* but with what the said clause 8(C) actually says through the interpretation of the words used therein to express the intention of the parties thereto. To me the words used are very simple and straightforward and need no complicated rules of interpretation. I therefore resolve issue 4 against the Appellant.

Having considered and resolved the issues against the Appellant, particularly issue 4, I hold the considered view that a resolution of Appellant's issue 5 is unnecessary and is consequently discountenanced.

On the cross appeal, learned counsel for the Respondent/Cross Appellant in the cross Appellant's brief filed on 5/10/06 formulated the following issue for determination: - "Whether in the light of *clause 8(C) of Exhibit "C"* the Court of Appeal was correct in its pronouncement that "if *Exhibit "D"* has been signed by the official of the Defendant/ Respondent that would have sufficed for proof that the original was delivered and the mere fact that the Defendant/ Respondent later failed or refused to sanction the re-location of the stocks by endorsing the Policy to that effect will not avail it."

It is the submission of learned counsel for the Cross Appellant that the movement of the goods from one location to another forms a new contract or a quasi - new contract because it introduces a new term into the contract in the form of a new or increased risk; that the essence of the provision of clause 8(C) is to enable the Respondent access the new risk introduced into the contract; that it is the acceptance of the risk that constitutes the obtaining of the sanction of the insurance company which is signified by the endorsement on the Policy by or on behalf of the insurance company.

Learned Counsel further submitted that merely notifying the insurance company cannot and would not automatically qualify as a fulfillment or compliance with clause 8(C). It is the submission of learned counsel, by reference to *Halsbury's Laws of England 4th Edition page 250 paragraphs 452 - 455* that four categories which qualify as an alteration of the risk insured against exist which are: -

- (a) Increase in the likelihood of loss
- (b) Alteration of the subject matter
- (c) Change of identity and
- (d) Change of circumstances comprised in the definition;

That during the period when the goods are not at the applicable locality whether the Policy is voided by express provision or is merely inoperative, the insurance at the time ceases to attach, for which learned counsel referred the court to the case of *Dawsons Limited vs Bonin (1992) 2 AC 413*; *Zachariah Pearson vs The Directors & C of the Commercial Union Assurance Co. (1876) A.C 498 at 502*; that parties are bound by the agreement they entered into and that clause 8(C) clearly stated the mode by which consent of the relocation or alteration of risk will be communicated which is by endorsement upon the Policy by or on behalf of the company and that anything short of that will not suffice.

In the Cross-Appellant's Brief of Argument filed on 26/10/06, learned counsel for the Cross-Respondent formulated two issues for determination. These are:
 "Whether this Cross-Appeal is maintainable by reason of failure of the Cross-Appellant to appeal to the Court of Appeal against the finding, the subject of this appeal by the High Court;

Whether it is not against public Policy for the Cross-Appellant to use its own failure to sanction the relocation of the insured goods to avoid its obligation to the insured Cross Respondent."

I have to observe that there is only one ground of cross appeal as is contained in the Notice of Cross Appeal filed on 5/10/06- *It is settled law that a party is not allowed to formulate more than one issue for determination out of a ground of appeal even though he can combine two or more grounds of appeal in formulating an issue for determination.* This is the principle against the proliferation of issues for determination. In the instant case, learned counsel has submitted two issues out of the single ground of appeal for determination, thereby rendering the issues incompetent. Secondly, the first issue appears to wear the garb of a preliminary objection without being properly so called and whereas there is no notice of preliminary objection to the ground of appeal as filed in this Court on record. I hold the view that there being no preliminary objection to ground cross respondents' issue 1, the said issue is incompetent and liable to be struck out.

Thirdly, the Cross Respondents' issues have no relationship whatsoever with the ground of the cross appeal. None of the two issues can be said to have been formulated from the single ground filed in this cross appeal. It is settled law that issues for determination must be formulated from the ground(s) of appeal, which in turn must be complaints against the *ratio decidendi* of the judgment or decision appealed against otherwise, the issue(s) is/are incompetent and liable to be struck out.

The ground of appeal complains as follows: -
 "Grounds of Appeal

The Learned Justices of the Court of Appeal erred in law in holding as follows: -
 "If Exhibit"D" had been signed by the official of the Defendant/Respondent, that

would have sufficed for proof that the original was delivered and the mere fact that the Defendant/Respondent later failed or refused to sanction the relocation of the stocks by endorsing the Policy to that effect will not avail it.”

Particulars of Errors

Whilst in paragraph 1 of page 11 of its judgment, the Court of Appeal accurately formulated/determined the burden of proof placed on the appellant, it erred in law when it failed to give credence to the contract between the parties by equation of "obtaining the sanction of the company evidenced by endorsement on the Policy" as stipulated in clause 8(C) of the insurance Policy (Exhibit "C") with the notification of the company by the Respondent of the movement of the goods from the location where it was insured to another location, even though it rightly held that there had been no notification.”

Looking at the above ground of appeal, it is very clear that the two issues formulated by learned counsel for the cross Respondent have no bearing whatsoever with the above ground of appeal and therefore are very irrelevant to the determination of the cross appeal and are consequently hereby struck out. The result of the above exercise is that there is legally no Cross-Respondent Brief in opposition to the cross appeal and I so hold. As regard the issue for determination, I had earlier held, during the determination of the main appeal that by the provisions of *clause 8(C) of exhibit C* what is relevant and very material is not the receipt of the letter of notification, exhibit D, but the sanction of the cross appellant endorsed on the Policy approving or consenting to the relocation of the insured goods from the place where the insured was localized by the terms of the contract to another location outside the locality accepted by the cross appellant in the contract.

The words of *clause 8(C) of Exhibit C* are so clear and unambiguous that they require no interpretation at all. The facts of the case being what they are and having regard to the provisions of *clause 8(C) of exhibit "C"*, I am of the considered view that the Court of Appeal was in error when it held that: "if *Exhibit "D"* had been signed by the official of the Defendant/Respondent that would have sufficed for proof that the original was delivered and the mere fact that the Defendant/Respondent later failed or refused to sanction the relocation of the stocks by endorsing the Policy to that effect will not avail it" and consequently allow the cross appeal and set aside that holding by the lower court.

In conclusion, I find no merit in the main appeal, which is consequently dismissed with costs of ₦10,000.00 in favour of the respondent. On the other hand, the cross appeal is meritorious and is hereby allowed by me with costs which I assessed and fixed at ₦10,000.00 in favour of the cross appellant.

The main appeal is dismissed, while the Cross Appeal is allowed.

SYLVESTER UMARU ONU, J.S.C.

The appeal herein arose from the operation of a contract enforcement entered into between the parties on 8th October 1992. The Appellant had insured against fire, its stock and materials in trade comprising of tyres contained in the shop forming part of a building occupied as business premises by the Appellant at No.32 Enu-Owa Street, Lagos, for the sum of ₦3, 500,000.00. After executing the contract, the Appellant, without first obtaining the approval of the Respondent, decided to move the insured

stock-in-trade from the insured shop at No.32 Enu-Owa Street, Lagos, to Block 3, Ijgun Road, Ikotun Egbe, Lagos. When the Appellant's stock and materials insured were destroyed by fire at the new premises to which they were moved, and the Appellant sought to invoke its right under the Policy to be compensated for the loss in accordance with the insurance Policy, the Respondent declined liability. In consequence, the Appellant headed to the Lagos State High Court of Justice for redress.

The learned trial Judge, Obadina J. (as he then was) in what amounted to clear findings, dismissed the Appellants' case as follows: "Having removed the insured goods from 32 Enu-Owa Street Lagos to Block 3, Ijgun Road Ikotun Egbe, I think the Plaintiff had it a duty to see that the approval or sanction of. The Defendant was obtained by the Defendant endorsing the Policy document *Exhibit C. Clause 8(c) of Exhibit C* does not say that the Plaintiff should write to the Defendant informing the Defendant of the removal of the insured goods to a building or place. What clause 8C) of the Policy document Exhibit C says is that the Plaintiff must obtain the approval of the Defendant by endorsement upon the Policy. Such endorsement could be obtained by the Plaintiff taking the Policy directly to the Defendant for endorsement; it may also be obtained by first writing and thereafter seeing that the Policy is endorsed by the Defendant."

The Appellant's appeal to the Lagos Division of the Court of Appeal was also heard and dismissed. This further and final appeal to this court is equally, in my view, without merit, being, in my opinion, concurrent findings of fact.

For the foregoing reasons, I am in agreement that the appeal against the decision of the court below, being devoid of merit, fails. Accordingly, I also dismiss the appeal and allow the Cross-Appeal. I abide the orders contained in the leading judgment, including those as to costs.

DAHIRU MUSDAPHER, J.S.C.

I have had the preview of the judgment of my Lord, Onnoghen, J.S.C. just delivered with which I entirely agree. For the same reasons contained in the aforesaid judgment, which I hereby respectfully adopt as mine, I too do hereby dismiss the appeal and allow the cross-appeal. I abide by the order for costs proposed in the judgment aforesaid.

SUNDAY AKINOLA AKINTAN, J.S.C.

The appellant, Yadis Nigeria Limited, was the Plaintiff in this action instituted against the respondent, as Defendant, at the Lagos High Court. The dispute arose over a claim by the Appellant for loss of goods insured with the Respondent, which were destroyed when fire gutted the Appellant's warehouse at Block 3, Ijgun Road, Ikotun-Egbe, Lagos on the night of 10th and 11th January 1993.

The brief facts of the case are that the Appellant had taken an insurance Policy, which covered fire in respect of its stocks and materials in its warehouse at 32 Enuowa Street, Lagos. The Appellant, however, relocated its warehouse from 32 Enuowa Street, Lagos, to Block 3, Ijgun Road, Ikotun-Egbe, another location in Lagos. The Appellant wrote to the Respondent informing it of the relocation to the new address. There was no reply from the Respondent acknowledging the receipt of the Appellant's

letter and endorsing the Policy to reflect the change in the insured address before fire gutted the goods in the new at Lagos High Court. The dispute arose over a claim by the Appellant for loss of goods insured with the Respondent, which was destroyed when fire gutted the Appellant's warehouse. The Respondent refused to honour a claim made by the Appellant for the losses suffered as a result of the fire outbreak.

The Appellant's claim at the High Court was dismissed.

An appeal to the court below was also dismissed, hence the present appeal.

The position of the law is that a contract of insurance should be one of utmost good faith, *uberrima fidei*. To constitute a contract of insurance, therefore, 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 v. N.I.C.O.N. (1998) 8 NWLR (Pt. 560) 1; Northern Assurance Co. Limited vs Wuraola (1969) 1 All NLR 14; and Royal Exchange vs Chukwurah (1976) 11 SC295.*

In the instant case, the proposal accepted by the Respondent was in respect of the Appellant's goods and stocks in the warehouse at 32 Enuowa Street, Lagos. When the Appellant relocated to a new place at Block 3, Ijegun Road, Ikotun-Egbe, Lagos and wrote to the Respondent about the change in the address of the insured warehouse, the letter, in my view, was an offer to amend one of the terms of the insurance contract. The parties could only be bound if the offer was accepted. There was no such acceptance before the fire incident that led the Appellant to make the claim. I therefore believe and hold that the Respondent rightly refused to honour the claim since the agreement it had with the Appellant was yet to be endorsed to cover the new address.

I had the privilege of reading the draft of the lead judgment written by my learned brother, Onnoghen, J.S.C. I agree with his reasoning and conclusion that there is no merit in the appeal. For the reasons I have given above, and the fuller reasons given in the lead judgment, which I also adopt, I too make an order dismissing the appeal and I allow the cross-appeal. I abide by the costs as assessed in the lead judgment.

MAHMUD MOHAMMED, J.S.C.

The dispute between the parties in this appeal arose out of the operation and enforcement of an insurance contract entered into between the parties on 8th October, 1992 by which the Appellant insured against fire, the Appellant's stock and materials in trade comprising of tyres contained in the shop forming part of a building occupied as a business premises by the Appellant at No. 32 Enu-Owa Street Lagos for the sum of ₦3,500,000.00. After executing the contract, the Appellant decided to move the insured stock-in trade from the insured shop at No. 32 Enu-Owa Street Lagos to Block 3, Ijegun Road, Ikotun-Egbe, Lagos without first obtaining the approval of the Respondent which was required to endorse the change of premises on the contract document namely, the Insurance Policy executed by the parties. When the Appellant's stock and materials insured were destroyed by fire at the new premises to which they were moved and the Appellant sought to invoke his right under the Policy to be compensated for the loss in accordance with the insurance contract, the Respondent declined liability resulting in the Appellant heading to the Lagos State High Court of Justice as a Plaintiff for redress.

The manner the trial Lagos State High Court resolved the dispute between the parties is contained in the judgment of that Court at pages 114 - 115 where Obadina J. (as he then was) stated the position as follows: "Having removed the insured goods from 32 Enu-Owa Street Lagos to Block 3, Ijegun Road Ikotun Egbe, I think Plaintiff had it a duty to see that the approval or, sanction of the Defendant was obtained by the Defendant endorsing the Policy document - *Exhibit C. Clause 8(c) of Exhibit C* does not say that the Plaintiff should write to the Defendant informing the Defendant of the removal of the insured goods to another building or place. What Clause 8(c.) of the Policy document Exhibit C says is that the Plaintiff must obtain the approval of the Defendant by endorsement upon the Policy. Such endorsement could be obtained by the Plaintiff taking the Policy directly to the Defendant for endorsement; it may also be obtained by first writing and thereafter seeing that the Policy is endorsed by the Defendant."

With these clear findings by the learned trial judge, the Plaintiff/Appellant's claim against the Defendant/Respondent was dismissed. In addition to that, the Appellant's appeal to the Lagos Division of the Court of Appeal was also heard and dismissed. This further and final appeal to this Court is by the Appellant against the dismissal of his appeal by the Court of Appeal. Although as many as five issues for determination were formulated in the Appellant's brief of argument for the determination of this appeal, it is quite clear from the facts of this case which are largely not in dispute, that the crux of the dispute between the parties revolves around the compliance or non-compliance by the Appellant with the provisions of *Clause 8(c) of Exhibit "C", the Insurance Policy*. The document, which was in evidence, does not contain any endorsement modifying the terms of the contract between the parties, allowing the movement of the insured goods from the original premises insured to the new premises, which was not part of the contract. On the face of overwhelming evidence, therefore, I am of the firm view that the trial Court was right in dismissing the Plaintiff/Appellant's claim and the Court below was equally on very strong grounds in dismissing the Appellant's appeal.

For the foregoing reasons and full reasons contained in the leading judgment of my learned brother Onnoghen, J.S.C., which he has just delivered, I completely agree that this appeal is without merit. Accordingly, I also dismiss this appeal and allow the Cross-Appeal. I abide by the orders made in the leading judgment, including the order on costs.

11.4. REMARKS

The position of the law is that a contract of insurance should be one of utmost good faith, *uberrima fidei*. To constitute a contract of insurance, therefore, 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 v. N.I.C.O.N. (1998) 8 NWLR (Pt. 560) 1; Northern Assurance Company Limited vs Wuraola (1969) 1 All NLR 14; and Royal Exchange vs Chukwurah (1976) 11 SC295.

11.5. REFERENCES

1. *Onyemeh vs Eghuchulam (1996) NWLR (Pt.448)255 at 265.*
2. *Tunbi vs. Opawole (2000) 2 NWLR (Pt. 644) 275 at 288.*
3. *Yakubu vs Omaiboje (1998) 1 NWLR (Pt. 559) 708 at 719.*

4. *Nwobodo vs Onoh & Ors* (1983) 14 NSCC 470.
5. *Omoborinola vs Military Governor, Ondo State* (1998) 14 NWLR (Pt. 584) 89.
6. *Onwuchuruba vs Onuchuruba* (1993) 5 NWLR (Pt. 292) 85.”
7. *Ojibah vs Ojibah* (1991) 5 NWLR (Pt. 191) 296 at 314
8. *Katto vs C.B.N* (1999) 6 NWLR (Pt. 607) 390 at 411 -
9. *A-G - Oyo State vs Fairlakes Hotels Limited* (1989) 5 NWLR (Pt. 121) 255.
10. *Yeni vs Dada* (1978) 11 NSCC 147.
11. *Nwobodo vs Onoh* (1983) 14 NSCC 470.
12. *Labiya vs Moberuagba* (1992) 8 NWLR 139 at 158

12.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT OF NIGERIA

DATE: 20th May, 1955

SUIT NO: 3PLR/1955/20 (SC)

JUDGE: Mbanefo, J.

ZACCHUS ODUNSI
(Plaintiff/ Appellant)

vs

INSPECTOR-GENERAL OF POLICE
(Defendant/ Respondent)

12.2 REPORTS/FACTS/ISSUES.

CRIMINAL LAW AND PROCEDURES – Motor Traffic offence, Failure to produce insurance certificate on demand, Motor Vehicles (Third Party Insurance) Ordinance section 17 (1), and Time within which insurance certificate must be produced.

INSURANCE AND REINSURANCE – THIRD PARTY INSURANCE- Offence under the Motor Vehicles (Third Party Insurance) Ordinance, How proved, whether failure to produce Certificate of insurance, even where the car owner had one, constitutes the offence.

INSURANCE AND REINSURANCE – THIRD PARTY INSURANCE- Purpose of Ordinance, Whether the Motor Vehicles (“Third Party Insurance) Ordinance does not make it obligatory for the driver to carry the certificate of insurance on his person. Whether in the case of an accident, the driver has 24 hours to produce the certificate but if there is no accident, he must produce it at once. Whether the production of the certificate should be made within a reasonable time after it was requested. Reasonable time, whether it depends on the circumstances of each case.

TRANSPORT AND LOGISTICS LAW – MOTOR VEHICLE:- Traffic offence, how proved? Third party insurance certificate, whether an offence for a driver not to have the same on his person at all times, and how treated.

INTERPRETATION OF STATUS – Proper construction of Section 17 (1) of the Motor Vehicles (Third Party Insurance) Ordinance Cap.139

12.3 DECISION OF COURT.

JUDGMENT

MBANEFO, J.:

The Appellant, who is a District Engineer, Aba, was charged before the Magistrate Grade III, Aba, on two counts- the first count for Regulation 102 (1) of the Road

Traffic Regulations No. 2914. The second count charges him with failing to produce a Policy of insurance when demanded by a Police Officer in uniform, contrary to Section 17 (1) of the *Motor Vehicles (Third Party Insurance) Ordinance Cap. 139* and thereby committing an offence punishable under Section 22 of the same Ordinance. The Magistrate convicted him on the two counts and sentenced him on the 1st count to a fine of 20s and, on the 2nd count, he was cautioned and discharged. The appellant has appealed against his conviction on both counts.

With respect to the first count, the appellant is a first offender and the offence in respect of a first offender is punishable by a fine of £50. By the second proviso to Section 5 of the *Magistrate's Courts (Appeals) Ordinance Cap. 123*, the appellant has no right of appeal in respect of his conviction on this count since the fine imposed by the Magistrate was less than £5. When this was pointed out to the Appellant's Counsel, he withdrew the appeal in respect of the conviction on this count and the appeal proceeded only with respect to the 2nd count.

The facts as established by the evidence are that the appellant was seen driving along the Factory Road in Aba Township, going in the direction of the Railway Gate opposite the premises of Messrs. G. B. Ollivant Limited he passed two Motor Traffic Police Constables who, suspecting that he was exceeding the speed limit, chased after him on their motor bicycles. They overtook him within a distance of less than a mile, but were not able to stop him before he branched off to his house. They followed him to the front of his house and, after telling him that he had exceeded the speed limit and having some argument about speedometers and percentage errors, demanded his certificate of insurance. The appellant said he made a quick search for it, but as the constables could not wait, he told them that he had it, but that he could not lay his hand on it immediately. The constables said that he did not produce it at once, and so they left.

It is not disputed that the appellant had at the time, a Certificate of Insurance. The prosecution says that he should have produced it on demand and that in so far as he did not do so, he had contravened the provisions of Section 17 (1) and that it does not matter if, in fact, he had the certificate or not. The whole case before the Magistrate turned on the proper construction of Section 17 (1) of the *Motor Vehicles (Third Party Insurance) Ordinance Cap. 139*. Section 17 (1) reads as follows:

“Any person driving a motor vehicle on a highway shall, on being so required by a Police Officer, give his name and address and the name and address of the owner of the motor vehicle and shall produce his certificate of insurance and any person contravening the provisions of this subsection shall be guilty of an offence against this Ordinance.” This section is taken from Section 49 (1) of the Road Traffic Act in England and the wording is the same except for a slight variation. Section 40 (1) of the English Act has a proviso which is missing from Section 17 (1) of the Nigerian Ordinance. The proviso says that if the driver, within five days after the date on which the production of his certificate was so required, produces it, he shall not be convicted of an offence.

Section 17 (2), which is worded similarly to Section 40 (2) of the English Act but without the proviso it says that in the case of an accident, the driver shall produce the certificate as soon as possible, but in any event within 24 hours thereafter. Section 40 (2) has a proviso similar to that following Section 40 (1).

The *Motor Vehicles (“Third Party Insurance) Ordinance* does not make it obligatory

for the driver to carry the certificate of insurance on his person. It seems odd that in the case of an accident, the driver has 24 hours to produce the certificate but if there is no accident, he must produce it at once. The purpose of the Ordinance is to protect third parties in case of an accident by ensuring that motor vehicles are covered by third party insurance and it is essential that the driver should satisfy the Police Authorities as soon as possible after an accident that the vehicle was covered.

Reading Section 40 (1) and (2) of the English Road Traffic Act, the intention seems quite apparent. Is it the intention of the legislature that in Nigeria, the opposite should be the case? I think not. When a Police Officer asks for the certificate of insurance, it becomes a question of fact whether or not the driver is in a position to produce one and the onus is on him to satisfy the Police Officer that he has one. This he can do by producing the certificate either immediately or so soon afterwards as is reasonably convenient. An inordinate delay in producing one may be evidence that none was available.

The Magistrate takes the view that Section 17(1) requires that the certificate should be produced there and then on the spot and failure to do that is an offence under the section. I do not agree that it is intended that such a restricted interpretation should be placed on Section 17 (1). To take that view would cause great hardship and would make Section 17 (1), when read with the following subsection, appear absurd. A driver required to produce his certificate and who failed to produce it there and then on the spot commits an offence under the Ordinance, and then, if going a mile further he drives the car into a ditch he will have 24 hours to produce the same certificate and if he produces it within that time, he “shall not be convicted”.

Taking that restricted view, the Magistrate did not consider the question whether or not the appellant did produce the certificate soon afterwards. That point was not considered in the learned Magistrate’s judgment. The appellant said that he contacted the Superintendent that night and told him what had happened and that as a result, his driving license, which had been taken by the constables, was returned to him the next morning. The prosecution under this count would not have been necessary if the appellant had taken his certificate to the Motor Traffic Office and explained himself instead of thinking that the constables were impertinent in saying that he exceeded the speed limit. I am concerned, however, with interpreting Section 17 (1) and I hold that the production of the certificate should be made within a reasonable time after it was requested. What is reasonable depends on the circumstances of each case. Taking that view, I allow the appeal on the 2nd count and in respect of that count I set aside the conviction of the appellant and order that he be acquitted and discharged. Appeal against the conviction on the second count allowed.

12.4 REMARKS

From this intent case, it is not mandatory to carry the certificate of Insurance in person, but the driver must be given a reasonable period of time to produce such a document.

12.5. REFERENCES

1. *Motor Vehicles (Third Party Insurance) Ordinance Cap. 139.*
2. *Magistrate’s Courts (Appeals) Ordinance Cap. 123.*

13.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT OF NIGERIA

DATE: 11th May, 2007

SUIT NO: S.C. 259/2002

JUDGE: Umaru Atu Kalgo, J.S.C.
Sunday Akinola Akintan, J.S.C.
Aloma Mariam Mukhtar, J.S.C.
Walter Samuel Nkanu Onnoghen, J.S.C.
Francis Fedode Tabai, J.S.C.

AFRICAN REINSURANCE CORPORATION
(Defendant/ Appellant)
vs

J.D.P CONSTRUCTION NIGERIA LIMITED
(Plaintiff/ Respondent)

13.2 REPORTS/FACTS/ISSUES

The brief facts of the case are that the Appellant is a corporation carrying on re-insurance business in Nigeria while the Respondent is a civil engineering company incorporated in Nigeria. By a written contract between the parties, the Respondent agreed with the Appellant to construct the Appellant's head office building at Victoria Island, Lagos for a tentative sum of US \$6,234,989.66. One of the clauses in the agreement provides that the parties agreed to subject themselves to the jurisdiction of the High Court of Lagos in the resolution of any dispute arising from the contract.

13.3. DECISION OF COURT.

JUDGMENT

SUNDAY AKINOLA AKINTAN, J.S.C.

The present Respondent, as Plaintiff, instituted this action Lagos High Court as Suit No LD/2342/2000 against the present Appellant as the Defendant. The Plaintiff's claim is as follows:

- (1) The sum of US\$2,755,618.85 is the sum due and payable to the Plaintiff on a building contract between the parties.
- (2) Interest on the said sum of US \$2,755,618.85 at the rate of 12% per annum from the 22nd June, 2000, until judgment and thereafter at the same rate until total liquidation.
- (3) The Cost of this action."

The writ of summons was filed along with the statement of claim. When the Appellant was served, it entered an appearance under protest and then filed a notice of preliminary objection in which it claimed that the trial High Court lacked jurisdiction to entertain the claim. The reason for the objection is given as follows: "The Appellant by virtue of the Diplomatic Immunities Privileges (African Reinsurance Corporation) Order 1985 has diplomatic immunity."

The matter then went for a hearing before Shitta-Bey, J. After hearing the parties on the objection, he delivered the court's ruling on 26/10/2000, in which the objection was overruled. The Appellant was dissatisfied with the ruling and an appeal filed against the ruling at the court below was dismissed. In the lead judgment of the court below written by Oguntade J.C.A. (as he then was) to which Galadima and Chukwuma-Eneh, JJ.CA agreed, that learned Justice said thus in the concluding portion of the judgment.

"The answer I return to Appellant's questions for determination is that I agree with the decision of the Supreme Court in the Fantaye case that a waiver by a corporate body, like the Appellant, of its diplomatic immunity must be supported by a resolution of its board of directors; and the waiver can only be effectively raised before the court at the time when the body is brought before the court. I however, do not think that such a claim to diplomatic immunity was available to the appellant in the circumstances of this case. In the final conclusion, this appeal fails and is dismissed with ₦7,500 costs in favour of the respondent."

The appellant was again not satisfied with the judgment and has therefore appealed against it to this court. The respondent was also not satisfied with some portions of the judgment. A cross-appeal was also filed. The parties filed their respective briefs of argument in this court. The appellant formulated the following two issues as arising for determination in the appeal:

1. Having:
 - (i) ruled after formal objection and argument that the two issues formulated by the Plaintiff/respondent did not arise for determination in the appeal;
 - (ii) ruled further that it was only the three issues formulated by the Defendant/appellant which arose for determination and
 - (iii) resolved the said three issues in favour of the Defendant/appellant. Was the Court of Appeal entitled to turn round thereafter to consider the Plaintiff/appellant's rejected two issues and resolve them in the Plaintiff/appellant's favour and then dismiss the Appellant's appeal?
2. Having resolved all of the three issues arising before it for determination, in favour of the appellant, was the Court of Appeal entitled to dismiss the Appellant's appeal on the ground that it would be immoral and unjust to allow it.

The respondent, on the other hand, formulated two issues as arising for determination in the appeal and three issues as arising for determination in the cross-appeal. The two issues formulated by the respondent in respect of the appeal are as follows:

- (1) Whether or not the additional grounds of appeal filed and argued herein, without the leave of Court specifically prayed for and granted to appeal on a consent judgment, are competent in the circumstances herein.
- (2) Whether or not the Court of Appeal was not enjoined in the circumstances herein to have considered and determined all the issues appropriately arising for determination before it."

The three issues formulated in respect of the cross-appeal are as follows:

1. What is the legal consequence of the *Diplomatic Immunities and Privileges (African Reinsurance Corporation) Order 1985* which was issued, based on the Headquarters Agreement in total disregard to and without compliance with *section 12(1) of the 1979*

Constitution which was then extant.

2. Whether or not by producing the 1985 Order, albeit as an appendix to the Appellant's brief in the Court of Appeal, the appellant had not removed the list from the appeal on the issue of Judicial notice of the 1985 Order before the Court of Appeal.
3. Did the Defendant/appellant properly raise a special defence before the High Court of Lagos State in the circumstances therein?"

The respondent pleaded that it had completed the construction work and delivered possession of it to the appellant. The amount now claimed by the respondent is what was outstanding to it from the appellant out of the cost incurred in constructing the building. When the appellant failed to pay the said sum, the respondent filed the action at the Lagos High Court. Upon service of the writ on the appellant, it entered an appearance under protest and then filed a notice of preliminary objection. The ground of objection filed is as follows: "The applicant by virtue of the Diplomatic Immunities and Privileges (*African Reinsurance Corporation*) Order 1985, has diplomatic immunity."

The matter thereafter came up for hearing before Shitta-Bey, J., sitting at the Lagos High Court. After hearing submissions from counsel for the parties, the learned trial judge delivered a considered ruling in which he overruled the objection.

The appellant was dissatisfied with the ruling of the trial High Court and an appeal was filed against it to the court below. The appeal was dismissed by the Court below and the present appeal is from the judgment of the court below delivered on 20/5/2002. The contention of the appeal, as canvassed in the Appellant's brief and in the oral presentation at the hearing, is that the court below, in its judgment now on appeal, although it resolved all the issues canvassed before it in favour of the appellant. This is said to be wrong. The court below is said to have based its reason for dismissing the appeal before it by reopening the issue as to whether the appellant was in fact, entitled to claim diplomatic immunity in the circumstances of this case.

Reference is made to a portion of the lead judgment written by Oguntade, J.C.A. (as he then was) where he said as follows: "The correct position is that the diplomatic immunities and privileges which a foreign sovereign enjoys in Nigeria are largely determined by the common law. In other words, a foreign sovereign cannot claim immunity when he is engaged in trade, commerce or ordinary business activities."

It is submitted that the learned Justice was wrong in that contention had earlier been rejected by this court in the case of *African Reinsurance Corporation v. Fantaye* (1986) 2 NSCC 884, which is binding on the court below.

It is submitted in reply to the appellant's brief that the status of Diplomatic Immunity is a special defence to an otherwise valid right of the citizens to seek redress in a court of law. Reference is made to *Order 17 Rule 11 of the High Court of Lagos State Civil Procedure Rules (1994)*, which provides, *inter alia*, that the Defendant or Plaintiff must raise by his pleading all matters which show the action or counter-claim not to be maintainable or that the transaction is either void or voidable in point of law.

The appellant is said to have breached that Order by not objecting to its statement of defence. The reliance by the appellant on the provisions of the Diplomatic Immunity

in respect of purely commercial transactions is also said to be immoral, having regard to the facts of this case. The main question raised in this appeal is whether the appellant was covered by the diplomatic immunity raised in its objection to the court's jurisdiction in this case. It may be mentioned that the idea of diplomatic immunity was developed from one of the consequences of the States' equality rule, which is expressed in the Latin maxim: *par in parent non habet imperium* - meaning: no State can claim jurisdiction over another. In practice, therefore, although States can sue in foreign courts, they cannot, as a rule, be sued there unless they voluntarily submit to the jurisdiction of the court concerned. See *Oppenheim, International Law, a Treatise*, Vol 1 Peace, 8th edition, pages 264.

The practice of granting diplomatic immunity to States has, in practice, been extended to government naval ships, properties and government servants acting in their official capacities. But such immunity is no longer granted to a foreign State in respect of acts which are not governmental, which means in most cases, the acts of a foreign State as a trader: See *Oppenheim*, supra, page 265.

In the instant case, the appellant is an international corporation, jointly set up by some African States. It was to carry on the reinsurance business in many African States. The host States confer on it certain immunities usually enjoyed by States. But the immunity granted to it by the Nigerian government specifically excludes its commercial activities. In the *African Re-insurance Corporation v. Fantaye* (1986) 2 NSCC 884, the appellant was able to successfully raise the immunity granted to it in Nigeria. The action was instituted against the company by one of its employees. It was a claim for wrongful termination of the employee's appointment and damages. One of the reasons for the Appellant's success in that case is that there was no proper proof of waiver of the immunity.

In the instant case, the facts are that the transaction was commercial in nature. It was a contract given out by the appellant to the respondent to build its headquarters in Lagos, Nigeria. It was specifically provided in the written contract that any dispute arising from the contract could be litigated in a Lagos High Court. I believe that the Appellant's Board of Directors approved the agreement and had implemented its provisions by releasing funds to the respondent for the execution of the building. Also, on the completion of the job, the Board took possession of the completed building from the respondent. It is, in my view, very ridiculous and unethical for the appellant to now claim that it had not waived its diplomatic immunity in the instant case by agreeing that it could be sued in the written contract.

Again, I believe that, having regard to the fact that the activities covered in this case are commercial, the appellant was not covered by the provisions of the Diplomatic Immunity arrangement it now relies on as a defence. As a result, I hold that there is no merit in the appeal. I accordingly dismiss the appeal with ₦10,000 costs in favour of the respondent.

UMARU ATU KALGO, J.S.C.

I have had the privilege of reading in advance the judgment just delivered by my learned brother Akintan J.S.C. in this appeal. I agree with his reasoning and the conclusion reached therein, which I adopt as mine. I accordingly find no merit in the appeal and the cross appeal, which are hereby dismissed. I abide by the consequential order made in the said judgment, including the order of costs.

ALOMA MARIAM MUKHTAR, J.S.C.

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Akintan J.S.C. I am in complete agreement with the reasoning and conclusion reached in the judgment. The appeal has no merit whatsoever, and I am also dismissing it in its entirety. I agree with the order as to costs.

WALTER SAMUEL NKANU ONNOGHEN, J.S.C.

This is an appeal against the judgment of the Court of Appeal held in Lagos in appeal No. CA/L/449/2000 delivered on the 20th day of May 2002, in which it dismissed the appeal of the appellant against the ruling of the High Court of Lagos State in suit No. LD/2342/2000 delivered on the 26th day of October 2000.

The appellant and the respondent entered into a contract in which the respondent agreed with the appellant to construct the Appellant's head office building situated at Victoria Island, Lagos, for a tentative sum of United States Dollars 6,243,989.66. The parties also agreed to submit themselves to the jurisdiction of the Lagos State High Court in the resolution of any dispute arising from the said contract. It is the case of the respondent, as pleaded in the Statement of Claim, that it completed the contract and delivered possession thereof to the appellant which delivery was acknowledged by the appellant in writing but the appellant refused to pay 50% of the retention money of US 386,243.92 despite repeated demands; that the total entitlement of the respondent from the appellant is \$3,755,618.85 which the respondent claimed in addition to interest thereon.

When the processes were served on the appellant, it caused a conditional appearance to be entered on its behalf together with a preliminary objection challenging the jurisdiction of the trial court to entertain the matter on the ground that it enjoys diplomatic immunity by virtue of the provisions of the *Diplomatic Immunities and Privileges (African Reinsurance Corporation) Order 1985*. The objection was overruled by the trial court, resulting in an appeal to the Court of Appeal, which, as stated earlier in the judgment, dismissed same. On further appeal to this Court, the issues for determination, as identified by learned Senior Counsel for the appellant Chief G.O.K. Ajayi, SAN are as follows: -

402. 1 Having:
- (i) ruled after formal objection and argument that the two issues formulated by the Plaintiff/Respondent did not arise for determination in the Appeal.
 - (ii) ruled further that it was the three issues formulated by the Defendant/Appellant which arose for determination and
 - (iii) resolved the said three issues in favour of the Defendant/Appellant.

Was the Court of Appeal entitled to turn round thereafter to consider the Plaintiff/Appellant's rejected two issues, resolve them in the Plaintiff/Appellant's favour and then dismiss the Appellant's Appeal?

2. Having resolved the three issues arising before it for determination, in favour of the Appellant, was the Court of Appeal entitled to dismiss the Appellant's Appeal on the ground that it would be immoral and unjust to allow it?"

I should, at this stage, mention the fact that the respondent has cross-appealed against the judgment of the lower court and in the Respondent/Cross Appellant's Brief of Argument filed on 23/4/04, the following issues have been identified for determination:

- 2.03 Whether or not the additional grounds of appeal filed and argued herein, without the leave of court specifically prayed for and granted to appeal on a consent judgment, are competent in the circumstances herein. Issue No. 1.
- 2.04 Whether or not the Court of Appeal was not enjoined in the circumstances herein to have considered and determined all the issues appropriately arising for determination before it. Issue No. 2.

On the Cross Appeal

- 2.05 What is the legal consequence of the *Diplomatic Immunities and Privileges (African Reinsurance Corporation) Order 1985 ("the 1985")*, which was issued, based on the Headquarters Agreement in total disregard of and without compliance with *section 12(1) of the 1979 Constitution*, which was then extant. Issue No. 3.
- 2.06. Whether or not by producing the 1985 Order, albeit as an appendix to the Appellant's brief in the Court of Appeal, the Appellant had not removed the list from its appeal on the issue of judicial notice of the 1985 Order before the Court of Appeal. Issue No. 4.
- 2.07 Did the Defendant/Appellant properly raise a special defence before the High Court of Lagos State in the circumstances herein? Issue No. 5."

From the above issues, it is very clear that learned counsel for the respondent/cross-appellant did not file a separate brief of argument in respect of the two appeals, but a joint brief in which arguments on the two appeals are identified only by the issues formulated in relation thereto. For instance, issues 1 & 2 relate to the main appeal, while issues 3-5 relate to the cross appeal, all of which are argued in the same brief and without separate headings to demarcate them. This approach is not only novel but also strange indeed. I do not wish to comment any further on that. In arguing the appeal, learned Senior Counsel for the appellant has urged the court to allow the appeal because the lower court having after formal objection rejected the issues formulated by the Plaintiff/respondent, the Court of Appeal was bound by that decision; that the Court of Appeal was wrong to have resolved in favour of the Plaintiff/respondent those very issues it had rejected as arising or determination in the appeal; that having resolved in favour of the appellant all the issues raised by it for determination the Court of Appeal ought to have allowed the appeal; that the Court of Appeal is bound by the decision of the Supreme Court in *Fantaye's case* wherein it was declared that the appellant enjoys diplomatic immunity; and that the Court of Appeal was in error in supposing that it would be unjust or immoral for it to hold that the appellant was entitled to rely on its diplomatic immunity.

On the other hand, Learned Senior Counsel for respondent/cross appellant C.O.I, Joseph Esq. SAN, submitted that the additional grounds of appeal of appellant are incompetent and so are the two issues as formulated and argued thereon because the appellant did not seek nor obtain the leave of court before filing and arguing them particularly as the grounds and issues thereon touch on what Learned senior counsel

termed consent judgment; that the Court of Appeal was eminently competent to have and validly raised and determined the issue as to whether or not the appellant enjoys diplomatic immunity in circumstances herein; that the 1985 order is a void piece of legislation the same being in direct infraction and violation of *section 12(1) of the 1979 Constitution* as amended; that by producing the 1985 order, albeit as an appendix to the Appellant's brief before the Court of Appeal, but in deference to the decision of the High Court of Lagos State, the appeal removed the list on the issue of judicial notice before the Court of Appeal; and, that a claim of diplomatic immunity is a special defence under the High Court of Lagos State Civil Procedure Rules 1994 and the proper place for a plea of special defence as provided for by the said rules is in the Statement of Defence.

To begin with, I find it difficult to understand the respondent/cross-Appellant's issue No. 1, particularly the term "consent judgment" in the context in which it appears therein. My inability to so understand the term arises from the fact that there is nothing on record to show that any consent judgment was entered by the trial court or the lower court in the matter, making it necessary for the contention that leave of the court is thereby required for the Appellant's appeal against the said consent judgment. In the practice of the law, words and phrases are employed as works of art which have, by practice, acquired specific meaning or usage associated therewith and one is likely to create confusion when such words or terms of art are used out of context, as in the instant case with regard to the term, "consent judgment."

The primary issue for determination in this appeal, as I see it, is simply whether the lower court was right in dismissing the appeal having regards to the holding by that court that "I agree with the decision of the Supreme Court in the Fantaye case that a waiver by a corporate body like the appellant of its diplomatic immunity must be supported by a resolution of its board of directors; and that the waiver can only be effectively raised before the court at the time when the body is brought before the court." (See page 194 of the record). It is the case of the appellant (that the lower court having agreed with the decision of the Supreme Court which is relevant to the facts of the instant case, it ought to have allowed the appeal, not to have dismissed it; that the lower court went on to dismiss the appeal on an issue not properly before it particularly as it is alleged to have, earlier in its judgment, expressly rejected the issues based on which such a decision or conclusion could have been reached. The question is whether the appellant is correct, having regard to the record. In an attempt at justifying the contention of the appellant that the lower court rejected the two issues raised by the respondent yet went ahead to determine the appeal on those very issues, learned senior counsel referred the court to pages 189 where the lower court alluded to the objection of learned counsel for the appellant to the two issues and pages 181 - 182 of the record where the lower court is alleged to have reacted to the said objection.

It should be noted that pages 181 - 182 precede page 189 and not the other way round, as presented by learned senior counsel, and when one looks at the record, it does not support the contention of learned counsel for the appellant.

At pages 9 - 10 of the Appellant's brief, learned senior counsel for the appellant made the following submissions: -

- 5.04 The Defendant/Appellant submit that, since the two Issues formulated by the Respondent were not based on any Grounds of Appeal, they fell flat to the ground, and the Court of Appeal could not consider them (the authorities in support of that proposition are cited in the Appellant's reply brief at page 139 of the Record). See also *Adeyemi v. The State (1991) 1 NWLR 679*. So, when, in the course of the

arguments in respect of the Appeal, Learned Counsel for the Respondent attempted to argue those two Grounds of Appeal, counsel for the Appellant objected on the ground that they could not be considered.

- 5.05 The Court of Appeal, in the course of its Judgment (Oguntade JCA), alluded to this objection at Page 189 of the Record where Oguntade JCA said:
"The Appellant's issues sought to discuss whether such Diplomatic Immunity existed in the circumstances of this case. Chief G.O.K. Ajayi S.A.N. had objected at the time we heard this Appeal to the issues raised by the Respondent. He argued that since the Respondent had not filed a Cross-Appeal, it could not raise issues not arising from the Appeal by the Appellant."
- 5.06 The reaction of the Court of Appeal to this objection is reflected at Pages 181 - 182 of the Record. The relevant passage has already been reproduced earlier in this brief paragraph 3.07 above, but it can bear repetition. This is what Oguntade J.C.A. said:
"In the Appellant's brief filed, the issues for determination in the appeal were identified as the following:
1. Was the court below right in refusing to hear the Defendant's challenge to the court's jurisdiction upon the ground specified in the Notice of preliminary objection filed by it?
 2. At what time can a body enjoying Diplomatic Immunity be held to have effectively elected to waive its immunity from suit and give jurisdiction to the ordinary courts; is it when it agrees in the body of a contract that disputes arising therefrom be referred to the courts for determination or is it when a court is about or is being asked to exercise jurisdiction over it?
 3. Can a corporate body enjoying Diplomatic Immunity be held to have waived its immunity on account of a contract if there is no averment or evidence that such waiver is supported by a Resolution of the Board of Directors of the body?"

The appellant's issues were these:

- (i) Whether or not the Defendant would otherwise have been entitled to a claim of jurisdictional immunity under the Common Law (under section 1 (i) of the Act, which was the applicable law before the enactment of the 1962 law.
- (ii) Whether or not the Defendant, which assumes the character of a trader/merchant, can claim the benefit (of diplomatic immunity) provided by section 1 (i) of the Act in view of section 1 (3)(b) of the same Act."

I shall be guided in this judgment by the issues formulated by the appellant. I intend to consider issue No. 1 separately and issues 2 and 3 together."

- 5.07 As submitted earlier in paragraph 3.08 of this Brief, the Court of Appeal had, by the above-quoted passage, ruled that the Issues sought to be raised, and which were objected to both in our Reply Brief and orally during arguments, did not arise for hearing in the Appeal.
- 5.08 The appellant respectfully submits that the Court of Appeal was bound by its Ruling that the issues sought to be argued by the Respondent did not arise for determination in the Appeal and would not be considered in the Appeal. The Court of Appeal was therefore incompetent to reverse that determination. *See Lawal v. Dawodu (1972) ANLR 707*, where the Supreme Court (per Coker JSC) said *inter alia*, at page 719:

"We are clearly of the view that the Learned Trial Judge was not entitled, as he thought he was, to alter the effect of his own ruling on the issue previously decided by him in the course of the same proceedings in favour of the Plaintiff."

- 5.09 The Defendant/Appellant therefore respectfully submits that the Supreme Court ought to set aside the determination of the Court of Appeal on the two Issues, made at Page 193 of the Record, where it held, in the lead Judgment of Oguntade J.C.A, as follows:

"The correct position is that the diplomatic immunities and privileges which a foreign sovereign enjoys in Nigeria are largely as determined by the Common Law. In other words, a foreign sovereign cannot claim immunity when he is engaged in trade, commerce or other business activities."

At pages 181 - 182 of the record, the lower court held as follows:

"In the Appellant's brief filed, the issues for determination in the appeal were identified as the following:

1. Was the court below right in refusing to hear the Defendant's challenge to the court's jurisdiction upon the ground specified in the Notice of preliminary objection filed by it?
2. At what time can a body enjoying Diplomatic Immunity be held to have effectively elected to waive its immunity from suit and give jurisdiction to the ordinary courts; is it when it agrees in the body of a contract that disputes arising there from be referred to the courts for determination or is it when a court is about or is being asked to exercise jurisdiction over it?
3. Can a corporate body enjoying Diplomatic Immunity be held to have waived its immunity on account of a contract if there is no averment or evidence that such waiver is supported by a Resolution of the Board of Directors of the body?"

The appellant's issues were these:

- (i) Whether or not the Defendant would otherwise have been entitled to a claim of jurisdictional immunity under the Common Law (by virtue of *section 1 (i) of the Act*, which was the applicable law prior to the enactment of the 1962 law.
- (ii) Whether or not the Defendant, which assumes the character of a trader/ merchant, can claim the benefit (of diplomatic immunity) provided by section 1 (i) of the Act in view of *section 1(3) (b) of the same Act*."

I shall be guided in this judgment by the issues formulated by the appellant. I intend to consider issue No. 1 separately and issues 2 and 3 together."

It is very clear from the above that the lower court did not state the reason for its preference of the issues as formulated by learned counsel for the appellant to those of the respondent, nor did the court state expressly that it had rejected the said issues of the respondent.

The reaction of the lower court to the objection of learned senior counsel for the appellant to the two issues raised by learned senior counsel for the respondent is at pages 189 190 of the record as follows: -"The appellant's issues had sought to discuss whether such diplomatic immunity existed in the circumstances of this case. Chief G.O.K Ajayi S.A.N had objected at the time we heard this appeal to the issues raised by the respondent. He argued that since the respondent had not filed a cross-appeal, it could not raise issues not arising from the appeal by the appellant.

Particulars

In accordance with *section 2(3) of the Diplomatic Immunities and Privileges (African Reinsurance Corporation) Order 1985*, the only transaction where the Appellant does not have immunity is in the Reinsurance business."

From the above ground of appeal, it is clear that the trial court did hold that appellant did not enjoy immunity in the transaction leading to the action thereby necessitating the particular ground of complaint before the Court of Appeal, hold the view that with that ground of appeal the issue of question as to whether the appellant enjoyed diplomatic immunity in relation to the transaction in issue is prominently brought into focus. My view is that it would be a worthless exercise to consider this appeal without first determining whether, indeed, there was diplomatic immunity in favour of the appellant in respect of the suit brought against it. This is the more so in this case, having regard to the circumstances in which the matter giving cause to this appeal arose. The trial judge had reasoned in a manner I consider ambivalent. It had first been said that the appellant, who had not filed a statement of defence, could not raise the issue of diplomatic immunity. Later, it went on to hold that the immunity claimed did not cover the type of contract, which was the subject matter of the dispute before the court.

It does not seem wise in my humble view to start discussing how diplomatic immunity should be raised without ascertaining whether or not they said diplomatic immunity exists." From the above passage, it is very clear that the lower court did not expressly or by necessary implication sustain the objection of learned Senior Counsel for the appellant as regards the two issues raised by learned senior counsel for the respondent. Rather, it appears to me that the court agrees with the issues as falling for the determination of the appeal and proceeded to do so. I am of the considered view that the lower court is correct in the position I took on the matter having regard to the grounds of appeal before it, particularly ground IV, which complained thus: - "IV. The learned Trial Judge erred in law when she concluded that the Appellant does not enjoy immunity since subject matter of the transaction, is a contract." the lower court for determination. It follows, therefore, in my view, that if the lower court takes up the issue and determines the same, it is perfectly in order in so doing the same having been supported by the ground of appeal before the court. In resolving the issue, it is the view of the lower court, as reproduced earlier in this judgment, that though the applicable law on the issue of Appellant's diplomatic immunity' is as stated by this Court in *Fantaye's case*, the said decision does not apply to the facts of this case because diplomatic immunity does not avail the appellant in the circumstances of this case thereby affirming the decision of the trial court complained of in ground IV of the grounds of appeal before the Court of Appeal.

I therefore find nothing wrong with the decision of the Court of Appeal, which is hereby affirmed by me. In conclusion, I agree with the lead judgment of my learned brother Akintan, J.S.C., the draft of which I had earlier read, that the appeal and cross appeal are without merit and should be dismissed. I accordingly dismiss them and abide by all other consequential orders contained in the said lead judgment, including the order as to costs.

Appeal and cross appeal dismissed.

FRANCIS FEDODE TABAI, J.S.C.

I had a preview of the leading judgment of my learned brother, Akintan J.S.C. I agree

entirely with the conclusion that the appeal lacks merit and is liable to be dismissed. The Diplomatic Immunity under which the Appellant sought protection is not available to it. Having voluntarily entered into the contractual commercial venture and derived benefits thereunder and having further undertaken to submit to the jurisdiction of the Lagos State High Court in the event of a dispute arising under the contract, the Appellant cannot turn around to claim diplomatic immunity to evade its liability under the contract.

I also dismiss the appeal with costs, which I assess at ₦10,000.00 in favour of the Respondent.

13.4. REMARKS

In accordance with *section 2(3) of the Diplomatic Immunities and Privileges (African Reinsurance Corporation) Order 1985*, the only transaction where the Appellant does not have immunity is in the Reinsurance business.

13.5. REFERENCES

1. *African Reinsurance Corporation v. Fantaye (1986) 2 NSCC 884.*
2. *Lawal v. Dawodu (1972) ANLR 707.*
3. *Adeyemi v. The State (1991) 1 NWLR 679.*

14.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT OF NIGERIA

DATE: 13th December, 1996

SUIT NO: 136/1990

JUDGE: Salihu Modibbo Alfa Belgore, J.S.C.
Idris Legbo Kutigi, J.S.C.
Emanuel Obioma Ogwuegbu, J.S.C.
Sylvester Umaru Onu, J.S.C.
Yekini Olayiwola Adio, J.S.C.

JESSICA TRADING COMPANY LIMITED
(Plaintiff/ Appellant)

vs

BENDEL INSURANCE COMPANY LIMITED
(Defendant / Respondent)

14.2 REPORTS/FACTS/ISSUES

INSURANCE AND REINSURANCE LAW – MARINE INSURANCE: - Contract of marine insurance, validity of condition precedent thereto, Section 24(1) of the Marine Insurance Act. Where Policy of insurance has expired, whether any form of compromise between insurer and insured is enforceable.

INSURANCE AND REINSURANCE LAW – CONTRACT: - Marine Insurance, Voyage Policy and Time Policy. Meanings of and distinction between whether both are mutually exclusive. Relevant consideration. Section 27 of the Marine Insurance Act considered common mistakes and legal effects.

INSURANCE AND REINSURANCE LAW – Marine Insurance, Time Policy, its meaning and necessary precautions for insured taking same basis of precautions.

INSURANCE AND REINSURANCE LAW – Time Policy and Voyage Policy, whether both can co-exist within the same marine insurance contract. “Continuation Clause”, Purport of, effect where a Policy harbouring both time and voyage Policy elements expire without a continuation clause. Implication for liability of the insurer where loss occurs.

INSURANCE AND REINSURANCE LAW – Marine Insurance certificate, nature and effect of.

INSURANCE AND REINSURANCE LAW – Marine Insurance Policy, existence of Form A document relied upon as such essentials it must satisfy.

INSURANCE AND REINSURANCE LAW – Marine Insurance Policy, whether it can be substituted by a compromise agreement between the insured and insurers. Where a compromise agreement made under a common mistake that there was valid insurance Policy and whether court can uphold same under the doctrine of estoppel.

COMMERCIAL LAW – CONTRACT: - Terms of a contract, distinction between a condition and a condition precedent and the legal effects. Which needs to be specifically pleaded and which is deemed inherently implied.

COMMERCIAL LAW – CONTRACT: - Document, Commercial disputes based thereon, whether merely referring to the document and asserting it will be relied upon, suffice. Need for specificity and implications for bulky contracts with fine print.

COMMERCIAL LAW – CONTRACT: - Contract of Marine Insurance, whether is sui generis of other contracts of insurance or whether amendable to ordinary rules of construction of commercial contracts.

INTERNATIONAL TRADE: –Maritime insurance and international transportation of goods. Claim to recover for loss of cargo due to fire destruction and relevant considerations.

WORDS AND PHRASES: –“Marine Insurance Policy”, meaning and nature of under Sections 2 and 3 of the Marine Insurance Act.

WORDS AND PHRASES: –“Voyage Policy”, “Time Policy”: meanings of and distinction between both.

WORDS AND PHRASES: –“A contract of insurance”, “Policy”; meanings of.

14.3. DECISION OF COURT.

JUDGMENT

ADIO, J.S.C. (delivering the Leading Judgment):

The Appellant (the insured) took out a marine cover (Exhibits “D” to “D8”) from the respondent (the insurer) in relation to his cargo(white sugar) which was being shipped from somewhere in Europe to the port in Warri, Nigeria. The open cover was to “remain open and to attach to all sendings made after 7th July, 1977 to 6th July, 1978. “It was one of the terms of the Policy that the cover was to terminate immediately after completion of discharge overside of the goods insured from the Oversea carrying vessel at the Nigeria Port. Upon paying the premium, the appellant was issued a marine certificate of insurance (Exhibit F) on the 13th July, 1978. An endorsement” as per open cover No. MAR. 3195/8/77”, was made on Exhibit F, and it was subject to the condition that Exhibit “F” was to terminate immediately after completion of discharge overside of the goods insured from the Oversea carrying vessels at the final port of discharge. Exhibit “D” to “D8” was otherwise known as open cover No. MAR. 3195/8/77. The ship, M. V. Vori, which carried the consignment of sugar, got burnt off Abidjan. Some of the sugar consignment was salvaged. The parties held a meeting in relation to the matter. They agreed on certain terms which were set out in a letter, Exhibit “T,” otherwise referred to as “compromise agreement.” It was alleged that the appellant complied with the terms of the compromise agreement, Exhibit “T”, but the respondent did not observe and/or perform its own part. It was, for that reason, that the appellant instituted the present action in which its claim was as follows:

- 1 (a) ₦146,138.18 being the cost of 13,371 bags of lost sugar.
- (b) ₦29,375 being money paid to Messrs Blaesberg which towed the crippled M. V. Vori with its remaining cargo to Warri port.
- (c) Consideration to the issues identified for determination in the briefs filed by the

parties. Altogether, six issues for determination were set out in the Appellant's brief, while six issues were set down for determination in the appellant's brief.

I think that by now the issues involved or necessary to be resolved for the determination of this case have been narrowed. The crucial issue is whether under the provisions of the open cover Policy (Exhibit "D" to "D8"), the Marine Insurance Certificate (Exhibit "F") or the Compromise Agreement (Exhibit "T") either alone or in combination with one another it could rightly or legally be said that the respondent was liable to indemnify the appellant for the loss or damage, if any, suffered by the appellant as a result of the accident involving the ship, M. V. Vori at Abidjan (West Africa) on the 4th September, 1978. Having regard to the issues set down by each party in its brief and the circumstances mentioned above, I am of the view that the following issues set out hereunder are reasonably sufficient for the determination of this appeal;

1. Whether any of the documents (Exhibit D to D8, F and T) on which the appellant relied in this case was a marine insurance Policy and, if so, the nature of the Policy.
2. if the answer to the first part of issue (1) is in the affirmative, whether it could legally be said that, under the provisions of the marine insurance Policy or policies, the respondent was liable to indemnify the appellant for the loss or damage, if any, suffered by the appellant as a result of the accident involving the vessel, M. V. Vori at Abidjan (West Africa) on the 4th September, 1978.
3. if the answer to the question raised under issue (2) is in the affirmative, what was the nature and extent of the indemnity, if any?
4. Whether the court below was right in dismissing the cross-appeal of the appellant in its entirety.

For the avoidance of doubt, one of the preliminary matters that must be noted is that the law that is applicable to a matter was the law that was in force when the incident in question occurred. *See Fatola vs Mustapha, (1985) 2 NWLR (Pt.7) 438*. For that reason, the legislation that was applicable in this case was the Marine Insurance Act, 1961. A contract of insurance is, according to Section 3 of the Act, a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the loss incident to marine adventure. The word "Policy" under Section 2 of the Act means a marine Policy. Its ordinary meaning is that, in form, it is a unilateral undertaking by the insurers to pay the sum insured on the happening of the specified event and, unless and until rectified, is the exclusive record of the contract. *See Halsbury's Laws of England, 4th Ed., Vol, 25, paragraph 406.*

The exclusive nature of a Policy of insurance, as evidence of the contract of marine insurance, was affirmed by Section 24 (1) of the Act, which provided, inter alia, as follows: "24.(1) Subject to the provisions of any statute, a contract of marine insurance shall not be admissible in evidence unless it is embodied in a marine Policy in accordance with the form in the first Schedule to the Act or the like effect." In view of the fundamental importance of a Policy of marine insurance contract, one would appreciate the necessity for the determination of the question raised under issue (1) above which was whether any of the documents on which the appellant relied on the alleged appellant's liability was a marine insurance Policy and, if so, the nature of the Policy. The court below identified four principal documents on which the marine insurance contract, in this case, revolved. They were:

- (a) Exhibit “D” – “D8”: Marine Open Cover effective from 7th July, 1977 to 6th July, 1978;
- (b) Exhibit “F”: Marine Certificate of Insurance effective from 13th July, 1978;
- (c) Exhibit “G” Bill of Lading of 21st July, 1978 endorsed to Plaintiff/respondent;
- (d) Exhibit “T”: Compromise Agreement B/C/MAR/98/78 of 3rd April, 1979.

After due consideration of the aforesaid principal documents, the court below concluded that Exhibits “D” to “D8” were a marine insurance Policy. It was common ground that Exhibit “D” to “D8” was a marine open cover. A maritime open cover issued under a contract of marine insurance is a floating Policy of marine insurance and it is the main contract. *See National Insurance Corporation of Nigeria vs Power and Industrial Engineering Co. Limited, (1986) 1 NWLR (Pt. 14) 1 at Pp. 18 & 19.* Different considerations applied to the document called Marine Certificate of Insurance, Exhibit “F”, Ogundere, J.C.A. expressed the view that the certificate, Exhibit F, was not a Policy and it did not contain all the terms of the Policy. The other Justices (Achike and Ejiwunmi), J.C.A., agreed with him. The submission made for the appellant was that Exhibit “F” itself was an insurance Policy. The respondent contended that the document was not a marine insurance Policy. Apart from other things, it has to be pointed out that endorsements made on, the rubber stamp impressions affixed to, and statements in Exhibit “F” have implications and or their own meanings.

The declaration in Exhibit “F” was that an insurance had been effected with the respondent for the appellant. For the conditions of the insurance, a person, based on the endorsement on Exhibit “F,” should refer to the conditions set out in Exhibit “D” to “D8.” Indeed, it was clear from the contents of Exhibit “F” that the document was not a Policy and that it never purported to be one. The opening statement immediately below the heading of Exhibit F was as follows: “This is to certify that BENDEL INSURANCE COMPANY LIMITED have undertaken to issue Policy/policies of insurance on the standard form of the companies “24.(1) Subject to the provisions of any statute, a contract of marine insurance shall not be admissible in evidence unless it is embodied in a marine Policy in accordance with the form in the first Schedule to the Act or the like effect.”

The voyage was from the European port (that is, in Europe) to Warri in Nigeria and the period and date of attachment, which was one of the conditions of the Policy, was 7th July, 1977 to 6th July, 1978. In this circumstance, a contract for both voyage and a contract for time were included in the same Policy, Exhibit “D” to “D8”. There was nothing strange, wrong, or irregular in the said marine insurance Policy (Exhibit “D” to “D8”) except that certain precautions must be taken to ensure maximum and effective protection of the insured, in this case, the appellant. One of the precautions to be taken was for the appellant to ensure that all the vessels carrying its goods from Europe to Warri did so and discharged the goods within the limited period (7th July, 1977 to 6th July, 1978) specified in the Policy.

Further, if a vessel that left the European Port loaded with Appellant’s goods within the limited period would not be able to reach Warri and discharge the Appellant’s goods within the limited period, as a result of which the Policy would expire, the appellant had to renew the Policy to cover the Appellant’s goods for the time that the vessel would require to get to Warri (its destination) and discharge the Appellant’s goods. This is because where the loss which occurred was a result of damage to the vessel or goods in an accident which happened after the expiry of the Policy and before its renewal, the insurer will not be liable to indemnify the insured for such a loss. *See*

Another method of taking precaution is for the insured to ensure that the Policy contains what is generally referred to in insurance business as “continuation clause,” which automatically continues the insurance after the expiration of the insured period until the ship arrives at her port of destination. *See Charlesworth v. Faber (1900) 5 Com. 400.* Even if Exhibit F was regarded as a Policy, the endorsement “as per open cover No. MAR. 3195/8/77 immediately below “MARINE CERTIFICATE OF INSURANCE” and “CONDITIONS OF INSURANCE” therein was intended or calculated to incorporate or link Exhibit “F” with “D” to “D8” (otherwise known as Open Cover No. MAR. 3195/8/77), at any rate, so as to adopt or incorporate the conditions in Exhibit “D” to “D8” into Exhibit “F.” If that was so, all that I have said above concerning Exhibit “D” to “D8” containing a time (7th July, 1977 to 6th July, 1978) and voyage contract in the same Policy; the contracts of time and voyage being in the same Policy not being irregular; some of the precautions which must be taken to ensure maximum and effective protection of the appellant; the consequence of failure to take the precautions; the expiration of the time contract in the Policy at a time that the vessel had not reached its destination (Warri); failure to renew time contract before vessel was involved in an accident causing damage to vessel and goods; and the question that the insurer would not be liable to indemnify the insured for the loss thereby caused to the insured, are applicable with equal force to the situation under Exhibit “F.”

The appellant could not properly contend that Exhibit “D” to “D8” or Exhibit F adopted and incorporated in itself the conditions contained in Exhibit “D” to “D8”, did not expire on the 6th July, 1978, at a time when the vessel in question in this case had not completed the voyage from Europe to Warri and discharged the appellants’ goods. Under the heading: “THE FACTS” at page 4 of the appellants’ Brief it was stated as follows: “By Exhibit D-D8, made on 7.7.77, effective for 12 months and with 6.7.78 as expiry date the parties established between themselves a contract of marine insurance, evidenced by a Marine Open Cover Policy, Exhibit D-D8 in the proceedings” The foregoing was not all.

In paragraph 4.02 under the heading “ARGUMENT,” there was the following statement: “4.02, in the entire proceedings, there are three instruments establishing contractual relationships (sic) between the Plaintiff and the Defendant: they are Exhibits D-D8, F and T. The first document, to wit Exhibit D-D8, took effect on 7th July, 1977 and has a life span of 12 months, with 6th July, 1976 (sic) as its terminal (i.e., expiring) date. Thus, after the close of day on 6th July, 1978. Exhibit “D” – “D8” is *functus officio*: shipped, even on 6th July, 1978, the SENDING is covered; risk attaches. But shipped even only 1 day later on 7th July 1978, risk does not attach: Exhibit D -D8 has automatically become stale and useless.”

If Exhibit “D” to “D8”, as stated or contended in the Appellant’s brief, expired, became stale, and *functus officio* on 6th July, 1978, when the journey of the vessel carrying Appellant’s goods to Warri had not been completed, the responsibility was on the appellant to renew the time Policy to cover the period between the time of the expiration of the Policy up to the time the vessel would be able to complete the voyage and discharge the Appellant’s goods. As the appellant did not do so, the respondent was not liable to the appellant for the loss caused by the involvement of the vessel in an accident at the time that it happened.

I now come to Exhibit “T” which, according to the submission made for the appellant,

was a document which could support a claim for indemnity by the appellant against the respondent in relation to the loss which occurred as a result of the accident in which the vessel, M. V. Vori, was involved on the way to Warri. The position of the respondent was that Exhibit "T" could have that effect, in law, as it had no legal basis. The view of the court below was that the terms of Exhibit "T" were agreed upon by the appellant and the respondent at a time when Exhibit "D" to "D8", which they believed constituted the legal basis compromise agreement, had expired. Exhibit "T" was, therefore, meaningless and worthless. The legal position in relation to Exhibit "D" to "D8", Exhibit "F" and Exhibit "T" was summarized by the court below as follows. "Thus, when the respondent was later informed that all was not lost, the respondent company approached their insurer, the appellant and agreed Exhibit "T" which was predicated on Exhibit "D" to "D8" which in fact had expired. In view of the above, the main insurance contract herein, the marine insurance open cover lasting from 7th July, 1977 to 6th July 1978, Exhibit "D" to "D8" cannot be said to incorporate Exhibit "F" the marine certificate of insurance of 13th July, 1978, issued some 7 days after the expiry of Exhibit "D" – "D8" which was not renewed after its expiry. A fortiori Exhibit "D" – "D8" cannot cover the loss of cargo on the motor vessel "Vori" burnt at sea on the 4th September, 1978.

In an effort to gum some paper over that difficulty, Exhibit "T" BIC/MAR/98/78 of 3rd April, 1979, the so-called compromise agreement was concluded and acknowledged by the appellant insurance company. The effort also hit a stone wall and disintegrated because it was not backed by any consideration nor was it under seal. It also offends section 24 (1) of the Marine Insurance Act, 1961, which cannot be waved (sic)."

I entirely agree with the view expressed above by the court below on the extent, if at all, of the legal effect, if any, of Exhibit "D" to "D8", Exhibit "F" or Exhibit "T." The answer to the question raised under issue (2) is negative. The respondent was not liable to indemnify the appellant under the provisions of Exhibit "D" to "D8", Exhibit "F" or Exhibit "T" for the loss suffered by the appellant in connection with the destruction of its goods in the M. V. Vori when it was involved in an accident at Abidjan on its voyage towards Warri.

The next question to be examined is the controversy which arose in connection with the date, "21st July, 1978" which was dealt with in the brief filed by the parties. The complaint of the appellant was that the date "21st June, 1978 which appeared on the face of the bill of lading (Exhibit G) showed that the cargo of the appellant was delivered or sent on that date. For that reason, exhibit "D" to "D8" covered it. According to the appellant, the date "21st July, 1978," held by the court below to be the date that the cargo was sent with Exhibit "G" was completely irrelevant.

The appellant stated inter alia, as follows in its briefs:

"As already stated above, the date 21st July, 1978, is foreign to the entire proceedings and without more, places Exhibit "G" outside the ambit and coverage of exhibit "D" to "D8." The date, without more, determines the entire matter brought before the Court of Appeal." It is sufficient, in relation to this aspect of the matter, to state that the respondent in its brief pointed out, and I agree with it, that the evidence of the 2nd P.W. (witness for the appellant) was that the bill of lading was endorsed to him by the end of July, 1978. The aforesaid endorsement is at the back of Exhibit "G" signed and dated "31/V78" by whoever endorsed it to the appellant. Certainly, the date "21st June, 1978" on Exhibit "G" was the date that Exhibit "G" was issued but that might not necessarily be the same date as the appellant to obtain indemnity from the

respondent was due to the fact that the Policy covering the Appellant's goods had expired and not renewed at the time that M. V. Vori was involved in an accident. That was a finding which could be legitimately made and which was, in fact, made on the basis of the evidence on record.

It is not every slip of a Judge in his judgment that will result in his judgment being upset. For a mistake to have that result it must be substantial in the sense that it affects the decision appealed against. *See Ezeoke v. Nwagbo*, (1988) 1 NWLR (Pt. 72) 616; and *Mora v. Nwalusi* (1922) 2 SCNLR 73; (1962) All NLR 681 at P.689.

In view of the answer to the question raised under issue (2) it is not necessary to consider and/or determine the question raised under issue (3) or issue (4). The appeal has no merit. The judgment of the Court of Appeal on the appeal and the cross-appeal before it is affirmed. This appeal is dismissed with ₦1,000.00 cost.

BELGORE, J.S.C.:

I am in full agreement with the judgment of my learned brother, Adio, J.S.C., wherein he concluded that this appeal has no merit. I adopt his reasoning and conclusion as mine in dismissing this appeal. I award ₦1,000.00 as costs against the appellant in favour of the respondent.

KUTIGI, J.S.C.:

I have had a preview of the judgment just read by my learned brother Adio, J.S.C. I agree with him that the appeal has no merit. It is accordingly dismissed with ₦1,000.00 costs against the appellant.

OGWUEGBU, J.S.C.:

The judgment just delivered by my learned brother Adio, J.S.C. was made available to me in draft. I agree with his reasoning and conclusion. I, too, will dismiss the appeal.

This is an appeal by the Plaintiff against the decision of the Court of Appeal, Benin Division allowing the appeal of the Defendant to that court and dismissing the Plaintiff's cross-appeal. The facts of the case may be summarised as follows: The Plaintiff took out a marine open cover (Exhibits "D" to "D8") from the Defendant and it was endorsed on Exhibit "D" – "D8" that it would remain open for the full amount therein stated and attach to all sendings made on or after 7th July, 1977 to 6th July, 1978. By a Marine Certificate of Insurance (Exhibit F) issued by the Defendant on 13th July, 1978, the Plaintiff paid a premium of ₦1,092.95 for the insurance of 1000 M.T. white sugar valued ₦218,589.75 being shipped at a European Port to Warri Port in Nigeria. It was clearly endorsed on Exhibit "F": As Per Open Cover No. MAR3195/8/77." The ship carrying the consignment of sugar, M. V. Vori caught fire and burnt on the high seas off the coast of Abidjan. Some of the sugar consignment was salvaged by a Danish Company which claimed N29,375.00 for services. At a meeting between the parties on 3rd April, 1979 an agreement was reached between them. The Defendant confirmed the agreement in a letter addressed to the Plaintiff the same day (i.e. 3rd April, 1979).

This letter was admitted in evidence as Exhibit "T." Part of Exhibit "T" reads: "...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 Blaesberg and Company, which is ₦29,375.00. However, the necessary receipts for the payment of the said amount should be forwarded for reimbursement.
- (3) That the company will be responsible for the overtime liability in respect of the customs men to be posted to the site during discharge.”

The Plaintiff claimed that it performed its own part of the terms of the agreement and the Defendant did not perform its own part, hence this action. The Plaintiff claimed as follows:

- (1) Damages for breach of contract of 314:79, to wit,
 - (a) ₦146,138.18 being the cost of 13,371 bags of sugar lost;
 - (b) ₦29,375.00 being money paid to Messrs Blaesberg on the authorization of the Defendant;
 - (c) ₦2,000.00 is being expended on overtime services authorized by the Defendant.
 - (d) ₦142,371.01 being the loss suffered by the Plaintiff as interest on bank overdraft for that 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 expenses and interest on the money lost which was not paid at the proper time.” After the trial, Akpamgbo, J. gave judgment for the Plaintiff. Dissatisfied with the said judgement, appealed against the decision. The Plaintiff cross-appealed in respect of interest which was not awarded and an upward review of general damages as a result of inflation. The Defendant's appeal was appeal was allowed and the cross-appeal was dismissed. The Plaintiff has appealed to this court against the decision of the court below setting aside the judgement of the trial court. Counsel on both sides filed briefs of argument. Issues for determination in the appeal were formulated in the respective briefs of argument. Everything taken together, I think the main issue in the appeal is whether there existed at all material times a valid marine insurance Policy issued by the Defendant in favour of the Plaintiff in respect of the 1000 M.T of white sugar. In that regard, Exhibit “D” – “D8” (Marine Open Cover), Exhibit “F” (Marine Insurance Certificate) and Exhibit “T” (The Compromise Agreement) will be critically considered.

The parties joined issue on the existence or validity of a marine insurance contract. The Plaintiff pleaded Exhibit “F” as the contract of marine insurance made between it and the Defendant and Exhibit “D”- “D8” as the conditions of the insurance Policy effected on 7/7/77 and effective for all shipments made on 7/7/77 and up to 6/7/78. In paragraphs 5 to 9 of the statement of defence, the Defendant averred that:

1. There was no Policy/contract of marine insurance in existence between it and the Plaintiff in 1978 or at any other time;
2. Exhibit “F” dated 13/7/78 was issued by the Defendant to the Plaintiff as per Open Cover (Exhibit “D” – “D8”), both of which are “Binding in Honour”,
3. The Marine Open Cover (Exhibit “D” – “D8”) had long expired by the time Exhibit “F” was issued and
4. The said Exhibit “D” – “D8”, having expired on 6/7/78, is an ineffectual document vis-à-vis the shipment of the Plaintiff's sugar.

The court below rightly found that Exhibit “D” – “D8” is a Policy embodying the contract and any certificate of marine insurance following it is subject to it and is an

endorsement thereon. See *National Insurance Corporation of Nigeria v. Power and Industrial Engineering Company Limited* (1986) 1 NWLR (Pt. 14) 1 at 18-19. Exhibit "F"- A Marine Certificate of Insurance is not in itself a marine insurance Policy. It is endorsed with it the following expression: "As Per Open Cover No. MAR.3195/8/77." This is a reference to the Policy Exhibit D-D8. Exhibits "D" – "D8" is a time Policy since it contains two limits of time. It attaches to all sendings made on 7/7/77 and up to 6/7/78, both inclusive. The Policy covered losses occurring between the two dates, whether partial or total, even though the extent of loss is only ascertained after 6th July, 1978. See section 27 of Marine Insurance Act No. 54 of 1961 which reads:

"Where a contract is to insure the subject-matter "at and from," or from one place to another or others, the Policy, is called a voyage Policy and where the contract is to insure the subject-matter for a definite period the Policy is called a time Policy."

The Policy Exhibit "D" – "D8" covered the goods of the Plaintiff during the period stipulated therein. The fire incident which burnt the Plaintiff's consignment of white sugar took place on or about 4/9/78 after the life span of Exhibit "D" – "D8" had expired and the Policy did not contain a clause, called the "continuation clause", which continues the insurance after the expiration of the insured period until the ship arrives at her port of destination. At the time Exhibit "F" dated 13/7/78 came into existence, Exhibit "D" – "D8" had expired. The Marine Open Cover (Exhibit "D" – "D8" having come to an end on 6/7/78, it cannot be said to incorporate Exhibit "F." In the circumstance, Exhibit "D" – "D8" did not cover the loss of Plaintiff's cargo on the motor vessel M/V Vori which caught fire on 4/9/78. The Defendant is therefore not liable to the Plaintiff for the loss that resulted from the accident. The Plaintiff has urged in the alternative that Exhibit "T," (letter dated 3/4/79 by the Defendant to the Plaintiff) was substituted as the agreement reached by the parties after the M. V. Vori was brought to Warri port to discharge its cargo including the remains of the Plaintiff's cargo the leaned Plaintiff's counsel also argued that Exhibit "T" is a kind of estoppel which prevented the Defendant from going back from its existence having extinguished Exhibit "F." She relied on the case of *Charles Rickard Ltd v. Oppenheim* (1950) 1 K.B. 616.

It seems clear that when the parties entered into the compromise agreement in Exhibit "T," they were under a common mistake which was fundamental to the whole agreement. Both parties thought that the Marine Open Cover (Exhibit "D" – "D8") was still in existence and enforceable. The Plaintiff had no valid claim after 6/7/78 on the Defendant. If he had no claim on the Marine Open Cover, it is not equitable that he should have a good claim on Exhibit "T." See *Magee v. Pennine Insurance Co. Limited* (1969) 2 All E.R. 891. The doctrine of estoppel does not therefore apply, having regard to the common mistake. The alternative claim under Exhibit "T" was rightly rejected by the court below. As a result, Exhibit "T" is not a valid, contractual document that can bind the parties. For the above reasons and the fuller reasons given in the lead judgement, I, too, dismiss the appeal. I abide by the order for costs made in the lead judgment of my learned brother Adio, J.S.C.

ONU, J.S.C:

I have had a preview of the judgement just delivered by my learned brother Adio, J.S.C. and with it I am in entire agreement that the appeal is lacking in merit and ought therefore to fail. The cardinal or crucial issue for decision as I see it in this case whose facts are straightforward and not in dispute, is whether, considered standing alone or together with the other documentary evidence (otherwise referred to as the principal

documents) involved herein, Exhibits “D” – “D8” (the open cover Policy otherwise also known as a time Policy) bind the parties thereto. For this to occur, it is pertinent, firstly, to determine what the purport of these pieces of documentary evidence are. While Exhibit ‘D’ to ‘D8’ as a marine open cover made pursuant to Section 24(1) of the Marine Insurance Act, Cap.216 Laws of the Federation had a life span of 12 months and having effect from 7th July, 1977 to 6th July, 1978, Exhibit F constituted a document of marine certificate of insurance issued 7 days after the expiry of Exhibit ‘D’ to ‘D8’. Exhibit G, on the other hand, is the bill of lading that came into existence on 21/7/78 after the marine cover had expired, while the vessel M. V. Vori was lost at sea off the coast of Abidjan on 4/9/78, long after Exhibits D to D8 had expired.

Finally, Exhibit ‘T’, otherwise called a compromise agreement, was entered into between the appellant and the respondent. but which, because Exhibit ‘D’ to ‘D8’ had expired before the accident involving the M. V. Vori, on which perished with its cargo of sugar, became meaningless itself and left to hang in the air for not prolonging the life of Exhibit ‘D’ to ‘D8’. Not only did Exhibit ‘F’ therefore fail to provide any marine insurance cover to the appellant for the loss of the cargo on 4th September, 1978 when the M. V. Vori had its accident, no risk, I venture to add, attached thereto vide section 24(1) Marine Insurance Act, Cap.216 Laws of the Federation of Nigeria, 1990. Thus, the non-liability of the respondent as the insurer for the loss caused to the cargo on M. V. Vori leaves the appellant without a remedy for the presumed contractual relations founded on any of these documents. It is for the above reasons and the more elaborate ones proffered in the judgment of my learned brother Adio, J.S.C. that I too dismiss this appeal and make the same orders for costs as assessed therein.

Appeal dismissed.

14.4 REMARKS

Marine insurance Policy, meaning and nature of. Sections 2 and 3 of the Marine Insurance Act, whether rights of parties are determined by the Policy of marine insurance between the parties or a certificate issued under the Policy, or both.

14.5. REFERENCES

1. *Fatola vs. Mustapha*, (1985) 2 NWLR (Pt.7) 438.
2. *National Insurance Corporation of Nigeria vs Power and Industrial Engineering Company Limited*, (1986) 1 NWLR (Pt. 14) 1 at Pp. 18 & 19.
3. *Solicitor General, Western Nigeria vs Adebajo* (1971) All NLR 178.
4. *Union Bank of Nigeria vs Ozigi*, (1994) 3 NWLR (Pt. 333) 385.
5. *Lockyer vs Offey* (1786), 1 Term Rep, 252.
6. *Charlesworth vs Faber* (1900) 5 Com. 400.
7. *Ezeoke vs Nwagbo*, (1988) 1 NWLR (Pt.72) 616.
8. *Mora vs Nwalusi* (1922) 2 SCNLR 73; (1962) All NLR 681 at P.689.
9. *Magee vs Pennine Insurance Company Limited*. (1969) 2 All E.R. 891.

15.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT OF NIGERIA

DATE: 27th May, 1977

SUIT NO: 1955-1958 WNLR 154

JUDGE: Udo Udoma, J.S.C.
M. Bello, J.S.C.
A.O. Obaseki, J.S.C.

**THE STATE (1977)
(Defendant/ Appellant)**

vs.

**GREGORY GODWIN DABOH & ANOR. All N.L.R. 146.
(Plaintiff/ Respondent)**

15.2 REPORTS/FACTS/ISSUES

This appeal is against the conviction of the two appellants by the High Court of Lagos State holden in Lagos on two counts in which they were charged, firstly that they had both conspired together on 14th July 1970 in Lagos to commit felony, that is to say, to induce by pretenses the Registrar of insurance in the Federal Ministry of Trade, to deliver the certificate of Registration as an Insurer to the Nigerian States Assurance Corporation Limited and thereby committed an offence contrary to section 516 of the Criminal Code, and secondly on the same day with intent to defraud, induced the Registrar of Insurance, Insurance Division, Federal Ministry of Trade, Lagos to deliver the certificate of registration as an insurer to the Nigerian Assurance Corporation Limited aforesaid had a credit balance of ₦50,000.000 in its account with the Bank of the North Limited and thereby committed an offence contrary to section 419 of the Criminal Code.

On conviction, the appellants were each sentenced to two years imprisonment on the first count and 18 months imprisonment on the second count; and sentences were ordered to run concurrently. The case of the prosecution in support of the charges was that on 31st January 1969 by a formal application duly completed and signed by the 1st appellant as Executive Director, the Nigerian States Assurance Corporation Limited, applied to the registrar of insurance, Federal Ministry of Trade, to be and was duly registered as an insurer after other requisite forms had also been duly completed and submitted. The Nigerian States Assurance Corporation was then called upon to deposit ₦50,000.00 with a bank, and after having done so, to communicate the fact to the Registrar of Insurance, Federal Ministry of Trade, to enable the latter to grant and deliver to the company a certificate of registration as an insurer. Subsequently, on the 14th of July, 1970, the 1st appellant, as the Executive Director of the Nigerian States Assurance Corporation Limited met the 2nd appellant who at the material time was the Manager in charge of the Bank of the North Limited Apapa branch, at his office. The 2nd appellant then introduced the 1st appellant to Kafaru Ajala (P.W.6), then Accountant of the Bank of the North Limited and told him that the 1st appellant as the Executive Director of the Nigerian States Assurance Corporation Limited would be opening two accounts for his company with the Bank of the North Apapa Limited. The

second appellant at the same time handed over to Kafaru Ajala a cheque no. 000422 bearing the date for the sum of ₦50,000.00 which had issued by the first appellant from a cheque book numbered from 000361-000480, Exhibit 45, supplied by the United Bank for Africa Limited Benin City Branch to the Nigerian States Assurance Corporation Limited as its customer. The cheque was for the opening of a current account with the Bank of the North Limited, Apapa branch.

On receiving the cheque, Kafaru Ajala asked the 1st appellant for the resolution of his company appointing the Apapa branch of the Bank of the North as its bankers, the Articles of Association of the company, and the certificate of incorporation of the company. The 1st appellant promised to bring these items to the bank during his next visit. The 2nd appellant then instructed Kafaru Ajala to get the cheque no. 000422 for ₦50,000.00 receipted for under credit advice. On the instruction of the 2nd appellant, Patrick Ikechuku Olisa typed out another credit advice instead of the 1st one that was disapproved and torn off by the 2nd appellant which now reads: - "proceeds of deposit made by you ₦50,000.00" which is what appears in Exhibit P.28 and was signed by both the 2nd appellant and Kafaru Ajala. The credit advice Exhibition P.28 was thereafter delivered to the 1st appellant as a receipt for the payment of the sum of ₦50,000.00 by the cheque no. 000422 of 14th of July 1970.

Thereafter, the cheque no. 000422 for ₦50,000.00 was passed on to the clerk in charge of clearing cheques, Rasaq Omotayo Ashiru (P.W.4) who on receiving it, registered the same in the cheques collection register of the bank, Exhibit P.4. Then contrary to normal practice and the usual course of business, instead of the cheque being treated as for collection by the passing of entry for the same by Rasaq Omotayo Ashiru, on the instruction of the 2nd appellant, the entry in the register was cancelled by Rasaq Omotayo Ashiru and the cheque returned to Kafaru Ajala who later handed it over to the 2nd appellant. No action was ever taken to have the cheque cleared and proceeds realized. The cheque was subsequently said to be lost, apparently in the hands of the 2nd appellant.

On 27th July 1970, a letter Exhibit P.27A signed by the 2nd appellant alone was addressed to and received by the Registrar of Insurance, Ministry of Trade, Insurance Division, confirming the assurance already given in a letter addressed to the Registrar of Insurance by the Nigerian States Assurance Corporation Limited that the deposit of ₦50,000.00 with the Bank of the North, Apapa branch would never be withdrawn from the bank by the 1st appellant without the prior consent and approval of the Registrar of Insurance. On receiving these letters (Exhibits P.27 and P. 27A), the Registrar of Insurance issued and granted to the Nigerian States Assurance Company Limited the Certificate of Registration as an insurer dated 11th August 1970, Exhibit P.42 under the Insurance Companies Act 1961 authorising the company to carry on specified classes of insurance business. The certificate of Incorporation was handed over to and received by the 1st appellant, who also signed for it.

By its letter dated 6th October 1970 Exhibit P. 43, written from its head office in Kano, the Bank of the North repudiated and depreciated the information and representation which its Apapa branch had communicated to the effect that Nigerian States Assurance Corporation ever had at any time a deposit of the sum of ₦50,000.00 to its credit and in its favour.

The Registrar of Insurance, therefore, addressed to the 1st appellant a letter Exhibit 2D2 calling for the original copies of the bank statements, cash books, and such other documents to establish that the company is operating within the margin of solvency

as defined under section 4 of the Insurance Companies Act 1961. When the 1st appellant failed to comply with the request within the stipulated time, the Registrar of Insurance cancelled the Certificate of Insurance granted to the Nigerian States Assurance Corporation Limited, and the fact of the cancellation was published as Government Notice No. 1225. The extra-judicial statement of the 1st appellant, Exhibits P. 15 and P. 16, which were made to the police, were also tendered and admitted as forming part of the case for the prosecution. At the close of the case for the prosecution, counsel representing the 1st appellant submitted that the prosecution had not made out a prima facie case against the appellant to warrant his being called upon to defend, and therefore, the 1st appellant should be discharged. The trial Judge, having given consideration to the submission made to him, upheld the submission in respect of the 1st count and discharged both appellants, but overruled it in respect of the 2nd and 3rd counts, now the subject of this appeal. As a result of the ruling, the 1st appellant refused to take further part in the proceedings of the trial and rested his case on the submission of "no case". The 2nd appellant gave evidence in his own defence.

15.3. DECISION OF COURT.

HELD:

- (1) The evidence in the instant case was sufficient at that stage to entitle the trial Judge not to express opinion one way or the other but to overrule any submission of no case to answer, and to rule positively that a prima-facie case had been made out by the prosecution which at the very least, called for some explanation by the first appellant. To so rule does not in any way shift the burden of proof from the prosecution onto the first appellant, nor does it necessarily mean that the first appellant was guilty of the offence charged.
- (2) There is no doubt whatsoever that from all the circumstances of the case on appeal, the only reasonable and irresistible inference to be drawn from the evidence must be that there was a definite agreement, a scheme-a contrivance if you like, between the 1st and 2nd appellant to induce the Registrar of Insurance to issue to the 1st appellant as Executive Director of the Nigerian States Assurance Corporation Limited a Certificate of Registration as an insurer. It was in furtherance of that agreement that the second appellant accepted the cheque no. ₦50,000.00, well knowing that the Nigerian States Assurance Corporation Limited did not have that much in the United Bank for Africa, Benin City branch and consequently passed it to the cheque clearance clerk.
- (3) The present charges against the appellants do not fall within the categories enumerated in the Federal Revenue Decrees. The provisions of section 7(3) relate to matters the proceedings in which are to be initiated at the instance of the Attorney-General of the Federation.
- (4) We hold that unless and until the Director of Public prosecutions or for that matter the Attorney-General of the Federation has been designated under section 344 of the criminal procedure law of a state as the proper authority to file information for the prosecution of offenders to be charged with the offences of the kind under consideration in this appeal, the appropriate court seized with the jurisdiction for the trials of such must be the state High Court.

Appeal dismissed

JUDGEMENT

Udo Udoma, J.S.C.:

This appeal is against the conviction of the two appellants by the High Court of Lagos State in Lagos on two counts in which they were charged, firstly, that they both conspired together on 14th July, 1970 in Lagos to commit a felony, that is to say, to induce by false pretenses the Registrar of Insurance in the Federal Ministry of Trade, to deliver the Certificate of Registration as an Insurer to the Nigerian States Assurance Corporation Limited and thereby committed an offence contrary to Section 516 of the Criminal Code; and secondly, that the two appellants on the same day with the intent to defraud, induce the Registrar of Insurance, Insurance Division, Federal Ministry of Trade, Lagos, to deliver the Certificate or Registration as an Insurer to the Nigerian States Assurance Corporation Limited by falsely pretending that the Nigerian States Assurance Corporation Limited aforesaid had a credit balance of ₦50,000.00 in its account with the Bank of the North Ltd., and thereby committed an offence contrary to Section 419 of the Criminal Code.

On conviction, the appellants were each sentenced to two years imprisonment on the first count, and 18 months imprisonment on the second count; and sentences were ordered to run concurrently. They have both appealed to this Court against their conviction.

In view of the submissions made to us in respect of charges against the first appellant, that the learned trial Judge was wrong in law in overruling the submission of no case to answer made on behalf of the first appellant, it is necessary to examine more carefully and in greater detail the case of the prosecution.

The case of the prosecution in support of the charges against the appellants was that on 31st January, 1969, by a formal application duly completed and signed by the first appellant as Executive Director, The Nigerian States Assurance Corporation Limited, applied to the Registrar of Insurance, Federal Ministry of Trade, to be and was duly registered as an Insurer after other requisite forms had also been duly completed and submitted. The Nigerian States Assurance Corporation Limited was then called upon to deposit the sum of ₦50,000.00 with a bank, and after having done so, to communicate that fact to the Registrar of Insurance, Federal Ministry of Trade, to enable the latter to grant and deliver to the company, a Certificate of Registration as an Insurer.

Subsequently, on 14th July, 1970, the first appellant, as the Executive Director of the Nigerian States Assurance Corporation Limited, met the second appellant, who at the material time, was the Manager in charge of the Bank of the North Limited, Apapa branch, at his office. The second appellant then introduced the first appellant to Kafaru Ajala (P.W.6). then Accountant of the Bank of the North Limited, Apapa branch, and told him that the first appellant, as the Executive Director of the Nigerian States Assurance Corporation Limited, would be opening two accounts for his company with the Bank of the North Limited, Apapa Branch. The second appellant, at the same time, handed over to Kafaru Ajala, a cheque No. 004422 bearing that date for the sum of ₦50,000.00 which had been issued by the first appellant from a cheque book numbered from 000361-000480, Exhibit 45, supplied by the United Bank for Africa Limited, Benin City branch to the Nigerian States Assurance Corporation Limited as its customer.

The cheque, which was drawn on the United Bank for Africa Limited, Benin Branch, in favour and to the credit of the Nigerian States Assurance Corporation Limited, was for the opening of a current account with the Bank of the North Limited, Apapa Branch. On receiving the cheque, Kafaru Ajala spoke to the first appellant. He asked him for the resolution of his company appointing the Apapa Branch of the Bank of the North Limited as its bankers, the Articles of Association of the company, and the Certificate of Incorporation of the Company. The first appellant promised to bring these items to the bank during his next visit. The second appellant then instructed Kafaru Ajala to get the cheque no. 000422 for ₦50,000.00 receipted for under Credit Advice. Kafaru Ajala thereupon gave the cheque, No. 000422, to Patrick Ikechuku Olisa (P.W.5), the shorthand typist employed by the bank and dictated to him for taking down in writing the wording of the Credit Advice in the following words: - "Proceeds of cheque No. so and so ₦50,000" or words to that effect. When as worded, the Credit Advice was passed on by Patrick Ikechuku Olisa to the second appellant, it was disapproved and torn off by the second appellant. On the instructions of the second appellant, Patrick Ikechuku Olisa typed out another Credit Advice which reads: "Proceeds of Deposit made up by you ₦50,000" which is what appears in Exhibit P28 and was signed by both the second appellant and Kafaru Ajala. The Credit Advice, Exhibit P28, was thereafter delivered to the first appellant as a receipt for the payment of the sum of ₦50,000.00 covered by cheque No. 000422 of 14th July, 1970.

Thereafter, the cheque No. 000422 for ₦50,000.00 was passed on to the clerk in charge of clearing Cheques, Rasaq Omotayo Ashiru (P.W.4), who, on receiving it, registered the same in "the cheques for collection register" of the bank, Exhibit P4. Then, contrary to normal practice and the usual course of business, instead of the cheque being treated as for collection by the passing of entry for the same by Rasaq Omotayo Ashiru, on the instructions of the second appellant, the entry in the register was cancelled by Rasaq Omotayo Ashiru and the cheque returned to Kafaru Ajala, who later handed it over to the second appellant. No action was ever taken to have the cheque cleared and the proceeds released. The cheque was subsequently said to be lost, apparently in the hands of the second appellant.

The first appellant, after having received the Credit Advice, requested that the bank should write a letter addressed to the Registrar of Insurance, Federal Ministry of Trade, certifying that the Nigerian States Assurance Corporation Limited had a deposit of the sum of ₦50,000.00 standing to its credit and in its favour. The request by the first appellant was promptly complied with; and as a result, a letter, Exhibit P27, which was signed by both Kafaru Ajala and the second appellant, was written, addressed and sent to, and later received by the Registrar of Insurance, Federal Ministry of Trade. The second appellant then told Kafaru Ajala that the first appellant was expecting the sum of ₦100,000.00 to be telegraphically transferred through the United Bank for Africa Limited, Lagos, and that as soon as the money arrived, it would be split into two and paid into the Bank of the North Limited, Apapa branch, in such a way that ₦50,000.00 would be paid into a fixed deposit account and the balance of ₦50,000.00 into a current account-all to the credit and in favour of the Nigerian States Assurance Corporation Limited. On 27th July, 1970, a letter, Exhibit P27A, signed by the second appellant alone was also addressed to, and later received by the Registrar of Insurance, Ministry of Trade, Insurance Division, confirming the assurance already given in a letter addressed to the Registrar of Insurance by the Nigerian States Assurance Corporation Limited, that the deposit of ₦50,000.00 with the Bank of the North Limited, Apapa Branch, would never be withdrawn from the bank by the first appellant without the prior consent and approval of the Registrar of Insurance. The duplicate of this letter was handed over to and received by the first

appellant.

On receiving the letters, Exhibits P27 and P27A, certifying that the Nigerian States Assurance Corporation Limited had a deposit of ₦50,000.00 with the Bank of the North Limited, and that the sum would never be withdrawn from the bank by the first appellant without the prior knowledge and consent and approval of the Registrar of Insurance, the latter issued and granted to the Nigerian States Assurance Corporation Limited the Certificate of Registration as an Insurer dated 11th August, 1970, Exhibit P42, under the Insurance Companies Act 1961, authorising the company to carry on specified classes of insurance business. The Certificate of Registration, Exhibit P42, was handed over to and received by the first appellant, who also signed for it. By its letter dated 6th October, 1970, Exhibit P43, written from its Head Office in Kano, the Bank of the North Limited informed the Registrar of Insurance, Federal Ministry of Trade that it was not correct that the Nigerian States Assurance Corporation Limited ever had at any time a deposit of the sum of ₦50,000.00 to its favour with the Bank of the North Limited, and that the Bank of the North Limited had not at any time held to the credit and in favour of the Nigerian States Assurance Corporation Limited, any deposits in the sum of ₦50,000.00.

By that letter, the Bank of the North Limited repudiated and deprecated the information and representation which its Apapa branch had communicated and held out to the Registrar of Insurance, Federal Ministry of Trade, as contained in its letters, Exhibits P27 and P27A. The Registrar of Insurance therefore addressed to the first appellant his letter dated 12th October, 1970, Exhibit 2D2, calling for the original copies of the bank statements, cash books and such other documents of the Nigerian States Assurance Corporation Limited "as would establish that the company is operating within the margin of solvency as defined under Section 4 of the Insurance Companies Act, 1961."

When the first appellant failed to comply with the request within the stipulated time, the Registrar of Insurance, Federal Ministry of Trade, cancelled the Certificate of Insurance granted to the Nigerian States Assurance Corporation Limited;, and the fact of the cancellation was published as Government Notice No. 1225.

The extra-judicial statements of the first appellant, Exhibits P15 and P16, which were made to the Police, were also tendered and admitted as forming part of the case for the prosecution.

At the close of the case for the prosecution, learned Counsel representing the first appellant submitted that the prosecution had not made out a prima facie case against the first appellant to warrant his being called upon for his defence and therefore that the first appellant should be discharged.

The learned trial Judge, after having given consideration to the submissions made to him, upheld the submission in respect of the first count, and discharged both appellants, but overruled it in respect of the second and third counts, now the subject of this appeal, the particulars whereof are set out in the first part of this judgment. It should be noted that the charge against the appellant originally contained three counts.

As a result of the ruling, the first appellant refused to take any further part in the proceedings of the trial and rested his case on the submission of "no case". The second appellant, unlike the first appellant, gave evidence in his defence. Now before us, Chief Awolowo, learned Counsel for the first appellant, in a well-thought out and

well-reasoned argument has submitted that the learned trial Judge was wrong in law in failing to uphold the submission that no prima facie case had been made out against the first appellant to have warranted his being called upon for his defense. Learned Counsel has contended that, in particular, the evidence of Kafaru Ajala who was the star witness for the prosecution, although he would not go the length of saying that he was an accomplice in so far as the case of the first appellant was concerned, was virtually destroyed and Kafaru Ajala himself discredited, and therefore, his testimony did nothing to advance the cause of the prosecution in that he said that the cheque for ₦50,000.00 issued by the first appellant was certified. But that evidence was contradicted by both Rasaq Omotayo Ashiru and Nelson Bello (P.W.8), the representative of the United Bank for Africa Limited, Benin City, both of whom denied that the cheque concerned was certified, as the United Bank for Africa Limited has stopped the issue of certified cheques since 1969.

Learned Counsel then neatly pointed out that to establish the charge as laid in the second count successfully, it was the duty of the prosecution to prove that there was a positive agreement between the first and the second appellants to commit a felony, to wit, to induce the Registrar of Insurance to deliver the Certificate of Registration as an Insurer to the Nigerian States Assurance Corporation Limited of which the first appellant was Executive Director; and that such positive agreement was to do so by pretenses. In respect of the third count, learned Counsel contended that the three essential elements which the prosecution ought to have proven were:

- (i) that there was an intent to defraud;
- (ii) that the first appellant induced the Registrar of Insurance to deliver to the Nigerian States Assurance Corporation Limited the Certificate of Registration; and
- (iii) that the inducement was by false pretenses; and since the prosecution had failed to establish these elements on the evidence submitted by the learned Counsel, the learned trial Judge ought to have ruled that there was no case for the appellant to answer.

On the facts, learned Counsel submitted that at the close of the case for the prosecution, the bulk of the facts established on the evidence was not in dispute, the element of controversy introduced by the evidence being when the United Bank for Africa cheque entered the scene a dispute arose as to whether or not the Nigerian States Assured Corporation Limited had at the material time a deposit of ₦50,000.00 with the Bank of the North Limited, Apapa branch. On that issue, it was the submission of the learned Counsel that the statement of the first appellant made it clear that the deposit he paid on behalf of the Nigerian States Assurance Corporation Limited was in cash for ₦50,000.00 and not cheque, but Kafaru Ajala and Rasaq Omotayo Ashiru had said that the only payment made in that respect was by cheque for ₦50,000.00 which he submitted, was not even treated properly by the bank.

Learned Counsel then pointed out that on the evidence, the cheque for ₦50,000.00 dated 14th July, 1970, registered by Rasaq Omotayo Ashiru and the one for ₦50,000.00 only issued by the first appellant on 13th July, 1970, bear the same number 000422 and that they were both drawn on the United Bank for Africa, Benin City. Learned Counsel then submitted that there was something of a mystery around the two cheques; and that such a mystery had nothing to do with the first appellant. It was entirely a matter for the bank because the first appellant was quite positive that his cheque No. 000422 of 13th July, 1970, had nothing whatsoever to do with the sum of ₦50,000.00 in cash which at the instructions of the Registrar of Insurance, Federal Ministry of Trade, he had paid to the Bank of the North Limited, Apapa Branch, as deposit in favour of the Nigerian States Assurance Corporation Limited.

Finally, it was the submission of learned Counsel that the learned trial Judge ought to have discharged and acquitted the first appellant on the whole of the case because there was no iota of evidence of any agreement between the first and second appellants to commit any offence, let alone, a felony; that there was no evidence that the first appellant did anything to induce the Registrar of Insurance, Federal Ministry of Trade to deliver the Certificate of Registration to the Nigerian States Assurance Corporation Limited. On the contrary, contended learned Counsel, on the evidence, the Registrar was induced by the letters, Exhibits P27, P27A and P28, written on behalf of, and delivered by the Bank of the North Limited, Apapa Branch, to the Registrar of Insurance, Federal Ministry of Trade.

These are important submissions. They are impressive and require careful examination and consideration. Before, however, embarking upon such an exercise, it is perhaps expedient here to observe that it is a well-known rule of criminal practice, that in a criminal trial at the close of the case for the prosecution, a submission of no prima facie case to answer made on behalf of an accused person postulates one of two things, or both of them at once.

Firstly, such a submission postulates that there has been throughout the trial no legally admissible evidence at all against the accused person on behalf of whom the submission has been made linking him in any way with the commission of the offence with which he has been charged, which would necessitate his being called upon for his defence. Secondly, as has been so eloquently submitted by Chief Awolowo, that whatever evidence there was which might have linked the accused person with the offence has been so discredited that no reasonable court can be called upon to act on it as establishing criminal guilt on the accused person concerned; and in the case of a trial by jury, that the case ought therefore to be withdrawn from the jury and ought not to go to them for a verdict. On the other hand, it is well settled that in the case of a trial by jury, no less than in a trial without a jury, however slight the evidence linking an accused person with the commission of the offence charged might be, the case ought to be allowed to go to the jury for their findings as judges of fact and their verdict.

Therefore, when a submission of no prima facie case is made on behalf of an accused person, the trial court is not thereby called upon at that stage to express any opinion on the evidence before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charged. If the submission is based on discredited evidence, such discredit must be apparent on the face of the record. If such is not the case, then the submission is bound to fail. Looking at the case of the prosecution, it cannot be said that there was no evidence linking the first appellant with the commission of the criminal offences charged.

There was evidence that it was the first appellant, as Executive Director of the Nigerian States Assurance Corporation Limited, who on 31st January, 1969, had applied for, and successfully got the Nigerian States Assurance Corporation Limited registered as an Insurer by the Registrar of Insurance, who thereupon had called for a deposit of ₦50,000.00 as required by law to be made in any bank by the Nigerian States Assurance Corporation Limited, and thereafter, that the fact of such deposit having been made should be communicated to him to enable him to issue the Company with a Certificate of Registration, which would entitle the Nigerian States Assurance Corporation Limited to start business operation as an Insurer.

There was also evidence that the cheque No. 000422 of the 14th July, 1970, for ₦50,000.00 was issued by the first appellant as the Executive Director of the Nigerian States Assurance Corporation Limited, leaving aside for the moment the controversy over whether the cheque was for ₦50,000.00 or ₦50.00. There was also evidence that the cheque, though registered on 14th July, 1970, in the books of the Bank of the North Limited, Apapa Branch, was lost in the hands of the second appellant; and that the proceeds thereof had never been realised. There was evidence that the credit advice was issued by the Bank of the North Limited, Apapa branch, to the first appellant on the strength of the cheque No. 000422 for ₦50,000.00.

There was evidence that although the cheque No. 000422 had not been cleared, but had disappeared, the letters, Exhibits P27, P27A and P28 had been written at the request of the first appellant to the Registrar of Insurance and that it was on the strength of the representations therein contained that the Registrar was induced to issue the Nigerian States Assurance Corporation Limited with a Certificate of Registration as an Insurer. There was no evidence that the first appellant had ever been issued with a fixed deposit receipt, which should have been issued to him if he had paid a deposit of ₦50,000.00 by cash.

There was evidence also that the Registrar's request that the first appellant should submit the books of the Nigerian States Assurance Corporation Limited, including bank statements to him was not compliant with by the first appellant. Indeed, on the evidence, the first appellant could not comply with the request because there was no bank account actively operated upon by the Company in the Bank of the North Limited, Apapa Branch.

There was evidence also that the Certificate of Registration was later cancelled when it came to the knowledge of the Registrar of Insurance that the claim that the Nigerian States Assurance Corporation Limited had a deposit of ₦50,000.00 with the Bank of the North Limited was false. Then there was the extra-judicial statement, Exhibit P8, made by the first appellant and written on the letter-headed paper of the Nigerian States Assurance Corporation Limited in which the first appellant confessed that he it was who had demanded a certificate of deposit for the Registrar of Insurance for the sum of ₦50,000.00 which he had deposited in cash with the Bank of the North Limited, Apapa branch, the certificate being required for use by him as evidence that he had in fact made such a deposit; that a certificate of deposit No. JNN/F01/7/70 dated 15th July, 1970 was issued to him duly signed by the second appellant and the Accountant, Kafaru Ajala; that he it was who submitted the certificate of deposit together with the bank credit advice to the Registrar of Insurance; that he it was who wrote, giving the requisite guarantee that the Nigerian States Assurance Corporation Limited would not, without the knowledge and consent of the Registrar of Insurance, on any account, make withdrawal from the deposit with the bank, the letter conveying that assurance being numbered ED00396/70-UEB; that he knew when the bank wrote on 27th July, 1970 confirming that undertaking; that the cheque No. 000422 of 13th July, 1970 for the sum of ₦50.00 had nothing whatsoever to do with the cash deposit of ₦50,000.00, the only available part of the former cheque being the stump or counterfoil, the original having disappeared.

Surely, the evidence such as it was, was sufficient at that stage to entitle the learned trial Judge not to express opinion one way or the other, but to overrule any submission of no case to answer; and to rule positively that a prima facie case had been made out by the prosecution, which at the very least, called for some explanation by the first appellant. To so rule did not in any way necessarily shift the burden of proof from the

prosecution unto the first appellant; nor did it mean necessarily that the first appellant was guilty of the offences charged.

We do not think, therefore, that the decision of this Court delivered by Irikefe, J.S.C. in *Wahabi Ohusanya Mumuni and 13 Ors vs. The State* (1975) 6 S.C. 79 cited to us by learned Counsel is of any assistance to the first appellant in the case on appeal. There, the decision on the aspect of the case now under consideration was that there is absolutely no evidence against the prisoner at the end of the prosecution's case, the court is under a legal obligation to discharge him at that stage, for to do otherwise, would be tantamount upon the prisoner the onus of establishing his innocence; and that a prisoner against whom there is some evidence calling for his explanation on oath shall not be placed in a more advantageous position at the end of trial solely on the ground that he had rested his case on his submission and declined to participate further in the proceedings. In such a case, the trial court may consider against the prisoner all the evidence produced at the trial, including any incriminating evidence subsequently given by a co-prisoner. With these propositions of law, we respectfully agree. In the circumstances, we hold that the ground of appeal alleging that the learned trial Judge erred in law in having ruled that the first appellant had a case to answer fails. It is rejected.

The learned trial Judge, having overruled the submission of no case to answer, the trial proceeded. As already stated, the first appellant declined to participate in the proceedings anymore, but the second appellant gave evidence on his own behalf. In his defence, the second Appellant's evidence was that at the material time, he was the Manager in charge of the Bank of the North Limited, Apapa branch; that on 13th July, 1970, the first appellant came to see him in his Apapa office concerning the difficulties he was encountering in getting his insurance company licensed according to the law of the country; that he thereupon requested the first appellant to bring to him documents relating to the Insurance Company to enable him to see what help he could render him and that in the meantime, he would discuss the matter with the Accountant of the bank; that on 13th July, 1970, the first appellant opened a current account with the bank; that the first appellant came again to the bank on 14th July, 1970; that among the documents produced by the first appellant was one from Kano State Government indicating its willingness to take up to 100,000 shares in the Company; that he it was truly who introduced the first appellant to Kafaru Ajala (P.W.6); that at his office that day, the first appellant made out a cheque for ₦50,000.00 for the opening of a current account for the Nigerian States Assurance Corporation Limited which he, the second appellant, handed over to Kafaru Ajala; that in truth, he did tell Kafaru Ajala, that the first appellant would be having a telegraphic transfer from Kano and that as soon as the money arrived, the cheque for ₦50,000.00 would be passed on for collection. And as a result of his instructions, Kafaru Ajala kept the cheque clipped together with the form, Exhibit P2, which had already been completed for the opening of a current account for the Nigerian States Assurance Corporation Limited, and that the form was completed by the first appellant on 14th July, 1970.

It was the case of the second appellant in his defence, that it was at the request of the first appellant, after some discussion, that the letters, Exhibits P27 and P27A, were written by him to the Registrar of Insurance, Federal Ministry of Trade; that he did so, even though he knew that the Nigerian States Assurance Corporation Limited had no deposit whatsoever with the Bank of the North Limited, Apapa branch, because he wanted to help the first appellant; and that he knew that Insurance Companies were required by law to show that they had a deposit of, or could account for the sum

of ₦50,000.00 before they could be granted license to operate as Insurers; and that by the letter, Exhibit P27, the Bank of the North Limited was committed to pay the sum of ₦50,000.00; that the bank was bound to pay to government if the money had been called for by the government; that he knew at the time no account was opened in favour of or for the Nigerian States Assurance Corporation Limited in the Bank of the North Limited, Apapa Branch, and that the company had no credit whatever with the bank.

It was also the evidence of the second appellant in his defence that when he committed the bank to guarantee the company the sum of ₦50,000.00 he had no authority from the Head Office of the Bank of the North Limited so to do; that the contents of the letter, Exhibit P27 was false to his knowledge; that he knew the Registrar of Insurance was going to act upon the representations contained in the said letter, and that was why it was so written; and that the purpose of the letter was to enable the Nigerian States Assurance Corporation to obtain a Certificate of Registration as an Insurer.

The evidence of the second appellant in the witness box had to be considered along with his extra-judicial statement, Exhibit P6, in which he had stated that the first appellant drew a cheque for ₦50,000.00 on the United Bank for Africa Limited, Benin City, and strongly requested him to write a letter to the Federal Ministry of Trade, Insurance Department, to confirm that the Nigerian States Assurance Corporation Limited had paid a deposit of ₦50,000.00 to the bank so as to enable him, the first appellant to obtain from the Registrar of Insurance a license for the Nigerian States Assurance Corporation Limited; that he took action immediately as requested, but that as soon as the first appellant left his office, he received a telephone call from the first appellant advising him not to send the cheque for ₦50,000.00 to Benin City for collection as the Nigerian States Assurance Corporation Limited had not sufficient funds with the United Bank for Africa Limited, Benin City; and that up to the time of his interdiction from service the Nigerian States Assurance Corporation Limited had no funds standing to its credit to enable the cheque for ₦50,000.00 to be cleared.

It seems to us quite clear that, as disclosed by his testimony, the second appellant had no defence whatsoever to the charges against him. He admitted quite frankly that the letters, Exhibits P27, P27A and the Credit Advice, Exhibit P28, were written by him when he well knew that the Nigerian States Assurance Corporation Limited did not have any funds to its credit at the material time, but that he did not have any funds to its credit at the material time, but that he did what he did to help the Nigerian States Assurance Corporation Limited to obtain a Certificate of Registration as an Insurer. The information contained in the letters, Exhibits P27, P27A, was all false to his knowledge.

After a review of the evidence, the learned trial Judge held that the first and second appellants on about 14th July, 1970, agreed together to induce by false pretenses the Registrar of Insurance to grant the Nigerian State Assurance Corporation Limited a Certificate of Registration as an Insurer, and that in fact, they did so by falsely pretending that the Nigerian States Assurance Corporation Limited a Certificate of Registration as an Insurer, and that in fact, they did so by falsely pretending that the Nigerian States Assurance Corporation Limited had a credit balance of ₦50,000.00 in the Bank of the North Limited, and that by virtue of Section 7 of the Criminal Code, the first and second appellants were also jointly answerable for carrying into effect their conspiracy of inducement of the Registrar of Insurance to issue to the Nigerian States Assurance Corporation Limited the Certificate of Registration, Exhibit P42, dated 11th August, 1970.

Now, the main attack by the learned Counsel for the first appellant was directed to the charge of conspiracy in that, as he submitted, there was no positive evidence of any agreement between the first and the second appellants. In support of this submission, Learned Counsel cited and relied on *Adebiyi Mejekodunmi vs The Queen 14 WACA 64*, in which it was held that the gist of the offence of conspiracy lies not in the doing of the act or the purpose for which the conspiracy is formed, but in the forming of the scheme or agreement between the parties; and that a person may be charged and convicted of conspiracy to commit a crime of which he could not, if he stood alone, be convicted.

That view of the West African Court of Appeal, was again re-echoed in *Momo Malick vs. R. Lagos No. 119 of 1953* in which the court set aside a conviction for obtaining money by false pretenses, but nevertheless, upheld the conviction for conspiring with others so to obtain money. As was stated by *Bruce J. in Rex vs. Plummer (1902) 2 K.B. at page 348*, "the external or overt act of the crime is concert, by which mutual consent to a common purpose is exchanged."

Although we respectfully agree with the propositions of law by these authorities, we are of the view that in the circumstances of the case on appeal, it would be extremely difficult to sustain learned Counsel's contention that the prosecution had failed to establish conspiracy merely because there was no positive evidence of any agreement between the first and second appellants to commit the offence the subject of the charge of conspiracy.

Generally, it may be stated that where persons are charged with criminal conspiracy, it is usually required that the conspiracy as laid in the charge be proved; and that the persons charged be also proved to have been engaged in it. On the other hand, as it is not always easy to prove the actual agreement, courts usually consider it sufficient if it be established by evidence the circumstances from which the court would consider it safe and reasonable to infer or presume the conspiracy.

In *R v. Brisac 4 East 164, 171* which was cited with approval by the House of Lords in England in *Mulcahy vs. R. L. R. 3 H. L. 306, 317*, it was laid down as a matter of law that in criminal practice, proof of the existence of conspiracy is generally a "*matter of inference deduced from certain criminal acts of the parties concerned, done in pursuance of an apparent criminal purpose in common between them.*" It is well recognised in law that conspiracy may exist between persons who have never seen each other or corresponded with each other: *R. v. Parnell 14 Cox 508 at page 515*. Indeed, to convict of conspiracy, it is not necessary that the accused persons concerned should have concocted the scheme, the subject of the charge, nor that they should have originated it. If a conspiracy is formed and a person joins it afterwards, he is equally guilty with the original conspirators. See *R v. Simmonds (1969) 1 Q.B. 685*.

In the course of his submissions, learned Counsel for the first appellant logically had to concede that Kafaru Ajala was not an accomplice in regard to the case against the first appellant. In that respect, he would appear to have accepted, with some reservations as to the cheque for ₦50.00 the findings of the learned trial Judge that the cheque No. 000422 for ₦50,000.00 issued by the first appellant, which was handed over to Kafaru Ajala by the second appellant was designed as a ruse to give semblance of regularity to the scheme already agreed upon by the first and second appellants. The purpose for that, according to the learned trial Judge, was to deceive Kafaru Ajala who would appear not to have been brought into the picture before the signing of the

credit advice, Exhibit P28.

There is no doubt whatsoever that from all the circumstances of the case on appeal, the only reasonable and irresistible inference to be drawn from the evidence must be that there was a definite agreement-a scheme-a contrivance if you like-between the first and the second appellants to induce the Registrar of Insurance to issue to the first appellant as Executive Director of the Nigerian States Assurance Corporation Limited a Certificate of Registration as an Insurer. It was in furtherance of that agreement that the second appellant accepted the cheque No. 000422 from the first appellant for ₦50,000.00, well knowing that the Nigerian States Assurance Corporation Limited, Benin City Branch, and subsequently passed it on to Rasaan Omotayo Ashiru, the cheque clearance clerk.

The second appellant acted in this way because, according to him, the first appellant had complained to him of the difficulty he was encountering about getting his Insurance Company licensed according to the law of the country; and because, again according to him, "I was ready to give him full credit for this cheque even before it was being cleared." That surely accords with the findings of the learned trial Judge.

The part of the extra-judicial statement of the first appellant to the effect that on 14th July, 1970 the money he deposited was in cash was, in our view, rightly rejected by the learned trial Judge on the grounds, inter alia, that the first Appellant's explanation as to how the said sum was made up "was more of an imagination than reality, particularly, with regard to certain items"; and that "the mode in which the said sum was made up between the dates mentioned rendered the acquisition of such a sum by the first appellant most improbable."

The learned trial Judge also found that, on the evidence, if that statement were true, in keeping with banking practice, the first appellant would have been issued with a fixed deposit receipt; and that none was in fact issued to him. The finding of the learned trial Judge in this respect could hardly be faulted.

It is only necessary to observe that the counterfoil or stump of the so-called cheque No. 000422 of 13th July, 1970, cannot be regarded in law as the best evidence for the proof of the correctness of the contents of the actual cheque No. 000422 said to have been lost. Since the entries as regards the date and the amount expressed thereon were made by the first appellant himself in the presence and to the knowledge of no one else except himself, such entries cannot carry greater weight than any other statement made by the first appellant; and since the entries seek to charge someone else with a debt to the credit of the first appellant, the probability is that it is a false record.

It is a matter for surprise that even though the cheque No. 000422 of 14th July, 1970, was for ₦50,000.00 drawn in the United Bank for Africa Limited, Benin City Branch, its counterfoil or stump also in the possession of the first appellant could not be produced or traced. And yet, the only counterfoil or stump found bearing that number but different date is supposed to have been for only ₦50.00. That, of course, cannot be correct, although to the learned Counsel for the first appellant, it is a mystery. In our view, there is nothing mysterious about it. It is highly probable that the figure of ₦50.00 and the date, 13th July, 1970, were deliberately inserted by the first appellant on the counterfoil or stump of the cheque for ₦50,000.00 after the cheque for ₦50,000.00 had been issued and delivered to the second appellant in preparation and in anticipation of the sort of situation which the first appellant now finds himself.

Apart from the reference to ₦50,000.00 being the payment made in cash by the first appellant to the Bank of the North Limited, Apapa Branch, it seems obvious that the extra-judicial statement, Exhibit P8, by the first appellant admits without reservations that it was at his request that the credit advice for ₦50,000.00, Exhibit P28, itself a false statement was issued in favour of the Nigerian States Assurance Corporation Limited. The certificate, according to the statement, was intended for the Registrar of Insurance in the Federal Ministry of Trade as evidence that a deposit of that amount had in fact been made by the first appellant. It was received by the Registrar in the Federal Ministry of Trade on 22nd July, 1970. It was also at the request of the first appellant that the Certificate of Deposit, Exhibit P27 intended for, and which was finally delivered to the Registrar of Insurance as evidence of the deposit made, was issued. He it was who submitted to the Registrar of Insurance, the Certificate of Deposit, that Bank Credit Advice and also gave guarantee to the Registrar that nothing would be withdrawn from the deposit account with the Bank of the North Limited, Apapa Branch. It was also at his request that the guarantee given by the bank, Exhibit P27A was given to the Registrar of Insurance, Federal Ministry of Trade. It was as a result of all these documents that the Certificate of Registration, Exhibit P42 was issued and delivered to the first appellant, who himself received and signed for it.

It is clear to us that on such evidence, considered along with the evidence given by the second appellant, as well as the evidence given by Kafaru Ajala and Rasaq Omotayo Ashiru, Moses Olaniran Akinsanya, the Assistant Registrar of Insurance, Insurance Division, Federal Ministry of Trade, and Nelson Bello of the United Bank for Africa Limited, Benin City Branch, there can be no doubt whatsoever that the conclusion reached by the learned trial Judge was correct that the first appellant had conspired with the second appellant to induce by false pretenses the Registrar of Insurance in the Federal Ministry of Trade to deliver the Certificate of Registration, Exhibit P42, to the Nigerian States Assurance Corporation Limited, and did so in fact induce the Registrar of Insurance aforesaid, who by reason of the false pretenses did deliver the Certificate of Registration, Exhibit P42, to the first appellant as the Executive Director of the Nigerian States Assurance Corporation Limited.

In view of the conclusion we have thus reached, the grounds urged on behalf of the first and second appellants that the learned trial Judge erred in law and on the facts in holding that the appellants were guilty of the offences charged in counts two and three must fail. They are accordingly rejected. We do not think it is necessary to go into details on the issue of the jurisdiction of the High Court of Lagos State to have tried the appellants. That ground was not pressed by learned Counsel for the appellants, who had conceded that the High Court has virtually concurrent jurisdiction with the Federal Revenue Court in these matters.

We consider it our duty, however, to deal with the issue since it has been properly raised and argued. In that respect, therefore, suffice it to say that we accept the submissions of Mr Ejiwunmi, learned Deputy Director of Public Prosecutions, Lagos State, to whom we are indebted for the clarity with which he made his submissions.

There can be no question of the Federal Revenue Court exercising jurisdiction over a case of the kind under consideration. For, although the Company concerned in the case in hand was duly incorporated as a Limited Liability Company, there was no evidence before the High Court that it had ever started business operations as an Insurer. Indeed, what resulted in the charges against the appellants was a process whereby efforts were being made, albeit unlawfully, to get the Company to obtain registration which would have enabled it to start business as an Insurer.

The relevant sections of the Federal Revenue Court Decree No. 13 of 1973 to which our attention has been drawn are Sections 7(2) and (3) and Section 8(i) the provisions where of are as follows:- "7(2), The Federal Revenue Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters arising out of or connected with any of the matters in respect of which jurisdiction is conferred by subsection (i) of this section. 7 (3). The jurisdiction conferred under the foregoing subsection in respect of criminal causes and matters shall without prejudice to the generality of that subsection and subject to section 63(3) below include original jurisdiction in respect of offences under the provisions of the Criminal Code being offences in relation to which proceedings may be initiated at the instance of the Attorney-General of the Federation. "8 (i) In so far as jurisdiction is conferred upon the Federal Revenue Court in respect of the causes or matters mentioned in the foregoing provisions of this part the High Court or any other court of a State shall, to the extent that jurisdiction is so conferred upon the Federal Revenue Court, cease to have jurisdiction in relation to such causes or matters."

In terms of these provisions, jurisdiction is conferred on the Federal Revenue Court in respect of criminal causes or matters arising out of or connected with the revenue of the Government of the Federation; Taxation of Companies; Customs and Excise; Banking; Foreign Exchange; Currency; other Fiscal Measures; the Operation of the Companies Decree; Copy-right, Patents, Designs, Trade Works, etc. and Admiralty Jurisdiction.

The present charges against the appellants do not fall within the categories enumerated in the Federal Revenue Decree. The provisions of Section 7(3) relate to matters the proceedings in which are to be initiated at the instance of the Attorney-General of the Federation. In this respect, we feel content to adopt and adapt the decision in *Queen vs. Azu A. Owoh & Others (1962) 1 All N.L.R. 659* to the present charges of which the first and second appellants have been convicted, and to hold that they are not cognisable by the Federal Revenue Court.

In that case it was held:

- (1) that the sections of the Criminal Code creating the offences of Conspiracy to Steal, Conspiracy to Defraud, Stealing, Forgery, and Uttering, are not laws with respect to any matter in the Exclusive Legislative List in the Schedule to the Constitution of the Federation; and that they have effect as if they had been enacted as Regional (State) Laws, and not as Laws of the Federation;
- (2) that in respect of Regional (State) offences, the Director of Public Prosecutions of the Federation has no power to institute or undertake prosecutions before Regional (State) Courts unless such powers had been previously delegated to him in accordance with the provisions of the Regional (State) Constitution in that regard; and
- (3) that since the power to institute and undertake prosecutions for offences against the laws of the Region (State) had not been delegated to the Director of Public Prosecutions of the Federation under the provisions of the Constitution of the Region (State); and since the Director of Public Prosecutions of the Federation had not been designated under Section 341 of the Criminal Procedure Act as the person authorised to sign an Information therefore, no information had properly been filed before the trial court since the same was signed by the Director of Public Prosecutions of the Federation and that the trial and conviction were therefore a nullity.

The substance of this decision is that unless and until the Director of Public Prosecutions or for that matter the Attorney-General of the Federation has been designated under Section 341 of the Criminal Procedure Law of a State as the proper authority to file information for the prosecution of offenders to be charged with the offences of the kind under consideration in this appeal, the appropriate Court seized with the jurisdiction for the trials of such cases must be the State High Court.

In these premises, we are satisfied and hold that the High Court of Lagos State had full jurisdiction and was competent to have tried the appellants of the offences with which they were charged, tried and convicted.

In all the circumstances of this case, and after having given careful consideration to the submissions addressed to us on behalf of the appellants, we have reached the inflexible conclusion that the appeal of the first and second appellants must fail. It is accordingly dismissed. The conviction and sentences are affirmed.

15.4 REMARKS

By its letter dated 6th October 1970 Exhibit P. 43, written from its head office in Kano, the Bank of the North repudiated and depreciated the information and representation which its Apapa branch had communicated to the effect that Nigerian States Assurance Corporation ever had at any time a deposit of the sum of ₦50,000.00 to its credit and in its favour.

15.5. REFERENCES

- 1 *Adebiyi Mejekodumni vs the Queen* 14 WACA 64
- 2 *Momo Malick vs R Lagos* No. 119 of 1953
- 3 *Mulchay vs. R* law report 3 H.L. 306
- 4 *Queen vs Azu Owoh & ors* (1962) 1 All N.L.R. 659
- 5 *R.V. Brisac* 4 East 164, 171
- 6 *R.V. Simmons* (1969) 1 Q.B. 685
- 7 *Rex vs Plummer* (1902) 2 K.B at page 348
- 8 *Wahabi Olusanya Mumuni vs The State* (1975) 6 S.C.79

16.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT

DATE: 14th October, 2019

SUIT NO: LCN/2408(SC)

JUDGE: Karibi Whyte, J.S.C.

**UNITED BANK OF AFRICA.
(Defendant/ Appellant)**

vs

**MRS NGOZI ACHORU.
(Plaintiff/ Respondent)**

16.2 REPORTS/FACTS/ISSUES

The two parties in this case, namely, the appellants who were the appellants in the court below, and Defendants in the court of first instance; and the respondent who was the respondent in the court below and Plaintiff in the court of first instance, have appealed against the judgment of the court below.

Appellants are appealing against the judgment as a whole. Respondents are appealing against the reduction by the Court of Appeal of the damages awarded in the High Court. It is obvious that both parties are dissatisfied with the judgment of the court below.

The facts of the case are very simple and straightforward. The injuries to the Plaintiff, which gave rise to this action, resulted from a motor accident on the 10th September, 1984, on Ibrahim Taiwo Road, Jos. The evidence was that the Respondent/Plaintiff, a school teacher, was driving her car, a Peugeot 504 Saloon, Registration No.PL.486 RY, along Ibrahim Taiwo Road towards the direction of Bukuru. She stated in her statement of claim and oral evidence that she was on a speed of 40 kilometers per hour, when she suddenly saw an Isuzu Trooper Van Registration No.PL.5679 JD, driven by the 2nd Appellant coming towards her from Niven Road, which is a minor road, into Ibrahim Taiwo Road. Plaintiff/Respondent alleged that 2nd Appellant was driving with speed and so negligently that when he reached Ibrahim Taiwo Road, on which Plaintiff/Respondent was, he failed to look out properly to ensure that there was no on-coming vehicle before entering the road. To avoid collision and being hit by the 2nd Appellant's vehicle, the Plaintiff/Respondent swerved to the right and consequently collided with a mango tree.

16.3. DECISION OF COURT.

JUDGEMENT

KARIBI-WHYTE, J.S.C.:

Plaintiff/Respondent sustained very severe injuries to her person. The vehicle was

very badly damaged. The 2nd appellant managed to control his vehicle, which came to a stop within 24 feet of the Plaintiff's vehicle. 2nd Appellant did not suffer any injuries; his vehicle was not damaged. In May 1983, the Plaintiff/Respondent commenced this action in the High Court at Jos, claiming jointly and severally from the appellants the sum of ₦200,000.00, being general and special damages for negligence. Pleadings having been filed and exchanged, the case was heard and judgment was delivered on the 9th December, 1985.

Plaintiff/Respondent called evidence and tendered exhibits. Defendants/Appellants relied on the case of the 2nd Defendant. In the course of the hearing, Defendants applied by Motion Ex Parte for leave to join their insurance company. The learned trial Judge refused the application in a ruling delivered on 25/10/85. On the 9th December, 1985, judgment was given in favour of the Plaintiff/Respondent. The learned Judge awarded ₦73,210.05 as special and general damages and ₦1,500.00 as costs.

Defendants/Appellants' claim that the Plaintiff/Respondent was guilty of contributory negligence with regard to the accident was dismissed. Not satisfied with the judgment, the Defendants appealed against the decision to the Court of Appeal. Plaintiff/Respondent also appealed against part of the decision but subsequently withdrew the appeal.

The Court of Appeal, after hearing the appeal, dismissed it. The cross appeal of the Respondents was also dismissed. However, the Court of Appeal reduced the damages awarded by the High Court by ₦25,000.00. The Court of Appeal also found that there was no evidence of contributory negligence on the part of the Plaintiff/Respondent. It was also held that the Defendants/Appellant did not discharge the burden of proof on them by law to prove that the appellant's negligence contributed to the injury in respect of which action was brought.

Defendants/Appellants have further appealed against the judgment of the Court of Appeal to this court. Respondent was granted leave to appeal against that part of the judgment reducing the damages awarded to the Plaintiff/Respondent by the trial Judge, and the overruling of the objection raised against grounds 5 & 6 of the additional grounds of appeal in the court below.

The grounds of appeal of the Appellants, excluding particulars, are as follows: -

1. The learned Justices of the Court of Appeal erred in law in holding that the Appellants' application before the lower court was to join NEMInsurance Company in the suit as a co-Defendant rather than a third party, and this error occasioned a miscarriage of justice.
2. The learned Justices of the Court of Appeal misdirected themselves on the facts and the law, when, having agreed with Appellants that there was evidence of the manner of driving by the Respondent, contrary to the finding of the lower court, then proceeded to find on the established facts that the Respondent had not contributed to the accident.
3. The learned Justices of the Court of Appeal again erred in law in basing part of their decision on points on which counsel, particularly the Appellants' counsel, did not have the opportunity of addressing them and this error occasioned a miscarriage of justice."

The Respondent has relied on the grounds excluding particulars reproduced hereunder:

1. The learned Justices of the Court of Appeal erred in law in reducing the award made

by the court of trial in respect of loss of amenities of life from ₦30,000.00 on the ground that there was an element of double compensation in the award when in fact there was none.

2. The learned Justices of the Court of Appeal erred in law in reducing the award made by the court of trial in respect of loss of amenities of life on the ground that that award was tantamount to double compensation was not raised either in the brief or in oral argument.
3. The Court of Appeal erred in law when it held that the evidence of the Plaintiff on the aspect of loss of amenities of life appeared scanty and consequently proceeded to reassess the award made by the court of trial.
4. The Court of Appeal erred in law in overruling the objection raised against grounds 5 and 6 of the additional grounds of appeal filed by the Defendants when the grounds of appeal did not give particulars of errors in law alleged in each case. The briefs of argument are quite comprehensive.

It seems to me, however, that there has been no agreement on issues for determination in the appeal, which have been formulated differently by counsel. I reproduce the issues as formulated to accentuate the differences. For instance, learned counsel to the Appellant on the question of contributory negligence states as follows:

- (i) whether the Court of Appeal was right when it held that, having regard to the peculiar circumstances of this case, there was no evidence of contributory negligence on the part of the respondent.”

On the same issue, learned counsel to the respondents’ states:-

- (ii) whether the lower courts were right in holding that the burden of proving contributory negligence was on the appellants and that the appellants had failed to discharge that burden.” Whereas Appellants are herein complaining that the courts have failed to find any evidence of contributory negligence against the Respondent, the issue raised by the Respondent is on who lays the burden to prove contributory negligence where it is alleged.

I think it will be necessary in the determination of this appeal to consider the two issues raised. Though different, they are complementary and will elucidate the issues raised.

The second issue raised by learned counsel to the Appellants has been split into two by learned counsel to the Respondents. The formulation of this issue by counsel to the Appellants is consistent with his contention that he was not given a fair hearing. It does not, in my view, challenge the correctness or not of the discretion to refuse the application to join NEM Insurance Company Ltd. as a third party. As against the above, learned counsel to the Appellant’s third formulation of the issues relates to the exercise of the court’s discretion to refuse the application to join the NEM Insurance Company Limited as a third party to the action. It reads:-

- (iii) whether the Court of Appeal was right in holding that the court of trial properly exercised its discretion in refusing Appellants’ belated application to join NEM Insurance Company.” The issue of fair hearing is distinct from whether there was a proper exercise of discretion to grant or refuse the application. The second issue formulated by learned counsel to the Respondent, which was taken as a ground for the want of fair hearing, is as follows:-
 - (i) whether the Court of Appeal was right in upholding the award of ₦8,000.00 made by the court of trial on the evidence tendered before it for the damage done to the respondents’ vehicle.”

This seems to me a misunderstanding of the issue raised by learned counsel to the Appellant. Counsel's contention, as I understand it, is that the court below, in affirming the trial Judge and awarding ₦8,000.00 in respect of damage to the vehicle, relied on its own reasons which are different from those given by the trial Judge and learned counsel to the Respondent. This, the learned Justices of the Court of Appeal did without first hearing arguments on the new issue on which they relied. This is different from the second issue formulated by the Respondent. Learned counsel to the appellant was not challenging the ground on which the court below affirmed the award, but the method through which they arrived at their decision.

There is no doubt that if the court based its decision on a ground not argued before it, and on a reason not relied upon by the court below, the court would be making a case for the parties. It is well settled that the court would be wrong to do this. See *Ochonna vs Unosi* (1969) *N.M.L.R.*325. It is on this principle that learned counsel to the Appellants has founded his arguments in respect of his second issue for determination. Starting with the main appeal, I have already set out the grounds of appeal of the Appellants and the issues for determination as formulated. It is clear that the second issue contemplates consideration of the issues raised in grounds 1 and 3, whereas the first issue is concerned with the first ground of appeal.

It is necessary at this point to consider the issues raised in the second issue for determination, which concerns the important principle of fair hearing. In his brief of argument, learned counsel to the Appellant challenged the reasons relied upon by the court below in affirming the judgment of the trial court in respect of the ₦8,000.00 special damages awarded for repairs to the Appellant's vehicle. It was also submitted that the dismissal of the Appellant's application to join NEM Insurance Company Limited as a third party in the suit amounted to a denial of fair hearing. In support of this contention, learned counsel to the Appellants referred to the submissions of counsel to both parties in the court below and submitted that the court did not rely on the reasons adduced by, but decided the issue on its reasons, and without calling upon counsel to present arguments on the issue. I think it is pertinent to restate the issue before the court below before considering the complaint of the Appellant.

The contention of the Appellants against the award of ₦8,000.00 special damages in respect of the repairs to the Appellant's vehicle was that where a chattel is completely destroyed, the only reasonable and permissible compensation is its pre-accident value less the value of the scrap. It was contended that there was evidence in the instant case that the Appellant's vehicle was a total write-off (Exh.2). Accordingly, since there was no evidence of the pre-accident value of the car, the trial Judge was wrong to have made an award under this head. Learned counsel relied on *Ubani-Ukoma v. Nicol* (1962) 1 *All N.L.R.*105; [1962] 1 *S.C.N.L.R.*176; *Kerewi v. Odegbesan* (1965) 1 *All N.L.R.*95; *Armel's Transport v. Martins* (1970) 1 *All N.L.R.*27. Counsel referring to the observation of the trial Judge that "... the Plaintiff minimised costs by not asking for a new car which she is entitled to. Given the V.I.O.'s report, the Plaintiff had the option of either asking for a new car or repairing the damaged car in spite of the fact that the V.I.O. had written it off the car due to the accident; probably, if she had asked for a new car, it might have cost more than ₦8,000.00."

It was submitted that it was evident from the above observation that the learned trial Judge applied wrong legal principles and relied on sentiments in his determination of the award under this head. It was therefore concluded that this view was contrary to *Ubani-Ukoma v. Nicol* (*supra*) and the judicial authorities. Learned counsel argued

that there was no evidence that the Respondent was minimising costs by repairing the car.

Respondent in reply, conceded that if their claim were for the cost of replacing their car, which is a write off, then the principles in *Ubani-Ukoma v. Nicol* (supra) and *Kerewi v. Adegbesan* (supra) would have applied. But that was not their claim. The claim was for the cost of repairing a damaged car, in which case, the question of the pre-accident value of the damaged car and its scrap value would not be considered, since they are not relevant. It was submitted that the Respondent was by the claim, mitigating her loss.

In the judgment of the Court of Appeal, now challenged by the Appellants because they had given reasons not relied upon by either party, the court, conceding correctness of the principles in *Ubani- Ukoma v. Nicol* (supra) and pointed out that in the instant case it was not the Plaintiffs case that her vehicle was a total loss as a result of the accident in question. The court referred to the evidence of the Plaintiff that her car was badly damaged. There was also evidence of the damage to the vehicle and the cost of repairs. The cost of repairs and relevant receipts totaling ₦8,000.00 were tendered. The court observed that there was no cross-examination on the issue or that it was uneconomical to repair the car. The Court of Appeal pointed out that the evidence of V.I.O. (i.e., vehicle inspection officer) that the vehicle was a total write-off was contrary to the Plaintiff's statement of claim and was not relevant to any of the issues raised. It is for these grounds that the court below concluded that, "... there is no legal basis for saying in this case that the Plaintiff's vehicle was damaged beyond repairs as a result of the accident giving rise to this case. Because of this, there is equally no basis for the application of the principle as to the measure of damages stated above, in consideration of what the Plaintiff was entitled to for damages to her vehicle. Her case as I have said earlier in this judgment, was that her vehicle was badly damaged and that it was repaired and she was claiming the cost of the repairs. There was, before the learned trial judge, ample evidence in support of these contentions of hers."

These are the reasons relied upon by the court below in affirming the claim for damages for the repair of the car. The contention that the court discarded the Appellant's view and substituted its own is completely erroneous.

The case of the Respondent is as averred in her statement of claim, the oral testimony before the court and the argument of counsel. In considering the claim before the court, the totality of the case is examined and analysed for a determination of the justice of the issues joined before the court. Learned counsel has submitted, and correctly too, that where the court is likely in its consideration of the case to rely on a point not argued before it, counsel should be invited to address it on such issues, see *Saude v. Abdullahi* (1989) 4 N.W.L.R. (Pt.116) 387. This is well settled and is the invariable practice. However, in the instant case, the issue is a fundamental one and the crux of the claim and the issues joined before the court. The Appellant would seem to have misunderstood the case of the Respondent. Appellants have regarded a claim for repairs to a damaged vehicle as a claim for total loss. If the claim is for the latter, the Appellant would have been on strong grounds. Since it is for the former, the court below has not, in its reasoning, introduced anything new. It merely stated more explicitly what the trial Judge stated obscurely.

See also Peter Abu v. The State (1976) LLJR-SC.

Learned counsel to the Appellant has submitted that the learned trial Judge applied the wrong principles in determining the damages to be awarded in this case. A careful analysis of the judgment of the trial Judge does not suggest that he relied on wrong principles.

The court below, in the exercise of its appellate jurisdiction, is entitled to make any findings of fact which the court below could have made. But it has no right to substitute its views of the evidence for those of the trial court. See *Egri v. Uped* (1973) 1 N.M.L.R.22. In this case, it found that “In line with her pleadings, the Plaintiff gave evidence that her car was badly damaged in the accident. The Plaintiff also called one Linus Ayaka, who described himself as a panel beater and who also gave evidence as to the damage to the vehicle and the cost of the repairs to it. He also put in evidence the receipt for the sum of ₦8,000.00 he was paid for the repairs he did to the vehicle. There was no cross-examination suggesting that the vehicle was a total loss or that it was uneconomical to repair it.”

Although the trial Judge has referred to the principle of the total loss of the car, it was clear that he did not rely on that principle in determining the damages of ₦8,000.00 he awarded. This sum was based on the repairs to the damaged vehicle. It was undoubtedly right to have awarded the damages of ₦8,000.00 for the repairs to the car, which was the claim before him, even if the opinion expressed would seem to have betrayed the principle the learned Judge had relied upon. This is because judgment must be confined to a decision of the issues raised in the pleadings. See *Adeniji v. Adeniji* (1972) 1 All N.L.R. (Pt.1) 298. The court below was right in not setting aside the decision, which is right. It is well settled that an appellate court will not set aside the decision of a lower court which is right and just merely because the learned Judge gave wrong reasons for the decision, see *Ayeni v. Sowemimo* (1982) 5 SC.60 at p. 74. The paramount consideration for the appellate court is whether the decision is right, not necessarily whether the reasons are. In the instant case, the Court of Appeal was right. The issue of a fair hearing did not arise.

The other issue relied upon by learned counsel to the Appellant was that of the absence of a fair hearing in the refusal of the application of the appellant by the learned trial Judge to join NEM Insurance Company as a Defendant, and the affirmation of that refusal by the court below. Learned counsel to the Appellants contended that the court below relied on grounds not put forward by counsel to the parties or the learned trial Judge, and that counsel was not invited to address the court on these issues. In his brief of argument, learned counsel to the appellant reproduced the submissions in the court below by learned counsel to the Respondent. He pointed out that although the learned trial Judge reproduced the rule of court under which the application was brought, which related to the joinder of a third party, he erroneously referred to the application as one to join a co-Defendant. Learned counsel submitted that it was this misconception as to the nature of the application that led the learned trial Judge to refuse the application. Counsel pointed out that the case of *Ajufo v. Ajarbor* 1 L.R.N.295, cited and relied upon by the trial Judge, does not apply to the instant case. As against the above, it was submitted that the Respondent relied on the fact that the trial Judge refused the application because the Respondent had no business with the insurance company. Joinder of the insurance company was the exclusive concern of the Appellants and should not be at the expense of the Respondents.

It was submitted that the application was refused on the ‘ground of delay’. In their consideration of the issue, the court below referred to the application before the court and found that it was an application to join the NEM Insurance Company as a co-

Defendant. Although Order 6, rule 8 of the High Court Civil Procedure Rules, under which the application was made, provides for the joinder of third parties. What was refused was an application seeking leave to join the NEM Insurance Company as a co-Defendant, and not one seeking leave of court to join the insurance company as a third party in the case. It seems clear that the court below affirmed the refusal of the trial Judge to grant leave to the Defendant to join the N.E.M. Insurance Co., because, as the court said, "...the Plaintiff in an action of this nature can have no claim against the insurers of the Defendants. So, the insurance company could not have been joined by the Plaintiff as a co-Defendant to this action. Nor can it be said that its presence before the court is necessary to ensure that all matters in dispute in the case or matter may be effectually and completely determined or adjudicated upon." These were the reasons adduced by the court below for affirming the decision of the trial Judge. It seems to me that learned counsel to the Appellant founded his contention of absence of fair hearing on the additional reasons given by the court below for affirming the trial judge's refusal to join the NEM Insurance Company as a co-Defendant.

Learned counsel to the Appellant has not suggested the question whether or not the trial Judge was right in refusing the application to join the NEM Insurance Company. The grievance seems to lie in the fact that the court below gave additional reasons not adduced by counsel to the Respondent why the refusal of the application by the trial Judge ought to be affirmed. It is the sacred duty of the court to decide all the issues raised relevant to the determination of the case before it. Whereas the court is ordinarily precluded from raising issues suo motu, and where it does so to hear parties and their counsel on such issues before reasons on the issues so raised can form the basis for deciding the case, this is not the case where reasons given in support of issues have been those argued by the parties.

The issue before the court was the dismissal of an application to join the N.E.M. Insurance Company as a co-Defendant/third-party to the action. The Court of Appeal was concerned with the reasons given by the court of first instance why the application was refused. The court gave additional reasons. No new issues were raised. I have not found it easy to comprehend how, in such a situation, the appellant could be said not to have had a fair hearing. There is no doubt appellant has been heard in respect of the issue whether the N.E.M. Insurance Co. could be joined as a co-Defendant. The fact that the court relied on his presentation of his application and did not consider the application as one of a joinder for a third party does not, in my opinion, remove the hearing from the established category of fairness. One of the cardinal principles of our administration of justice is the observance of the rules of natural justice, by hearing the party aggrieved and the untrammelled opportunity afforded him to present his case and argue the issues involved. The fact that the issue raised might have been poorly presented by counsel or misunderstood by the court cannot and does not, in my view, affect the fact that the hearing was otherwise fair. Fair hearing does not, in my view, lie in the correctness of the decision handed down by the court. It lies entirely in the procedure followed in the determination of the case. Hence, the true test of fair hearing is..." the impression of a reasonable person who was present at the trial whether, from his observation, justice has been done in the case ..." See *Mohammed v. Kano N.A. (1968) 1 All N.L.R.426*.

It cannot be disputed in the instant case that the hearing was fair. There is therefore no merit whatsoever in the contention that, because the Court of Appeal gave additional reasons for affirming the refusal of the trial Judge to join the NEM Insurance Company as a Co-Defendant, there was no fair hearing. This concludes the second issue, which concerns the 1st and 3rd grounds of appeal.

I now turn to the first issue, which dealt with the finding of the court below that, owing to the peculiar circumstances of this case, there was evidence of contributory negligence on the part of the Respondent. It will be more appropriate to set out again the ground of appeal which reads – “The learned Justices of the Court of Appeal misdirected themselves on the facts and the law, when, having agreed with appellants that there was evidence of the manner of driving by the Respondent, contrary to the finding of the lower court, then proceeded to find on the established facts that the Respondent had not contributed to the accident.” It is pertinent to mention that the appellant is trying under this ground to establish that the Respondent contributed to the accident by her manner of driving and was therefore negligent. The issue is whether the fact that the court below having found, contrary to the court of trial, the manner of driving of the Respondent, and that the Appellant’s car collided with the mango tree and not with the 2nd Appellant’s car, the inference of negligence on the part of the Respondent contributory to the accident resulting in the damage and injuries was irresistible

The issue raised is whether the Respondent was negligent in the manner of driving, thereby contributing to the accident; it is not whether there was evidence of the manner of driving. Both the court of trial, which made no finding on the manner of driving and the court below, which did, have not found that the Respondent was negligent. The issue is not the manner of driving simpliciter, but whether it was negligent and contributed to the accident. There are concurrent findings of fact in the two courts that the Respondent was not negligent in the manner of driving and had not contributed to the accident.

Learned counsel to the Appellant seems to be relying on a kind of *res ipsa loquitur*. That is, the respondent having collided with a mango tree, it is self-explanatory of negligence. Learned counsel to the Respondent has submitted and correctly that the onus is on the person alleging negligence to lead evidence and give particulars of the negligence, *see Nigerian Bottling Company Limited vs Ngonadi (1985) 1 N.W.L.R. (Pt. 4) 739*. It was also submitted that the evidence of the manner of driving given by the Respondent was uncontradicted. I am satisfied and the court below was right, that since the appellants did not give any evidence in proof of the alleged negligence of the Respondent, they were amply justified in holding that contributory negligence by the Respondent had not been made out.

I think the law is well settled that where the appellant seeks to challenge the concurrent findings of fact, cogent reason must be given why this court should accede to the challenge and set them aside. *See Motunwase v. Sorungbe (1988) 5 N.W.L.R. (Pt.92) 90*. The only point raised and which borders on *res ipsa loquitur*, had been considered in the two courts and cannot now be a reason why the findings should be interfered with and set aside by this court. On the facts of this case, the fact that the Respondent collided with a mango tree is not evidence of negligence on her part. Paragraph 3 of the statement of claim of the Plaintiff, which pleaded how the accident occurred, avers that “On or about the 10th of September, 1984, the Plaintiff was driving her Peugeot 504 saloon car No.PL.486 RY along Ibrahim Taiwo Road towards Plateau hospital. In the car with the Plaintiff was her son, Obi Achoru. Ibrahim Taiwo is a major public highway. As the Plaintiff was driving past the junction of Niven Road and Ibrahim Taiwo Road, the 2nd Defendant, who was driving a van called Isuzu Trooper with registration No. PL.5679 JD belonging to the 1st Defendant under whose employment the 2nd Defendant was at the material time, so negligently drove and managed the said van with reckless speed and without due caution that the Plaintiff was thrown out of Ibrahim Taiwo major road, with the result that the Plaintiff’s car hit a nearby tree.

The 2nd Defendant, who failed to stop before entering Ibrahim Taiwo major road from Niven Road, did so with reckless speed and without due caution, so that the Plaintiff, to avoid a collision, swerved off the road and hit a nearby mango tree. "Paragraph 4 of the statement of defence, in reply to the above averred as follows:- "In further answer to paragraph 3 of the statement of claim, it would be the Defendant's case that the 2nd Defendant was neither negligent nor reckless in the driving management and control of Isuzu motor vehicle with registration number PL 5679 JD on 10/9/84 and that he did not collide with the Plaintiffs vehicle or another vehicle on the said date." The Defendants then went on at paragraph 5 of the statement of defence to allege that the accident was a result of the negligent manner in which the Plaintiff drove, managed and controlled the said vehicle on the fateful day.

They further averred at paragraph 6 as follows: -

"The Defendants further deny that they were guilty of any acts of negligence or omission with regard to the Plaintiff's accident and that the injuries sustained by the Plaintiff in the said accident were occasioned by her own negligence in the driving of the motor vehicle aforesaid in a dangerous manner on the public highway which resulted in her running into a tree."

Plaintiff/respondent in her evidence-in-chief gave evidence in support of her pleading. She said she was on a speed of 40 kilometers per hour on Ibrahim Taiwo Road, which is the major road. Under cross-examination respondent said the 2nd Defendant came from Niven Road into Ibrahim Taiwo Road when she saw him. To avoid being hit by the Defendant, she swerved to the right and collided with the mango tree. She said that 2nd Defendant's car would have collided with her car, and probably killed her in the ensuing collision, if she had not swerved to the right as she did.

See also Mimota Oluwo & Ors v. R.O. Adebawale (1964) LLJR-SC.

The oral evidence and answers to cross-examination were substantially corroborated by PW6, who was an eyewitness to the accident. Neither of these witnesses was shaken under cross-examination. Thus, having established the manner in which Respondent was driving and the circumstances resulting in the accident, I think the court of trial, and indeed the Court of Appeal, was right that the Respondent was not in any way to blame for the accident which gave rise to this action. I think it is fair to postulate that every user of the public highway is entitled to assume that in the normal course of events, others like users of the public highway will obey the law and to have regard for the lives and safety of other users. Thus, where a careful, reasonable, and law-abiding user of the public highway successfully avoids collision with a negligent or reckless user, such as a motor car driver on the public highway, but still suffers damage from a collision with another object, as a result of the avoidance the damage so suffered is the direct result of the negligence or recklessness of the other road user. Thus, there is a direct nexus between the negligence and the damage.

It will not only be preposterous, but will defeat the object of the law to hold that the damage caused to a person by avoiding collision by swerving has not been caused by the negligent user of the highway whose negligence or recklessness caused the swerving. Negligence, being the failure to take reasonable care, where there is a duty, is attributed to the person whose failure to take such reasonable care has resulted in damage to another.

There is no evidence before the court of trial that the conduct of the respondent fell below that expected of a driver on a major road driving at a reasonable speed. The

court of trial was right that the respondent was not guilty of contributory negligence, and the court below was right in affirming that finding.

I now turn to the cross-appeal of the respondent. It is concerned with the reduction in the damages awarded to the respondent, and whether the Court of Appeal was right to allow the appellant in the main appeal to argue grounds 5 and 6 of the grounds of appeal without particulars of the errors alleged in the grounds of appeal.

Four issues for determination arising out of five grounds of appeal, have been formulated as follows: -

- (i) Whether the learned Justices of the Court of Appeal were right in reducing the award of compensation made by the court of trial in respect of loss of amenities of life when what they took into consideration in reducing the award was the evidence of the Respondent and not the evidence upon which the court of trial based its award
- (ii) Whether the Court of Appeal was correct in holding that there was an element of double compensation in the award made by the court of trial in respect of loss of amenities of life
- (iii) The issue of double compensation was not raised by the Appellants in their grounds of appeal, in their brief and their oral argument before the Court of Appeal. Whether the Court of Appeal was right in taking that crucial point suo moto and reaching a decision on it without inviting counsel's address
- (iv) Whether the Court of Appeal was right in law to have allowed, despite objection, the Appellants to argue the grounds of appeal alleging errors in law for which no particulars were given."

The issues 1-3 relate to the question of the reduction of damages as a result of double compensation. It is convenient to consider the three issues together.

In the cross-Appellant's brief in support of the cross appeal, it was submitted that the court below reduced the award of ₦30,000.00 made in respect of loss of amenities of life to ₦5,000.00, on the ground that the award in respect of pain and suffering also involves loss of amenities of life.

Learned counsel submitted that the reduction of the award was not justifiable. It was contended that an element of double compensation can only be found in the reasons given by the court of trial for making the award. It was argued that the court below was wrong to have held that there was an element of double compensation for pain and suffering in the award. It was submitted that it was erroneous in law for the court below to hold that there is an element of double compensation merely because the trial Judge referred to pain and suffering under the head of claim for amenities of life. It was submitted that there can only be double compensation or an award where the two awards were made for substantially the same matters. The two heads of claim, that is;

- (a) pain and suffering,
- (b) loss of amenities of life is separate.

The cases of *Odulaja vs Haddad* (1973) 11 S.C.357 at p.361, *British Transport Commission vs Gourby* (1955) 3 All E.R.796 were cited and relied upon. It was further argued that the issue of double compensation was not one of the grounds of appeal before the Court. The issue was never raised before the court below.

Counsel submitted relying on *Armels Transport Limited vs Transco (Nig.) Limited* (1974) 11 S.C.237 at p.240 that the issue of double compensation ought to be raised as a ground of appeal. However, the court may suo motu take the point, but is obliged to invite address of counsel

before it can base its judgment on the point. See *Saude v. Abdullahi* (1989) 4 N. W.L.R. (Pt. 116) 387, *Shitta-Bey vs Federal Public Service Commission* (1981) 1 S.C. 40, *Ejowhomu vs Edok-Enter Mandilas* (1986) 5 N.W.L.R. (Pt.39) 1. It was submitted that in this case, counsel had not been heard on the issue.

Finally, it was submitted that the court below was in error to have removed the sum of ₦25,000.00 from the award made by the trial court for loss of amenities of life on the ground that evidence in support of that item was very scanty.

Learned counsel to the cross-appellant submitted that there is, in law, no specific and fixed quantum of evidence required to sustain an award under the head loss of amenities of life. Learned counsel referred to the evidence by the PW3, the doctor, and of respondent that;

- (a) she could no longer play tennis or participate in school games or dance.
- (b) she would walk with a walking stick and could not climb a staircase, cross gutters.

None of this evidence was challenged. They are therefore admitted *Omeregbee vs Lawani* (1980) 3-4 S.C.108. 117.

Learned counsel to the appellant, who is the respondent to the cross appeal, has submitted that the Court of Appeal has jurisdiction to raise and determine the issue of double compensation suo moto. This has been conceded by learned counsel to the cross-appellant. But the more fundamental issue that the parties had not been heard, an issue raised suo moto by the court, remains unanswered.

In Shitta-Bey v. Federal Public Service Commission (1981) 1 S.C. 40 at p.59. This court said, “This court has on several occasions warned against decisions of courts being founded on any ground in respect of which it has neither received argument from or on behalf of the litigants before them, nor even raised by or for the parties or either of them.”

See also *Saude v. Abdullahi* (1989) 4 N.W.L.R.(Pt.116) 387. The rationale for this principle is the avoidance of the circumstance where the court suo moto makes a case for either of the parties, thereby resulting in a situation amounting to a lack of fair hearing. In this case, there was no basis for interfering with the award, the parties having not been heard on the issue.

I now turn to the question of the reduction by the Court of Appeal of the amount awarded by the trial Judge in respect of loss of amenities of life.

It seems to me clear from the approach of the court below that the complaint is that the award of ₦60,000.00 for both pain and suffering and for loss of amenities of life was excessive. The Court of Appeal stated the correct principle that an appellate court should not interfere with the finding of the trial Judge as to the quantum of damages unless it can be established that the trial Judge proceeded on a wrong principle of law, or that the award was an erroneous estimate. See *Soleh Boneh Overseas (Nig.) Limited vs Ayodele* (1989) 1 N.W.L.R. (Pt.99) 549 S.C. The Court of Appeal relied on Macgregor on Damages, 14th Ed. page 831, paragraphs 1212 and 1213 on pain and suffering, and p.833, paragraphs 1218, 1219 on loss of amenities of life.

The Court of Appeal considered the principles applied by the trial Judge in determining damages for pain and suffering and concluded that it would not interfere with the sum of ₦30,000 awarded. The court was not, however, satisfied that the learned trial Judge applied the right principle in awarding damages for loss of amenities of life.

In reducing the sum awarded for damages on this head, the Court of Appeal observed that the learned trial Judge took into consideration the mental pain which the Plaintiff would suffer. In

the view of the court, there is an element of double compensation since the factor of mental pain was taken into consideration in awarding damages for pain and suffering.

In addition, the Court of Appeal referred to the nature of the evidence in support of the claim for loss of amenities of life as follows:

“The evidence of the Plaintiff on the aspect of loss of amenities of life appears scanty. It tends to show a superficial loss of ability to play games or to take part in any physical exercise or to dance. There is nothing in the evidence to show her devotion to any of these occupations, which she said she could no longer pursue. In other words, there was no evidence of how, in the past, before the accident, she had enjoyed these occupations and how much time she had devoted to them.”

For the above reasons, the Court of Appeal held that to award ₦30,000 for loss of amenities of life was compensating the respondent twice for the same injury, pain and suffering. The cases of *Armel's Transport v. Transco (1974) 11 S.C.237* and *Agaba v. Otubusin (1961) All N.L.R. 299; [1961] 2 S.C.N.L.R.13* were cited and relied upon. Finally, it was held that on the evidence, the respondent/cross-appellant was not entitled to anything substantial on this head of claim.

The Court of Appeal concluded as follows- “The conclusion I reach therefore on the award of ₦30,000 as damages for loss of amenities of life is that the learned trial Judge in making the award has proceeded in part on a wrong principle and even on the evidence properly before him in this regard the award is an erroneous estimate of the damage the Plaintiff had suffered. So, I will interfere with the award. Accordingly, I reduce the award of ₦30,000.00 for damages for loss of amenities of life from that amount to ₦5,000.”

Learned counsel to the cross-appellant has challenged this reasoning. Whilst conceding that the court is, in appropriate cases, entitled to interfere where there is a double award of damages in respect of the same head of claim, it was submitted that there was no double compensation in the award made by the court of trial. For there to be a double award, the court of trial must be seen to have made a double award for substantially the same matters. It was submitted that the claims for pain and suffering and loss of amenities, in the instant case, as in claims in tort generally, are separate and distinct. The cases of *British Transport Commission v. Gourley (1955) All E.R.796, at p.804*, *Odulaja v. Haddad (1973) 11 S.C.357 at p.361* were relied upon.

Learned counsel submitted that there is no specific quantum of evidence requisite to establish a claim under the head, loss of amenities of life. Learned counsel referred to the evidence of the Plaintiff and that of her medical doctor to establish the extent of her disability, which remained unchallenged and submitted that the evidence before the trial Judge was adequate.

It is well settled that the heads of claim for pain and suffering, and for loss of amenities of life are two distinct and separate claims arising from the same damage and injury.

The phrase “pain and suffering” has now become a term of art employed to describe the pain associated with the injury resulting from the damage suffered. The worse the injury, the greater the pain and suffering of a Plaintiff who is aware that his expectation of life has been greatly affected and reduced by the injury. Hence, when the Plaintiff makes a full recovery from his injuries, almost all his general damages will come under the head of pain and suffering. As against the head of claim of pain and suffering, loss of amenities of life, embraces all the claims which result from the injury and because of which the Plaintiff's enjoyment of the ordinary pleasures of life has been impaired. Thus, the head of damages arises whenever the Plaintiff, because of the injury, is unable to enjoy the ordinary facilities of life as before. The condition was put tersely by *Birkett, L.J. in Manley v. Rugby Portland Cement Company Limited. (1952)*

C.A. No.286 when he said; “There is a head of damage which is sometimes called loss of amenities; the man made blind by accident will no longer be able to see the familiar things he has seen all his life; the man who has both legs removed and will never again go upon his walking excursions, things of that kind of loss of amenities.”

Thus, this is a head of damage based on the loss resulting from the extent of disability due to the subject matter of the injury. The claim is an objective matter and will be awarded on the extent of loss, as long as the disability has been established.

In *West v. Shephard* (1964) A.C.326, it was held that the claim, unlike pain and suffering, will not be lost because the Plaintiff is unconscious of his loss. It was said, “An unconscious person will be spared pain and suffering, and will not experience the mental anguish which may result from knowledge of what has in life been lost or from knowledge that life has been shortened. The fact of unconsciousness is therefore relevant in respect of and will eliminate those heads of elements of damage which can only exist by being felt or thought or experienced. The fact of unconsciousness does not, however, eliminate the actuality of the deprivations of the ordinary experiences and amenities of life which may be the inevitable result of physical injury.”

Since the enjoyment of life’s amenities has a direct correlation with physical deprivation and the expectation of life of the Plaintiff, the length of the period of life during which the deprivations will continue will be a relevant factor in the determination of the damages to be awarded. In *Bird vs Cocking* (1951) 2 T.L.R.1260, Singleton, L.J. said, “... just as the consideration of age must be remembered, when arriving at the loss of earnings, in the case of a Plaintiff who can never work again, so it appears to me, must that element be remembered, when damages are being assessed for loss of amenities of life...”

The expression “loss of amenities of life,” which is exemplified in the physical disability of the Plaintiff, is hardly quantifiable in terms of money. This is generally because, apart from the fact that every person is entitled to enjoy the amenities of life, the natural and ordinary activity and age of the Plaintiff may determine the nature of the deprivation suffered by the physical injury. The value depends on the assessment of the trial Judge based on the evidence, guided by awards made in respect of earlier similar disabilities. The Court of Appeal has interfered with the award by the trial court on the ground that the wrong principle was upheld, and that the evidence of disability was scanty. I think both reasons are wrong and seem to be an imperfect comprehension of the principles. The Court of Appeal was of the view that the trial Judge considered the mental pain of the Plaintiff in making the award.

A careful examination and analysis of the factors considered by the learned Judge discloses that the reference to mental pain by the trial Judge in the award was merely descriptive of the condition. For instance, this was done after describing her disabilities, that” ... she could no longer play tennis or take part in any school game. She cannot jump over a gutter; neither can she dance. She has to walk with a walking stick; she cannot climb any steps, etc., all because of the accident ... it is certainly most pathetic for a young lady of her age and status in life of the Plaintiff, to be deprived of enjoying these amenities of life at her prime of life ” It is important to observe that the Plaintiff was 28 years of age at the time of giving evidence. The trial Judge considered this factor. The dominant consideration consisted of the deprivations catalogued. It is naive to assume that the element of emotional pain for the loss of the ability to enjoy the amenities of life will never come into consideration. This is natural, but not a factor to be categorised. It is well settled that the primary responsibility for finding facts in a matter is entirely that of the court of trial. See *Balogun v. Agboola* (1974) 1 All N.L.R. (Pt.2) 66. Where such facts have not been challenged, they are conclusive. See *Omeregbee v. Lawani* (supra).

The Court of Appeal is indeed in as good a position as the trial court of the facts found where the trial court has failed to evaluate such facts. In the instant case, the trial court has properly evaluated the facts on the evidence before it and it was unnecessary and wrong for the Court of Appeal to question the facts relating to the loss of amenities of life. For instance, the Court of Appeal has observed (See p.96 lines 9-20).

“The evidence of the Plaintiff on the aspect of loss of amenities of life appears scanty. It tends to show a superficial loss of ability to play games or to take part in any physical exercises, or to dance. There is nothing in the evidence to show her devotion to any of these occupations, which she said she could no longer pursue. In other words, there was no evidence of how in the past prior to the accident, she had enjoyed these occupations and how much time she had devoted to them.” This seems to be a demonstrably wrong approach to the determination of the quantum of damages in claims for loss of amenities of life. The Court of Appeal has not found that the trial Judge has not taken advantage of the opportunity he had of seeing, hearing and observing the witness before him. It has not even suggested that he did not correctly evaluate the evidence before him. The Plaintiff was being compensated for the physical deprivation attendant on the injury. The basis of the determination of the quantum of damage is the deprivation suffered by a person because of the injury, not necessarily in a professional capacity, but merely in his enjoyment of the ordinary amenities of life. Hence, to search for evidence of devotion to games, or dancing, or a history of such preoccupations as the Court of Appeal had set out to do, is to apply the wrong principles.

I agree with learned counsel to the cross-appellant that there is, in law, no specific and fixed quantum of evidence that must be adduced in support of a claim for loss of amenities of life. It is, however, evident from the decided cases on claims on loss of amenities of life, that evidence of physical disability arising from the damage has always been considered sufficient, *see Wise v. Kaye (1962) 1 Q.B.638; Bird v. Cocking (1951) 2 T.L.R.1260*. There was in the instant case such evidence which remained unchallenged. The Court of Appeal, having admitted the existence of such evidence, should not have been concerned with the volume. They were wrong in law to have done so. I am satisfied the Court of Appeal was wrong to have interfered with the award by the trial court. For the reasons I have given above, the cross appeal succeeds. The judgment of the Court of Appeal reduced the damages awarded in respect of the loss of amenities of life by the court of trial. ₦30,000 to ₦50,000 is hereby set aside. The judgment of the trial court is restored in its entirety to ₦30,000 for the claim of loss of amenities of life.

Learned counsel to the cross-appellants finally argued the ground that his objection at the court below that the court below was wrong to have overruled the objection that grounds 5 and 6 of the Appellant’s grounds of appeal lacked particulars of error as required by Order 8 Rule 2(2) of the Supreme Court Rules, 1985. Counsel has cited the relevant rules of the Supreme Court, rather than the rules of the Court of Appeal, applicable. It has been argued that the court below ought to have struck out the grounds of appeal. I have myself read the grounds 5 and 6 of the grounds of appeal challenged. I agree with the submission of learned counsel to the Respondents in his brief that the particulars of error alleged are not merely implicit in the grounds, but are clearly stated in both grounds of appeal. For instance, ground 5 alleging excessive damages in respect of loss of amenities of life, and ground 6 complains about a fair hearing, have indicated that they were denied the opportunity to have their obligations properly determined, and disclose sufficient particulars of the nature of the error alleged.

There is no doubt that where the particulars of error complained of are not stated separately from the grounds of appeal, and cannot be discovered from the ground of appeal relied upon, this is a contravention of the provisions of Order 3 rule 2(2) Court of Appeal Rules 1981 and is liable to be struck out *see Anyaoke & 6 Ors. v. Adi & Ors. (No.2) (1986) 3 N.W.L.R. (Pt.31) 731, 741*. However, where the grounds of appeal relied upon in themselves disclose the error

or errors of law alleged, this will satisfy the provision and the separate particulars of error will not be necessary. The purpose of order 3 r.2(2) is to inform the court and the respondent of the particulars of error alleged to enable the respondent to meet the case of the appellant that the court to determine the nature of the error complained about. *See Atuyeye vs Ashamu (1987) 1 N.W.L.R. (Pt.49) 267, at p.282.*

This ground of appeal fails and is accordingly dismissed. From the reasons I have given in this judgment, the appeal of the appeal fails in its entirety and is hereby dismissed.

The appeal of the cross-appellant succeeds. The judgment of the Court of Appeal reducing the damages awarded by the trial Judge in respect of the loss of amenities of life is hereby set aside. The judgment of the trial Judge is restored. Respondent shall have the costs of this appeal assessed at ₦500 in this court and ₦300 in the Court of Appeal. There shall be costs assessed at ₦500 to the respondent in respect of the cross-appeal.

OBASEKI, J.S.C.:

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Karibi-Whyte, J.S.C. His opinions on all the issues raised in this appeal for determination accord with mine and I adopt them as my own. Accordingly, the appeal of the appellants fails and is hereby dismissed.

The appellant's cross-appeal succeeds and is hereby allowed. The judgment of the Court of Appeal reducing the damages awarded to the respondent/cross-appellant from ₦30,000.00 (Thirty thousand naira) to ₦5,000.00 (Five thousand naira) is hereby set aside and the judgment of the High Court awarding ₦30,000.00 (Thirty thousand naira) for the claim of loss of amenities of life is restored. The respondent cross-appellant, who was the Plaintiff in the High Court, was involved in a serious car accident at Ibrahim Taiwo Road, Jos, on 10th September, 1984. She was driving a Peugeot car registration No.PL.486 RY when she saw an Isuzu trooper van registration No. PL.5679 JD driven by the 2nd appellant coming towards her from Niven Road which was a minor road to Ibrahim Taiwo Road. He drove with such excessive speed and so negligently that when he reached Ibrahim Taiwo Road, he failed to keep a proper lookout to ensure that there was no oncoming vehicle on the road before entering.

The sudden entry onto Ibrahim Taiwo Road made the respondent swerve to avoid a collision with his vehicle and in the process, ran into and collided with a mango tree. The appellant's vehicle was badly damaged and in addition, she sustained very severe injuries to her person. The 2nd appellant careered to a stop without damage. The 2nd appellant was also unhurt. The respondent, therefore, in 1985 commenced proceedings in Jos High Court claiming ₦200,000.00 general and special damages for negligence. The Appellants' claim that the Respondent was guilty of contributory negligence did not avail them. The learned trial Judge then gave judgment in favour of the Respondent, awarding her a total of ₦73,210.05 as special and general damages with ₦1,500.00 on 9th December, 1985.

The Appellants took the matter on appeal to the Court of Appeal, being dissatisfied with the decision. The Respondent also appealed against part of the judgment, but later withdrew the appeal. The Court of Appeal dismissed the appeal against liability, but reduced the damages awarded by ₦25,000.00. This was as a result of the reduction in the amount of special damage awarded on the claim of "loss of amenities of life" from ₦30,000.00 to ₦5,000.00. The Court of Appeal agreed with the High Court that there was no proof of contributory negligence.

Dissatisfied with the decision of the Court of Appeal, the Appellants have brought this appeal on three grounds which have been set out in the judgment of my learned brother, Karibi-Whyte,

J.S.C. The Respondent was not satisfied with the reduction of the damages awarded to her by ₦25,000.00 and has also appealed to this court on four grounds set out in the judgment of my learned brother.

I find no merit in the Appellant's contention that the Court of Appeal was wrong in holding that there was no evidence of contributory negligence on the part of the Respondent. The burden of proving contributory negligence lies on the appellant and he failed to discharge the burden. With regard to loss of amenities of life, it appears to me that the Court of Appeal took a very narrow view of amenities of life. It minimised the value of the loss of ability to play games or to take part in any physical exercises, or to dance. This is borne out by the comment of the court, to wit: "The evidence of the Plaintiff on the aspect of loss of amenities of life appears scanty. It tends to show a superficial loss of ability to play games or to take part in any physical exercises, or to dance. There is nothing in the evidence to show her devotion to any of these occupations, which she said she could no longer pursue. In other words, there was no evidence of how, in the past, before the accident, she had enjoyed these occupations and how much time she had devoted to them."

Ability to play games or to take part in any physical exercises, or to dance is the spice of life. A man or woman is an active animal whose ability to play games or take part in any physical exercise or to dance is evidence of life and in Nigerian society, a necessary criterion of a useful member of any community or ethnic group. The value of these qualities cannot be adequately estimated. To the individual, they constitute life itself; to the community to which the individual belongs, they enhance the cultural asset of the community and to Nigeria, they constitute the power of the fighting and defense forces. It was therefore a grave error on the part of the Court of Appeal to have concluded wit: "The conclusion I reach therefore on the award of ₦30,000.00 as damages for loss of amenities of life is that the learned trial Judge in making the award has proceeded in part on wrong principle and even on the evidence properly before him in this regard the award is a erroneous estimate of the damage the Plaintiff had suffered. So, I will interfere with the award. Accordingly, I reduce the award of ₦30,000.00 for damages for loss of amenities of life (from that amount) to ₦5,000.00."

There is no doubt that and it is universally known that the health of the body of a human being depends in a large measure on the individual's ability to play games, to take part in physical exercise and dance. The fact that the individual is not engaged by entertainment houses does not deprive these faculties of their proper value. Such engagement will properly constitute a head of damage in terms of "loss of earnings from occupation."

I therefore find myself in entire agreement with my learned brother, Karibi-Whyte, J.S.C., to restore the amount awarded under the head of 'loss of amenities of life' by the High Court. The cross appeal succeeds and is hereby allowed.

The appeal fails and is hereby dismissed. The Respondent Cross-Appellant is entitled to costs fixed at ₦500.00.

16.4 REMARKS

The Supreme Court, as the final arbiter in all Judicial cases in Nigeria, took the liberty of its apex position to reverse the decision of the Court of Appeal that overturned the earlier decision of the High Court on the quantum of compensation payable as stated in the above matter. The case, therefore, ends at this point.

16.5. REFERENCES

1. *Ochonma v. Unosi* (1969) *N.M.L.R.*325.
2. *Ubani-Ukoma v. Nicol* (1962) *1 All N.L.R.*105; [1962] *1 S.C.N.L.R.*176.

3. *Kerewi v. Odegbeson* (1965) 1 All N.L.R.95; *Armel's Transport v. Martins* (1970) 1 All N.L.R.27.
4. *Saude v. Abdullahi* (1989) 4 N.W.L.R. (Pt.116) 387.
5. *Peter Abu v. The State* (1976) LLJR-SC.
6. *Adeniji v. Adeniji* (1972) 1 All N.L.R. (Pt.1) 298.
7. *Ayeni v. Sowemimo* (1982) 5 SC.60 at p. 74.
8. *Ajufo v. Ajarbor* 1 L.R.N.295
9. *Mohammed v. Kano N.A.* (1968) 1 All N.L.R.426.
10. *Nigerian Bottling Company Limited. v. Ngonadi* (1985) 1 N.W.L.R. (Pt..4) 739.
11. *Motunwase v. Sorungbe* (1988) 5 N.W.L.R. (Pt.92) 90.
12. *Mimota Oluwo & Ors v. R.O. Adebawale* (1964) LLJR-SC.
13. *Odulaja v. Haddad* (1973)11 S.C.357 at p.361.
14. *British Transport Commission v. Gourby* (1955)3 All E.R.796.
15. *Saude v. Abdullahi* (1989) 4 N. W.L.R. (Pt. 116) 387,
16. *Shitta-Bey v. Federal Public Service Commission* (1981) 1 S.C. 40.
17. *Ejowhomu v. Edok-Enter Mandilas* (1986) 5 N.W.L.R. (Pt.39) 1.
18. *Omeregbee v. Lawani* (1980) 3-4 S.C.108. 117.
19. *Shitta-Bey v. Federal Public Service Commission* (1981) 1 S.C. 40 at p.59.
20. *Saude v. Abdullahi* (1989) 4 N.W.L.R.(Pt.116) 387.
21. *Soleh Boneh Overseas (Nig.) Limited. v. Ayodele* (1989) 1 N.W.L.R. (Pt.99) 549 S.C.
22. *Armel's Transport v. Transco* (1974) 11 S.C.237 and *Agaba v. Otobusin* (1961) All N.L.R. 299; [1961] 2 S.C.N.L.R.13.
23. *British Transport Commission v. Gourley* (1955) All E.R.796, at p.804.
24. *Odulaja v. Haddad* (1973) 11 S.C.357 at p.361.
25. *Birkett, L.J. in Manley v. Rugby Portland Cement Co. Ltd.* (1952) C.A. No.286
26. *West v. Shephard* (1964) A.C.326
27. *Bird v Cocking* (1951) 2 T.L.R.1260.
28. *Anyaoke & 6 Ors. v. Adi & Ors. (No.2)* (1986) 3 N.W.L.R. (Pt.31) 731, 741.
29. *Atuyeye v. Ashamu* (1987) 1 N.W.L.R. (Pt.49) 267, at p.282.
30. *Wise v. Kaye* (1962) 1 Q.B.638.
31. *Bird v. Cocking* (1951) 2T.L.R.1260.
32. *Balogun v. Agboola* (1974) 1 All N.L.R. (Pt.2) 66.

17.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT,

DATE: 14th May, 1965

SUIT NO: FSC 217/1963.

JUDGE: Brett, F.J.
Onyeama, J.S.C.
Ajegbo, J.S.C.

MATTAR
(Plaintiff/ Appellant)

vs

NORWICH UNION FIRE INSURANCE SOCIETY LTD. & ANOR.
(Defendant/ Respondent)

17.2 REPORTS/FACTS/ISSUES

INSURANCE AND REINSURANCE: - Insurance Policy covering theft following upon an actual forcible and violent entry or damage by thieves following such entry in respect of goods and other property in a shop. Condition in Policy to keep a complete set of Books, Accounts and Stock Sheets or Stock Books showing a true and accurate record of all business transactions, and stock in hand.

INSURANCE AND REINSURANCE: - Warranties of Insurance, Conditions framed in general terms in contradistinction from condition which goes into details. Nature of performance required to satisfy each category and the effect of failure thereto.

ALTERNATIVE DISPUTE RESOLUTION: - Arbitration clause in insurance – Submission to arbitrator and award by arbitration stipulated as a condition for bringing a legal action – Failure thereto – Implication for right of action – When court would deem same waived.

17.3 DECISION OF COURT.

JUDGMENT

ONYEAMA, J.S.C. (delivering the judgment of the Court): -

The appellant took out a Policy of insurance No. 77135823 of the 18th of May, 1960, with the respondents against loss by theft following upon an actual forcible and violent entry or damage by thieves following such entry, in respect of goods and other property in a shop at 73 Broad Street, Lagos, for a sum of £4,000.

The Policy is in printed form, but attached to it was a sheet of paper called —Documentary Evidence Warranty attached to Policy 77B5823. As the case at the trial and the arguments on this appeal turned on the conditions in this paper, we set them out in full:

It is warranted during the currency of this Policy:-

“That in the event of a claim for loss arising under this Policy, it is warranted by the Assured that they will produce Documentary Evidence in English of the amount of value of the stocks held immediately before the happening of the loss.

That the Assured keeps and during the whole of the currency of the Policy shall keep a complete set of Books, Accounts and Stock Sheets or Stock Books showing a true and accurate record of all business transactions, and stock in hand, and that such Books, Accounts and Stock Sheets or Stock Books shall be locked in a fire-proof safe or removed to another building at night, and at all times when the premises are not open for business.

This Warranty applies separately to each and every business or branch business. That transfers of goods from one premise to another shall be a business transaction within the meaning of this Warranty.

It is further warranted that the said safe shall not contain explosives or other hazardous commodities. Clause 9 of the Policy incorporated these conditions into the Policy.”

The facts found at the trial in the High Court are that on the 8th and on the 15th of August, 1960, while the Policy of insurance was still in force, thieves broke into the Appellant’s shop at 73 Broad Street, Lagos and stole a quantity of the goods covered by the insurance. The Appellant alleged in his Statement of Claim (and the respondents denied) that: The value or cost of articles or goods stolen on the 8th August, 1960, is £1,401-7s-9d and the value or cost of articles or goods stolen on the 15th August, 1960, is £2,201 13s-2d (total £3,602- Os-I Id). The Respondents in their Statement of Defence stated, *inter alia*:

8. The Defendants will contend during the trial that the basis of the Plaintiff’s assurance was that he shall keep and post promptly Stocks and Sales books relating to his goods. The said Plaintiff failed to keep such books at all times material to this claim and upon these Premises, the Defendants will contend that the Plaintiff is not entitled as per his Writ of Summons.

The learned trial judge decided that the Appellant had failed to observe the conditions attached to the Policy, which had been set out, and dismissed the claim. He also decided that, although the Respondents refused to go to arbitration when called upon by the appellant and as provided by clause 13 of the insurance Policy, the Appellant’s right to bring the present action was barred since an award by an arbitrator was a condition precedent to the bringing of an action under the Policy.

Mr. Benson, for the Respondents, did not seek to support this latter ground of the judgment and the appeal proceeded solely on the question whether the Appellant kept the books required by the Policy. Nothing that we may say in this judgment, therefore, should be taken as deciding whether, given the arbitration clause in the Policy and the Respondents’ refusal to go to arbitration, the appellant could or could not commence this action.

Mr. Lardner’s main contention in support of the appeal is that the Appellant kept sufficient records to enable the Respondents to determine what goods were in the shop; indeed, the Respondents did not dispute the accuracy of the computation of the value of the goods stolen based on the invoices, daily sales books and receipts; all that was required was substantial compliance with the Policy. He further submitted that the

condition that — the assured keeps and during the whole of the currency of the Policy shall keep a complete set of Books is so vague that it is not open to the Respondents to rely on it.

It is not in dispute that the only books the Appellant kept were daily sales books and files concerning invoices and receipts. It is admitted that he did not keep stock books or stock sheets, but Mr. Lardner submits that these stock sheets and stock books are not special kinds of books but any records from which the state of the stock in the shop can be determined; the daily sales books, the invoices and the receipts between them provide all the information about the state of the business and the stock in hand and are, in effect, stock sheets and stock books. We are quite unable to accept this suggestion. The documents and books to which Mr. Lardner refers were in evidence and a witness called for the Appellant at the trial said that the Appellant was not keeping a proper account of his business and that the daily sales book, the receipts of purchases and invoices in a file were not sufficient to enable him to find out the overall position of the Appellant's business. Whatever view one takes, therefore, of the nature of the books kept by the Appellant, it is clear from the evidence of his own witness that they did not show a true and accurate record of all his business transactions.

It is beyond dispute that a stock book is a book that shows the aggregate of goods a trader has in hand. The Appellant did not keep any such book, and this failure was in breach of the endorsement on his Policy. By Clause 9 of the Policy, the observance and fulfillment by the Appellant of the terms and conditions of the Policy and any endorsements which may be made thereon shall be a condition precedent to the Appellant's right to recover under the Policy. The law on the point is stated in Halsbury's Laws of England, 3rd edn., Vol. 22, p. 226 in the following words — 'If a condition is framed in general terms, performance is adequate if it covers the substance of the matter, but, if the condition goes into details, performance must be strictly in accordance with the details required, and, however burdensome or immaterial they may appear to be, they cannot be disregarded. It is, however, sufficient in such a case if the precise letter of the condition is performed in the most literal sense; the insurers cannot require the assured to go beyond the precise terms of the condition, or complain that a literal performance does not protect them adequately.'

In *Welch v. Royal Exchange Assurance* [1938] 14 All E.R. 289 the assured was by a clause in the Policy required to give to the insurers all such proofs and information with respect to the claim as may reasonably be required. On the happening of the event, the insurers requested information about certain accounts that the assured had failed to provide. At the subsequent arbitration, the assured gave the required information. The arbitrator found that there was no fraudulent concealment by the insured but that the information as to accounts was reasonably required by the insurers; he further found, and this is important and relevant to the argument put forward by Mr. Lardner, that the accounts, when disclosed, did not contain any material which justified, or tended to justify, the Respondents in repudiating the claim under the Policy.

In an appeal taken from a dismissal of the claim of the assured MacKinnon, L. J., after pointing out that the stipulation that the insured shall give all such information as may be reasonably required is one the nature of which permits it to be a condition precedent to the right of the assured to recover, stated (p. 296):—The arbitrator has found that the assured ought to have produced these accounts, but that, when produced, they contained nothing which justified, or tended to justify, a refusal to pay his claim. This means that the Appellant had an honest claim for a large amount, but, because of his stupid obstinacy over an immaterial matter, he has enabled the Respondents to refuse

to pay anything.

We agree with Mr. Benson that the Appellant's failure to keep a stock book or stock sheets during the currency of the insurance Policy was fatal to his claim and that it is immaterial that he kept other books or documents.

We are of the opinion that, on the evidence before him, the learned trial judge was right in finding that the Appellant had not kept the books which he had undertaken to keep and we agree that for that reason the Appellant was in breach of the warranty in the Policy and could not recover on the Policy. His claim was properly dismissed, and this appeal therefore fails.

The appeal is dismissed with costs to the Respondents assessed at 30guineas.

17.4 REMARKS

Required Condition in a Policy for a complete Set of Books, Accounts and Stock sheets or Stock Books showing a true and accurate record of all business transactions and stock in hand.

Therefore, failure to keep the above-mentioned books during the currency of the Insurance Policy will be fatal to any claims on such Policy (ies).

17.5 REFERENCES

1. *Halsbury's Laws of England, 3rd edn., Vol.22, p.226.*
2. *Welch v. Royal Exchange Assurance [1938] 4 All E.R. 289.*

18.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT,

DATE: 12th January, 1965.

SUIT NO: SC 502/1964.

JUDGE: Bairamian, J.S.C.

SUN INSURANCE OFFICE LIMITED
(Plaintiff/ Appellant)

vs

VICTORIA OLAYINBO OJEMUYIWA.
(Defendant / Respondent)

18.2 REPORTS/ FACTS/ ISSUES

An insurer is an interested party in an action against its insured for damages for negligence arising out of the use of a motor vehicle and is entitled to be granted leave to appeal against the decision of the court. Following a judgment in favour of the Respondent, the widow of the deceased who died in an accident caused by the Insured, the Applicant as Insurer of the tortfeasor, brought an application for leave to appeal against the said judgment, although it was not a party to the action wherefrom the judgment arose. The Plaintiff contended that the application should be struck out on the ground that the applicant Insurer could not appeal against the judgment of an action to which it was not a party.

18.3 DECISION OF COURT.

JUDGMENT

Held that the Insurer was entitled to the leave sought on the ground that it was an interested party pursuant to SEC. 117(6) of the 1963 Constitution.

PER BAIRAMIAN, J.S.C.

The Respondent objects that the Insurers have no interest in the matter. Her Learned Counsels have referred to Sundry provisions in the Motor Vehicles (Third Party Insured Act on the liability of Insurers and on the defence against liability which the Act accords to Insurers. It strikes us that the argument is very much like the dissenting judgment of Slesser L.J in *Windsor vs. Chalcraft*. We think that the majority judgment of Greer, L.J and Mackinnon, L.J is to be preferred and accept the Insurer's claim that they have an interest in the matter which enables them to apply for leave to appeal, which they should be given if there are no cogent reasons have been advanced against it. One is that they have put in a defense in the second suit that they are not liable for want of notice, they cannot be interested in the quantum of damages awarded in the first suit and should not have leave against the damages. There is nothing to discuss in this objection; for the Insurers' Learned Counsel has told the Court that if leave is given, they will not resist liability but to pay the damages as decided on appeal. The remaining reflection is that, as in Nigeria, civil cases are tried by a Judge alone; there is no need to conduct these fatal accident cases in a world of

make-believe. 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 Insurers, who control the defense, formally out of the suit. We would ask the solicitors of the parties to consider whether, in these third-party Insurance cases, it would not be better to have the Insurers also joined.

18.4 REMARKS

An interested party in a Suit on Insurance is entitled to seek relief even though he/she is not the insured, but have a stake in the matter.

Therefore, an interested party can seek leave of the Court for an Appeal in an Insurance case to protect his/her interest.

18.5 REFERENCES

1. *Nigerian Motor Vehicles (Third Party Insurance Act).*
2. *Windsor vs. Chalcraft.*

19.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT

DATE: 21st March, 1975

SUIT NO: S.C.83/1974.

JUDGE: Coker, J.S.C.
Fatayi-Williams, J.S.C.
Irikefe, J.S.C.

CRUSADER INSURANCE (NIG.) LIMITED
(Defendant/ Appellant)

vs

EPHRAIN OKOYE ANUNIKE.
(Plaintiff/ Respondent)

19.2 REPORTS/ FACTS/ ISSUES

APPEAL from the High Court, Onitsha.

The Plaintiff/Respondent sued the Defendant/Appellant in Onitsha High Court, claiming *inter alia* a declaration that the condition in a life Policy which he had taken with Defendant company, and which provided for non-payment of surrender value by the Insurers under certain circumstances is null and void; and also, that he was entitled to the surrender value of the Policy. Plaintiff had paid premiums for three years before the outbreak of the civil war, at the end of which the Defendant company informed him that his Policy would continue to be in force if he paid all outstanding arrears of premium within three months. He, however, failed to pay the arrears and so was informed that the Policy had lapsed.

The learned trial Judge *inter alia* ordered the Defendant company to pay back to the Plaintiff the sum of £149.6s.8d being the two years' premium paid by him. On appeal to the Supreme Court.

19.3 DECISION OF COURT.

JUDGMENT

HELD:

Allowing the appeal,

- (1) that the contractual relationship between the parties is governed solely by the terms of the Life Policy;
- (2) that condition 2 in the said Policy provides that if any premium which is due remains unpaid within the days of grace, and if the balance of the surrender value, after deducting any amounts due to the insurers, is less than the overdue premium, the Policy will remain in force until the balance is exhausted;
- (3) that it is also provided in Condition 6 thereof that the Policy shall be free of all restrictions as to war;

- (4) that as the insurers have rightly invoked Condition 2 of the Policy in their defence to the claim, the question of frustration due to the civil war was irrelevant; and
- (5) that the Plaintiff/assured did not plead frustration, hence the learned judge should not have based his judgment on it.

Appeal allowed.

FATAYI-WILLIAMS, J.S.C. (Delivering the Judgment of the court)-

The Plaintiff, a trader, took out a Life Policy (Ex. 2) with the Defendant, an insurance company, on 1st June, 1964. The Policy was to mature in 1994 for the assured sum of £2,000 (N4,000) with participation in profits. The agreed premium payable by the Plaintiff to the Defendant was £74.13.4 annually. The Plaintiff paid the premiums due for three years, that is from 1st June, 1964 to 1st June, 1967. Under Condition 6 of the said Policy, it is provided, as a condition precedent, that the Policy shall be-"Free from all restrictions as to war, foreign residence, occupation or travel, including aviation, except as provided in these conditions, the special provisions as to the Schedule and any endorsement hereon."

Sometime after the 30th May, 1967, the Military Governor of the former Eastern Nigeria announced that the former Eastern Nigeria had seceded from the Federation of Nigeria. Consequently, and in order to preserve the corporate existence of the Federation, war broke out on or about the 6th day of July, 1967, between the Government of the Federation of Nigeria and the secessionist regime of Eastern Nigeria.

At the end of the civil war on 12th January, 1970, the Plaintiff wrote two letters to the Defendant, the first on 14th November, 1970 (Ex. 8) and the other on 7th January, 1971 (Ex. 4), asking to know the amount due and payable to him as the surrender value of the Policy. To these letters the Defendant replied on 20th January, 1971 in their letter (Ex. 5) as follows:-

"Dear Sir,

Life Policy No. N/117798

Further to our letter to you of 11th December, 1970, we regret to advise you that your Policy lapsed on the 1st of February, 1970. Our lapse notice confirming this will be forwarded to you in due course. When a Policy has been in force for two years, it acquires a surrender value against which unpaid premiums are advanced in accordance with the non-forfeiture regulations of your Policy, Condition 2. When the surrender value is exhausted the Policy automatically lapses. Payments made on any date during the period starting on 31st May, 1967, and ending on 12th January, 1970, have not been taken into account in view of the provisions of the Banking Obligations (Eastern States) Decree No. 56 of 1970. In view of the above, we are sorry that we will be unable to consider your request for the surrender value of your Policy.

Yours faithfully,

(Sgd.) R. J.Eagle, Manager

The provisions of Condition 2 referred to in the letter (Ex.5) read-

2. NON-FORFEITURE REGULATIONS: When the Policy has a surrender value, if any premium shall not be paid within the days of grace, the amount thereof

shall be advanced at compound interest upon security of the Policy, provided the balance of the surrender value, after deducting any amount due to the company, is not less than the amount of the overdue premium, but, should it be less, the Policy will remain in force for a proportionate period until the balance is exhausted." On the receipt of the letter (Ex.5), the Plaintiff commenced proceedings against the Defendant company in which he claimed:

- (a) A declaration that the application of Condition 2 of Policy No. N/117798 by the Defendant company against the Plaintiff/assured is void to the extent that it applies to the Plaintiff; that it is harsh, unconscionable and/or inequitable and contrary to the public interest; and
- (b) A declaration that the Plaintiff/assured is entitled to the surrender value acquired under the Policy No. N/117798 as per Condition 4 of the Policy- the Defendant/company to give full account to the Plaintiff/assured of the surrender value so far acquired under the Policy and to pay to the Plaintiff/assured the full amount so accounted for."

The Plaintiff further explained the basis for his claim (which he repeated in paragraph 13 of his statement of claim) in paragraphs 11 and 12 of the said Statement of Claim as follows: -

11. The Plaintiff says that of all the insurance companies operating in the Federal Republic of Nigeria, it is only the Defendant/company which has refused to pay their assured the surrender value under the Policy, seeking to take shelter under Condition 2 of the Policy aforementioned, regardless of the circumstances of the war.
12. The Plaintiff further says that Condition 2 aforesaid is quite in contradistinction to Article 7 of the African Alliance Insurance Company's Life Policy, which Policy will be founded upon at the trial and evidence led to prove conclusively that the application of Condition 2 of the Defendant/company's Life Policy in so far as it affects the Plaintiff/assured is void and contrary to public interest."

To these averments, the Defendant replied in paragraphs 6 to 9 of its statement of defence as follows: -

6. In answer to paragraphs 11 and 12 of the statement of claim the Defendant says that the averments therein contained are completely irrelevant. The Defendant will contend that the contract of insurance between the Plaintiff and the Defendant is contained in the Policy. The Defendant will rely on the documents mentioned above.
7. In further answer to paragraphs 11 and 12, the Defendant says that the contract constituted by the said Policy of Assurance is binding on both parties according to its terms, that according to the terms of the contract, it has lapsed and that the Plaintiff is not entitled to the reliefs claimed or at all.
8. The Defendant also states that in a letter dated 11th December, 1970, and addressed to the Plaintiff, the Defendant offered a relaxation of the strict terms of the Policy but the Plaintiff declined to take advantage of the liberal concession.
9. In answer to paragraph 13 of the Statement of Claim, the Defendant avers that the claim is inadequately drawn and does not disclose any cause of action. The Defendant also states that contracts of Life Assurance are *uberrima fides*, that the contract was entered into willingly by both sides with full disclosure on the

part of the Defendant and that the Defendant is entitled to rely on the terms of the contract."

The letter dated 11th December, 1970 (Ex. 3) and referred to above in paragraph 8 of the Statement of Defence, for ease of reference, is reproduced hereunder. It reads-

"Dear Sir,

Life Policy No. N/117798

Thank you for your letter dated 14th November, 1970. We are pleased to see that you have survived the war.

We have traced from our records that the last premium paid on your Policy was That due 1st June, 1966 which covered up the end of May, 1967.

However, should you wish to continue with your Policy, the outstanding arrears to the end of December, 1970 amount to £298.13.4d. This amount is purely premium arrears and no interest has been charged for late payments. We have re-opened our Branch Office at 41 Ogui Road, Enugu should you wish to pay your premium there. To assist all our Policy holders who have been affected by the war, and whose stoppage of premiums was due to hardship of the war, the company has as mentioned above agreed as a concession that no interest should be charged for late payment on unpaid premiums, provided the arrears are paid within three months from the date of this letter. If the arrears are not paid within this period, any outstanding balance of arrears at the end of the three months will commence to attract interest from that date. Evidence of health which would normally be required by Condition 3 of the Policy is also being waived.

We trust that these concessions will be appreciated and we look forward to receiving your remittance.

Yours faithfully, (Sgd.) Manager."

At the hearing, the Plaintiff testified in support of his claim and produced the correspondence and other documents to which we have referred earlier. He admitted under cross-examination that the next premium after the payment of the last one in June, 1966, was due on 1st June, 1967, that he did not pay it and had, in fact, not paid any premium since. The Plaintiff also admitted that he did not at any time protest to the Defendant about Condition 2 in the Policy (Ex. 2).

Mr. Frank Buckle who was the only witness called by the defence stated that the Plaintiff did not at any time apply to surrender the Policy (Ex. 2).

In a reserved judgment, the learned trial Judge, after reviewing the evidence adduced before him, came to the conclusion that the contract between the Plaintiff and the Defendant was frustrated on 31st May, 1967. He then observed as follows:-

"In my view it is just and equitable and in accord with the evidence led and a fair and just construction of Condition 4 of Exhibit 2 allow the Defendant company to retain the first year's premium of £74.13.4d and pay back to the Plaintiff the sum of £149.6.8d representing his two years' premium which, if I am allowed to borrow the expression used by Lord Wright in the *Fibrosa* case, will now be regarded as 'money

had and received'. In the circumstances I do not think it is necessary to order an account."

Following that observation, the learned trial Judge finally found as follows:-

"In the final result I uphold the Plaintiff's claim that in the peculiar circumstances of this case it will be harsh, unconscionable and inequitable to apply Condition 2 of the Policy (Ex. 2) to him and I hereby declare that Condition (Ex. 2) shall not apply to the Plaintiff.

With regard to the second arm of the Plaintiff's claim I hold that no useful purpose would be served by ordering an account. For all the reasons given in the body of the judgment I order that the Defendant company do pay back to the Plaintiff the sum of £149.6.8*d* being money had and received on a frustrated contract."

The short point canvassed before us in the appeal against this decision by Chief Williams, learned Counsel for the Defendant company, is that the question of whether the contract was frustrated or not did not come into the matter at all. It was neither pleaded nor canvassed by the Plaintiff in his claim before the court. The first-time frustration was mentioned was in the final address of learned Counsel for the Plaintiff. The learned trial Judge was therefore in error in basing his judgment on it. Under the Policy, the Defendant company assumed a risk of the Plaintiff dying and promising to pay his Executors, Administrators or Assigns the sum of £2,000 or if he lived and did not die by 1st June, 1994, he would be paid the same amount. In either case, that contract was binding on both parties. The restrictions which a war could bring about were not applicable. In support of this submission, Chief Williams referred first to the contents of the Policy (Ex. 2), then to MacGillivray on Insurance Law, Vol. II, 4th Edition, paragraph 2143 at page 1034, and Halsbury's *Laws of England* 3rd Edition, Volume 22 paragraph 455, and finally to the observations of Viscount Simon in *British Movietonews Limited. vs London and District Cinemas Limited*[1925] A.C. 166 at page 185.

The Plaintiff was neither present at the hearing of the appeal nor was he represented.

Undoubtedly, the contractual relationship between the parties is governed solely by their terms of the Policy (Ex. 2). In that Policy the life of the Plaintiff was insured by the Defendant company for the sum of "two thousand pounds with participation in profits." This sum became payable on the death of the Plaintiff or on his survival until the 1st of June, 1994. It is also manifest that if he died, this sum would be paid to his Executors, or Administrators or Assigns as the case may be. The premium of £74.13.4*d* was payable from the 1st of June in each year starting from 1st June, 1964, and ending on 1st June, 1993, inclusive. Various conditions attached to the Policy Condition 4 provided that a surrender value would be allowed after two full years' premiums had been paid while Condition 6 stated, in clear and unmistakable terms, that the Policy should be free from all restrictions as to war. The crucial condition for the purpose of this appeal, however, is Condition 2 which reads: -

"When the Policy has a surrender value, if any premium shall not be paid within the days of grace, the amount thereof shall be advanced at compound interest upon security of the Policy, provided the balance of the surrender value, after deducting any amounts due to the company, is not less than the amount of the overdue premium, but, should it be less, the Policy will remain in force for the proportionate period until the balance is exhausted."

In our view, it is this condition which the Defendant company, with justification if we may say so, has invoked in the case in hand, and we are therefore unable to see how the question of frustration due to the civil war ever came into it. In any case, the Plaintiff did not plead frustration and it is, therefore, not open to the learned trial Judge to countenance it, let alone consider it. However, as he has based his judgment on it we will consider its applicability to the facts of this case. Condition 6, if we may recall, has made the Policy free from all restrictions brought about by war. For this reason, we are not in any doubt that the learned trial Judge was in error when he held that the contract had become frustrated on 31st May, 1967. He was also in error in ordering, as a consequence, the refund of part of the premiums already paid by the Plaintiff under the Policy.

In this connection, we wish to refer to Mac-Gillivray's book on Insurance Law, 5th Edition Vol. II. The learned author, in paragraph 2143 at page 1034 of the book, considered the rule governing the return of premium and stated rightly in our view, as follows:-

"No risk no premium. The general rule applicable to claims for the return of premium is that if the insurers have never been on the risk they have not earned the premium, and ought to return it. Thus, if a contract of insurance is set aside on the ground of misrepresentation or mistake, or for some other reason the Policy is held to have been void *ab initio*, or to have been avoided before the risk began to run, the insured is, in the absence of any express condition to the contrary, entitled to claim repayment of any premiums which he may have paid. "Equity" said Lord Mansfield, "implies a condition that the insurer shall not receive the price of running a risk if he runs none."

The learned author then went on to point out, again rightly in our view, that once the risk has commenced to run under a valid Policy, the whole of the premium for that risk is immediately deemed to be earned, and even though the insurer should shortly afterwards be relieved of the risk for the remainder of the term, the insured is not entitled to a return of any part of the premium (*see Anderson v. Fitzgerald (1855) 4 H.L.C. 484 at page 508 and Stone v. Marine Insurance [1876] 1 Ex. Div. 81*). Thus, if the day after a risk has attached there is a breach of warranty or the interest of the insured ceases, the whole premium is earned, and there can be no return. That is precisely what has happened in the present case. The risk had started to run as soon as the Plaintiff paid the first premium on 1st June, 1964, and if he had died in the civil war which broke out three years later, the Defendant would have been liable on the Policy. As no premiums were paid after the one paid on 1st June, 1967, the Defendant committed a breach of the provisions of Condition 6.

As we had stated earlier, Condition 6 of the Policy states, in clear terms, that war will not affect the contractual relationship of the parties. War was certainly in the contemplation of the contracting parties and it is therefore wrong for the learned trial Judge to agree with the Plaintiff, as he did, that-

"His failure to pay up his premiums was due to circumstances which were beyond his control and which were not in the contemplation of the contracting parties to Ex. 2".

While on this point, we wish to refer to the observation of Viscount Simon at pages 185-186 of his judgment in the *British Movietonews case (supra)* which we consider particularly apposite and which appears to support the stand we have taken in this appeal. It reads-

"It is of the utmost importance that the action of a court, when it decides that in view of the supervening situation the rights and obligations under a contract have automatically ceased, should not be misunderstood. The suggestion that an 'uncontemplated turn of events' is enough to enable a court to substitute its notion of what is 'just and reasonable' for the contract as it stands, even though there is no 'frustrating event', appears to be likely to lead to some misunderstanding. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate-a wholly abnormal rise or fall in prices, a sudden depreciation of currency, and unexpected obstacles to execution, or the like. Yet this does not in itself affect the bargain they have made.

If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceased to bind at that point-not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. When it is said that in such circumstances the court reaches a conclusion which is 'just and reasonable' (*Lord Wright in Constantine's case [1942] A.C. 154 at page 186*) or one which justice demands' (*Lord Sumner in Hirji Mulji vs Cheong Yue Steamship Co. Limited. [1926] A.C. 497 at page 510*), this result is arrived at by putting a just construction upon the contract in accordance with an 'Implication... from the presumed common intention of the parties' (*Lord Sumner in Bank Line Limited vs. Arthur Capel & Co. [1919] A.C. 435 at page 455*)."

For all these reasons, we think that the judgment cannot be allowed to stand. The appeal therefore succeeds and it is allowed. The judgment of the learned trial Judge in Suit No. O/87/1971 delivered in the Onitsha High Court on 7th December, 1971, including the order as to costs, is accordingly set aside. Instead, we order that the Plaintiff's claim for declaration that the application of Condition 2 of Policy No. N/117798 is void, be dismissed and it is hereby dismissed. This shall be the judgment of the court.

The Defendant is awarded costs in the court below assessed at ₦158.

19.4 REMARKS

Provision of the Terms of Life Policy is crucial to the determination of a case on any contractual relationship between parties and Insurance inclusive.

19.5 REFERENCES

1. *British Moveitonews Limited vs. London and District Cinemas Limited [1952] A.C. 166 at 185.*
2. *Anderson vs Fitzgerald (1853) 4 H.L.C. 484 at 508.*
3. *Stone vs Marine Insurance [1876] 1 Ex. Div. 81.*
4. *Constantine's case [1942] A.C. 154 at 186.*
5. *Hirji Mulji vs Cheong Yue Steamship Co. Limited [1926] A.C. 497 at 510.*
6. *Bank Line Limited vs Arthur Capel & Co. [1919] A.C. 435 at 455.*

20.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT,

DATE: 25th March, 1966

SUIT NO: SC.583/1964

JUDGE: Brett, J.S.C.
Onyeama, J.S.C.
Ajegbo, J.S.C.

NORTHERN ASSURANCE COMPANY LIMITED
(Defendant/Appellant)

Vs

STEPHEN IDUGBOE.
(Plaintiff/ Respondent)

20.2 REPORTS/ FACTS/ ISSUES

The Plaintiff/Respondent commenced an action against the Defendant Company, who is the Appellants (hereinafter referred to as the Company) in the High Court of Western Nigeria on the 9th of December, 1963, claiming £1,200 under an alleged Policy of insurance. His case was that on the 17th of September, 1963, he paid £98 as a premium for a comprehensive insurance cover in respect of a Citroen saloon car registered as WW3 1 1 1 and valued at £1,200 by the Plaintiff to an agent of the company. The Plaintiff filled up a proposal form which was handed to this agent who then issued a Cover note to the Plaintiff. On the day following the issue of this cover note the car insured was involved in an accident and became a total loss.

The Plaintiff then made a claim to the Company who repudiated liability on a number of grounds of which the most important and relevant for the purpose of this appeal was that there was a material non-disclosure of fact on the Proposal Form which formed the basis of the contract. The issue of non-disclosure was squarely before the trial court, for the Plaintiff in paragraphs 6 and 7 of the Statement of Claim pleaded:

6. At the time the Proposal Form was being completed Plaintiff made it known to the agent, (Mr. Y. Aika) that he could not write or read but that he could sign his name; wherefore Mr.Aika requested Plaintiffs' clerk, Mr.Pullen Ugheneze to complete the Form while he (Mr. Y Aika) was dictating to him what he should put down.
7. Whilst the Form was being filled, the Plaintiff made it known to Mr. Aika that he had taken out a third party insurance Policy on the car, but Mr. Aika told Plaintiff that it did not matter. Plaintiff also disclosed to the agent that he had insured other vehicles with the Defendant Company, and other insurance companies before.

The Company answered as follows:

3. Paragraphs (6, 7, 9 and 10 of the Statement of Claim are denied.—
4. (Not relevant)

5. The Defendants aver that the Plaintiff induced the issuance of the said Cover Note referred to in paragraph 5 of the Statement of Claim by reason of non-disclosure of facts material to be made known by the said Plaintiff and by representations of fact which were false in material particulars.

20.3 DECISION OF COURT.

JUDGMENT

ONYEAMA, J.S.C.:-

PARTICULARS OF NON-DISCLOSURE

The Plaintiff failed to disclose that prior to the issue of the said cover note that the said car No. WW3 111 was already insured with Provincial Insurance Company Limited from 10th May, 1963 to 9th May, 1964 inclusive under cover note No. 36109 of 10th May, 1963 and Policy No. 603839. The Plaintiff failed to disclose that the West African Provincial Insurance Co. Ltd. refused to grant him a comprehensive cover.

The Company also alleged that the cover note issued by the agent Yesufu Aika was procured by fraud as it was backdated to cover a risk which had already resulted in a loss before it was issued. This allegation was negated by the finding of the trial judge and there is no need to consider it further.

The material portion of the judgment appealed from which deals with the non-disclosure complained of is in the following terms:

It is clear that Mr. Yesufu Aika was the Defendant's agent. Each of the particulars of non-disclosure relied on by the Defendants was disclosed to him by the Plaintiff as he, the Plaintiff and the Plaintiff's clerk, Pullen Ugheneze have told this court. He knew that the Plaintiff was an illiterate man who could only write his name. He and the Plaintiff's clerk who had never filled a proposal form before, filled the form on the information supplied by the Plaintiff.

It was held in *Bawden versus London, Edinburgh and Glasgow Assurance Co. [1892] 2 Q.B. 534* that knowledge of the Defendants 'agent as to facts supplied to him by the insured, is knowledge of the principal even though the agent failed to communicate such knowledge to him. As I have stated, each of the non-disclosures complained of by the Defendant was in fact, disclosed to Mr. Yesufu Aika their agent. It was also held in *Golding versus Royal London Auxiliary Insurance Company Limited (1914) 30 T.L.R. 350*, that it is the duty of the agent to convey to the Company the correct answers given to him by the insured and if he fails to do so the Company is not entitled to refuse to pay a claim under the Cover Note on the ground that there was mis-statement in answer to the questions on the proposal form.

The learned trial judge then entered judgment for the Plaintiff.

The evidence on this issue of non-disclosure was given by the Plaintiff, his clerk and Yesufu Aika, and was to the effect that the Plaintiff did not set out in the Proposal Form all the insurance companies with which he insured motor vehicles but had only written down one of them; namely, South British Insurance. He had also answered on the proposal form that no insurers had ever declined his proposal when, in truth, the West African Provincial Insurance Company Limited had declined comprehensive cover for the vehicle concerned in this case.

The Plaintiff stated in evidence that he disclosed these facts to Yesufu Aika who, the judge held, was the Company's agent, and that it was Aika who dictated some of the answers on the Proposal Form. It is to be noted that although there is evidence that Aika instructed the Plaintiff's clerk to write down South British Insurance only, and not all the insurance companies with which the Plaintiff had insured his motor vehicles, there is no evidence or suggestion that it was Aika who dictated the untruthful answer to the question whether any insurers had ever declined the Plaintiff's proposal.

Mr. Sofola for the Appellant Company has attacked the judgment on two main grounds, viz:

- (1) that Yesufu Aika was no more than a canvassing agent and was not the Company's general agent;
- (2) that Yesufu Aika had no authority to conspire with the Plaintiff to give false answers to material questions and thereafter enter into a contract on behalf of the Company on the basis of those answers; he submitted that in filling up the proposal form for the Plaintiff, or assisting him and his clerk to fill it up, Yesufu Aika was not the agent of the Company.

He submitted that *Bawden v. London, Edinburgh and Glasgow Assurance Co.* [1892] 2 Q.B. 534 ought not to be followed any longer in view of the decision in *Newsholme Brothers vs Road Transport & Company Limited* [1929] 2 K.B. 356 and that the case of *Golding vs Royal London Auxiliary Insurance Company Limited* (1914) 30 T.L.R. 350 was distinguishable from the present.

In Bawden's case the assured effected an insurance with the Defendant company through their agent against accidental injury; in a statement in the Proposal Form the assured said he had no physical infirmity although he had then lost the sight of one eye. The fact that the assured had lost one eye was known to the agent but he did not communicate it to the Defendant company. The answers to the questions and the statements in the proposal form were dictated by the assured who was illiterate, and written down by the agent. During the currency of the Policy, the assured lost the sight of the other eye and became permanently blind. At the trial, the company gave no evidence as to the extent of the agent's authority. The Court of Appeal held that—in the particular circumstances of the case, the knowledge of the agent was to be imputed to the company.

That case can be distinguished from the present on the ground that in that case there was no evidence as to the extent of the agent's authority and the company held him out on the Proposal Form as their agent for the Whitehaven area. In the case under consideration, there is evidence that Yesufu Aika was a commission agent whose duty was to canvass for customers. It was not his duty to investigate facts in the Proposal Forms or to negotiate proposals. The learned trial judge did not say he disbelieved this evidence.

In Newsholme's case the Proposal Form was filled up by the agent of the insurance company and contained untrue answers in material respects, although the agent was told the true facts; it did not appear why the agent had not written down the correct answers as told to him; the agent was appointed in writing by the insurance company and supplied with Proposal Forms; his duties were to procure persons to take out insurance policies with the company and to obtain from them duly filled in and signed proposal forms; he was authorised to receive premiums but not to give a cover note

or enter into any Policy of insurance. On these facts, it was held that in filling up the Proposal Form the agent was the agent of the assured and not of the insurance company. This view was upheld in the Court of Appeal where Scrutton L.J. said:

I find considerable difficulty in seeing how a person who fills up the proposal can be the agent of the person to whom the proposal is made. A man cannot contract with himself. A. makes a proposal to B. by signing it, and communicating it to B. If A. gets some one-C. to fill up the form for him before he signs it, it seems to me that C. in doing so must be the agent of A. who has to make the proposal, not of B. who has to consider whether he will accept it. If C. is also the agent of B. to procure proposals, and induces A. to make a proposal by representing that a certain form of proposal contains the particulars that B. wants to know, when it does not, the remedy seems to be to rescind the written contract procured by misrepresentation, not to alter the written contract and claim the benefit of it as altered.

He went on to hold “that although” he may have been an agent to put the answers in the form, the agent of an insurance company cannot be treated as their agent to invent the answers to the questions in the proposal form; and that, if he is allowed by the proposer to invent the answers, and to send them as the answers of the proposer, the agent is, to that extent, the agent, not of the insurance company, but of the proposer.

Finally, his Lordship concluded:

In my view the decision in Bawden’s case is not applicable to a case where the agent himself, at the request of the proposer, fills up the answers in purported conformity within the formation supplied by the proposer. If the answers are untrue and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are untrue, but he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company. In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed.

In the present case we do not think that anything turns on the fact that Yesufu Aika had the authority to give Cover Notes.

The Plaintiff is illiterate and some of the expressions used by Scrutton, L.J., such as the reference to allowing the agent to invent the answers, and signing a document without reading it, are not applicable without qualification to every illiterate proposer, but there is no suggestion here that the answers given were not in accordance with the Plaintiff’s wishes, and we need not consider a hypothetical case.

In this instance, the Plaintiff’s illiteracy is no ground for not following Newsholme’s case. The plain fact of the matter is that Yesufu Aika and the Plaintiff’s clerk wrote down untrue answers in the Proposal Form, and we hold that in filling up the form, they were the agents of the person making the proposal, that is, the Plaintiff.

The learned trial judge was, therefore, in error when he held that Yesufu Aika’s

knowledge was to be imputed to the Company, and this error was fundamental and falsified the entire judgment. It is unfortunate that Newsholme's case was not cited to the learned trial judge.

We are of the view that this appeal must be allowed. It is ordered that the judgment of the High Court of the Warri Judicial Division in Suit W/85/1963 - Stephen Idugboe vs. Northern Assurance Company Limited. (By their Agents, Marina Agencies Limited, Benin City) be and is hereby set aside, and that the claim be dismissed with costs in the court below assessed at 54 guineas and in this Court assessed at 60 guineas.

20.4 REMARKS

Material Non-disclosure of facts on the Proposal Form, and which forms the basis of the Insurance Contract, is Fatal to the reliefs sought by the Plaintiff/Respondent.

20.5 REFERENCES

1. *Bawden vs London, Edinburgh and Glasgow Assurance Co. [1892] 2 Q.B. 534.*
2. *Newsholme Brothers vs Road Transport & Company Limited [1929] 2 K.B.356.*
3. *Golding v. Royal London Auxiliary Insurance Company Limited. (1914) 30 T.L.R. 350.*

21.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT,

DATE: 25th April, 1986

SUIT NO: SC.233/84

JUDGE: Kayode Eso, J.S.C.
Uwais, J.S.C.
Karibi-Whyte, J.S.C.
Oputa, J.S.C

MARINE AND GENERAL ASSURANCE COMPANY LIMITED
(Defendant/ Appellant)

vs

ANTONIE ROSSEK AND ANOTHER
(Plaintiff/ Respondent)

21.2 REPORTS/FACTS/ISSUES

The Plaintiffs (herein the Respondents) action, as revealed in the Statement of Claim filed in the High Court, was for possession of the premises situate at 194 Broad Street Lagos and ₦60,000.00 per annum as mesne profit until possession is given up.

The Respondents were the landlords of the said premises and by written agreement, they let the said premises to the 1st Defendant, that is, Batakoko Limited, for a period of 6 years commencing from 6th October, 1970, at the rate of ₦60,000.00 per annum. The tenancy, however, expired by effluxion of time on 6th October 1976. Before the expiration of the lease, the 1st Defendant had put the 3rd Defendant, one Mrs. Abiola Elegbede, in possession, who in turn put the 2nd Defendants, Marine and General Insurance Company Limited in possession.

However, the 1st Defendant had already vacated the premises before the action was commenced, notice to recover possession was served on the 2nd and 3rd Defendants. The 2nd Defendant who is the Appellant in this case admitted that the Plaintiffs are leasehold owners and are entitled to the possession of the said premises. The 3rd Defendant had quit the premises by the time of the service of the writ and so the only person in possession throughout the hearing of this case was the 2nd Defendant, the Appellant in this case.

The trial Judge in a well-considered judgment entered judgment for the Plaintiffs/Respondents for possession and mesne profits of ₦60,000.00 per annum. The Appellant were dissatisfied with the decision of the trial court and therefore appealed to the Court of Appeal which dismissed the appeal. On a further appeal to the Supreme Court, it was contended for the Appellant that since they were not direct tenant of the Respondent, it was wrong to give judgment against them for mesne profit.

21.3 DECISION OF COURT. JUDGMENT

HELD:

1. In this case, the relationship of the Appellant to the Respondent was one of statutory tenancy. That is, once they held over the tenancy qua a tenant of the original tenant, after the expiration of the original tenancy agreement between the 1st Defendant and the Respondent, they became the statutory tenants of the Respondent. The Respondent accepted the Appellants as such statutory tenants and is therefore entitled to claim mesne profits from the Appellants.
2. I agree with the Court of Appeal and I am of the opinion that their finding is impeachable when the court held-"it is my view therefore that if the Appellants are liable at all, they are liable in a sum of ₦60,000.00 per annum as mesne profit.

Appeal dismissed

KAYODE ESO, J.S.C.:-

The action, as revealed in the Statement of Claim, filed in the High Court, by the Plaintiffs in this case, was for possession of the premises situate at 194 Broad Street, Lagos, and ₦60,000.00 per annum from 6th October 1970 until possession of the premises, as mesne profits.

The Plaintiffs were the landlords of the premises, and by a written agreement, they let the premises to the 1st Defendant, that is Batakoko Limited, for a period of six years commencing from 6th October, 1970 at the rate of ₦60,000.00 per annum. This tenancy, however, expired by effluxion of time on 6th October, 1976. Before the expiration of the lease, the 1st Defendant had put the third Defendant, one Mrs. Abiola Elegbede in possession, who, in turn put the 2nd Defendant – Marine and General Insurance Company Limited, in possession. I have already stated the claim of the Plaintiffs against the three Defendants.

Because the 1st Defendant had already vacated the premises before the action was commenced, notice to recover possession was served only on 2nd and 3rd Defendants.

It is significant that in the Statement of Defence of the 2nd Defendant, who is the Appellant in this case, it admitted paragraph 1 of the Statement of Claim which was filed by the Plaintiffs, that is, the Respondents in this appeal. The Plaintiffs had claimed as follows-

- (1) The Plaintiffs are leasehold owners and entitled to the possession of the premises known as No. 194 Broad Street Lagos and the Defendants averred-
"The 2nd Defendant admits paragraph 1 of the Statement of Claim to the extent that the Plaintiffs are entitled to the possession of the premises known as No. 194 Broad Street Lagos."

It is also significant that the 3rd Defendant had quit the premises by the time of the service of the writ and so the only person in possession throughout the hearing of this case was the 2nd Defendant the Appellant in this case.

The learned trial Judge, in a well-considered judgment, entered judgment for the Plaintiffs/ Respondents, for possession and mesne profits at the rate of ₦60,000.00 per annum. Mention may also be made here that in regard to mesne profits, only the Plaintiffs called evidence-indeed a qualified valuer-who assessed the rental value of the premises at ₦60,000.00 per annum.

Neither the Appellant nor either of the other Defendants called evidence in regard

thereto:

The Appellant were dissatisfied with the decision of the High Court and appealed to the Court of Appeal. That Court, Ademola, Nnaemeka-Agu and Uthman Mohammed J.J.J. C.A. also in a well-considered judgment, as per Nnaemeka-Agu, J.C.A., found;

- (1) that the Appellant occupied the whole premises,
- (2) that the contractual rent of ₦60,000.00 between the Respondents(Plaintiffs) and the 1st Defendant (the original tenant) would be irrelevant in the assessment of mesne profits and what is relevant and material is the rent or profit which the Appellants *are deemed* to have received, or entitled to receive, on the premises during the period under consideration. This, the Court of Appeal confirmed to be ₦60,000.00 per annum as found by the trial Court upon the uncontradicted evidence of the 1st Plaintiffs' witness tendered by the Respondents to the trial Court;
- (3) that under the law, a tenant is any one person who occupies premises whether on payment of rent or otherwise, be he a tenant, sub-tenant or even trespasser, unless he occupies it under a bona fide claim to be the owner of the premises, and therefore a sub-sub tenant which the Appellant claims to be is a tenant within the meaning of the law and is liable for mesne profits.

The Court of Appeal dismissed the appeal and the Appellants have now appealed to this Court upon the following grounds of appeal-

The learned Justices of the Court of Appeal were wrong in Law in giving judgment against the Appellant for mesne profits when the Appellant was not a direct tenant of the Respondent.

PARTICULARS OF ERROR:

In Law, a document forming part of such correspondence is inadmissible in evidence, though not marked "Without Prejudice".

- (1) The learned Justices of the Court of Appeal were wrong in law in granting an amendment of the Statement of Claim when the amendment was not filed in the Court and no copy of the amendment was served on the Appellant.

PARTICULARS OF ERROR:

Unless the amendment was formulated in writing, filed in Court and a copy of the amendment served on the Appellant or its counsel, the terms of the amendment could not be known and defined.

- (1) The learned Justices of the Court of Appeal were wrong in law in not allowing the Appellant to call an additional witness when counsel for the Appellant, applied to call one more witness.

The Justices of the Court of Appeal were in such a hurry to conclude the hearing of the appeal that they disallowed Appellant's counsel's application to call his additional witness.

PARTICULARS OF ERROR:

In law, an Appellant is entitled to a fair hearing of his appeal. Such refusal is not fair hearing and is contrary to the provision of the suspended constitution of Federal

Republic of Nigeria, 1979.

Further grounds of appeal will be filed on receipt of record of proceedings.

The Appellants, as per their learned Counsel, filed a Brief, under the Rules, wherein, the learned Counsel stated the questions for determination by this Court as follows-

1. Whether a sub-sub-tenant is liable to pay Mesne Profits to the Head Landlord when no orders for possession and payment of Mesne Profits were made against the sub-sub-tenant's immediate landlord i.e. the 3rd Defendant.
2. If the answer to the question is in the negative, were the courts below correct to have ordered the Appellant to pay Mesne Profits to the Respondents?
3. If the answer is in the affirmative, what is the quantum of Mesne Profits payable and from what time should it start. Should it be from when the action was instituted i.e. from the 6th day of June, 1978 until possession is given up or should it be from when notice of intention to recover possession was served i.e. on the 8th day of December, 1977?
4. Were the letters written by the Appellants' Solicitors (i.e. Exhibits FCA1 and 2) in the course of an attempt to settle a dispute while action was going on admissible?
5. If the answer is in the negative, is the Court of Appeal correct in admitting the correspondence?

In law, can a person not found in an address be said not to be in lawful possession of such premises especially a shop and store?

6. Is the Court of Appeal correct in granting an amendment of the Statement of Claim contrary to Order 3 Rule (1) of the Court of Appeal Rules? and after this, argued.

Firstly, that there was no privity of contract between the Respondents (Plaintiffs) who were landlords and the Appellants who were only "sub-sub-tenants", the sub-sub-tenants that is the Appellants in this case, would not be personally liable for the rent payable on the premises to the Head landlord but only liable to his own landlord, that is, the 3rd Defendant;

Secondly that there was a misconception of the provisions of section 2 of the Recovery of Premises Law (Cap 118) Laws of Lagos State 1973 by the Court of Appeal. There having been no notice to quit served by the 3rd Defendant on the Appellant, and the Appellant not being trespassers, the rent the Appellant is said to have received on the premises should not be relevant in calculating mesne profits;

Thirdly that the Respondents could only claim mesne profits from the date of their election to determine the tenancy and not from March 1976, and the contractual rent payable by the Appellant to the 3rd Defendant is ₦12,000 per annum.

Learned Counsel for the Respondents, Mr. G.O.K. Ajayi, S.A.N., in his brief, argued that there has been no appeal against the concurrent findings of fact by the two lower courts to the effect that-

- (1) The Respondents (Plaintiffs) granted a lease for 6 years to 1st Defendant at a rent of ₦6,000.00 per annum and the lease expired on 5th October 1976.

- (2) The 1st Defendant, before the expiration of lease, had put 3rd Defendant into possession of the whole premises who in turn before the expiration of the lease, also put 2nd Defendant – Appellant in possession of the whole premises.
- (3) By the time of the commencement of this action in the High Court, neither the 1st nor 3rd Defendant occupied any part of the premises and the Appellant. (2nd Defendant) was in occupation of the entire premises.
- (4) The open market rental value was, in 1976, ₦60,000.00 per annum.

Learned Counsel argued in that brief that upon the correct construction of A2 of the Recovery of Premises Law (cap 118) Laws of Lagos State 1973, the only persons occupying the premises, since 6th October 1976, when the original term expired, were the Appellant and the two lower courts had so found. It was not necessary to serve any notice on the 1st and 3rd Defendants as both had ceased to occupy the premises before the expiration of the term and as the appellants were admittedly in possession, they would be "a tenant" of the premises under s.2 of the law aforesaid as the Respondents would be landlords of the premises under the same provision.

Learned Counsel further submitted in the Brief that the Respondents never claimed for rent from the Appellant, but mesne profits, against under the provision of the Law aforesaid. That the issue of privity of contract was irrelevant.

There were oral arguments. The crux of the arguments of Mr. Akinbisehin, learned Counsel for the Appellant, was that the Appellant became a statutory tenant. At this stage, this Court referred him to the indisputable finding of the two lower courts that the 1st Defendant ceased to be a tenant from 5th October 1976 and had in fact vacated the premises before the expiration of the tenancy. Mr. Akinbisehin said he would be concerned only with the question of mesne profits.

As the Appellant was a sub-sub-tenant, the 1st Defendant was still a tenant, despite the expiration of the term by effluxion, even though they were not in physical possession. On that token, said learned Counsel, the Appellant became a statutory tenant and if the appellants were to pay mesne profits, it would be for period starting with the writ and not the period from when they held over.

Mr. G.O.K. Ajayi reminded the Court, in his final address, that from the evidence adduced by the Appellant in the Court of Appeal, the Appellant had paid ₦12,000 for just a portion of the premises.

Replying to this point, Mr. Akinbisehin conceded that ₦12,000 per annum was paid for a portion of the premises but, he said, mesne profits should only be paid to the date of the sale of the property itself to the Appellant, the property having now been sold to the Appellant.

The issues for the determination of the Court as they are, would appear to me in this case as follows-

- (1) What, if any, is the liability of the Appellant under the Recovery of the Premises Law (Lagos State) Cap. 118 of 1973.
- (2) What are mesne profits? And

- (3) When, on the evidence, did the liability of the Appellant, on mesne profits, if any, one (1) above cease?

By section 2 of the Recovery of Premises Law (hereafter referred to as the law),- "mesne profits" means- "the rents and profits which a tenant who holds over, or a trespasser, has or might have received during his occupation of the premises and which he is liable to pay as compensation to the person entitled to possession"

In this case, the relationship of the Appellant to the Respondent was one of statutory tenancy.

That is, once they held over the tenancy, qua a tenant of the original tenant, after the expiration of the original tenancy agreement between the 1st Defendant and the Respondents, they became the statutory tenants of the Respondents. In this case, the Respondents accepted the appellants as such statutory tenants.

Section 2 of the Law defines tenant to include- "any person occupying premises whether on payment of rent or otherwise but does not include a person occupying premises under bona fide claim to be owner of the premises."

The Appellant are such tenants as they do not claim ownership of the premises.

The Respondents are therefore entitled to claim mesne profits from the Appellants. Indeed, the Appellants really never disputed their liability to pay mesne profits. Exhibit K, which is a letter from the Solicitors to the Respondents acknowledging the receipt of a cheque sent on behalf of the Appellants, is a testimony to this. The exhibit reads as follows-

Gentlemen

SUIT NO LD/680/78

A. ROSSEK & ANOR. V. BATAKOTO LTD. & ORS.

We acknowledge the receipt of your letter FNA/RUC/667/78 of the 13th of October, 1978 and the cheque attached thereto. Although it is not our practice to refuse documents and cheques sent to us on behalf of our clients, we are obliged to return your said cheque on the ground that we have now realised the Typographical error made in stating the mesne profits claimed as ~~₦~~6,000.00 instead of ~~₦~~60,000.00. You will probably agree with us that to accept the cheque in the circumstances would amount to our implying that the figure erroneously claimed in the writ was correct.

Please acknowledge receipt.

Yours faithfully,

(Sgd.) for G.O.K. AJAYI & Co."

The exhibit shows that the Appellants acknowledged themselves as liable to mesne profits of ~~₦~~6,000.00 per annum a figure which the Respondents disputed to the effect that it should read ~~₦~~60,000.00.

And so, as such statutory tenants, admitted as such by both parties, the Appellant's contention in this Court could only be limited to whether the amount of mesne profit should be ~~₦~~6,000.00 or ~~₦~~12,000.00 as later admitted by the Appellants' counsel during the course of his argument before us, or the ~~₦~~60,000.00 which the learned trial Judge awarded in the case.

The evidence was, no doubt, one sided, as the appellants chose to give no evidence in contradiction of the clear and scientific evidence adduced by the Respondents per one Oludemi Oluse, a chartered surveyor, whom the learned trial Judge described as having "years of experience in his field." The witness placed what he referred to as the correct value of the property at ₦60,479.00 per annum. It was in the quest for a round figure that the lower figure of ₦60,000.00 was accepted and rule upon by the trial Court.

In regard to the figure claimable, I think the amendment sought by the Appellants in the Court of Appeal and the evidence adduced in regard thereto are material. After the Respondents had been allowed to amend their statement of claim in that Court, learned Counsel for the appellants, Dr. Akintoye, sought, and was granted, leave to amend paragraph 3 of the statement of defence as follows-

As regards paragraph 4 of the Amended Statement of Claim, save that the 2nd Defendant admits that the 1st Defendant put the 3rd Defendant in possession of the whole premises known as 194 Broad Street, Lagos, the 2nd Defendant denies the rest of the amended paragraph.

(a) The 2nd Defendant/Appellant further states with regard to paragraph 4 of the Amended Statement of Claim *that the 3rd Defendant put the 2nd Defendant in possession of a portion of the said premises on payment of an agreed amount of ₦12,000.00 a year whilst the 3rd Defendant retains the possession of the remaining portion of the said premises viz a Shop.*"
(Italics mine for emphasis).

It is clear that the figure of ₦6,000.00 could not be sustainable if the Appellants admitted paying ₦12,000.00 for just a portion of the premises. And this would have laid further credence to the evidence of the Respondents' expert witness, had these facts been available before the trial court.

There were two letters tendered by the Appellant in the Court of Appeal to wit. Exhibits FCA1 and FCA2 and they read as follows-

G.O.K. Ajayi & Co.,

Unity House (14 Floor)

37, Marina, Lagos.

Sirs,

No. LD/680/78

A. Rossek & Another vs Batakoto Limited & 2

Others in Re: 194, Broad Street, Lagos

We refer to the writ of summons served on our clients Marine & General Assurance Company Limited *Who are in possession of the whole of the above premises.*

We have our clients' instruction to forward their cheque for the sum of ₦18,000 representing the rents claimed at ₦6,000 per annum for 6th October, 1976 to 5th October, 1979.

Our Mr. Akinbisehin will find time to see you at no distant date to try to effect settlement out of Court as our clients are not interested in giving up possession of the premises at the moment.

Please acknowledge receipt while thanking you for your continued co-operation.

Yours faithfully,
F. BAYO AKINBISEHIN & CO.

C.C. The Managing Director, Marine & General Ass. Co. Limited, 194, Broad Street,
Lagos
Enc."

Exhibit FCA 2 reads as follows:-
The Registrar, High Court of Lagos
Lagos
Dear Sir
SUITLD/680/78

Antoinne Rossek, Diab Basr
vs

Batakoto Limited

Marine & General Assurance Company Limited, Mrs. Abiola Elegbede:

Please be informed that the writ of Summons meant for Mrs. Abiola Elegbede was served on our clients Marine & General Assurance Company Limited, *we hereby return same as Mrs. Abiola Elegbede is no more at the address on the writ. New address to the best of our knowledge is 1/9 Berkley Street, Lagos.*

Thanks.

Yours faithfully,
F. Bayo Akinbisehin & Co.
CC. Messrs G.O.K. Ajayi & Co.,
Solicitors, Unity House (14 Floor) Lagos.

Above for your information and necessary action.

The Court of Appeal made reference to these letters and, rightly in my view, resolved the issue of mesne profits when it held as per Nnaemeka Agu.

It is clear from these two letters that, on the admission of the Appellant's solicitors, at the time the writ was served, the 3rd Defendant was no longer occupying the premises and that as at the date of the letter i.e. the 3rd Defendant had quit the premises and that the offer of ₦18,000.00 as rents which the 2nd Defendant made was for the whole premises, and not just for a portion of it.

Coupled with the other evidence on record particularly that of the valuer, P.W.1, that the appellants were the occupiers of the premises it is perfectly clear that the evidence of Stephen Oguniyi, the only witness called by the defence on the point, is false. I do not believe that they occupy only a portion of the premises. I find that they occupy the whole premises.

Now from the uncontradicted evidence of P.W.1 Samuel Kayode Oludemi, the valuer, it is clear that the annual rental value of the premises is ₦60,000.00".

I agree with the Court of Appeal and I am of the opinion that their finding is unimpeachable when the court held- "It is my view therefore that if the appellants are liable at all, they are liable in a sum of ₦60,000.00 per annum as mesne profits."

I have no doubt, for all these reasons, that there is no merit in this appeal, and that the Court of Appeal was right to have dismissed the appeal against the clear and well-reasoned judgment of Akibo Savage J. in the High Court.

Both learned Counsel have indicated to us that the premises has now in fact been sold to the Appellant, and this would amount in law to "giving up possession "which the Appellant held of the Respondents as statutory tenants.

The appeal is hereby dismissed. The Appellant shall pay ₦60,000.00 per annum mesne profits *but only up to the date the property changed hands by sale to the Appellants.*

Costs of ₦300.00 to Respondents.

UWAIS, J.S.C.: -

I had a preview of the judgment read my learned brother Eso, J.S.C. I entirely agree with the judgment and the order contained therein. I have nothing to add.

COKER, J.S.C.: -

Having had a preview of the draft of the judgment just delivered by my learned brother ESO, J.S.C., and after careful consideration of the arguments of counsel, I agree that this appeal has no merit and should be dismissed. As there is nothing significant in any of the points raised by counsel, I do not consider it necessary to add anything further to what has been ably stated by my said learned brother.

I too will dismiss the appeal and also agree to the costs of ₦300.00 to the Respondents.

KARIBI-WHYTE, J.S.C.: -

I have had the privilege of a preview of the judgment of my learned brother Kayode Eso, J.S.C. in this appeal. I agree entirely with his reasoning and the conclusion that the finding of the Court of Appeal is unimpeachable. I too dismiss this appeal. I award costs of ₦300 to the Respondent.

OPUTA, J.S.C.: -

I have had the privilege of a preview in draft of the lead judgment just read by my learned brother and Presiding Justice Eso, J.S.C. I am in complete agreement with him that this appeal should be dismissed.

The facts and the law were fully dealt with in the lead judgment of Nnaemeka-Agu, J.C.A. to which Ademola and Uthman Mohammed, JJ.C.A. both concurred. The facts, which are not in dispute are as follows: -

The Plaintiff/Company and Respondent in this Court was the owner of the premises situate at No. 194 Broad Street, Lagos.

1. By a written agreement, the Plaintiff let the premises aforementioned to Batakoto Limited (sued in the original action as 1st Defendant) for six years with effect from 6th October, 1970 at the rent of ₦6,000.00 per annum,
2. This tenancy expired by effluxion of time on 6th October, 1976.
3. Before the end of the tenancy, the 1st Defendant sublet the premises to one Mrs. Abiola Elegbede who was sued as 3rd Defendant.
4. Subsequently the 3rd Defendant sublet the premises to Marine and General Assurance Company Limited who was sued as 2nd Defendant.
5. The Plaintiff sued the three Defendants and in his amended Statement of Claim,

- claimed possession of the premises and ₦60,000.00 per annum as mesne profits from 6th October 1976 until possession is given up.
6. It was discovered that the 1st Defendant was not in possession of the premises so the necessary Notices were served on the 2nd and 3rd Defendants respectively.
 7. The 3rd Defendant vacated the premises before pleadings were filed. It was thus only the 2nd Defendant who filed a Statement of Defence. It was thus a straightforward fight between the Plaintiff and the 2nd Defendant.
 8. From the pleadings of the parties; the only issue that went to trial was whether the liability of the 2nd Defendant for mesne profits was the amount of ₦60,000.00 per annum agreed between the Plaintiff and the 1st Defendant as rent from 6th October 1970 to 6th October 1976 OR the ₦60,000.00 being the current rent of the premises as claimed by the Plaintiff.
 9. At the trial the Plaintiff called as P.W.1 one Mr. S.K. Oludemi, a qualified Valuer who assessed the current rental value of the premises at No. 194 Broad Street, Lagos at ₦60,000.00 per annum.
 10. The learned trial Judge found for the Plaintiff, gave him judgment for possession and awarded him ₦690.00 per annum as mesne profits.
 11. The 2nd Defendant appealed against the judgment of the trial court
 12. To the Court of Appeal Lagos Division. That Court dismissed its appeal.
 13. The Defendant/Company has now appealed to this Court.

21.4 REMARKS

This a case of Landlord/Tenant relationship.

Marine and General Insurance Company Limited was a Sub-Tenant in the property and when the Plaintiffs/Respondents sought to take possession of the property, Marine and General Insurance Company Limited that became the Appellant had to appeal the decision of the lower Court that entered judgment for the Plaintiff/Respondents for possession and mesne profit.

Not strictly an insurance matter but it is a useful guide for Insurance Companies and all on Landlord/Tenant/Property matters.

21.5 REFERENCES

1. *Recovery of the Premises Law (Lagos State) Cap. 118 of 1973.*
2. *Order 3 Rule(1) of the Court of Appeal Rules.*
3. *Constitution of the Federal Republic of Nigeria 1979 (suspended).*

221 ARRANGEMENT OF MATTER, COURT, DATES.

COURT: SUPREME COURT,

DATE: 10th January, 1969

SUIT NO: SC.349/1966

JUDGE: Ademola, C.J.N.
Coker, J.S.C.
Madarikan, J.S.C.

NORTHERN ASSURANCE COMPANY LIMITED
(Defendant/ Appellant)

vs.

A. WURAOLA.
(Plaintiff/ Respondent)

222 REPORTS/FACTS/ISSUES

The Respondent assured while taking out a third party motor vehicle insurance agreed in the Proposal Form to accept a Policy in respect of his vehicle subject to the terms, provisions and conditions of the Appellant insurer. A cover note was thereafter issued to him which similarly contained a provision that the risk was covered in the terms of the usual form Policy of the insurer. The insurer's Policy contained provisions, inter alia, that the insured shall inform the insurer of any impending prosecution which may result in a claim, and also that due observance of the conditions therein specified is a condition precedent to the liability of the insurer. The Policy was however not delivered to the insured. The Appellant insurer repudiated the claim of the insured on the ground that the insured had broken a clause in the Policy.

Held, by the Supreme Court, the insurer was entitled to deny liability as the Policy forms part of the contract, a provision of which the insured had broken, even though the Policy was not delivered to him.

223 DECISION OF COURT.

JUDGMENT

COKER, J.S.C:

The principle or doctrine of incorporation by reference is one that is frequently applied in the construction of documents, including contract of insurance, where from the documents produced by both parties it is clear that some other evidence must have been in the contemplation of the parties. In such cases the principle is that the documents put forward compel the court to look beyond them and ascertain precisely the other evidence which by necessary implication the parties must have had in their minds at the time of the contract. In *Wyndham Rather Limited vs Eagle Star & British Dominium Insurance Company Limited (9)*, the point came up for decision as to whether the insured was bound by an arbitration clause appearing in an insurance Policy which it was found had not been issued or delivered to him... In the course of

his judgment in the case *Sargent L.J.* stated (1925), 21 L.1L. Rep. at 215)

I am of the same opinion. The slip contains a clear reference to the proposal form, and the proposal form contains a clear incorporation of the usual conditions of the company's Policy...

We have come to the conclusion that the document put in issue in this case and the evidence given on both sides point equivocally to the existence as between them of a Policy of insurance. We have also concluded that in the construction of the document before the court, the Policy must be deemed to have been incorporated by reference being a document which was in the contemplation of both parties as forming part of the contract into which they had entered.

224 REMARKS

An Insurer is entitled to deny liability as the Policy documentation forms part of the Contract, a provision of which the Insured did not comply with, even when the Policy document was not delivered to him.

225 REFERENCES

1. *Wyndham Rather Limited vs Eagle Star & British Dominion Insurance Company Limited* (9).

APPEAL COURT

23.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL (IBADAN)

DATE: 23rd June, 1982

SUIT NO: Appeal No. FCA/1/107/80

JUDGE: Hon. Samuel Adetunji Ogunkeye J.C.A.
Hon. Muhammed M. A. Akanbi J.C.A
Hon. Latif J. Dosunmu, J.C.A

**AKWIWU MOTORS LIMITED
INNOCENT ANOSIKE
(Defendants/ Appellants)**

vs

**DR. BABATUNDE O. SANGONUGA
(Plaintiff/ Respondent)**

23.2 REPORTS/FACTS/ISSUES

The Respondent a Surgeon and university Lecturer on 13/7/76, then aged 37years, while driving his car at about 8:30pm 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 were no street lights. The stationary vehicle was owned by the 1st Appellant/Defendant was seriously injured as a result of the accident and became a quadriplegic.

In a suit filed by the Plaintiff at the Ile-Ife 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.

23.3 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 N301,409.30 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 second 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, Stoke Mandeville Hospital, Bucks, England. At the time of the accident, he was 37years 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 N301,490.30 The breakdown is as follows:

SPECIAL DAMAGES

(a) Loss of earnings of Consultancy fees at the rate of ₦3,00.00 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
(f) per month i.e ₦240.00 per month from August, 1977 up to date, a total of	₦3,240.00.
(g) 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	
Basic salary of ₦7,620.00 per annum for 25years	₦190,500.00
Consultancy Earnings at the rate of N3,000.00 p.a. for 25years =	₦75,000.00
(iii) Prospective medical expenses inclusive of overseas trip for follow-up treatment, costs of medical gadgets and 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)

provision of drugs, extra food and nourishment using a multiplier of 12 x 500	₦6,000.00
Not allowed as a capital expenditure to be met from other heads	
Loss of a advancement in service using a multiplier of 12 at ₦1,500.00 p.a	₦18,000.00
	<u>N301,490.00</u>

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 Ife 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 Appellant'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 Appellant's witnesses P.W. 9 and P.W. 10 to the effect that after the accident they discovered the Appellant'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 Appellants' 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 witnesses 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.3. 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 the 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 1st Appellant's vehicle on it, signifying his agreement with its accuracy. It was 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 the 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 Appellant'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 Appellants’ 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 Appellants’ 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 Appellants the burden of proving what the Respondent failed to prove. This, Counsel for the Appellants 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 Sijuwade 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 Defendants’ 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”

Q You must have done some running around before the incident?

A. 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.

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

A 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 Appellant'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 Defendants' 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 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: 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

- 9 dangerously left the said vehicle in the centre of the highway and in the township of Ife.
- 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 *McNaughten 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 Limited* (1961)1A.LN.R. Part IV 747).

Finally, Counsel for the Appellants described 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 the 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 Appellants' negligence. In the case of medical treatment, there was a detailed statement of account expended in Exhibits P4 to P6 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 practicing surgeon acting as consultant to the Ife University Teaching Hospital. He was 40years old at the time of the action with a 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 Priestley in the London Times who was awarded the high sum of £225,000 in England after becoming a quadriplegic from a fall while working on 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 a 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 v. 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 *LimPoh 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 the demands of the Respondent, day and night. I believe the provision of two helpers is reasonable and the rate of ₦ 120.00 per person from August 1977 to date is 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 that 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 the National Spinal Injuries Centre in 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 completely 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. Sometimes 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 a 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 is ₦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 follow-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 the 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 a 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 Appeal is dismissed and the judgment of the lower court is accordingly confirmed. The Appellants shall pay cost of ₦250,000.00 to the Respondents.

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.

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 incapacitated 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 at 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.

23.4 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.

23.5 REFERENCES

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

24.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL

DATE: 19th May, 1986.

SUIT NO: CA/1/77/85

JUDGE: Adenekan Ademola, J.C.A.
Philip Nnaemeka-Agu, J.C.A.
Idris Legbo Kutigi, J. C.A.

GREAT NIGERIA INSURANCE COMPANY LIMITED
(Defendant/Appellant)

vs

LADGROUPS LIMITED
(Plaintiff/Respondent)

24.2 REPORTS/FACTS/ISSUES

INSURANCE AND REINSURANCE: Marine Insurance Policy; What it constitutes under Section 24 of the Marine Insurance Act, whether rights of parties are determined by the Policy of Marine Insurance between the parties, Certificate issued under the Policy or both.

INSURANCE AND REINSURANCE: Marine Insurance Policy; Construction of, whether it requires a special rule of construction different from the rules of construction applicable to other commercial contracts.

INSURANCE AND REINSURANCE LAW: Marine Insurance Act of 1961 and contractual freedom. Whether the Act prohibits parties from agreeing to any term they like.

INSURANCE AND REINSURANCE: Claim brought to recover the sum due under a Certificate of Valued Policy of Marine Insurance covering cargo lost in a sunk ship. Insurer's denial of liability based on alleged Policy Holder's breach of conditions (usage, custom, and practice) applicable to Marine Insurance policies generally and conditions precedent to liability or claim as stated in the Policy of insurance, part to Excess Clause and whether inconsistent.

INSURANCE AND REINSURANCE: Valued Policy of Insurance; Meaning of, "One in which the value of the thing insured, and also the amount to be paid thereon in the event of loss, is settled by arrangement between the parties and inserted in the Policy." Legal effect.

INSURANCE AND REINSURANCE: Floating Marine Insurance Policy; Meaning and components of whether needs to be read and construed together with the terms in the Certificate of Marine Insurance which covers the specific transaction, the covered

risk of which is the subject of this litigation.

INSURANCE AND REINSURANCE: Relationship between a Valued Policy and Excess Clause. Whether the idea of excess clause is inconsistent with the object and purpose of a valued Policy or insurance generally.

INSURANCE AND REINSURANCE: Excess clause in Marine Insurance Policy which is not expressly written into the Certificate of Insurance pursuant thereto. Whether endorsement on the certificate which made reference to terms and conditions in the Policy suffices.

INSURANCE AND REINSURANCE: Exemption clause; Rule that it is not open to a court to strike down an exemption clause merely on the ground that it is unreasonable. Exemptions thereto, situations expressly provided for in the Unfair Contract Terms Act 1977 and effect.

INTERNATIONAL TRADE – Maritime insurance and international transportation of goods - Fish – Claim to recover for loss of cargo due to sinking of ship – Relevant considerations.

PRACTICE AND PROCEDURE – PLEADINGS – AVERMENTS: -

Where a party pleads a document by merely referring to it and, without stating the effects or the purport for which it is referred to – Whether enough to assert document will be relied upon – Need to plead effect of the document as a fact so that the document will then be tendered as some evidence of that fact or to state the precise purport for which the document is being relied upon – When the precise words used should be stated in full in the pleading.

PRACTICE AND PROCEDURE – PLEADINGS: - Rule that a court does not give a litigant what he did not claim, where a Defendant fails to bring a cross-claim or counter-claim - Whether to assert a lien or a set-off based on the pleadings of the Plaintiff.

PRACTICE AND PROCEDURE – PLEADINGS: - General principles of, rule that pleadings control the evidence – What can and cannot be pleaded – Order XXXI rules 5 and 13 of the Federal High Court Rules 1976.

PRACTICE AND PROCEDURE – PLEADINGS: - Insurance – Excess Clause in valued Policy – Whether must be pleaded.

24.3 DECISION OF COURT.

JUDGMENT

NNAEMEKA-AGU, J.C.A. (delivering the Judgement of the Court):

In an action commenced by a Writ of Summons, the Plaintiff's claim against the Defendants is for the sum of ₦217, 892.05 being the amount payable on the valued Policy of Marine Insurance No. M/9001460/L over Plaintiffs' cargo of 20,000 cartons "Plaza" Mackerel shipped on board MN "JALSEACONDOR" from Yokohama, Japan to Apapa, Nigeria, which ship, however, sank on the 3rd July, 1978 off Namibian Coast with the entire Plaintiff's cargo aboard.

The Plaintiff claimed 5% interest from the date of the Writ until the judgement in the suit is fully satisfied. There is no counterclaim before the court.

Now in paragraphs 5 and 6 of the Statement of Claim the Plaintiff pleaded as follows:

5. On or about the 4th day of April, 1978, the Plaintiff in respect of the aforesaid 20,000 cartons of Canned Mackerel took out with the Defendants a valued marine Policy and paid the premium charged.

- (1) On the said 4th day of April, 1978, the Defendant issued in favour of the Plaintiff in Lagos, Nigeria, in respect of the Consignment of 20,000 cartons of canned mackerel, a Certificate of Insurance expressing clearly the value of the Policy as ₦217,892.05.”

In paragraphs 2,5,6,8 and 9 of the Statement of Defence, the Defendant pleaded as follows:

2. The Defendant admits paragraphs 5 and 6 of the Statement of Claim to the extent that the said Certificate of Insurance was issued to the Plaintiff subject to terms, warranties, stipulations and conditions applicable to Marine Insurance Policies.
- (2) The Defendant avers that from 31st day of October, 1977, an open Insurance Policy (No. M/900146/L) was issued in favour of the Plaintiff subject to the conditions, stipulations, practices, terms, clauses, express warranties, implied warranties and limitations applicable to marine insurance.
- (3) The Defendant avers further that on the 4th day of April, 1978, at the request of the Plaintiff, a Certificate of Insurance was issued to the Plaintiff subject to the terms and stipulations referred to in paragraphs 2 and 5 above.
- (4) The Defendant avers further that the Plaintiff failed to satisfy the conditions precedent to liability as well as conditions precedent to claim as stated in the aforementioned Marine Policy.
- (5) At the trial of this matter, the Defendant will rely on the Marine Policy usage, custom and practice relating to the marine market on which the aforesaid Policy was formulated.”

At no place did the Defendant plead expressly entitlement to compulsory excess of ₦800.00 or any other sum. What are pleaded are *inter alia* conditions applicable to marine insurance policies generally and conditions precedent to liability or claim as stated in the Policy. Those conditions were not spelt out. Apart from tendering the Policy and the Certificate of Insurance, there is no evidence of such conditions or condition precedent, still less of the usage, custom, and practice, relating to the marine market as averred in paragraph 9 of the Statement of Claim. The Marine Insurance Policy No. MAR (9001460/L dated 9th December, 1977 was tendered as Exh. D1. It contains an endorsement in the following words:

“Conditions-

Insurance to cover “FPA” as per the institute cargo clause attached. This Policy does not cover loss or damages directly or indirectly caused by or contributed to by or arising from heat, rats, delay, moth, vermin, inherent vices or the nature of the subject matter insured loss of colour and/ or scratches. Subject to an excess of ₦800.00 or 10%

of each and every claim, whichever is greater.”

Subsequently, a Certificate of Marine Insurance, Exh.D2 dated 4th day of April, 1978, was issued to the Plaintiff. In it, the above quoted condition was not repeated. But part of it states:

“Conditions of Insurance – Insurance to cover “F.P.A. “as per institute cargo clause. Subject to open Policy conditions.”

At the trial, witnesses called by the Defence admitted that Exh.D1 is a valued Policy and that the value which the Defendant was supposed to pay in case of a total loss was ₦217, 892.05. Surprisingly at no place in their oral testimonies did any of the two witnesses called for the Defence state that they were entitled to any compulsory excess. It was first raised during the final address of their counsel. After trial and addresses of counsel, the learned Judge in a considered judgement, entered judgement for the Plaintiff. He held that Exh.D2 shows that the contract between the parties was for a valued Policy and awarded to the Plaintiff the sum of ₦217, 892.05 as per the agreed value. He also rejected the Defendant’s claim for compulsory excess on the grounds that it was not pleaded; that the idea of such an excess is alien to a valued Policy; and that if it was intended to apply it should have expressly been stated in Exh.D2.

The Defendant (hereinafter called the appellant) has appealed. In point of fact, the grounds of appeal and the arguments both in the briefs and orally are on the refusal of the learned Judge to allow for the compulsory excess. The Plaintiff shall be referred to as the Respondent.

From the briefs and arguments before us, the issues for determination in this appeal are as follows:

- (i) Whether the learned Judge was wrong in holding that the issue of excess was not pleaded or given in evidence;
- (ii) Whether the idea of excess is at variance with a valued Policy, and whether there was any pleading or evidence that an excess clause is a common feature of marine insurance;
- (iii) Whether the appellant is entitled to a discount of ₦21,789.20 being 10% of the valued insurance Policy.

As I see it, the most paramount question in this appeal is the pleading: whether the appellants pleaded the compulsory excess clause on which they now rely in this appeal, and, if they did not, whether its consideration does arise at all. For this reason, I regret, with respects, that I am unable to agree that it was pleaded of that it does arise. It is now perfectly settled that pleadings control the evidence. The sum total of all the decided cases on the point is that evidence on a fact not pleaded goes to no issue at the trial and ought to be disregarded. See on this: for examples, *Aniemeka Emogokwue vs James Okadigbo* (1973) 4 S.C. 113, p.117. *African Continental Seaways Limited vs. Nigerian Dredging Roads & General Works Ltd.* (1977) 5 S.C. 235, 243, 247-50; *Akpapuna vs. Obi Nzeka H* (1983) 7 S.C. 1, pp.24 and 62; *Ferdinand George vs. The United Bank for Africa* (1972) 1 All N.L.R. (Pt.2) 347 at pp.353, so I hold the view that if upon a careful consideration of the pleadings before the court the Appellant’s entitlement to compulsory excess was not pleaded or put in issue in the proceedings, it does not arise. Therefore, the court needed not consider Exhs. D1 and D2 upon which the claim thereto was based. I do not agree that the converse is the case; i.e. that as Exh.D1 and D2 were tendered, the question of pleading the compulsory excess does

not arise.

The trend of the arguments in this appeal dictates that I should re-examine certain elementary rules of pleadings. In *Philips v. Philips* (1878) 4 Q. B. D. 133, these basic rules were stated to be what the pleader must plead:

- (i) material facts, not law;
- (ii) material facts, not evidence;
- (iii) materials facts only;
- (iv) all material facts; and
- (v) all facts in a summary form.

The second and fourth of the above rules are material in this case. These basic rules have found their way into most of our Rules of Court. It is sufficient for our present purpose to refer to Order XXXI Rules 5 and 13 of the Federal High Court Rules 1976, which provide:

- (1) Every pleading shall contain a statement of all the material facts upon which the party pleading relies, but not the evidence by which they shall be proved, such statement being divided into paragraphs numbered consecutively, and each paragraph containing as nearly as may be, a separate allegation.”
- (2) The Defence must allege any fact not stated in the Statement of Claim on which the Defendant relies in defence, as establishing for instance, fraud on the part of the Plaintiff, or showing that the Plaintiff’s right to recover or to any relief capable of being granted on the petition, has not yet accrued, or is released or barred, or otherwise gone.”

On the above principles, it is my view that if the Appellant’s contention is that the amount to which the Respondent was entitled would be reduced by the amount of the compulsory excess, he had to plead that fact as well as entitlement to the compulsory excess.

While not seriously disputing their duty to plead the fact, the learned counsel for the Appellant contended that reference to the Insurance Policy (Exh.D1) and Certificate of Insurance (Exh.D2) and stating that they were issued to the Plaintiff “subject to terms, warranties stipulations and conditions applicable to marine insurance policies” as averred in paragraphs 2, 5, 6, 8 and 9 above was sufficient pleading of that fact. In my view, it is not. What the Appellants should have pleaded is either such effect of the documents as are relevant to their case in relation to the compulsory excess (for this see *Bristow v. Wright* (1781) 2 Dong. 665); or the simple fact that they are entitled to the compulsory excess and that the agreed value of the Policy should be reduced thereby. (Order 31 Rule 13 supra). If they had pleaded either way, the documents would have been part of the evidence they could have relied upon in proof of their averment. In my view, to plead the documents alone without more, instead of their effect is to plead evidence. This would be contrary to the rule of pleadings. Moreover, there appears from the above pleading by the Plaintiff, to be a confusion in thought between the term’s “condition” and “condition precedent”. For the avoidance of doubt, a condition is a material term of the contract, whereas a condition precedent (See para. 8 of the statement of defence) is a condition precedent to the Plaintiff’s right of action: it is a thing that must happen or be performed to vest the Plaintiff with the right to sue. Whereas neither party needs to allege a condition precedent, as it is implied, any condition which the Plaintiff alleges to be a material term of the contract must be clearly pleaded.

I would like to seize this opportunity to state that, in my opinion, a party does not plead a document by merely referring to it and, without stating the effects or the purport for which it is referred to, just saying that it will be relied upon. To hold that it is sufficient will, in a case like this, in which Exh.D1 runs into eight pages, some of them in very tiny print, leads to obvious injustice. The adverse party is entitled to know the purport for which the document is being relied upon. Therefore, a party pleads a document either by pleading its effect as a fact so that the document will then be tendered as some evidence of that fact or the precise purport for which the document is being relied upon will be stated. It is only when the precise words used are material that those words should be stated in full in the pleading. See *Bristow v. Wright* (1781) 2 Doug. 665. The learned authors of Supreme Court Practice 1982 stated part of the relevant rule in paragraph 18/717, where they said:

“If a document is referred to in a pleading, but neither its effect stated nor its precise words set out, it cannot be read, without consent, on a summons or motion for judgement or a motion to strike out a Statement of Claim as not disclosing any reasonable cause of action (*Howard v. Hill* (1887) W.N. 193; and see *Williamson v. London & North Western Ry.* (1879) 12 Ch. D. 787; and *Smith v. Buchan*, 36 W.R. 631.”

The learned authors of *Bullen & Leake: Precedents of Pleading* (12th Edn.) had this to say at p.44. “Where any document or conversation is referred to in any pleading, the precise words of the document or conversation should not be stated, but only the effect of the document or the purport of the conversation should be briefly stated; but if the precise words of a document or conversation are themselves material, they must be set out in full in the pleading. Thus, it is not ordinarily necessary to set out verbatim the entire terms of a written contract, but only to state briefly the effect thereof and to specify the particular terms in respect of which any breach is alleged. So, it is not ordinarily necessary to set out the precise words used by the parties when making a contract or taking part in any conversation relied on. If the party alleges that a document has a particular effect, he should set out so much of the document as is necessary to show that it has the effect alleged.” See also *Davis v. James* (1884) 26 Ch.D.778.

In the instant case it was at least necessary for the Appellant to have alleged that they were entitled to compulsory excess by reason of the conditions stipulated in Exh.D1. The blanket averment that the Appellants would rely on terms, conditions, warranties and stipulations in the Policy does not give any or sufficient notice to the respondents as to what purpose any or all of them would be relied upon.

There is also another aspect of the pleading in this case. As the learned counsel for the Appellant stated in his brief and reply brief, their case is that the Insurer/ Appellant is entitled to recover the sum of ₦21,789.20, and, so the Respondent should be paid the sum of ₦217,892.05 less that sum under the compulsory excess clause. The Appellant has no cross claim or counterclaim before the Court. Obviously, the Court is without power to award to the Appellant what it did not claim: *Etim Ekpenyong & 3 Ors. V. Inyang Effiong & 6 Ors.* (1975) 2 S.C. 71, at p.80; *Adegbenro v. Attorney General of the Federation* (1962) 2 All N.L.R. 431. So, what the Appellant is seeking for can only be a defence by way of a set-off to part of the amount due to the Respondent. By Order XXXI Rule 14 of the Federal High Court Rules, 1976, I set out above, they were obliged to plead the set off specifically in their Statement of Defence. Without a counterclaim or pleading the sum as a set off, I cannot see how they could be entitled to deduct that sum from the amount adjudged due on the valued Policy. It is not open to the Appellant to rely on a defence which it should have pleaded at the trial, but did

not: see *Idahosa & Anor. v. D. N. Oronsaye* (1959) 4 F.S.C. 166. I therefore agree that reliance could be placed on the opinion of Ademola C.J.N. where he said in the case of *Ogiamen v. Ogiamen* (1967) 1 All N.L.R. 191, at p.196.

“This Court has pointed out on several occasions that it is wrong for a Judge to give a decision on a point on which opportunity was not afforded counsel to argue, at the hearing, particularly a point which throughout the hearing was not raised.”

I dare say it would have been worse in this case if the learned Judge had given a decision on a fact which ought to have been pleaded but was not, and was not referred to in oral evidence – because a party was relying on a single line in a voluminous document which was tucked into evidence without even being read. One of the objects of pleading is to avoid surprise. Nowadays, the game of litigation is played with cards face upwards. This is because the rule *audi alteram partem* cannot be obeyed if one is expected to prepare for the unknown. In the instant case, it is of material significance that the first mention of excess in the proceedings was during Defence counsel’s final address. In my opinion this will not do. I therefore agree with the learned trial Judge that the issue of Appellant’s entitlement to compulsory excess was not pleaded; so he could not take advantage of it. If I am right in this opinion, it becomes unnecessary to consider the other issues in this appeal. In case I am wrong, I shall deal with other issues rather briefly.

The next question is whether an excess clause is alien to a valued Policy of insurance, as the learned Judge has held. I am of the view that the statement of the learned Judge that the question of the excess clause is hardly relevant to a valued Policy is perhaps an overstatement. It can certainly not be said that in every valued Policy the provision for compulsory excess in case of a loss is a *sine qua non*. For one thing a valued Policy is one in which the quantum of indemnity in case of a loss is agreed by the contracting parties in advance. See *Woodside v. Globe Marine Insurance Company Limited* (1896) 1 Q.B. 105, p.107. See also Section 29(1) of the Marine Insurance Act of 1961.

On the other hand, compulsory excess entails a deduction from the agreed sum. I must point out, however that there is nothing in the Marine Insurance Act of 1961 to prevent any parties from agreeing to any term they like. In that state of the law and considering the freedom of parties to make their own contract it would be an overstatement to say categorically that an excess clause is necessarily irrelevant to a valued Policy. But where excess is one of the terms of a valued Policy it must be clearly averred in the pleading and proved by legal evidence. But as I have said it was not pleaded in this case; so any evidence on that goes to no issue. If I am right, this should be the end of this appeal. Because of the view I have held of the state of the pleadings the relationship between the Marine Open Cover, Exh.D, and the Certificate of Insurance, Exh. D2, becomes less important for purposes of this appeal.

If I should, however, give the expression “Subject to open Policy conditions” in Exh. D2 an interpretation most favourable to the Appellant and hold that it incorporates the “Conditions” in Exh. D1 by reference, it will still not avail the Appellant in so far as the relevant condition in Exh.D1 was not pleaded. I must, however, observe that, as Obaseki, J.S.C. carefully explained in *National Insurance Corporation of Nigeria vs. Power & Industrial Engineering Co. Limited* (1986) 1 N.W.L.R. 1, Exh.D1 is only a floating Marine Insurance Policy. It provides the guidelines for the transaction such as types of packing to be employed, mode of transport, and limit per bottom (stated therein to be ₦3,000,000.00). It will be read and construed together with the terms in

the Certificate of Marine Insurance, Exh.D2, which covers the specific transaction the covered risk of which is the subject of this litigation. But, for what I have stated, I need not to go into the matter here.

In the result, this appeal fails and is dismissed. I hereby affirm the judgement of Belgore, J., in this case in the Federal High Court.

The Respondents shall have the costs of this appeal which I assess at ₦350.00.

ADEMOLA, J.C.A. (*Presiding and Dissenting*):

Two questions fall to be determined in this appeal.

The first is whether a particular condition in the General Open Policy in the Marine Insurance should be constructed so as to affect a valued Policy issued under the General Open Policy in the contract of Marine Insurance. The second question is whether the Defendant in any action wherein the Plaintiff relies on a Policy of Insurance need to plead or give evidence about a condition relating to excess in the Policy in the Statement of Defence. In this case, the Respondent in the court below claimed from the Appellant as follows:

“By the Writ of Summons, the Plaintiff claim against the Defendants is for the sum of ₦217,892.05 being the amount payable on the Valued Policy of Marine Insurance No. M/9001460/L over Plaintiffs cargo of 20,000 cartons “Plaza” Mackerel shipped on board M/V “JAL SEACONDOR” from Yokohama, Japan to Apapa, Nigeria which ship, however, sank on the 3rd July, 1978 off Namibian Coast with the entire Plaintiff’s cargo aboard.

Both sides filed pleadings and relied on the Policy of Marine Insurance executed between the parties. The facts are hardly in dispute. Respondent was issued with a Certificate under the General Open Marine Insurance Policy executed between the parties. The Certificate of Insurance which is a valued Policy – Exhibit D.2 was for the sum of ₦217,892.05k being the value of a cargo of 20,000 cartons of “Plaza” Mackerel shipped on board M/V “JAL SEA CONDOR” from Yokohama, Japan to Apapa, Nigeria which ship sank on the 3rd day of July 1978 off the Namibian Coast with the entire cargo belonging to the Respondent lost. The learned trial Judge in the court below held that the Plaintiff had proved all he needed to do in the circumstances of this case and found the Appellant liable. He then went on to state correctly that what is at issue here is the amount of money the Respondent is entitled to recover under the Policy. The Learned Judge decided that the respondent is entitled as per Exh.D2 the Valued Policy the whole amount insured while the Appellant in this appeal contended that the Valued Policy must be read subject to the term in the Open Policy – Exhibit DI which allows for an excess of ₦800.00 or 10% of the amount insured or whichever is to be deducted from the sum of ₦217,892.05k. The question now before me is who is right?

Both sides have filed briefs of argument in this appeal and it is left to me to consider the contentions in the briefs filed. In the briefs filed on behalf of the Appellants covering the grounds of appeal in the notice of appeal, Otunba Awopeju argued that the basis of the contract upon which both sides agreed turned on Exhibit D1 and D2 which are Open Policy and Certificate of Insurance respectively relating to the order of the 20,000 cartons of mackerel fish. Both Exhibits D1 and D2 are in evidence and

the pleadings were founded on them. Exhibits D1 and D2 were made subject to conditions therein stated and particularly the Certificate of Marine Insurance – Exhibit D2 was made subject to Open Policy conditions which are contained in Exhibit D1. The pleadings filed on behalf of the Defendant did say that both the Policy and the Certificate were issued subject to conditions, etc. It was therefore submitted that the Judge was in error not to have applied the conditions about the excess contained in the Policy to the claim before it. It is not the duty of the court, learned counsel contended to impose its own terms into the contracts arrived at by parties freely.

In the brief, it was also contended that there was nothing unusual or unreasonable in excess clause contained in Exhibit D1 and D2 as this is recognized practice in all well-known insurance companies. Reliance is placed upon a statement in Chitty on Contract 25th Edition volume 11 page 844, Article 3724 wherein it stated:

“Excess Clauses. Often (and especially in motor insurance) the insurer stipulates that the assured must bear the amount of any loss up to a specified figure, the insurer only being liable for the excess (if any) over that figure.”

Also, the following cases were relied upon in support of the point:

- (1) Law Guarantee Trust (1914) 2 Ch. 617, 645;
- (2) Beacon Insurance Company Limited vs Langdale (1939) 4 E.R. 204, 206-207.

The brief contended that a condition or clause or warranty in a contract which is not unreasonable will be upheld by the court. It was submitted that the condition or clause relating to excess in Policy of Insurance cannot be regarded as unreasonable. The brief relied upon the statement of the law in Chitty on Contract Volume 125th Edition article 958 page 511 thus: “Unreasonable provision. It has been stated on a number of occasions that a clause which excluded or restricts liability should not be given effect if it is unreasonable, or if it would be unreasonable to apply it in the circumstances of the case, at least in contracts in standard form where there is inequality of bargaining power. But the better view would seem to be that, except in those situations expressly provided for in the Unfair Contract Terms Act 1977, it is not open to a court to strike down an exemption clause merely on the ground that it is unreasonable.” And the following cases are illustrative of the legal principle in this passage:

- (a) Grand Trunk Railway of Canada vs Robinson (1915) A.C. 740, 747;
- (b) Luddiuvvs Ginger Coote Airways Limited (1947) A.C.233, 241, 242.
- (c) Photo Production Limited vs Securicor Transport Limited (1980) A.C. 827, 848.

The brief also directed attention to the error contained in part of the judgement of the learned Judge which read thus:

1. “If this idea of excess is correct then it is hardly relevant to a valued Policy of marine claim. I cannot accept this particular condition in the general Policy in “Exhibit D1”, relates to valued Policy in “Exhibit D2.”
2. A condition so important ought, if it were to relate to ‘Exhibit D2’, to be written in it; for a condition to abrogate a legal right has to be categorical and unambiguous neither of which the condition of excess ‘Exhibit D1’ can be claimed to be. I do not therefore accept that the valued Policy in ‘Exhibit D2’ is subject to excess condition in ‘Exhibit D2’. If I am wrong in holding as I have done that I agree with the submissions of the learned counsel for the Plaintiff that the issue of excess was not pleaded nor given in evidence.

3. There is nowhere in the Statement of Defence where the issue of excess was specially or by necessary implication mentioned. Paragraph 2 of the Statement of Defence only mentioned that ‘Exhibit D2’ was subject to ‘terms warranties stipulations and conditions applicable to insurance policies and paragraph 5 says it was subject to the conditions stipulations practice terms clauses express warranties implied warranties and limitations applicable to marine insurance. I have no evidence that such an excess clause is a common practice of marine Policy.’ (I have italicized and marked 1,2,3 for comments later).

It is contended in the brief that the learned Judge was in error regarding the construction of the Marine Insurance Policy since the construction of Marine Insurance Policy is the same as all commercial instruments. Reliance is placed upon a statement of the law in Halsbury Laws of England Volume 254th Edition page 36 Article 43 and 44 which read thus:

Construction of Marine Policies

43. “General principles. A contract of marine insurance is to be construed, like all other commercial instruments, so as to give effect to the parties’ intention as expressed in the written contract.”
44. “Printed and written words. One of the most important of the rules of construction which have reference only to the words actually used, and not to the admission of extrinsic evidence for the purpose of explaining or adding to the contract, is that full effect must, if possible, be given to every provision, written or printed, contained in the Policy, even though it may be one which the assured would have rejected had it been present to his mind at the time of his entering into the contract.”

Finally, the brief contended that the learned Judge was in error when he said that the excess clause was not pleaded nor was it given in evidence because exhibits containing the Excess Clause – Exhibits D1 and D2 were pleaded and tendered in evidence and everything containing them must be part of that oral evidence led or given in court in pursuance of Order 40 Rule 10 of the Federal High Court (Civil Procedure) Rules 1076 which states as follows:

“Documentary evidence must be put in and read, or taken as read by consent.”

In the Respondent Brief and in oral argument by counsel, Mr. Adedoyin, the main contention is that Exhibit D2 being a valued Policy is not subject to the Excess Clause in Exhibit D1. The idea of excess, it was submitted, is at variance with the law and principle of valued Policy. The respondent argued that the basis of the contract between the parties were Exhibits D1 and D2. The valued Policy is defined by Section 29(1) of the Marine Insurance Act 1961 as “Policy which specified the agreed value of a subject matter insured. “This, it was submitted presupposes that in the event of loss of the goods insured, the assured will be entitled to the full value of the subject matter insured.

It is contended that this proposition is supported by Section 29(ii) of Marine Insurance Act 1961 which states thus:

“Subject to the provisions of this Act and in the absence of fraud, the value fixed by the Policy is between the insurer and the assured, conclusive of the insurable value of the subject intended to be insured whether the loss is total or partial.”

It was contended that the interpretation given to the relationship between the valued Policy – Exhibit D2 and the Excess Clause in Exhibit D1 is in consonance with laid down principle in construction of marine policies and is respectfully submitted that the idea of excess clause is inconsistent with the object and purpose of a valued Policy. In respect of this proposition, reliance was placed in the brief of Halsbury Laws of England Volume 25 4th Edition Article 44 at page 37 lines 3 and 4 where it is stated thus:

“No effect should be given to a printed clause in a Policy where it is inconsistent with the object and purpose of insurance.”

It is therefore submitted that it was quite in order that the excess clause in Exhibit D1 is inconsistent with the object and purpose of the insurance in Exhibit D2. It was submitted that the learned Judge was right in law in saying that:

“A condition so important if it were to relate to Exhibit D2 to abrogate a legal right has to be categorical and unambiguous neither of which the condition in Exhibit D1 can be claimed to be.”

The brief relied upon decisions in:

1. Izzard v. Universal Insurance Company Limited (1937) 3 All E.R.79,106;
2. Kaufman v. British Surety Insurance Company (1929) 45 TLR page 399;
3. Woodside v. Globe Marine Insurance Company Limited (1896) 1 Q.B. page 105 at 107;
4. Howard Houlder & Partners v. Union Marine Insurance Co. Ltd. (1922) 38 TLR. 515, HL.

The Brief supported the extract from the judgement of the learned Judge quoted above in respect of Grounds 2 of the Appellants complaint relating to the non- pleading of the Excess Clause in Exhibit D1. Reliance was placed on Order 31 Rule 51 of the Federal High Court (Civil Procedure) Rules which provides as follows:

“Every pleading shall contain a statement of all the material facts which the pleading relies.”

It was submitted that going by the decisions in Philips (1878) 4 Q.B.D. page 127 at 129 a Statement of Defence must also disclose material facts which it relies on for the success of the defence and that the issue clause is material and fundamental to the defence of the Appellant and it should have been pleaded. Not only must it be pleaded, there must also be evidence on it which is not so in this case, reliance was placed on the case of Ogiamen v. Ogiamen (1967) N.M.L.R. page 247 where Ademola, C.J.N. (as he then was) said:

“this court has pointed out on several occasions that it is wrong for a Judge to give a decision on a point on which opportunity was not afforded Counsel to argue at the hearing, and particularly a point which throughout the hearing was not raised.”

It was submitted in the Brief that in as much as the issue of excess claim was not canvassed at the hearing of this action, it cannot be said that Counsel for the Respondent was afforded the opportunity to argue thereon and as such, it will be wrong for the learned trial Judge to allow it to influence his judgement.

The case of Adegbenro v. The Attorney General of the Federation (1962) 2 All N.L.R. 431 and also Ekpeyong and Others v. Inyang and others (1975) 2 S.C. 71, 80 were also cited to the effect that a party will not be heard on issues not pleaded.

It was therefore submitted that the full value of ₦217,892.05k is the liability of the Appellant to the Respondent being the amount insured for under the Policy particularly Exhibit D2. The Appellant filed a Reply brief which tried to answer the contentions and submission in the Respondents brief.

Before I consider the contentions and the submissions made by learned counsel in this appeal, it is important to clear some legal misconceptions implicit in the argument of learned counsel for the Respondent which unfortunately found expression in the thinking of the learned Judge.

The first misconception is to regard Exhibit D2 as a Marine Insurance Policy. It is not. Section 24 of the Marine Insurance Act defines what constitutes a Policy. In this case, the Policy of marine insurance between the parties in Exhibit D2. Exhibit D2 is a Certificate issued under the Policy. See National Insurance Corporation of Nigeria v. Power and Industrial Engineering Company Limited (1986) 1 N.W.L.R. page 1 at pages 18-20 per Obaseki, J.S.C. The rights of the parties are determined by Exhibit D1 and not by Exhibit D2.

The second is that there is no special rule of construction in respect of Marine Insurance Policy different from the rules of construction applicable to other commercial contracts. Contract of Marine Insurance is not *sui generis* of other contracts of insurance. The statement of the law is correctly stated in Halsbury Laws of England Vol.25 4th Edition page 36 Article 43 as noted in the Appellant's brief earlier in this judgement.

I have reproduced above as extract from the judgement of the learned Judge and have indicated with figures 1,2,3 and the underlining done to areas in the judgement which I think there are errors which will now merit my comment.

Area 1: The Judge agreed with Appellant's submission that the idea of excess is at variance with the law and principle of valued Policy. Regrettably no authority is cited in support of this statement. The paragraph 754 from Vol.25 of Halsbury Laws of England 4th Edition page 382 only explained the "excess" and "no claim bonus" and does not support the proposition of law laid down by the Judge.

Area 2: There was the rejection by the Judge that the "excess" clause in Exhibit D1 does not affect Exhibit D2 because such clause is not written into Exhibit D2. The view is erroneous. The endorsement on Exhibit D2 under conditions of insurance clearly made reference to terms and conditions in the Policy. Exhibit D1 therefore in law had incorporated terms and condition in the Policy to Exhibit D2 by such endorsement on the face of Exhibit D2. This is trite law and does not need any citation of authorities to justify this statement.

Area3: Failure to plead the "excess" clause in the statement of defence. On the view that the learned Judge held that Exhibit D1 does not govern Exhibit D2, this ground for the rejection of Appellant defence does not arise. I say it does arise because following the Judge's reasoning, the excess clause is not part of Exhibit D2.

But in my opinion, the better view is that Exhibit D2 is subject to the terms of conditions in Exhibit D1. Since Respondent has relied on Exhibit D1, he must be taken as relying on all the terms, conditions and exceptions contained therein. If the Appellant does similarly rely on Exhibit D1 as has been done on the pleadings, there is no obligation on him to set out in his pleadings any other material facts different from those conditions, terms and conditions, terms and exceptions as contained in the Exhibit D1. In my view, the matter becomes a matter of law for success or failure for either party. If I am wrong in this view, I am firmly of the opinion that paragraphs 2 and 5 of the Statement or Defence is sufficient pleading or terms, conditions in the insurance Policy issued to the Respondent. It was up to the Respondent to tie down the Appellant to particular terms, conditions in the Policy for which he relies upon for his defence. I do not agree with Respondent Counsel that the question of the “excess” clause came as a surprise. It was raised in the address in the court below and ruled upon by the learned Judge. In fact, the acceptance of it is the crux of this appeal.

The Respondent counsel has contended in his brief that the idea of excess clause is inconsistent with the object and purpose of valued Policy the effect of which is to render such excess clause ineffective. He relied as indicated earlier on a passage from Halsbury Volume 25 Article 44 at page 37 lines 3 to 4. While I agree that this is a correct statement of the law, the question that now arises is whether the excess clause in the Policy – Exhibit D1 is inconsistent with the object and purpose of the insurance. I reproduce the excess clause as it occurred in Exhibit D1:

“Conditions:

Insurance to cover “FPA” as per the institute cargo clause attached. This Policy does not cover loss or damages directly or indirectly caused by or contributed to by or arising from heat, rats, delay, moth, vermin, inherent vices or nature of the subject matter insured loss of colour and/ or scratches. Subject to excess of N800.00 or 10% of each and every claim whichever is greater.”

If the clause were to be framed that the insurance company will accept no liability whatsoever, then it stands to reason that the object and purpose of the insurance would have been defeated by such a clause. Here the clause is not disclaiming any liability whatsoever in the case of any liability arising under the Policy; what it attempts to do in my view is to apportion, the quantum of damages to be paid by both the insurer and assured in the case of the risk occurring. If that view is correct and I think it is, the question of any excess clause in any insurance Policy and in this marine insurance Policy being inconsistent with the object and purpose of insurance does not arise. I am fortified in this view by the attitude of the court in decided cases where parties have been held to have the freedom to put into an agreement clause which sometimes relieve one of the parties of liability in the case of the occurrence of an event or where parties have even decided how a risk inherent in the performance of various kinds of contract can be most economically borne. See *Photo Production v. Securicor Limited* (1980) A.C. 827 at pages 850-851 per Lord Diplock:

That being the view that I have taken in this matter, I am of the view that the excess clause applies to Exhibit D2 and the N800.00 mentioned or 10% of the value whichever is less should apply to diminish the liability of the Appellant on the occurrence of the risk insured; see *Beacon Insurance Company Limited v. Langdale* (1939) 4 All E.R. page 204.

This appeal therefore succeeds and accordingly exception clause in Exhibit D1 applies to the amount of the valued insurance as stated in Exhibit D2. The Appellant is to have the cost of this appeal.

KUTIGI, J.C.A.:

It is doubtless that the basis of the contract of marine insurance between the parties herein is the Open Policy (Exh.D1) and the Certificate of Insurance (Exh.D2). Both sides pleaded and relied on the Policy and the Certificate. Exh.D2 is clearly made subject to the conditions contained in Exh.D1.

The only serious issue for determination in this appeal is whether or not Exh.D2 which both parties agreed is a valued Policy is subject to the “Excess Clause,” one out of many conditions contained in the open Policy (Exh.D1) without actually pleading that clause or its effect. The conditions read thus:

“Conditions:

Insurance to cover “FPA” as per the institute cargo clause attached. This Policy does not cover loss or damages directly or indirectly caused by or contributed to by or arising from heat rats delay moth vermin inherent vices or nature of the subject matter insured loss of colour and/ or scratches. Subject to excess of ₦800.00 or 10% of each and every claim whichever is greater. “The relevant clause is the portion italicized by me above. And as could be seen quite clearly above the “clause” comes at the tail end of the various conditions stated therein. No where in the pleadings did the appellants expressly plead that they are entitled to claim excess of ₦800.00 or 10% of the claim or any amount at all. What, for example, stops the appellants from denying liability under the conditions by saying that the loss was directly or indirectly caused or contributed to by heat, moth or vermin? In fact that would be consistent with their plea which is a complete denial of liability as para. 11 of the Statement of Defence shows: “11. The Defendants deny the said sum of ₦217,897.05 as claimed in the Plaintiff Writ of Summons or for a lesser amount or any amount whatsoever.”

What the Appellants actually pleaded was “terms,” warranties stipulations applicable to Marine Insurance Policies.” (See for example paras. 2 & 5 of the Statement of Defence.) and even then, nowhere were these spelt out. One would have expected the Appellant to have at least set out the relevant terms, warranties or conditions they intend to rely upon, so as to give the Respondent notice of it. I have no difficulty in agreeing with my learned brother Nnaemeka-Agu, J.C.A. that in a situation like this the Appellant should have either pleaded the effect of the relevant conditions or clause they intend to rely upon; or to simply state the fact that they are entitled to excess of so much. This they failed to do. And so the learned Judge rightly in my view held that ‘excess’ was not an issue in the pleading before him.

I will now like to consider whether an ‘excess clause’ is really alien to a valued Policy of insurance as found by the learned trial Judge. I do not share that view. I do not think that the idea of excess clause is inconsistent with the object and purpose of a valued Policy as submitted by learned counsel for the respondent. What is a valued Policy in the first place? Black’s Law Dictionary, Fifth Edition, defines it thus:

“Valued Policy: one in which the value of the thing insured, and also the amount to be paid thereon in the event of loss, is settled by arrangement between the parties and inserted in the Policy.”

I must state here that Sections 29 and 68 of the Insurance Act No. 54 of 1961 have the same effect when read together.

So that once a given Policy satisfies the two conditions in this definition i.e. states the value of the thing insured and also states the amount payable in the event of loss, a court of law, short of illegality or fraud, would have no alternative other than to enforce the terms of the contract. Definitely insurance policies are to be construed according to the principles of construction applicable to commercial contracts generally and I am not aware of peculiar rules of construction applicable to the terms and conditions in a Policy which are not equally applicable to the terms and conditions of other commercial contracts. I find support for this view from the provisions relating to the measure of Indemnity set out in Sections 69, 70, 71, 72, 74, 75, & 78 of the Insurance Act, 1961 itself. All these sections state or have embedded in them the words “subject to any express provision in the Policy”. This goes to show that proper express provisions or conditions in the Policy are to be given effect in considering liability or otherwise. So that in the case before us I have no doubt in my mind at all that the Appellants would have been entitled to excess claim if they had pleaded it and made it an issue at the trial. This as I have said, they failed to do. I think the cause, “subject to excess of ₦800.00 or 10% of each and every claim whichever is greater” is as good as putting down in advance ₦196,102.85 as the amount payable (in the event of loss), where the value of the thing insured is known and stated to be ₦217,892.05 and the 10% being easily calculable as ₦21,789.20. It is only a question of simple arithmetic. Subject to what I have said above, I agree with the lead judgement of my learned brother Nnaemeka-Agu, J.C.A.

I will also dismiss the appeal and affirm the decision of Belgore J., I will also award costs of ₦350 to the respondent.

24.4 REMARKS

In Marine Insurance matters, are the rights of parties determined by the Policy of Marine Insurance they have, and the Certificates issued under the Policy? This Case laid to rest issues around this question.

24.5 REFERENCES

1. *Aniemeka Emogokwue v. James Okadigbo* (1973) 4 S.C. 113, p.117.
2. *African Continental Seaways Limited v. Nigerian Dredging Roads & General Works Limited* (1977) 5 S.C. 235, 243, 247-50.
3. *Akpapuna v. Obi Nzeke H* (1983) 7 S.C. 1, pp.24 and 62; *Ferdinand George v. The United Bank for Africa* (1972) 1 All N.L.R. (Pt.2) 347 at pp.353.
4. *Howard v. Hill* (1887) W.N. 193.
5. *Williamson v. London & North Western Ry.* (1879) 12 Ch.D.787.
6. *Smith v. Buchan*, 36 W.R. 631.
7. *Davis v. James* (1884) 26 Ch.D.778.
8. *Etim Ekpenyong & 3 Ors. V. Inyang Effiong & 6 Ors.* (1975) 2 S.C.71, at p.80.
9. *Adeghenro v. Attorney General of the Federation* (1962) 2 All N.L.R.431.
10. *Idahosa & Anor. v. D.N. Oronsaye* (1959) 4 F.S.C. 166.
11. *Ogiamen v. Ogiamen* (1967) 1 All N.L.R. 191, at p.196.
12. *Woodside v. Globe Marine Insurance Co. Ltd.* (1896) 1 Q.B. 105, p.107.
13. *National Insurance Corporation of Nigeria vs. Power & Industrial Engineering Company Limited* (1986) 1 N.W.L.R. 1.

25.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL

DATE: 20th June, 1979.

SUIT NO: 3PLR/1979/5(CA-E)

JUDGE: Lord Denning, M.R

ALLEN AND OTHERS
(Plaintiffs/ Appellants)

vs

JAMBO HOLDINGS
(Defendant/ Respondent)

25.2 REPORTS/FACTS/ISSUES

The Plaintiffs were the widow, children and executors of a man who was killed when he was hit by the propeller of the light aircraft he was about to board. The aircraft was owned by a Nigerian company and at the time of the accident was in England for servicing. The Plaintiffs anticipated making a fatal accident claim against both the pilot and the Nigerian company as his employers. The Nigerian company had no other assets in England and when it was discovered that the aircraft was about to return to Nigeria the Plaintiffs issued a Writ and were granted a Mareva injunction preventing the aircraft from being removed out of the jurisdiction. On an application to discharge the injunction the questions arose (i) whether a Mareva injunction could be granted in a personal injury action or was confined to commercial actions, and (ii) whether the injunction should be refused because the widow was legally aided and neither she nor the other Plaintiffs could give a satisfactory undertaking as to damage if their anticipated action failed.

25.3 DECISION OF COURT

HELD:

There was no difference in principle between commercial actions and actions for personal injuries or other causes of action in regard to the issue of a Mareva injunction. Nor was the issue of a Mareva injunction to be determined solely by a Plaintiff's financial standing. In each case the issue of an injunction depended on the balance of justice and convenience, and on the facts of the case the injunction ought to be continued until the Nigerian company provided satisfactory security to ensure that any award of damages against them would be met.

JUDGMENT

LORD DENNING, M.R.:

A man's head got caught in a propeller. He was decapitated and killed. It was at the Leavesden Aerodrome, near Watford. There was a small twin-engine aircraft there. It belonged to a Nigerian company called Jambo Holdings Ltd. it had come into this country for servicing and to qualify for a Certificate of Airworthiness. All was in

order for its return to Nigeria. It was due to leave on the evening of Saturday, 27 January 1979. The first leg to Gatwick, then on to Nigeria.

The Pilot, John Eismark, had agreed to take two passengers with him on the first leg from Leavesden to Gatwick. Two friends were to go see them off. They were Mr. Harry Allen and his wife Ruth Allen. Earlier in the evening Mr. Allen himself had gone with the Pilot to the Aerodrome to help load some of the heavier luggage into the aircraft. Afterwards they both returned to fetch the others and the hand luggage.

The Pilot went ahead to test the engine. It was a cold, icy night, and he wanted to see that there was no ice on the wings and the propellers, and to see that everything was in order. He was in the cockpit making those checks when Mr. Allen, his wife and two passengers (who were going abroad the aircraft that evening) arrived by car. As the car approached the aircraft, the Pilot switched on the lights of the aircraft. The car driver had his lights on as he drew near. The Pilot waved him on. The motorcar backed to a distance of about ten yards from the aircraft. Then the passengers and Mr. Allen and his wife got out to go to the aircraft. Mr. Harry Allen was carrying a bag on his shoulder. He went first and the others followed after. It was then the accident happened. Mr. Allen's head became caught in the propeller. He was killed. It was a tragedy.

There was an inquest. It was held on 1 March 1979. The coroner found a verdict of accidental death. As soon as the inquest ended, the Pilot told the Solicitor for the widow that he intended to fly the aircraft back to Nigeria immediately. The Solicitor was afraid that any claim by the widow for damages would be fruitless if the aircraft was flown back to Nigeria. It would be very difficult to enforce any judgement in Nigeria. The Solicitors tried to discover whether the aircraft was insured with an English insurance company, but they failed. So on the next day they took steps immediately. They instructed counsel. Counsel telephoned Drake J and explained the circumstances to him. The judge granted a Mareva injunction (*Mareva Compania Naviera SA v. International Bulkcarriers SA* (1975) [1980] 1 All ER 213) to restrain the Nigerian company and the Pilot from removing the aircraft from the jurisdiction until after the hearing of a Summons. The aircraft has remained at Leavesden Aerodrome ever since. The injunction was continued by agreement. No request was made for it to be discharged. The reason was because more work had to be done on the aircraft, and further tests were to be made. From March until June nothing was done by the Nigerian company or anyone on their behalf to try and discharge the injunction.

Then on 19 June 1979 (that is, last month) a summons was taken out by a well-known firm of Solicitors who act for insurance companies in the City of London. They applied for the injunction to be discharged. Affidavits were sworn on both sides. It was heard by Bristow J. He realised that it was a new and important case. After careful consideration he decided to discharge the injunction. But he intimated that it was a suitable case for appeal to this court. So he gave leave to appeal.

It is a new case altogether. In the past Mareva injunctions have been confined to the commercial court. The judges of that court have granted injunctions to restrain foreign companies from removing moneys so as to defeat their creditors. The leading case is *Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners)* [1977] 3 All ER 324, [1978] QB 644, coupled with a very recent case, *Third Chandris Shipping Corp v. Unimarine Sa* [1979] 2 All ER 972, [1979] QB 645. Those were commercial cases. But this is new. Not because it concerns an aircraft. There was one case where an

aircraft ran up a bill for fuel. Its bill was not paid. The aircraft was restrained from moving until it was paid. But this is the first case we have had of a personal injury (this is a fatal accident case) where a Mareva injunction has been sought. The nearest parallel is a ship in an English port where there is an accident using personal injuries or death. It has been settled for centuries that the claimant can bring an action in rem and arrest the ship. She is not allowed to leave the port until security is provided so as to ensure that any proper claim will be duly met.

The question in this case is whether a similar jurisdiction can be exercised in regard to an aircraft. In principle I see no reason why it should not, except that it is to be done by a Mareva injunction instead of an action in rem. The real difficulty is that we do not know the rights or wrongs of this accident. The widow alleges that the pilot knew that people were coming aboard with the luggage; he knew that they were approaching the doorway close to the propeller. Either he ought to have warned them, or he ought to have stopped his engines and stopped the propellers going round. On the other hand, it is alleged against Mr. Harry Allen that he ought to have known better; he could hear that the engines were running; and that any person taking reasonable care of himself would not have gone close to the propellers as he did.

These are the two sides. It cannot be decided today. It has to be decided in the action. As the judge says, it maybe that the owners of the aircraft are wholly liable, or it may be that Mr. Harry Allen was wholly liable; or it may be half and half. All that can be said is that the widow and her children have a good, arguable case for claiming damages on the ground that it was at least in part the fault of the pilot. That is sufficient. We said so in *Rasu Maritima SA v Pertamina* [1977] 3 All ER 324 at 355, [1978] QB 644 at 663 and, as we also said there, the Mareva principle applies not only to money but also to goods. So it applies to this aircraft. On the evening of March 1979 all the Plaintiffs knew that the aircraft was about to fly off to Nigeria. It was Nigerian owned. For aught that anyone knew, if the aircraft went off, it might never return. The widow would have great difficulty in getting any damages if they were awarded to her. That was quite sufficient to warrant the judge in granting the Mareva injunction. The Nigerian company now come here and ask that injunction should be discharged. They do it on these grounds: first, they say in their affidavit: “..the First Defendant [that is, the Nigerian company] is insured against claims of this nature under Policy No. MA/AHL/78/HL/0004 issued by the National Insurance Corporation of Nigeria of 118 Broad Street, P.O. Box 1100, Lagos, Nigeria upon whose instructions the First and Second Defendants’ Solicitors herein are acting.’

That is all we are told. Nothing is said about whether the Insurance Corporation have accepted responsibility. Nothing is said as to their stability or their backing or as to Reinsurance or anything of that kind. Until more is known about it, it seems to me that the mere assertion of insurance is not sufficient ground for discharging the injunction. If there had been an undertaking by an English insurance company of standing, it would be different. But no such undertaking has been offered.

The affidavit goes on to say that this is a new aeroplane which was made in the United States from where it was exported in February 1978. It was intended to register it in Nigeria. It was worth £1/2m, which is far more than what might be awarded on any claim. No doubt that is true. But then it goes on to say that, if this injunction remains, the Nigerian company would suffer great loss. They are a big industrial group, and if they were deprived of the use of this aircraft, they would have to employ a further 20 senior managers at £50,000 a year each; and that would raise the group’s overheads by £1m a year. That is difficult to swallow. So the affidavit does not impress me in the

least. I can see no reason in this case, as is done in shipping cases all over the world, why security should not be given in the way of a bond or an undertaking by a reputable company or concern in England so as to ensure that any award of damages to the Plaintiffs would be met.

If the Nigerian companies are of such high standing, as we are now told they are, if they are ready to accept any liability, as we are told they will, it seems to me that a bank or an insurance company of standing in this country would back the Nigerian company by way of security without any difficulty whatsoever. No such security is forthcoming or is mentioned in the affidavit. We were told, 'Ships are different. They have their protection and indemnity clauses, whereas aircraft have not.' I would expect that insurance policies nowadays would cover the provision of security. But, even if they do not, the sooner they do the better. As with ships, so with aircraft. The situation is so parallel, the one with the other, that even though this is a new case, it seems to me that it would be right to continue the Mareva injunction in the expectation that the aircraft will be released at any moment as soon as security is provided.

There is one other point that I must mention. It is said whenever a Mareva injunction is granted the Plaintiff has to give the cross undertaking in damages. Suppose the widow should lose this case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw LJ said in the course of the argument, a legally aided Plaintiff is by our statutes not to be in any worse position by reason of being legally aided than any other Plaintiff would be. I do not see why a poor Plaintiff should be denied a Mareva injunction just because he is poor, where as a rich Plaintiff would get it. One has to look at these matters broadly. As a matter of convenience, balancing one side against the other, it seems to me that an injunction should go to restrain the removal of this aircraft.

The owners of the aerodrome, Rolls-Royce Ltd, are here. They wish for guidance as to what should be done at the aerodrome. This injunction does not prevent any steps being taken so as to see that the aircraft is in good order and is kept in good condition and is serviceable. But the injunction does make it clear that the aircraft must not be removed from the jurisdiction or from the aerodrome permanently until further order. It is to be hoped that all difficulties will be resolved in an hour or two by security being provided.

SHAW, LJ.

I agree. Counsel who has argued this appeal on behalf of the first and second Defendants has not suggested that there is any real difference in principle between an action for personal injury such as this one and an action in respect of some mercantile transaction. What he has said is that one ought to look more cautiously at this situation because in commercial dispute, it is usually the case that a Plaintiff will be in a position to meet any potential liability under his undertaking in damages if he asks for a Mareva injunction and then loses the action. But, as Lord Denning MR has pointed out, questions of financial stability ought not to affect the position in regard to what is the essential justice of the case as between the parties.

In the present case the Defendants have deposed to their being solvent and to the fact that the company has assets which are sufficient to satisfy a judgement. That perfunctory dismissal of the suggestion that the Mareva injunction ought not to go in respect of their aeroplane makes no reference at all to where those other assets are to be found or what they consist of; nor do they take into account what the magnitude of the judgement may be if the action should go against them. Altogether I found their

affidavit evidence very unimpressive; and indeed, if one began with any misgivings whether the Plaintiff if she succeeds in this action will be paid any damages she may be awarded, the Defendants' affidavit did not serve to allay those misgivings. They had rather the opposite effect.

One comes back to what is the central principle which should determine whether a Mareva injunction should go. It is urged that it would be a novel departure from precedent to apply it to an action such as this; but as recently as 1975 it was something of an innovation in regard to mercantile transactions. If one applies the principle that the proper order is that which would result in a due balance of justice and convenience, it would follow that in the circumstances of this case the course to be taken is that which would involve the least risk of ultimate injustice having regard to the actual and potential rights and liabilities of the parties on both sides. This, in my view, will be best achieved by the order proposed by Lord Denning MR, and I would allow the appeal accordingly.

TEMPLEMAN, LJ.

I agree. The Pilot assumed that the two passengers, Mr. and Mrs. Allen, and the hand baggage would not be brought up to the aircraft. The Pilot knew but obviously Mr. Allen did not realize that the clearance between the propeller and the entrance to the aircraft was such as to make it dangerous to attempt to enter while the engines were running. The Pilot did not switch off the engines, and Mr. Allen was fatally injured. The Pilot's employers are a foreign corporation with no assets in this country except the aircraft. They resist liability for the death of Mr. Allen; and through counsel, they complain that their one asset in this country, the aircraft, has been frozen. They produce evidence, although months have gone by, merely making the bland statement that the Pilot's employers are solvent and have assets sufficient to satisfy a judgement.

They produce the bland statement that they are insured against claims of this nature. They do not explain why they have not taken what would be normal precautions to reassure the widows and executors in the circumstances, namely of producing an undertaking by Insurers who are resident in this country or by producing a bond or some form of security. Instead of that they have put forward the proposition that if an injunction is granted and they have to do without the aircraft for a long period they will require 20 senior managers at £50,000 a year, raising their overheads by £1m a year. I am not impressed either by what they have not said, or by what they have said. So far as the questions of jurisdiction is concerned, I can see no difference between a Mareva injunction a commercial action and a Mareva injunction for personal injury or any other cause of action save this, that in the kind of actions in which Mareva injunctions have been granted, where the contest is between two big commercial concerns, there is usually very little argument about the value of the cross-undertaking in damages, and there are freely available methods of security. In this case one factor which counsel for the first and second Defendants very properly urged on us (but it is only a factor which we must bear in mind) is the cross-undertaking in damages which must inevitably be limited to the assets of the executors which I understand are no more than the present inflated value of a house.

Nevertheless, it seems to me that to deny an injunction in these circumstances would be to deny a measure of assurances to the widow which she is entitled to have. Accordingly, I agree that the injunction should go, and I would suggest that the Defendants instead of spending the amount which they have spent on air fares and the amount which they or their insurers have spent on this litigation will now employ their resources in obtaining what it seems to me are perfectly available, feasible and not

difficult methods of securing the release of their aircraft by providing the necessary security. Injunction to go restraining removal of aircraft from the aerodrome or the ground except by agreement with the Plaintiff's Solicitors and to the extent agreed. Security to be limited to £50,000 to include undertaking to be provided by Reinsurers in London to the extent of 40%. Liberty to apply to both sides. Application for leave to appeal to the House of Lords refused.

25.4 REMARKS

If there was an Insurance Cover, would Mareva Injunction have come to play in this matter? National Insurance Corporation of Nigeria (NICON) was of the view that the accident that claimed the life of Mr. Harry Allen was not part of the Risk Insured.

25.5 REFERENCES

1. *Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners)* (1977) 3 All ER 324, [1978] QB 644.
2. *Third Chandris Shipping Corpn v. Unimarine SA* (1979) 2 All ER 972, (1979) QB 645.
3. *Mareva Companies Naviera SA v. International Bulkcarriers SA, The Mareva* (1975) (1980) 1 All ER 213, (1975) 2 Lloyd's Rep 509, CA.

26.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL

DATE: 1st June, 2012

SUIT NO: CA/L/1202/2010

JUDGE: Akaahs, J.C.A.
Saulawa, J.C.A.
Pemu, J.C.A.

UNITY CAPITAL ASSURANCE PLC.
(Defendant/ Appellant)

vs

AKUT INVESTMENT LIMITED.
(Plaintiff/ Respondent)

26.2 REPORTS/FACTS/ISSUES

In March 2005, the Appellant's predecessor-in-title (Global Commerce & General Assurance Limited) issued an Insurance Policy to Akute Investments Limited through an insurance broker (Linear Insurance Brokers Limited). Premium on the Policy was paid by the Respondent to the Insurance Broker. The insurance Policy was in respect of the Appellant's Honda Accord V6 motor vehicle. The vehicle was snatched from the Appellant's Managing Director by armed robbers in October 2005.

The Respondent notified the Appellant of the robbery through the insurance broker and claimed compensation, the Appellant refused to pay the claim holding to the view that the premium had not been paid as it had not received payment from the insurance broker.

When the Appellant refused to pay, the Respondent instituted an action at the High Court of Lagos State against the Appellants and the insurance broker under the undefended list claiming the sum of ₦3,600,000 (Three Million Six Hundred Thousand Naira) being the sum insured and interest at the rate of 25% per annum.

The Appellant and the insurance broker each filed a notice of intention to defend and the court granted them leave to defend and the matter proceeded to trial. After considering the evidence before it, the trial court entered judgment in favour of the Respondent jointly and severally against the Appellant and the Insurance Broker in the sum of ₦3,600,000 and pre-judgment interest of 21% per annum on the judgment sum from January 2006 till judgment and 10% interest per annum post-judgment. The learned trial Judge also awarded ₦10,000.00 costs in favour of the respondent. Dissatisfied with the judgment of the trial court the Appellant appealed to the Court of Appeal.

26.3 DECISION OF COURT.

JUDGMENT

HELD (Unanimously dismissing the appeal):

1. ***Insurance – Insurance Contract – Payment of premium by the insured and issuance of a Policy by the insurer creates a valid contract of insurance.***

The Policy is conclusive documentary evidence of an insurance contract in existence between the insurer and the insured and the premium represents the consideration in insurance contract. The liability of insurer under a contract of insurance where premium has not been paid was clearly stated in *Irukwu v. Trinity Mills Insurance Brokers (1997) 12 NWLR (Pt. 531) 113 at 134* per Pats Acholonu, JCA (as he then was) that –

“.. the beachhead of the contract of insurance is the payment of premium” (P. 74 lines 27 - 36).

2. ***Insurance – Payment of Premium – The payment of the premium in an insurance contract after the Policy has been issued does not make the Policy illegal but voidable.***

Section 50 (1) of the Insurance Act states:

“The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of insurance risk, unless the premium is paid in advance.”

There is no doubt that the contract of insurance in exhibit B2 commenced on 16th March, 2005 while the date of payment on the receipt, exhibit B3(1) is 15th April, 2005. The date on the receipt is not conclusive of the date payment was made to 2nd Defendant and section 50(2) of the Insurance Act stipulates that:

“An insurance premium collected by an insurance broker in respect of an insurance business transacted through an insurance broker shall be deemed to be premium paid to the insurer involved in the transaction.”

Payment of the premium after the Policy has been issued does not make the contract illegal. It is to be noted that the robbery incident for which the claim on the Policy was made occurred on 9th October, 2005, a period of about six months after the premium had been paid.

At worst the contract is voidable but was ratified before the car was snatched by the robbers. The Appellant cannot enjoy the benefit of collecting the premium through its agent and turn round to avoid liability of the insurance claim. (P. 74 lines 41 - 45; P. 75 lines 1 - 20).

3. ***Insurance – Role of Broker – An insurance broker is not an agent of the insured but an agent of the insurer.***

An insurance broker is not the agent of the insured but that of the insurer usually pays commission to the broker and the instant case is no exception.

Furthermore, the Appellant’s liability could be limited to 30 days if it was just a cover that was issued but having issued the Policy lasting one year through the broker, the appellant cannot now repudiate the contract for lack of consideration since the broker actually received the premium but failed to remit it to the appellant. The respondent could not have known that the broker did not remit the premium since it received the

Policy. The attempt by the appellant to repudiate the Policy is not made in good faith. I resolve issues 1, 2 and 3 in favour of the respondent, since the learned trial Judge found that the premium was fully paid before the Policy was released and as I have stated it was not the respondent who wrote out the certificate but the appellant in conjunction with the 2nd Defendant. The respondent therefore has an insurable interest in the Policy. The learned trial Judge was right in interpreting section 50(2) of the Insurance Act to the effect that premium made by the Plaintiff to the 2nd Defendant is as good as premium paid to the 1st Defendant and if the premium was not paid in advance, the Policy ought not to have been released to the Plaintiff. **(P. 77 lines 4 - 22).**

4. *Award – Pre-Judgment Interest – A party claiming pre-judgment interest must prove either by evidence or law that he is entitled to the interest claimed.*

There is no evidence to show how the pre-judgment interest of 21% per annum was arrived at. That award was arbitrary and issue 4 is resolved in favour of the appellant against the Respondent. Apart from this, I find that the appeal lacks merit and it is accordingly dismissed. **(P. 77 lines 24-27).**

AKAAHS, J.C.A.(Delivering the lead Judgment):

The Respondent (who was the Plaintiff in the court below) commenced an action under the Undefended List against the Appellant's predecessor-in-title (Global Commerce & General Assurance Limited) as the 1st Defendant. On 16th March, 2005, the said Global Commerce & General Assurance Limited issued a comprehensive Insurance Policy No.PM/HO/001362/ B through an insurance broker, Linear Insurance Brokers Ltd (2nd Defendant) to Akute Investments Limited in respect of its Honda Accord V6 car with registration No.BG 87 FKJ for the period of 16th March, 2005 to 15th March, 2006. On 9th October, 2005, the car was snatched from its Managing Director by armed robbers. The Respondent claimed it gave notice of the loss of the car to the Appellant through the 2nd Defendant before issuing the Writ of Summons under the undefended list against the 1st and 2nd Defendants jointly and severally to recover:

- (a) *The sum of ₦3,600,000.00 (Three Million and Six Hundred Thousand Naira) being the sum insured under the comprehensive insurance Policy No.PM/HO/001362/B issued by the 1st Defendant to the Plaintiff hereof in respect of the Plaintiff's Honda Accord V6 with mark and Registration No. Lagos BG 87 FKJ and which sum the Defendants have refused, failed and neglected to pay despite repeated demands by the Plaintiff.*
- (b) *Interest at the rate of 25% per annum on the said sum from 1st January, 2006 till judgment and thereafter at the rate of 21% per annum until the entire judgment sum is fully and finally liquidated."*

In reaction to the court processes served, the Appellant's predecessor-in-title and the insurance broker each filed a separate notice of intention to defend the suit and were granted leave to defend the suit. As a result of capitalization in insurance companies in Nigeria, the Appellant's predecessor-in-title merged with two other insurance companies to form Kapital Insurance Company Ltd. Following another transformation of the Appellant from Kapital Insurance Company Ltd to Unity Capital Assurance Plc, the Appellant's name was amended by a motion granted on 13th December, 2009.

The suit was tried on the Further Amended Statement of Claim dated 21st December, 2009 (see pages 321-327 of the records) and the 2nd Amended Statement of Defence which was amended on 13th January, 2010 pursuant to order of court dated 18th

December 2009 (pages 397 - 400) of the records).

Kayode Agbetusin, the Managing Director and Chief Executive Officer of the Plaintiff company adopted his Witness deposition wherein he tendered some exhibits. The 1st Defendant also called Julius Mbiletem as its witness.

After considering the evidence led, the learned trial Judge entered judgment in favour of the Plaintiff against the Defendants jointly and severally on 16th July, 2010 and awarded the Plaintiff the sum of ₦3.6 million being insured value of the car under the Policy No.PM/HO/001362/B and a pre-judgment interest of 21% per annum on the judgment sum from January 2006 till judgment and 10% interest per annum post judgment. The learned trial Judge also awarded ₦10,000.00 costs in favour of the Plaintiff against the Defendants.

Dissatisfied with the judgment the 1st Defendant appealed against it in the Notice of Appeal dated 22nd September, 2010 upon six grounds of appeal from which the following four issues were distilled:

1. “Whether the Respondent is a party to Insurance Policy No.PM/ HO/001362/B to entitle it to sue thereon.
2. Whether the trial court was right in holding that the premium in insurance Policy No.PM/HO/001362/B was paid in advance.
3. Whether the trial court was right in holding that the Respondent has insurable interest in the stolen vehicle.
4. Whether the award of pre-judgment interest of 21% per annum is supportable by either evidence or law.”

The Respondent also submitted four issues for determination. The issues are:

1. Whether by virtue of the Further Amended Writ of Summons and Statement of Claim as well as the Written Statement on oath of one Kayode Agbetusin dated 21st December, 2009 and the evidence adduced by the Respondent and Appellant’s witnesses (PW1 and DW1) respectively, the Respondent is not a party to the Motor Insurance Policy No.PM/HO/001362/B who can sue on it and enter into a valid contract thereof.
2. Whether the evidence before the trial court shows that the premium on the insurance Policy was paid before the Appellant issued and released the insurance Policy to the Respondent *vide* the Appellant’s agent and insurance broker.
3. Whether the registration number of the subject matter of Motor Insurance Policy No.PM/HO/001362/B is not the same registration number of the vehicle contained in the Police extract of 9th October, 2004 (Exhibit B4).
4. Whether by virtue of the further Amended Writ of Summons and Statement of Claim as well as the written statement on oath of the Respondent and current state of the law, the Respondent is not entitled to the pre judgment interest of 21% awarded by the court below.”

The issues formulated in the two briefs are the same, although differently worded. I prefer the formulation of issues in the Appellant’s brief.

The first issue is central to this appeal. The Appellant has argued that the insured in the Policy is Akute Investments Limited and is not the same person as Akute Investment Limited which is the Plaintiff. It is argued that there is neither pleading nor evidence before the court that the insured and the Plaintiff are one and the same person.

In the Further Amended Statement of Claim dated 21st December 2009, the Plaintiff averred in paragraphs 1, 4, 5, 7 and 8 as follows:

1. The Plaintiff is a Private Limited Liability Company incorporated under the Laws of the Federation of Nigeria with its office at No. 5, Joe Akonobi Street, Omole Street, Ojodu, Lagos State. The Plaintiff hereby pleads its Certificate of Incorporation issued by the Corporate Affairs Commission for its terms and effect.
4. On or about 16th March, 2005, the Plaintiff entered into a comprehensive insurance contract with the 1st Defendant's predecessor-in-title in respect of the Plaintiff's Honda Accord V6 with Mark or Registration No. Lagos BG 87 FKJ. The said contract was executed in Lagos State within the jurisdiction of this Honourable Court.
5. The said contract of insurance was entered through the 2nd Defendant which acted as the agent of the 1st Defendant's predecessor-in-title as well as its Insurance Broker.
7. Under the said contract of insurance between the Plaintiff and the 1st Defendant's predecessor-in-title, the Plaintiff paid as premium, a total sum of ₦216,000.00 (Two Hundred and Sixteen Thousand Naira) to the 1st Defendant through the 2nd Defendant and was accordingly issued with the 1st Defendant's comprehensive Insurance Policy No. PM/HO/001362/B. The said Policy is hereby pleaded for its terms and effect.
8. Further to the averments contained in paragraph 7 hereof, the Plaintiff paid as premium for the Policy, a total sum of ₦216,000.00 to the 1st Defendant's predecessor-in-title through the 2nd Defendant, which issued 3 receipts to the Plaintiff as follows:
 - (a) Linear Insurance Brokers Ltd receipt No. 0061 of 15/ 4/2005 for ₦100,000.00.
 - (b) Linear Insurance Brokers Ltd receipt No. 0068 of 15/ 5/2005 for ₦100,000.00.
 - (c) The 3rd receipt represents the sum of ₦16,000.00 paid by the Plaintiff to the 1st Defendant through the 2nd Defendant which was inside the stolen Honda Accord V6 with registration No. Lagos BG 87FKJ.

The said receipts issued by the 2nd Defendant to the Plaintiff are hereby pleaded for their terms and effects."

In paragraphs 5, 6, 7, 8 and 9 of the 2nd Amended Statement of Defence, the 1st Defendant pleaded that —

5. The 1st Defendant denies paragraphs 4, 5 and 6 and says that the Plaintiff is a stranger and did not enter into any contract of insurance with it or as claimed or at all.
4. The 1st Defendant avers that the contract of insurance was entered with one Akute Investment Limited upon misrepresentation

PARTICULARS

- (i). The contract was entered into upon the claim of Akute Investments Ltd that it was a limited liability company registered under the laws of Nigeria. Limited.
 - (ii). Search at the Corporate Affairs Commission revealed that the said Akute Investments Ltd was not and is not a registered limited liability company as claimed or at all.
4. The 1st Defendant denies paragraphs 7, 8 and 9 and says that there cannot be any cover for any insurance risk unless the premium is paid in advance.
 5. The 1st Defendant says further that Insurance Policy No.PM/ HO/001362/B was issued upon the misrepresentation of the 2nd Defendant which negotiated the contract on behalf of Akute Investments Limited that the premium of ₦216,000.00 had been paid in advance.

PARTICULARS

4. The Policy was issued on 21st March 2005 for the period 16th March, 2005 to 15th March 2006.
5. The premium was indeed not paid in advance as represented by the 2nd Defendant.
6. Whatever payment Akute Investments Limited made to the 2nd Defendant for the premium was made after the Policy had been issued.
7. The premium has to date not been paid and if any part of it was paid to the 2nd Defendant, it has not been remitted to the 1st Defendant.

The 1st Defendant avers that Akute Investments Limited and the 2nd Defendant were engaged in some other business beyond the payment of premium.”

By this pleading, the appellant tacitly admitted that Policy No.PM/HO/001362/B which was issued to the Respondent by the 2nd Respondent was its Policy. The Policy is conclusive documentary evidence of an insurance contract in existence between the insurer and the insured and the premium represents the consideration in insurance contract. The liability of insurer under a contract of insurance where premium has not been paid was clearly stated in *Irukwu v. Trinity Mills Insurance Brokers* (1997) 12 NWLR (Pt. 531) 113 at 134 per Pats Acholonu, JCA (as he then was) that —

“.. the beachhead of the contract of insurance is the payment of premium”

Learned counsel for the Appellant argued by relying on Section 50(1) of the Insurance Act 2003 that the premium ought to have been paid before the commencement of the period of cover which is 16th March, 2005 and since the Policy came into effect before the premium was paid, the transaction is an illegal one. Section 50(1) of the Insurance Act states:

“The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of insurance risk, unless the premium is paid in advance.”

There is no doubt that the contract of insurance in exhibit B2 commenced on 16th March, 2005 while the date of payment on the receipt, exhibit B3(1) is 15th April, 2005. The date on the receipt is not conclusive of the date payment was made to 2nd Defendant and section 50(2) of the Insurance Act stipulates that:

“An insurance premium collected by an insurance broker in respect of an insurance business transacted through an insurance broker shall be deemed to be premium paid to the insurer involved in the transaction.”

Payment of the premium after the Policy has been issued does not make the contract illegal. It is to be noted that the robbery incident for which the claim on the Policy was made occurred on 9th October, 2005, a period of about six months after the premium had been paid.

At worst the contract is voidable but was ratified before the car was snatched by the robbers. The Appellant cannot enjoy the benefit of collecting the premium through its agent and turn round to avoid liability of the insurance claim.

The payment of the premium is peripheral to the main issue in contention which is whether the Respondent is a party to the insurance Policy. The Appellant's contention is that the contract of insurance is between Akute Investment Limited (a non-juristic person) and the appellant but it is Akut Investment Limited (a total stranger) that is making the claim. The records show that as far back as 26th March, 2007, the Plaintiff amended the Writ of Summons and filed an Amended Reply to the Defendant's Statement of Defence showing that the mistake in writing the Appellant's name on the Policy emanated from the Insurance Broker who is the agent of the Appellant. The main reason why the appellant refused to pay the claim is contained in its letter dated April 24, 2006 which was a reply to a letter written by the Commissioner for Insurance, National Insurance Commission produced at page 291 of the Record of Appeal. The letter reads:

“Dear Sir,

RE: REFUSAL TO PAY CLAIM - INSURED AKUTE INVESTMENTS LIMITED

Your letter dated 4th April 2006 with an attached letter of complaint by Onwuzurike Law Chambers refers.

It is true that the insured Akute Investment Limited took a comprehensive Motor Policy from us through Linear Insurance Brokers Limited.

However, it is not true that Linear Insurance Brokers is our appointed agent and Broker. Rather, Linear Insurance Brokers is licensed by the National Insurance Commission as brokers and in this case, appointed by the insured as its brokers and agent in placing the risk with us.

It is a well-established principle of insurance that the premium is the consideration that purchases risk cover for the insured. Where therefore the underwriter received no premium there is no basis for its liability. Such is the case in this instance. Up to now, NO PREMIUM has been paid to us either by the broker or the insured.

The contention of the insured's Solicitor that payment to the broker is sufficient to put us under liability is borne out of misunderstanding of the principles and practice of insurance. If the broker who bears no liability collects the premium and keeps it from what fund shall the underwriter source for the payment of any eventual claim.

This vexed issue of brokers not remitting premium is the genesis of the provision in Section 41 of the Insurance Act 2003 that premium collected by the broker must be

paid to the underwriter within 30 days. Any broker in default therefore bears both the civil and criminal consequences. It is only within this statutory allowed period of 30 days that the underwriter is deemed liable.

The emotional blackmail of an underwriter's repudiation of claim giving the industry a bad name is infantile, to say the least. There should always be a proper understanding of the modus operandi of insurance before running into judgment and condemnation. We cannot because of fear of what the public will say accept liability that is not ours.

Moreover, this claim is said to have occurred in October 2005 only for us to hear about it in 2006. This is a gross violation of the condition that we should be notified within one month of the occurrence of the loss.

Finally, we make bold to say that our operations have been guided by the loss practice principles of which the regulators, operators and our clients can attest to. And we intend to continue on that trend, and not to accept liability that is not ours such as this.

Thanks.

Yours faithfully,

For: GLOBAL COMM. & GEN. ASSURANCE LIMITED.

Signed: Julius Mbiletem
Company Secretary/Legal Adviser."

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- i. The contract was entered into upon the claim of Akute Investments Limited that it was a limited liability company registered under the laws of Nigeria.
- ii. Search at the Corporate Affairs Commission revealed that the said Akute Investments Limited was not and is not a registered limited liability company as claimed or at all. The Appellant got it all wrong. An insurance broker is not the agent of the insured but that of the insurer usually pays commission to the broker and the instant case is no exception.

Furthermore, the Appellant's liability could be limited to 30 days if it was just a cover that was issued but having issued the Policy lasting one year through the broker, the Appellant cannot now repudiate the contract for lack of consideration since the broker actually received the premium but failed to remit it to the Appellant. The Respondent could not have known that the broker did not remit the premium since it received the Policy. The attempt by the Appellant to repudiate the Policy is not made in good faith. I resolve issues 1, 2 and 3 in favour of the Respondent, since the learned trial Judge found that the premium was fully paid before the Policy was released and as I have stated it was not the respondent who wrote out the certificate but the appellant in conjunction with the 2nd Defendant. The Respondent therefore has an insurable interest in the Policy. The learned trial Judge was right in interpreting section 50(2) of the Insurance Act to the effect that premium made by the Plaintiff to the 2nd Defendant is as good as premium paid to the 1st Defendant and if the premium was not paid in advance, the Policy ought not to have been released to the Plaintiff.

There is no evidence to show how the pre-judgment interest of 21% per annum was arrived at. That award was arbitrary and issue 4 is resolved in favour of the Appellant

against the Respondent. Apart from this, I find that the appeal lacks merit and it is accordingly dismissed. I assess costs of ₦30,000.00 in favour of the respondent.

SAULAWA, J.C.A.:-

My learned brother, the Hon. Justice K.B. Akaahs, JCA has obliged me with a copy of the draft of the judgment just delivered by him. Having read, before now, the briefs of argument of the respective learned counsel vis-a-vis the record of appeal, I cannot but concur with the reasoning and conclusion reached in the lead-judgment, to the effect that the instant appeal lacks merits.

Hence, having adopted the said reasoning and conclusion as mine, I hereby, without any much ado, dismiss the appeal. I abide by the consequential order of costs of ₦30,000.00 awarded in favour of the Respondent, against the Appellant.

PEMU, J.C.A.:-

I have been privileged (sic) to read before now the lead judgment of my learned brother KUMAI BAYANG AKAAHS JCA. I agree with the opinion expressed therein and the conclusion arrived at. I too dismiss the appeal and, in the terms, set out in the lead judgment, along with the consequential order on costs.

26.4 REMARKS.

Payment of premium by the Insured and issuance of a Policy by the Insurer creates a valid contract of Insurance. Sec 50 of the Insurance Acton “no premium no cover” has further reinforced this and put paid to all speculations on this critical aspect of an Insurance Contract.

26.5 REFERENCES

1. *Irukwu v. Trinity Mills Insurance Brokers (1997) 12 NWLR (Pt.531).*
2. *113 Statute cited in the judgment.*
3. *Section 41, 50 (1) & (2)of the Insurance Act 2003.*

27.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL

DATE: 21st September, 1971

SUIT NO: CAW/88/1970

JUDGE: Kester.P, Eso,J.C.A.
Pemu, J.C.A
Akinkugbe, J.C.A.

BRITISH AMERICAN INSURANCE COMPANY LIMITED
(Defendant/ Appellant)

vs

I.O. OLANIYONU.
(Plaintiff/Respondent)

27.2 REPORTS/FACTS/ISSUES

The principle upon which the court would act when an application for a stay is brought in regard to a judgment wherefrom an appeal has been lodged to the Supreme Court is that the application must show that very exceptional circumstances exist to warrant the intervention of the court.

27.3 DECISION OF COURT. **JUDGMENT**

HELD:

- (1) The court will be slow to interfere with the rights of a successful litigant in a matter where an appeal has been lodged there from to the Supreme Court.
- (2) Mere inability to repay the amount without anything further would not constitute exceptional circumstances to warrant the intervention.
- (3) In this case, no exceptional circumstances had been shown to warrant the intervention of the court in this matter; consequently, the application must be refused.

Application dismissed.

ESO, J.C.A:

The application of the British-American Insurance Company Limited is for an order granting a stay of execution of the judgment delivered by this Court on 17th August, 1971.

By that judgment, the appeal of Olaniyonu against the judgment of the High Court was allowed and we awarded a total of damages and costs of £579.

The applicants now seek an order for a stay of this judgment pending an appeal against that judgment to the Supreme Court.

The grounds upon which the applicants rely for the order are set out in the affidavit of

one Sikiru Agboola Lasisi a Law Clerk and the arguments of learned Counsel Mr. Odojin in this Court. In the course of his arguments, learned Counsel referred us to paragraphs 12, 13 and 14 of the aforesaid affidavits which state:-

12. That the Defendants are a reputable Insurance Company carrying on business throughout Nigeria and have sufficient assets within the jurisdiction of this Honourable Court to discharge their ultimate liabilities under any final judgment.
13. That to the best of my knowledge, costs in the sum of 60 guineas awarded against the Plaintiff in the High Court has not been paid to the Defendants and there is every reason to believe that, the Defendants, should they make payment now, may well find it impossible to recover their money in the event of a successful appeal to the Supreme Court.
14. That the Defendants are willing to enter into a bond for the payment of the judgment debt and costs in the event of their appeal to the Supreme Court being refused."

Counsel also referred to paragraphs seven and ten of the counter affidavits sworn by Olaniyonu himself. The paragraphs state:-

- 7 That if the judgment debt with costs are paid to me, I have sufficient means to repay it back if judgment is given against me in the Supreme Court.
- 10 " That a lot of hardship will be caused to me if the judgment debt and costs in this case is not paid to me until the appeal to the Supreme Court is determined at an uncertain future date."

Now we have already laid down the principles governing the granting of stay of judgment of this Court where there is an appeal from that judgment to the Supreme Court. In *Ibadan Sawmills and Timber Exports Ltd. v. S.C.O.A. Motors (H.M.E.D. Division)* in Suit CAW/3/69 delivered on 22nd July, 1969, we said as follows:-

"The principle upon which this Court would act when an application for stay is brought in regard to a judgment of this Court wherefrom an appeal has been lodged to the Supreme Court is that the application must show that very exceptional circumstances exist to warrant the intervention of this Court. This Court will be slow to interfere with the rights of a successful litigant in a matter where an appeal has been lodged therefrom to the Supreme Court...Mere inability to repay the amount...without anything further would not constitute an exceptional circumstance to warrant the intervention."

Let us now examine the grounds relied upon in this application as revealed by the affidavits and submissions of learned Counsel. The sum total of all these is that the applicants are a reputable company with enough assets to satisfy the judgment debt whereas the judgment creditor had not paid the costs that were awarded against him in the High Court. The deponent, that is, the law clerk also said that "there is every reason to believe that the Defendants (that is the applicants) should they make payments now, may well find it impossible to recover their money, in the event of a successful appeal to the Supreme Court." Neither the deponent nor the applicants have disclosed what this reason is or how the deponent came about the reason if it exists.

As against this, the judgment creditor said in his affidavit and this has not been controverted that he offered the costs of 60 guineas to the applicant's Counsel but this was returned. It is significant that throughout his submissions in court the applicant's Counsel who, incidentally, also argued the appeal before us, never adverted to this statement. He made no comments whatsoever on this portion of the counter affidavit.

In our view, no exceptional circumstance has been shown in this case to warrant the intervention of this Court in this matter and for these reasons we will refuse the application which is hereby dismissed with costs.
Application dismissed.

27.4 REMARKS

The Court is slow in interfering with the rights of a successful litigant in a matter where an appeal has been lodged there from to the Supreme Court.

27.5 REFERENCES

1. *Ibadan Sawmills and Timber Exports Limited vs S.C.O.A. (H.M.E.D. Division).*

28.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL

DATE: 2021

SUIT NO: LCN/15009

JUDGE: Tobi, J.C.A.

ZEAL TRUST LIMITED
(Defendant/Appellant)

vs

GREAT NIGERIA INSURANCE PLC
(Plaintiff/Respondent)

28.2 REPORTS/FACTS/ISSUES

INTERPRETATION OF SECTION 50 OF THE INSURANCE ACT, 2003

Interpretation of Section 50 of the Insurance Act, 2003 vis-a-vis whether what constitutes payment in advance to cover an insurance risk necessarily mean payment at the point of entering the insurance contract.

28.3 DECISION OF COURT.

JUDGEMENT

TOBI, J.C.A.:

PRINCIPLE:

"Section 50 (1) which is in the front burner of this appeal provides thus: 50 (1) The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk, unless the premium paid in advance.

There is no dispute that Section 50 of the Insurance Act is mandatory as the provision is clear in that regard. The purpose of insurance is to indemnify the insured on the occurrence of a risk covered by a Policy. This means that the insured will have to pay premium for the risk so that at the occurrence of the risk insured the insurance company will pay the insured the agreed amount contained in the Policy. This makes the payment of the premium a condition precedent for the liability of an insurance company to the insured in the occurrence of the risk insured. If the premium is not fully paid, the insured cannot be entitled to be indemnified on the occurrence of the risk insured. This was what the apex Court decided in *Jombo United Company Limited vs. Leadway Assurance Company Limited* (2016) 15 NWLR (Pt.1536) 439. The apex Court made it very clear that if premium is not fully paid the insured shall not be entitled to indemnity from the insurer on the occurrence of the risk. This is what the Court said: "The above principle was applied by Acholonu, JCA,(as he then was) in *J.*

O. Irukwu v. Trinity Mills Insurance Brokers (1997) 12 NWLR (Pt.531) 11 at 39 134 – 135, thus:

"By virtue of the provision of Section 50(1) of the Insurance Decree No. 2 of 1997 the receipt of an Insurance premium is a condition precedent to a valid contract of insurance and there can be no cover in respect of an insurance risk unless the premium is paid in advance... There cannot be insurance whereby the insurer will be indemnified without the payment of premium.

The Appellant is holding the view that the only condition precedent for a valid insurance contract under Section 50 of the Insurance Act is the receipt of an insurance premium which is evidence that the premium has been paid. The question whether that represents the position of the law and whether that is the intention of the law maker is the puzzle that will be solved to settle issues 1 and 2 which I now address. Taking the argument of the Appellant as the legal position will mean that once the Respondent is unable to produce a receipt of payment of full premium then the Appellant can be excused from liability under the insurance Policy. The question therefore will be, if there is sufficient evidence that premium was fully paid but not a receipt to show for it, can it be said that the insurance contract is not valid? I do not think so and that cannot be the intention of the law maker. What is important for the insured to be indemnified by the insurer is that the premium was fully paid. To this extent in the *Jombo United Company Limited vs. Leadway Assurance Company Limited* (supra), the apex Court held that payment of premium is a condition precedent to a valid insurance contract. It is not in dispute that if premium is not paid the insured cannot be indemnified.

The Appellant did not deny the fact that the Respondent paid the premium for the insurance contract before the risk insured occurred, the Appellant case was that the Respondent did not fully pay the premium at the point or time that the insurance contract was entered. The Appellant interpreted the provision of Section 50 of the Insurance Act, 2003 that requires paying the premium in advance to mean paying the premium at the point of entering into the contract. On the other hand, the lower Court and the Respondent are of the view that provided the premium is paid before the risk occurred, the Appellant will be liable.

The Appellant made reference to the case of *Corporate Ideal Insurance Limited. vs. Ajaokuta Steel Co. Limited & 2 Ors.* (supra) to buttress the position that the premium must be paid in advance and that the Respondent did not pay the premium in advance and therefore the Respondent was not entitled to the claim. In this respect I will quote extensively from that case that the Appellant relied heavily on. The Supreme Court held in that case thus: "A proper resolution of this issue turns on the construction or interpretation of Sections 50(1) and 93(1) and (2) of the Insurance Act, 1997. The Appellant had contended that non-compliance with Section 50(1) of the Act renders the contract of insurance invalid and not illegal whereas the Respondents think otherwise.

For ease of reference, let me bring to the fore, the said provision. Section 50 (1) of the Insurance Act provides:

The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk,

unless the premium is paid in advance.

Clearly, the above provision means no other thing than what it says. There shall not be any valid contract of insurance until and unless the premium is paid in advance. In other words, payment of premium is a condition precedent to a valid contract of insurance. It is trite that a cardinal Rule of interpretation of statute is that where the words of a statute are clear and unambiguous, the Courts are to give them their plain and ordinary meaning. It does not require any special or canon of interpretation. This has been the position of this Court in several decided cases. *See Egbe vs. Yusuf (1992) NWLR (Pt.245) 1, Olanrewaju vs. Governor of Oyo State (1992) 11/12 SCNJ 92.*

The use of the word “shall: in Section 50 (1) (supra) is instructive here. It is now well settled that where the provisions of a statute is garbed with the word “shall” as in the instant provision, it connotes that it is imperative for the provision to be obeyed. The word “shall” make the provision mandatory, imposes a duty and is a word of command. *See Onochie vs. Odogwu (2006) 6 NWLR (Pt.975) 65; Amokeodo vs. IGP (1999) 5 SCNJ 71 at 81.* What this means is that both the Appellant and Respondents were bound to obey the clear provisions of Section 50(1) of the Insurance Act, 1997 without any discretion from any party. In other words, that Section is couched in mandatory terms and must be applied strictly.

There is therefore no doubt that Section 50(1) of the Insurance Act, 1997, specifically forbids entering into any insurance contract without the premium having first been paid —in advance. Any non-compliance with the express provision of that Section as in this case renders the contract of insurance between the parties illegal and enforceable. It is the view of this Court that where a statute clearly provides for a particular act to be done or performed in a particular way, failure to perform the act as provided will not only be interpreted as a delinquent conduct but will be interpreted as not complying with the statutory provision. It was held by this Court in *Adesanoye vs. Adewole (2006) 14 NWLR (Pt.1000) 242* that in such a situation, the consequences of non-compliance for follow, notwithstanding that the statute does not specifically provide for sanction. This knocks the bottom off the submission of the learned Counsel for the Appellant in this case that because Section 50(1) of the Act does not provide for sanction, the contract cannot be said to be illegal.

A contract which violently violates the provisions of a statute as in this case, with the sole aim of circumventing the intendment of the law maker is, to all intents and purpose, illegal, null and void and unenforceable. Such a contract or agreement is against public Policy and makes nonsense of legislative efforts to streamline the ways and means of business relations. This Court, and any other Court for that matter would not be allowed to be used to enforce any obligations arising there from. The summary of all I have endeavoured to say above is that parties cannot be allowed to enter into a contract or transaction to circumvent the clear and unambiguous provisions of a statute.

It has been the view of this Court and I reiterate it here that a transaction or contract, the making or performance of which is expressly impliedly prohibited by statute is illegal and unenforceable or impliedly prohibited by statute is illegal and unenforceable. *See Alao vs. ACB Limited. (supra); Eimskip Limited. vs. Exquisite Industries Nigeria Ltd. (2003) 4 NWLR(Pt.809) 88 at 118 – 199 Paras. H – A.* Although it is the duty of a trial Court to enforce agreements between parties and not

to speculate or question the reasons for their entering into any such agreement, where such agreement is illegal or contrary to public Policy, such agreement or contract should not be enforced by the Court. See *Oyeneyin vs. Akinkugbe* (supra).

The insurer in the above case escapes liability because no premium was paid and not because there was no receipt of premium payment. The purport of Section 50 therefore is the payment of premium and not necessarily receipt of the payment. If there is evidence of payment of the premium the condition precedent would have been satisfied. That is the purport of the line of cases Appellant referred to and indeed the intention of the law makers of the Insurance Act. The premium is to be paid in advance. As to what will constitute payment in advance does not necessarily mean payment of the premium at the point of entering the contract but rather that the payment must be made before the risk covered under the Policy occurs and this is more so that there is an agreement to that effect.

The law is that a contract of insurance is created when there is an agreement between the parties unequivocally as to the terms of the contract. When the insurance proposal in a form is accepted by the other party unequivocally, an insurance contract is created. See *Ngillari vs National Insurance Corporation of Nigeria* (1998) 8 NWLR (Pt.560) 1. Once the form is completed, it is a commitment to pay the premium. For the purpose of the contract, the filling of the form and returning same to the insurer is a commitment to the terms therein.

The liability of the insurer will be dependent on the payment of the premium which must be fully paid before the risk occurs. This in my opinion is what paying the premium in advance means. In advance means before the risk occurs. If full payment is not made before the risk occurs, the insurer will not be liable but once full premium is paid before the risk occurred even if it was not paid at the point of entering the contract, the insurer will be liable.

In dealing with insurance, the law should be interpreted in such a way that it is liberal towards the right of the insured. The insurer should not be allowed to use technical grounds to evade liability to the insured especially once the premium has been fully paid before the risk insured happened. In all intent and purpose, once the premium is paid before the risk insured happened, particularly in a case like this where the Appellant had agreed to the payment of the premium in installments (Exhibit N) and the Appellant received the payments in installments before the risk insured occurred, the insurer in this instance, the Appellant, cannot evade liability for the occurrence of the risk insured. The lower Court said this much on page 185 of the record of appeal having found as a fact that the Respondent fully paid the premium before the incident, a fact that the Appellant admitted, when it held thus:

“I therefore fail to see how the provisions of Section 50(1) can avail the Defendant as to the enforceability of the Insurance Contract. It is my view that the contract at its very worst was voidable until full payment of the premium.”

Having complied therefore with the full payment, the Claimant can be said to have entered a valid Insurance Contract in respect of the Truck Insurance Contract, Exhibit B. I cannot hold otherwise as the facts as disclosed in the record of appeal show that the premium was fully paid before the robbery incident. The Contract was entered on 26/7/10 for the commercial vehicle insurance and 29/9/10 for the goods in transit

insurance while the incident occurred on 18/1/11. Based on Exhibit N, the Appellant agreed to payment of the premium in installments which the Respondent adhered to before the incident the risk covered occurred on 18/1/11. The insurance cover for the vehicle which is Exhibit B is ₦825,000. The Respondent paid that premium in three installments of ₦330,000 on 28/7/10, ₦400,000 on 9/10/10 and ₦200,000 on 8/12/10.

The final payment was made on 8/12/10 and the incident occurred on 18/1/11. The full payment was made before the incident and therefore the Appellant was liable. I resolve issues 1 & 2 in favour of the Respondent."

ISSUE: ESTOPPEL BY CONDUCT- Whether estoppel by conduct must be specifically pleaded.

PRINCIPLE:

"I will now turn to issue 3 which is; whether the lower Court was right in invoking the doctrine of estoppel when it was not pleaded. Is it true that estoppel was not pleaded? It must be stated here that there are different types of estoppels and the rule of pleading to be applied will depend on the type of estoppel relied upon. For instance, if the estoppel relied on by the Respondent is estoppel per rem judicata or issue estoppel which is based on a judgment of a Court, such estoppel must be specifically pleaded but if on the other hand, it is estoppel by conduct like as in this case, there is no requirement of the law that such must be specifically pleaded.

This position was brought out clearly by this Court in *Okafor vs. Okolie & Anor.* (2019) LPELR-49118 (CA) where this Court per Lokolu-Sodipe, JCA, held thus:

"All I can sensibly say on this aspect of the appeal is that I have not seen in any part of the judgment of the Tribunal where the said Tribunal held itself out as invoking the doctrine of estoppel as raised by the 1st Respondent. Furthermore, I consider it expedient to state that the Appellant would appear not to realise that the need to specifically or expressly plead estoppel where it is being relied on by a party in a case, is not sacrosanct as it were."

There are various types of estoppels. They include estoppel per rem judicatam which precludes the bringing of a fresh action before any Court on the same cause and on the same issue pronounced upon by the Court in the previous action; cause of action estoppel against issue estoppel. Cause of action estoppel effectively precludes a party to an action, his agents and privies from disputing, as against the other party, in any subsequent suit, matters which had been adjudicated upon previously by a Court of competent jurisdiction between him and his adversary involving the same issues; issue estoppel on the other hand recognizes the position that within a single cause of action, several issues may come into question which are necessary for the determination of the whole case. The general rule is that, once one or more of any such issues have been distinctly raised in a cause of action and determined between the same parties in a Court of competent jurisdiction, neither party, his servant, agent or privy is allowed to tear-open or relitigate any of such issues in another action between the same parties or their agents or privies.

Estoppel of the nature mentioned herein-before has to be specifically pleaded. See the cases of *Gbemisola vs. Bolarinwa* (2014) LPELR- 22463 (SC) and *Okukuje vs. Akwido* (2001) LPELR-2526 (SC), amongst many others. Even at that, it would appear that the

case of *Ohiaeri vs. Akabeze*(1992) *LPELR-2360(SC)*is sufficient authority for the position that the Courts should be reluctant in disallowing estoppel though it has not been specifically pleaded. In any event, it is in my considered view that from the cases, I have researched into, that estoppel by conduct need not be specifically pleaded by the party relying on it once a party, either by his words or conduct, has intimated that he consents to an act, which has been done and that he will offer no opposition to it, he cannot later question the legality of the act he had so sanctioned to the prejudice of those who have given faith to his word.

See the case of *Buhari vs. Inec* (*supra*). See also the case of *Okonkwo vs. Kpajie* (1992) *LPELR-2483 (SC)* where it has long been held to the effect that estoppel by word or conduct can be properly invoked in a case where the facts to be relied upon as estoppel are duly pleaded or brought to the notice of the adjudicating Tribunal in some appropriate way. I am in no doubt that given the averments contained in the Appellants petition, there was sufficient basis for the invocation of estoppel by the Tribunal, given the averments contained in the Appellants petition regarding his participation in the supplementary election held on 23/3/2019. It would be absurd for the Tribunal not to have invoked the doctrine of estoppel in the manner it did, simply because the 1st Respondent did not plead the same as alleged by the Appellant.

I am further compelled to refer to another judgment of this Court. That is the case of *Iloabachie vs. Iloabachie* (2000) 5 *NWLR* (Pt.656) 178 where Olagunji, JCA, held: "...The third type with which the issue raised here is concerned arises from Section 151 of the Evidence Act" which reads:

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or such person's representative in interest, to deny the truth of that thing.

That defence was examined in *Iga v. Amakiri* (1976) 11 *SC* 1, 12-13 and *Okonkwo v. Kpajie* (1992) 2 *NWLR* (Pt.226) 633, 635. The practice and pleading of the defence of estoppels were clarified by the Supreme Court in *Chinwendu v. Mbamali* (1980) 3-4 *SC* 31, 55-56, where the Court, per Idigbe, JSC, enunciated the modern trend as follows:

One of the principal contentions of the Appellants in the Court of Appeal and in this Court is that the Respondents having failed to plead specifically estoppel by record (i.e. in this case, that the Appellants are estoppel from claiming, as owners, the land in dispute by virtue of Exhibit 3) the learned trial judge erred in law in giving effect to Exhibit 3 in the face of abundant evidence on both sides relating to the claim, proceedings and judgment in Exhibit 3. It is my view that the Court of Appeal was right in rejecting this contention of the Appellants.

Undoubtedly the old rule was that estoppel by record and deed must be pleaded where, as here, there was opportunity to do so; under the modern practice it is not, however, necessary to plead estoppel in any particular form so long as the matters constituting the estoppel are stated in such a manner (as has been done in the pleadings of the Respondents in these proceedings) to show that the party pleading relies upon it as a defence or an answer.

A few years later the matter came up again and the principle was restated and affirmed in *Ezewani v. Onwordi* (1986) 6SC 402. See in particular pages 442 to 444 and 456-457, (1996) 4 NWLR (Pt.33) 27. To emphasise the changing trend in the practice and pleadings on estoppel the Court, per Obaseki, JSC, at pages 409-410, while reaffirming the Court's earlier position in *Chinwendu v. Mbamalu* (Supra), expounded the position forcefully thus:

This Court gave serious consideration to the changes in the manner of pleadings particularly from the strict, rigid, archaic forms to the simple form shorn of all the ancient legal terminology but intelligible enough to bring to the mind of the Court the case being presented to the court. True enough, this is less colourful but it serves the purpose of the modern society and helps to highlight the changes from the old to the new. It is sufficient for the pleader to state the material facts.

The above cases which I agree with clearly take any merit out of the argument of the Appellant on this issue.

Estoppel by conduct operates to ensure that a party does not back out of an agreement or promise made to another which has made the other to take a step based on the promise which step he would not have ordinarily taken if not for the promise. The implication of this is that parties to any agreement should be careful not to make empty promises as every human conduct has consequences which will show up at the end. It is a sign of responsibility to own up to promises made. The doctrine does not apply based on the promise or the conduct made alone but it is complete when the other party takes steps that he would not have taken but for the promise or the conduct of the other party. Sounding more specific and relevant, the Appellant cannot lead on the Respondent to the effect that payment of premium by installment will be acceptable based on which the Respondent made three payments in installment which the Appellant accepted, only for the Appellant to turn round to say the non-payment of the full payment amount to violating the mandatory provision of the Section 50 (1) of the Insurance Act.

Permit me to say by way of obiter that it is conduct like this put forward by Insurance companies that makes people to be reprehensible about insurance covers. Insurance should be based on trust and as a result the insurer should not be allowed to evade responsibility on technical ground. There is nothing technical about the argument of the Appellant. It is only morally right for a person and indeed companies to take responsibility for their actions. Apart from morality, it is legally right to hold the Appellant responsible to own up to the promise made to the Respondent by Exhibit N wherein the Appellant agreed to the payment for the Insurance cover of the Vehicle in three installments. The Appellant is estopped by its conduct from denying liability on the premise that the full premium was not made at the time when the insurance contract was entered. On the operation of the doctrine of estoppels by conduct, the Supreme Court case of *Nsirim vs. Nsirim* (2002) 3 NWLR (Pt.755) 697 is instructive.

This is what the apex Court per Iguh, JSC, held:

"It needs be restated that where one by his words or conduct willfully causes another to believe the existence of certain state of things and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. This is how the rule in estoppel by conduct otherwise also known as estoppel **by matter** has been stated. See *Joe Iga and Others v. Ezekiel Amakiri and Others* (1976) 11 SC 1; *Gregory Ude v.*

Clement Nwara and Another (1993) 2 NWLR (Pt.278) 638 at 662-663.”

The law is settled to the effect that estoppel by conduct need not be specifically pleaded to avail the Respondent. The lower Court therefore was right when His Lordship held that as a Court of Justice, he cannot close its eyes to Exhibit N. I agree entirely with the lower Court in this regard. The argument that Exhibit N is illegal as it is against the mandatory provision of Section 50 of the Insurance Act is of no moment as I am of the firm view that Exhibit N is not contrary to the provision of the Insurance Act since the agreement covered the payment before the insured risk occurred.

Assuming I am wrong on this position though not conceding, I still cannot agree with the Appellant that estoppel was not pleaded as I find that paragraph 6 of the Appellant’s Statement of Claim is sufficient pleading. The Respondent pleaded therein thus: “Further to paragraph 5 above, the Claimant issued its Zenith Bank Plc Cheque for the payment of the said premium in three installments as evidenced by the Defendant’s official receipt issued in respect thereof. The Claimant shall at the trial rely on the copies of the cheques and the receipt.

I have no difficulty in resolving issue 3 in favour of the Respondent."

28.4 REMARKS

Sec 50 Insurance Act 2003 (No premium, no cover) has helped in the development of the business of Insurance and the development of Insurance Law in particular reference to the plethora of Court Cases bordering on No Premium No Cover.

28.5 REFERENCES

1. *Joe Iga and Others v. Ezekiel Amakiri and Others (1976) 11 SC 1.*
2. *Gregory Ude v. Clement Nwara and Another (1993) 2 NWLR (Pt.278) 638 at 662-663.*
3. *Ezewani v. Onwordi (1986) 6 SC 402.*
4. *Iga v. Amakiri (1976) 11 SC 1, 12-13.*
5. *Okonkwo v. Kpajie (1992) 2 NWLR (Pt.226) 633, 635.*
6. *Chinwendu v. Mbamali (1980) 3-4 SC 31, 55-56.*
7. *Okonkwo V. Kpajie (1992) LPELR-2483 (SC).*
8. *Iloabachie vs. Iloabachie (2000) 5 NWLR (Pt.656) 178*

29.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL

DATE 7th July, 2010

SUIT NO CA/461/2006

JUDGE Amina Adamu Augie, J.C.A.
Ibrahim Mohammed Musa Saulawa, J.C.A.
Sidi Dauda Bage, J.C.A.

MUTUAL LIFE & GENERAL INSURANCE LIMITED.
(Defendant/ Appellant)
vs
KODI IHEME.
(Plaintiff/ Respondent)

29.2 REPORTS/FACTS/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 Defence 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.

29.3 DECISION OF COURT.

JUDGMENT

AMINA ADAMU AUGIE, J.C.A.:

The Respondent, Kodi IHEME, was an Executive Director of the Appellant, Mutual Life & General Insurance Limited. The Appellant conducted a verification exercise of academic qualification of its Management and Staff. The failure of the Appellant to present his qualification documents within the required time led to his suspension from work. Subsequently, in line with their service agreement, the Respondent made a representation of the dispute to the Board of the Appellant which did not yield any positive effect.

Consequently, the dispute was referred to arbitration in line with his service agreement. The parties chose a sole Arbitrator, Dr. Lateef Adegbite, Parties filed pleadings before the Arbitrator. After hearing the parties and considering all available documents, the sole arbitrator *found in favour of the Respondent*. In order to enforce arbitral award,

the Respondent filed an ORIGINATING NOTICE OF MOTION at the High Court of Lagos State.

In reaction, the Appellant filed an ORIGINATING SUMMONS in which it prayed the High Court to refuse to recognise the arbitral award or set aside same on the ground that the entire proceeding was a nullity. What's more, it is a trite and well established doctrine of law, that where, as in the instant case, a Court is of the view, after hearing the argument of the respective parties, that there is a technical issue which ought to have been addressed by counsel, then it behooves upon the Court to reopen the case with a view to according counsel on each side to address the Court there on. *See Cole v. Martins (1968) All NLR 16*, wherein the Supreme Court held, inter alia, per Lewis, JSC at 163 thus: We have frequently stated in the past, and we must reiterate again now, that it is most desirable that if a Court consider after hearing argument of counsel that a matter before it can infact, be decided on a technical point on which it has not been addressed by counsel, then the judge should have the matter re-opened and give counsel on each side the opportunity to address him on the point which he thinks may decide the matter before he gives judgment in regard to it. It is in our view only after so acting that a Court should adjudicate on a technical point taken by the Court itself, particularly when the defect, if there is one, could be cured if the Court, in its discretion, gives leave to amend. *See also Registered Trustees v. Akindele (1967) NMLR 263; Nweke v. Okafor (2007) 10 NWLR (Pt.1043) 521.*

After hearing the parties, the High Court of Lagos State ruled in favour of the Respondent.

Unanimously dismissed the appeal.

29.4 REMARKS

The Law will not avail the claims in a fraudulent venture.

29.5 REFERENCES

1. *See Cole v. Martins (1968) All NLR 16.*
2. *Registered Trustees v. Akindele (1967) NMLR 263.*
3. *Nweke v. Okafor (2007) 10 NWLR (Pt.1043) 521.*

30.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL (ABUJA DIVISION)

DATE 12th June, 2009

SUIT NO CA/A/96/07.

JUDGE Abba Aji, J.C.A.
Omoleye, J.C.A.
Lokulo-Sodipe, J.C.A.

INDUSTRIAL AND GENERAL INSURANCE COMPANY LIMITED.
(Defendant/ Appellant)

vs

KECHINYERE ADOGU (MRS).
(Plaintiff/ Respondent)

30.2 REPORTS/FACTS/ISSUES

The Respondent entered into a contract of insurance with the Appellant to cover her car against the incidence of loss for the sum of ₦7,800,000.00 (seven million, eight hundred thousand naira only) and the premium was fixed at ₦520,000.00 (five hundred and twenty thousand naira only) per annum. On the same day, the Respondent paid the sum of ₦220,000.00 (two hundred and twenty thousand naira only), leaving out the balance of ₦300,000.00 (three hundred thousand naira only).

Subsequently, the said insured car was stolen and a formal complaint was lodged with the Police. Two days thereafter the Respondent paid the balance of ₦300,000.00 (three hundred thousand naira only) to the appellant, who agreed to pay the Respondent the sum of ₦6,318,000.00 (six million, three hundred and eighteen thousand naira only). The Appellant on its part commenced the processing of the Appellant's claim but discovered some irregularities and based on this, the Appellant stayed action on the processing and payment of the Appellant's insurance claims pending the outcome of its investigation.

Aggrieved by the non-payment of her claims, the Respondent applied to the trial court for the appointment of an arbitrator. The arbitrator made his award in favour of the Respondent. Dissatisfied with the arbitral award, the Appellant's application filed at the High Court of the Federal Capital Territory to set aside the same was refused and the arbitral award affirmed. Still dissatisfied, the Appellant appealed to the Court of Appeal.

30.3 DECISION OF COURT.

HELD: *(Unanimously allowing the appeal)*

Contract – Terms - parties are bound thereto and the court cannot read terms not agree to by the parties.

It is trite that the parties are bound by the terms of agreement they have freely entered into and the parties or the court cannot legally read into the agreement the terms on which the parties were not agreed and did not agree to. *See Agoaren v. Mimra (supra) and Evbuomwan v. Eleme (1994) 7-8 SCNJ (Pt11) 243 (p.267 lines 29 to 33).*

1. **Insurance contract –Section 50 (1) of the Insurance Act – receipt of the full insurance premium in advance is a condition precedent for providing cover in respect of an insured risk.**

The provisions of section 50 (1) of the Insurance Act provides as follows:-

The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk, unless the premium is paid in advance.

In the instant case, Section 50(1) of the Insurance Act is clear and unambiguous. It is simply to the effect that the receipt of an insurance premium is a condition precedent to a valid contract of insurance, and there is no cover in respect of an insurance risk unless the premium is paid in advance. In other words, a valid insurance contract is made when a premium for the insurance is paid in advance by the insured. The condition precedent to a valid contract of service has not been established between the parties because the receipt of an insurance premium is a condition precedent to a valid contract of insurance and there shall be no cover for an insurance risk unless the premium is paid in advance. What this means is that, a valid insurance contract is made when a premium for the insurance is paid in advance. *See also Section 50(1) of the Insurance Act ..* Section 50 of the Act therefore does not contemplate installment payment of premium in an insurance contract.

The payment of premium is a condition precedent to the contract of insurance and where parties have entered into a conditional contract, the condition precedent, like in the instant case, that is, the full payment of premium must happen before either party become bound by the contract. In the instant case, by the time the full premium was fully paid, the subject insured has ceased to exist and there is therefore no enforceable contract between the parties. *See Suberu v A.I.S.L Ltd (supra).(p.265 lines 24 to 29, p.265 lines 44 to p.266 line 4, p.266 lines 35 to 41, p.267 lines 39 to p.268 line 2).*

1. **Insurance contract – Bindingness – there must be unqualified acceptance by the insured.**

A contract of insurance should be one of utmost good faith *uberrima fidei*. To constitute a contract of insurance therefore, there must be an unqualified acceptance by the other party. In other words, 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 insured. (p.266 line 19 to 23).

2. **Insurance contract – Nature – meant to cover unforeseen future occurrences.**

It is trite that a contract of insurance is meant for unforeseen future occurrences and not for an incident that has occurred as in the instant case. *See Leadway Assurance Company Limited v J.U.C. Limited (supra) and Ajaokuta Steel Co. Nig v Corporate Insurers Limited (supra).* (p.267 5 to 8).

3. **Interpretation of statute – Literal rule – court is duty-bound to give effect to the provision of the statute where the same is unambiguous.**

It is a cardinal principle of the interpretation of statutes that where in their ordinary meaning, the provisions of an enactment are clear and unambiguous, effect must be given to them without recourse to any aid internal or external. It is the duty of the court to interpret the words of the lawmakers as used, *see SPDC (Nig) Limited v FHIR (1996) 8 NWLR (Pt 466) 255 at 286; A.G. Ondo State v A.G., Ekiti State (2007) 17 NWLR (Pt.743) 706. (p.265 lines 31 to 36).*

4. **Interpretation of statute – Expression unius personae est exclusio alterius – express mention of one thing in a statute is to exclusion of others not stated.**

The primary duty of a court in the interpretation of a statutory provision is therefore to give effect to the words used. *See Rossek v Ace Limited (1993) 8 NWLR (Pt 312) 382.* Therefore, in the construction of a statutory provision, where a statute mentions specific things or persons, the intention is that those not mentioned are intended to be excluded. The Latin maxim is the expression “*unius personae est exclusio alterius*” that is, the expression of one thing is the exclusion of another. If there is nothing to modify, alter or qualify the language of a statute, it must be construed in the ordinary and natural meaning of the words and sentences used. (p.265 lines 36 to 44).

JUDGMENT

ABBA-AJI J.C.A (Delivering the lead Judgment):-

This is an appeal against the decision of Honourable Justice O.O. Goodluck, of the High Court of the Federal Capital Territory, Abuja, delivered on the 6th of November, 2006 whereby the court refused to set aside the arbitral award made by an arbitral panel, thereby affirming the arbitral award.

The facts of the case can be summarised as follows:-

On the 18th of December 2002, the Respondent entered into a contract of insurance with the Appellant to cover her Mercedes E240 against the incidence of loss for Seven million, eight hundred thousand naira only (₦7,800,000.00). The premium was fixed at five hundred and twenty thousand naira (₦520,000.00) only. On the same day, the respondent paid the sum of two hundred and twenty thousand naira (₦220,000.00) only, leaving out the balance of three hundred thousand naira (₦300,000.00) only. However, on the 15th of February, 2003, the said insured car was robbed at gunpoint in front of the Appellant’s residence. A formal complaint was lodged (sic) with the Police and thereafter, on the 17th of February, 2003, two days after the robbery, the Respondent paid the balance of three hundred thousand naira (300,000.00) only to the Appellant, after which she put her claims for indemnity against the loss of her said car.

It is the case of the Appellant that it commenced the processing of the Appellant’s claim but discovered some irregularities as to the engine/chassis number of the said vehicle. Based on the above, the Appellant stopped the processing of the Appellant’s claims and made enquiries from the relevant government agencies (Vehicle Inspection Officer-as well as the Nigeria police), who confirmed that the vehicle alleged to have been stolen was not registered by them. i.e. the V.I.O. as nowhere in their information data was the vehicle with chassis No: A088968 registered. “The Appellant thus stayed action on the processing and payment of the Appellant’s insurance claims.”

It is the case of the Respondent that after the loss of the car on the 15th February, 2003, a formal complaint was lodged with the police and thereafter, the Respondent approached the Appellant, who directed that the balance of ₦330,000.00 be paid. This was done and following a series of demands made on the Appellant by the Respondent, it agreed to pay the sum of Six million, three hundred and eighteen thousand naira (~~₦~~6,318,000.00) only to the Respondent but this the Appellant failed to do. Aggrieved by the non-payment of her claims, the Respondent applied to the trial court for the appointment of an Arbitrator upon which the learned Senior Advocate Chief J.K. Gadzama, SAN, was appointed on the 8th of February, 2005.

By the Appellant's claim, she sought for the following reliefs to wit:

- i. The sum six million, three hundred and eighteen thousand naira (~~₦~~6,318, 000.00) only.
- ii. Interest accruing on the said sum of six million, three hundred and eighteen thousand naira (~~₦~~6,318,000.00) only, at the rate of 25% per annum from 15th of February, 2003, till an award is made in the matter and thereafter, at the rate of 12% per annum until final liquidation of the award sum.
- iii. The sum of one million naira (~~₦~~31,000,000.00) only being the cumulative cost of engaging counsel right from the 2nd day of September, 2003 when the first letter of payment was written at the inception of the transaction contained in the verifying affidavit as well as the cost of arbitration.

Similarly, the Appellant who opposed the claims of the Respondent filed her point of defence to wit: -

- i. The transaction leading to the arbitration was tainted with fraud;
- ii. The material condition precedent; a sine qua non to the contract of insurance was never met i.e. the payment of premium.
- iii. The contract is tainted with irregularities, as the requirements necessary for entering into a proper contract of insurance were not met.

At the close of pleadings, the parties called a witness each, tendered some documents in evidence and adopted their written addresses. At the close of addresses, the Arbitrator in a judgment dated 20th September, 2005, made his award in favour of the Claimant/Respondent to wit: -

1. The Appellant shall pay to the Respondent within 21 days (twenty-one) days of this award, the sum of six million, three hundred and eighteen thousand naira (~~₦~~6,318, 000.00) only.
 2. The Appellant shall pay to the Respondent interest on the said sum of six million, three hundred and eighteen thousand naira at the rate of 14% per annum from the date of this award until full payment is made.
 3. Parties shall bear their costs.
- Dissatisfied with the arbitral award, the Appellant filed a Motion on Notice at the trial court seeking to set aside the award, which application to set aside was refused by the trial judge on the 6th November 2006 and the arbitral award affirmed. Aggrieved still by the ruling of the honourable trial judge, the Appellant has *vide* a Notice of Appeal dated 27th November, 2006

and filed on the 28th November, 2006 filed four (4) grounds of appeal and raised four (4) issues for determination in this appeal before this court.

The grounds of appeal, without their particulars, are hereby reproduced;

GROUND ONE:

GROUND ONE:

The trial court erred in law when it affirmed an invalid contract of insurance between the parties thus allowing the Claimant/Respondent to benefit from a void transaction.

GROUND TWO:

In the face of clear evidence of only a part payment of the premium in contradiction with section 50 of the Insurance Decree 1997, the trial court erred in law in affirming the award erroneously made by the arbitrator. Thus, affirming an obvious error in law.

GROUND THREE:

The trial court erred in law when it affirmed the arbitral award on the interest even when it held that such an award of interest is not provided for by the Arbitration and Conciliation Act. Thus, affirming an illegality or an award made in excess of the powers conferred on the arbitrator.

GROUND FOUR:

The trial court erred in law when it affirmed the award of interest, even when the said award was based on speculation and illegality.

In compliance with the rules and practice of this court, parties filed and exchanged briefs of argument. In the Appellant's brief settled by James Ochoi, SAN, four (4) issues were raised for determination of the appeal namely: -

- i. Whether or not payment of premium in advance is a condition precedent to an insurance contract in Nigeria, without which a contract of insurance is rendered void.
- ii. Whether or not material misrepresentations made by a party to an insurance contract can vitiate the said contract.
- iii. If the answers to issues (I) and (II) above are in the positive, can a party be said to have waived his rights with regard to them upon deceit practiced on him by the other party?
- iv. Whether or not interest on judgment sum must be an integral part of the contract giving rise to the suit or part of the custom of trade of the said business, as well as proved strictly before it can be awarded to a party to the said contract.

The Appellant's brief, settled by Chris Ewere Onwugbonu Esq. formulated three (3) Issues for determination to wit:-

1. Whether or not there was a valid insurance contract between the Appellant and the Respondent?
2. Whether or not there was misrepresentation in the formation of the contract between the parties.
3. Whether or not the Respondent was entitled to interest on the sum of 6,38,000.00 (six million three hundred and eighteen thousand naira) only awarded.

At the hearing of the appeal, on the 18th March, 2009, learned senior counsel for the appellant, James Ocholi, SAN, adopted and relied on the Appellant's brief of argument dated 30th July, 2007 and filed on the 31st July, 2007 and deemed properly filed on the 11/12/07. He also relied on the Appellant's Reply brief, dated and filed on the 19th December 2008. He referred to paragraphs 3.7 to 3.10 of the Appellant's brief and urged the court to discountenance same as it is at variance with their position at the arbitration panel. He also urged the court to disregard the interpretation of the word shall by the respondent under the fundamental human rights. He urged the court to allow the appeal and set aside in its entirety the award made by the arbitrator which was erroneously affirmed by the trial court.

The Respondent counsel, Chris Ewere Onwugbonu Esq., also adopted and relied on the Appellant's brief of argument, dated and filed on the 10th of October, 2008 and deemed properly filed on the 10th of December, 2008. He urged the court to discountenance Appellant's issue 4 particularly paragraphs 7.0 to 7.10 therein as same goes to no issue, that the interest awarded was based on a pre-judgment while same is post-judgment interest. He urged the court to dismiss the appeal. I have considered the issues formulated by the respective counsel and it is my view that the issues formulated by the Appellant are apt as they focused more on the areas in controversy between the parties, I will therefore adopt same in the determination of the appeal.

In arguing his issue one to wit:

Whether or not payment of premium in advance is a condition precedent to an insurance contract in Nigeria, without which a contract of insurance is rendered void.

Learned senior counsel for the Appellant submitted that payment of premium in advance by the insured is a condition precedent to an insurance contract in Nigeria, without which a contract of insurance is rendered void. Learned senior counsel relied on section 50(1) of the Insurance Act, 2004 as well as the case of *Bakoshi v. Chief Of Naval Staff (2004) NWLR (Pt 896) 268 at 291* to the effect that in statutory interpretation, the word shall is a word of command and it denotes an obligation and gives no room for discretion. He submitted that for any insurance, contract to be valid, full premium must be paid by the insured. He cited the case of *Leadway Assurance Co. Limited v J. U. C. Limited (2005) 5 NWLR (Pt 919) 539 at 555-556*. He therefore contended that non-payment or part payment of premium in an insurance contract renders the said contract void *ab initio* and no amount of action or inaction on the part of the parties can breathe life into the said void contract.

The learned senior counsel submitted further that since the respondent only paid two hundred and twenty thousand naira (₦220,000.00) out of the five hundred and twenty thousand naira (₦520,000.00) premium as at the time of loss of the vehicle, this falls short of the statutory provisions of section 50(1) of the Insurance Act, 2004, which stipulates that premium must be paid in advance. Learned senior counsel referred to a text book titled; "Nigeria Insurance Law" By Funmi Adeyemi, published in 1992, paragraph 7 of page 8 paragraphs 1 & 2 of page 49; and submitted that payment of premium in advance and in full is a condition precedent and failure to adhere to this statutory provision by the Respondent rendered the contract void, illegal and unenforceable. Reliance was placed on the case of *Ajaokuta Steel Co. Nig v. Corporate Insurers Limited (2004) FWLR (Pt.235) 189 at 211-214*.

Based on the above, it is submitted that no party to the said contract can waive this statutory provision as it is based on public Policy of the state, citing the case of *Menakaya v Menakaya* (2001) FWLR (Pt.76) 742 at 748 He argued that courts do not make it a practice to aid the parties by enforcing contracts which are void *ab initio*. He referred to the case of *Royal Exchange Assurance Corporation v. Stoforsakrings Atkiebolaget Vega* (1902) 2 KB 384. It is his further contention that where the consideration for a contract is not furnished in line with a statutory provision, that contract will be contrary to public Policy and thus illegal. He referred to *Ajaokuta Steel Co. Nig v Corporate Insurers Ltd* (Pt 899) 369 at 399.

He concluded on this issue by submitting that payment of premium in advance is a condition precedent to an insurance contract without which the said contract is rendered void and unenforceable and urged this honourable court to resolve this issue in favour of the appellant.

In his response, learned counsel for Respondent opined that the cardinal principle in our judicial process is that each case or matter is determined in accordance with its peculiar facts. It is therefore his submission that on the facts of this case, the two principal cases to wit: *Leadway Assurance Co. Limited v. J.U.C. Limited* (*supra*) and *Ajaokuta Steel Co. Nig v. Corporate Insurers Limited* *supra*; do not apply to the facts of the instant case. It is his view that, in the *Ajaokuta Steel Co. Nig v Corporate Insurers Limited* (2004) 16 NWLR premium was not paid at all while in the *Leadway Assurance Co. Limited v J.U.C. Limited* (*supra*) the premium and certificate of Insurance were paid and issued respectively in respect of a non-existent subject of insurance, because the entire transactions were built on nothing. It is therefore submitted that, in the instant case the Respondent paid the premium as evidenced by the receipt issued by the Appellant in pages 217 and 219 of the records and by section 132 of the Evidence Act, the document speaks for itself and documentary evidence cannot be varied, altered or added to by oral evidence he contended.

It is also the contention of learned counsel that assuming without conceding that premium was not paid in full as at the date of constituting the contract, being on the 18th December, 2002, it is submitted that the sum of ₦220,000.00 effectively covered the period between the formation of the contract and the occurrence of the event insured against. It is his submission that monies paid to the appellant could actually be prorated. He relied on clause 5 of the specimen of the insurance Policy captioned “Cancellation of Policy” and submitted that short period rates is an integral part of the contract between the parties. He submitted further that when the total premium is divided by the period covered, i.e. 12months (520,000.00 ÷ 12), an approximate sum of 43,333.33 is obtained and that if the sum of 220,000.00 be divided by 43,333.33, it gives cover for a period of five months. It is his argument, therefore that the sum of 220,000.00 effectively covers the period between payment and occurrence of the event and so section 50 of the Insurance Act, 2004 was fully complied with.

He further argued that there was nothing in the language of section 50(1) of the Insurance Act, prohibiting payment of premium in part or in installments; and submitted that the book Nigeria Insurance Law by Funmi Adeyemi is only an opinion. He relied on the authority of *Broad Bank v Olayiwola & Sons & Anor* (2005) 21 NSCQR - 594 to posit that the courts have long moved away from technicalities to doing substantial justice and that the word shall has been given such interpretations with the: intention of doing justice. *See also Monye v P.T.F.T.M.* (2002) 1 NWLR

(Pt.789) 209. He therefore urged this honourable court to hold based on the foregoing that there was full compliance with the provisions of section 50(1) of the Insurance Act and that therefore, a valid contract existed between the parties and the court should resolve this issue in favour of the respondent.

In his reply brief, learned counsel for the Appellant submitted that there was no valid and enforceable contract between the parties because section 50 (1) of the Act does not contemplate installment payment of premium otherwise, payment of premium will be a condition subsequent and not a condition precedent as provided by the Act. He relied on the authority of *Suberu v. A.I.S.L Ltd (2007) 10 NWLR (Pt.1043) 590 at 612*. He referred this honourable court to pages 14 and 91 of the records and posited that as at the date the insurance agreement was entered between the Appellant and the Respondent, the payment of premium was partially fulfilled by the Respondent. The contract was therefore inchoate, incomplete and unenforceable under any law. He placed reliance on the case of *Banque Geneviese De Commerce Et De Credit v. Cia Mar Di Isola Limited (NO.2) (1962) ALL NLR 565 at 569*.

It is also the submission of learned senior counsel that the contract between the parties was completed and became enforceable on the 17th of February 2003; .i.e. the day the Respondent fully paid the balance of the premium and that since, by that day, the subject matter of the contract was already lost, she had no legal capacity to conclude the said contract and she acted contrary to the utmost good faith principle of insurance contract. He relied on the case of *Leadway Assurance Co. Limited v J.U.C. Limited (supra)*. It is further argued that a contract of insurance is meant for unforeseen future occurrence and not for an incident that has occurred as in the instant case. He also argued that clause 5 of the insurance Policy does not apply in the instant case and cannot be subjected to mathematical calculation and deductions as the Respondent had done. This he said, amounted to rewriting the agreement for the parties and the Respondent has no power to do so. He relied on *Agbareh v Mimra (2008) 3 FWLR (Pt.426) 3595 at 3633* and urged this court to discountenance all the arguments canvassed by the Respondent on this issue and to allow the appeal.

I have given due consideration to all the arguments of both counsel on this issue and in my view the question that needs to be answered here is: -whether or not payment of premium in advance is a condition precedent to an insurance contract without which a contract of insurance is rendered void. The provisions of section 50(1) of the Insurance Act provides as follows: -

The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk, unless the premium is paid in advance.

It is a cardinal principle of interpretation of statutes that where in their ordinary meaning, the provisions of an enactment are clear and unambiguous, effect must be given to them without recourse to any aid internal or external. It is the duty of the court to interpret the words of the lawmakers as used, see *SPDC (Nig) Limited v F.H IR (1996) 8 NWLR (Pt 466) 255 at 286; A.G. Ondo State v A. G, Ekiti State (2007) 17 NWLR (Pt.743) 706*. The primary duty of a court in the interpretation of a statutory provision is therefore to give effect to the words used. See *Rossek v Ace Limited (1993) 8NWLR (Pt 312) 382*. Therefore, in the construction of a statutory provision, where a statute mentions specific things or persons, the intention is that those not mentioned are intended to be excluded. The Latin maxim is “*expression unius personae est*

exclusio alterius” that is, the expression of one thing is the exclusion of another. If there is nothing to modify, alter or qualify the language of a statute, it must be construed in the ordinary and natural meaning of the words and sentences used. In the instant case, Section 50(1) of the Insurance Act is clear and unambiguous. It is simply to the effect that the receipt of an insurance premium is a condition precedent to a valid contract of insurance, and there is no cover in respect of an insurance risk unless the premium is paid in advance. In other words, a valid insurance contract is made when a premium for the insurance is paid in advance by the insured.

In the instant case, the car was insured for ₦7,800,000.00 (seven million, eight hundred thousand naira) and the premium payable was fixed at ₦520,000.00 for a period of 12 months. The Respondent on that same day, 18th December 2002 paid the first installment of ₦220,000.00 and was presented with an insurance certificate and receipt, exhibits N and O. On the 15th February, 2003, the car was robbed at gunpoint. The Respondent approached the Appellant who directed that the second installment of ₦300,000.00 (three hundred thousand naira) be paid and this was done and exhibit P was issued.

Now the question is, whether there has from the facts of this case been full compliance with provisions of section 50(1) of the Insurance Act, 2004, and if so, whether a valid contract of insurance exists between the parties?

A contract of insurance should be one of utmost good faith, “*uberrima Fidei*”. To constitute a contract of insurance therefore, there must be an unqualified acceptance by the other party. In other words, 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 insured.

In the instant case, the Mercedes Benz car was insured on the 18th December, 2002 for a period of twelve months for a premium of ₦520,000.00. A deposit of 220,000.00 was paid. See exhibits N and O, the receipt and insurance certificate. The car was then robbed at gun point on the 15th February, 2003. It is a fact not in dispute that at the time the car was robbed the respondent has not paid up the premium of ₦520,000 she was to pay at the time the contract was entered into. It is also not in dispute that it was two days after the robbery incident that the Respondent went back to the Appellant to pay the second installment of ₦300,000.00 to complete the payment of the premium. From the facts as stated above, it is clear that, at the time the car was robbed the premium has not been fully settled by the Respondent and the contract was therefore incomplete. The condition precedent to a valid contract of service has not been established between the parties because the receipt of an insurance premium is a condition precedent to a valid contract of insurance and there shall be no cover for an insurance risk unless the premium is paid in advance. What this means is that, a valid insurance contract is made when a premium for the insurance is paid in advance. *See also Section 50(1) of the Insurance Act.*

It is contended by the learned counsel for the Respondent that the contract between the parties was completed and become enforceable on the 17th February, 2003, i.e. the day the Respondent fully paid for the balance of the premium. It is in evidence borne out from the records of the court that at the time the premium was fully paid on the 17th February, 2003, the car the subject of insurance ceased to exist as a result of theft of same by armed robbers and the Respondent has no legal capacity to conclude the contract and therefore the Respondent had acted contrary to the utmost good faith

principle of insurance contract. It is trite that a contract of insurance is meant for unforeseen future occurrence and not for an incident that has occurred as in the instant case. See *Leadway Assurance Co. Limited v J.U.C. Limited (supra)* and *Ajaokuta Steel Co. Nig v Corporate Insurers Limited (supra)*. It is argued by the learned counsel for the Respondent that the facts of these cases do not apply to the facts of the present case. I have read through the facts of these two cases and I agree with the learned counsel for the Respondent that the facts are not similar; in fact, no two cases are entirely the same so each is decided on its own peculiar circumstances. However, these two cases decided the position of the law on insurance practice generally and are therefore relevant in the determination of the present appeal.

It is further contended by the learned counsel for the Respondent that even though premium was not paid in full as at the date of constituting the contract, being 18th December, 2002, the sum of ₦220,000.00 paid covered the period between the formation of the contract and the occurrence of the event insured against and that monies paid could actually, be prorated as provided in clause 5 of the agreement. With due respect to the learned counsel, that was not the intention of the parties at the time the contract was entered into. It was not stated anywhere that the insurance cover was for any shorter duration of time and I agree with the submission of the learned senior counsel for the Appellant that the contract cannot be subjected to mathematical calculations and deductions as this will amount to rewriting the agreement for the parties which neither the parties nor the court has power to do. It is trite that the parties are bound by the terms of agreement they have freely entered into and the parties or the court cannot legally read into the agreement the terms on which the parties were not agreed and did not agree to. See *Agoaren v Mimra (supra)* and *Evbuomwan v Eleme (1994) 7-8 SCNJ (Pt11) 243*.

Learned counsel for the Respondent also argued that section 50(1) of the Insurance Act does not prohibit payment of premium in part or by installment. With respect to the learned counsel, this argument is also misconceived. If the section intends to make payment of premium in part or by installment, it would have stated so as what is not stated it is meant to be excluded. Section 50 of the Act therefore, does not contemplate installment payment of premium in an insurance contract. The payment of premium is a condition precedent to the contract of insurance and where parties have entered into a conditional contract, the condition precedent, like in the instant case, that is, the full payment of premium must happen before either party become bound by the contract. In the instant case, by the time the full premium was fully paid, the subject insured has ceased to exist and there is therefore no enforceable contract between the parties. See *Suberu v A.I.S.L Limited (supra)*.

When the first premium of ₦220,000.00 was paid on the 18th December, 2002, when the contract was constituted, even though on the face of the receipt there was nothing to show that there was balance to be paid by the Respondent, it is clear to both parties that the amount contained in the first receipt issued; on the 18/12/2002 was not the total amount of premium to as be, agreed between the Appellant and the Respondent, hence the respondent paid the second installment of 300,000.000.00 on the 17th February, 2003. When the Respondent paid the balance of the premium, the subject matter of the contract, the Mercedes Benz Car was no longer in existence due to the loss of the car to armed robbers. It is trite that a contract of insurance should be of utmost good faith “*uberrima fidei*”, where therefore the subject matter of the contract of insurance had ceased to exist before the contract of insurance is concluded, the

contract is void. See *Leadway Assurance Co. Limited v J.U.C. Limite (supra)*.

The fundamental purpose of an insurance contract is to give cover to an insurance risk. Section 50(1) and (2) of the Insurance Act makes payment of insurance premium a condition precedent to a valid contract of insurance. In the instant case, the condition precedent for insurance contract has not been satisfied by the Respondent, that is, the payment of premium in advance. At the time the parties entered into the contract on the 18th/12/2002, the contract was conditioned on the payment of ₦300,000.00 before either parties becomes bound by the contract. In other words, the payment of ₦300.000.00 must be fulfilled before the effect can flow. When the balance of ₦300.000.00 was paid on 17/2/2003, the subject of insurance has ceased to exist and the effect is that there is no valid and enforceable contract between the parties. See *Suberu v A.I.S.L Limited (supra)*. The effect is that the contract is void since no premium was paid in advance by the Respondent. The conclusion therefore is that there is no full compliance with the provisions of section 50(1) of the Insurance Act in the instant case and the effect is that a valid and enforceable contract does not exist between the parties. This issue is therefore resolved in favour of the Appellant against the Respondent.

Having found that there is no legally binding and enforceable contract between the parties, it is therefore unnecessary in the circumstances to delve into the other issues for determination as doing so will amount to an academic exercise and this court will not venture into this as the court will not dissipate its energy on academic issues. Consequently, the appeal succeeds and it is hereby allowed. The judgment of the lower court delivered on the 6th November, 2006 refusing to set aside the arbitral award made by an arbitral panel is hereby set aside. There shall be no order as to costs.

OMOLEYE, J.C.A: I agree

LOKULO-SODIPE, J.C.A:

I have had the privilege of reading in advance the Judgment of my learned brother, Uwani Musa Abba Aji, JCA. I am in complete agreement with the reasoning and conclusion reached therein. My learned brother has dealt with the most essential issue for the determination in the appeal exhaustively to the extent that I have nothing more to add. I therefore adopt the judgment as mine and I too allow the appeal and accordingly set aside the judgment of the lower court delivered on 6th November, 2006, refusing to set aside the award made by the arbitral panel.

Furthermore, I abide by all consequential orders made in the judgment.

30.4 REMARKS

Where the condition as stipulated in Sec 50 (1&2) of the insurance Act is not fully complied with then the contract of Insurance cannot be deemed valid.

30.5 REFERENCES

1. *A.G. Ondo State v A. G, Ekiti State (2007) 17 NWLR (Pt.743) 706.*
2. *Ajaokuta Steel Co. Nig v Corporate Insurers Limited (2004)FWLR (Pt.235) 189.*
3. *Bakoshi v Chief of Naval Staff (2004) NWLR (Pt896) 268.*
4. *Banque Geneviose De Commerce ET De Credit v CIA Mar Di Isola Limited (NO.2) (1962) ALL NLR 565.*
5. *Broad Bank v. Olayiwola & Sons & Anor (2005) 21 NSCQR–594.*

6. *Leadway Assurance Co. Limited v J.U. C. Limited* (2005) 5 NWLR (Pt919) 539.
7. *Menakaya v Menakaya* (2001)FWLR (Pt.76) 742.
8. *Monye v P.T.F.T.M.* (2002) 1 NWLR (Pt.789) 209.
9. *Rossek v. Ace Limited* (1993) 8 NWLR (Pt312) 382.
10. *Royal Exchange Assurance Corporation v. Stoforsakrings Atkiebolaget Vega* (1902) 2 KB 384.
11. *SPDC (Nig) Limited v. F. HIR* (1996) 8 NWLR (Pt466) 255.
12. *Suberu v. A.I.S.L Limited* (2007)10 NWLR (Pt.1043) 590.

31.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL

DATE 9th December, 2002

SUIT NO: CA/J/81/2000

JUDGE Nzeako, J.C.A

ROYAL EXCHANGE ASSURANCE PLC
(Defendant/ Appellant)

vs

MICHAEL G. ANUMNU
(Plaintiff/ Respondent)

31.2 REPORTS/FACTS/ISSUES

This is an appeal against the judgment of Bala Umar, J., sitting at the High Court of Justice, Bauchi, Bauchi State of Nigeria delivered on 31st March, 1999.

The said High Court had given judgment in favour of the Plaintiff/Respondent in a claim for ₦250,070.00 special damages and ₦400,000.00 general damages for breach of contract. It awarded him ₦250,000.00 special damages.

The claim arose from an insurance contract whereby the Respondent was said to have insured his premises at No.2 Gawo Road, GRA Bauchi, against tornado, storm, earthquake and other calamities, with the Defendant/Appellant, an insurance company. The controversy arose between the parties when the appellant failed to pay the Appellant's claim following a tornado and flood, said to have damaged the Appellant's insured premises. The Respondent claimed that he had to effect repairs at his costs after the Appellant, in spite of demands, refused to reinstate the damaged premises or pay for their reinstatement.

31.3 DECISION OF COURT

JUDGMENT

NZEAKEO, J.C.A: -

Being dissatisfied with the judgment, the Defendant has appealed to this court. The Appellant had filed 7 grounds of appeal in his Notice of Appeal filed on 1/4/99. In accordance with the rules of the Court of Appeal, counsel for both parties filed and exchanged Briefs of Argument. Appellant's brief filed on 27/3/2000 was, by order of this court made on 3/5/2000, deemed properly filed and served within time. The Appellant's Brief filed on 23/11/2000 contained, among other things, notice of Preliminary objection. By reason of this, the Appellant filed a Reply Brief on 6/9/2001 out of time with leave of this court granted on 13/11/2001. At the hearing of the appeal, learned counsel for the Appellant, D. D. Ohietan, Esq., adopted his Brief of Argument and urged the court

to allow the appeal. Leo Ebi, Esq., (holding the brief of C. Madumere, Esq) for the Respondent, also adopted his Brief of Argument together with the Notice of Preliminary objection contained in the brief. He urged the court to dismiss the appeal. From the 7 grounds of appeal, the Appellant has distilled 6 issues for determination, thus: -

- (a) Whether having regard to Decree 60 of 1991 and Decree 107 of 1993, the Bauchi State High Court had jurisdiction to entertain the Plaintiff/Appellant's case, it being an insurance claim.
- (b) Whether what was insured was the interest of the Respondent or the Mortgage interest of Union Bank of Nigeria Plc?
- (c) Whether the learned trial Judge was in error in failing to hold that the Appellant's property was under-insured, with the result that he failed to apply the average clause in the insurance contract in issue in the case?
- (d) Whether the learned trial Judge was not in error in finding that the Respondent paid premium in advance, in respect of Policy No. 734B/R41197C when there were two Policy numbers on the receipt pursuant to which he so held and no attempt was made to explain why a different Policy number had been written on the receipt and cancelled.
- (e) Whether the Respondent had proved the damages claimed by him?
- (f) Whether the learned trial Judge applied the law relating to contracts of indemnity in awarding damages in this case?

He had framed no issue from ground 1 which he decided to abandon.

On the part of the Respondent, learned counsel, Mr. Madumere, raised a Preliminary objection to ground 2 of the grounds of appeal out of which the Appellant's issue No. 1 was distilled and urged the court to uphold the same. Should this court refuse to uphold it, he adopts Appellant's issue No.1 and also Appellant's other 5 issues as set out above.

It seems pertinent to me to identify briefly some salient facts of the case that the court below determined.

It is not in controversy that the suit at the High Court took its root from a loan agreement between Union Bank of Nigeria Plc. and a Company known as Manng Nigeria Limited. The Respondent, its Chairman/Managing Director, had acted as the guarantor of Manng Nigeria Limited for the loan. He mortgaged his property at No.2 Gawo Road, Bauchi, as security for the loan facility that the Union Bank granted to the company. In addition, by clause 10 of the Deed of Mortgage, exhibit PL10 the Mortgagor, who is the respondent herein, covenanted to insure all messages, building and property now or for the time being comprised in or subject to the security.....against loss or damage by fire, tornado .etc.

The Appellant, introduced by Union Bank, became the insurer of the mortgaged property at No. 2 Gawo Road, GRA Bauchi, covered by C of O No. BA/2211 and the interest of Union Bank were noted on the insurance Policy (Exh. PL 1). The property was insured among other things against hurricane, tornado, cyclone, or windstorm, flood, etc.

It is not in dispute that there was a heavy downpour, tornado, and flood in Bauchi on 15/6/94 which caused damage at No. 2 Gawo Road and other premises in the neighbourhood. By reason thereof, the Respondent submitted an estimate of the damage to the insurers, that is, the Appellant. This was after its agent in Bauchi inspected the damaged premises the next day. After some communication and correspondence between the parties, the parties disagreed on the extent of the property covered by the insurance and the amount payable for the damage. The claim in the action filed in the court below by the respondent was to recover the sum of ₦250,070.00, which he expended in repairing the damage caused at No.2 Gawo Street aforesaid. This, according to him, involved the main building, the Boys' quarters, and the wall fence around the premises. This is against the offer of ₦43,272.79 made by the Appellant, which, according to it, was for damages to the main building and the fence. It excluded the Boys' quarters, which it claimed did not form part of the insured property. Parties exchanged pleadings and presented evidence at the trial. Three witnesses testified for the Plaintiff and two for the defence. It is against the foregoing background that the court below gave judgment in favour of the Plaintiff/Respondent against the Defendant/Appellant in the sum of ₦250,000.00 special damages, being the cost of repairs to the damage caused to the insured property. And, against this, the Defendant/Appellant hereinafter called the Appellant, appealed to this court.

The Appellant, having framed no issue in respect of ground 1 of the ground of appeal, had abandoned it and so stated in his Brief of Argument. Ground 1 is therefore struck out. I will, at this stage, take the preliminary objection raised by the Respondent in his Brief of Argument, notice of which his counsel gave in the said brief, the same was adopted by his counsel at the hearing of the appeal. This relates to ground 2 of the grounds of appeal, which reads:

The learned trial Judge of the Bauchi State High Court erred in law when he entertained and gave judgment in an insurance claim when he had no jurisdiction to entertain such a claim. The ground of this objection is that the trial court had delivered a ruling on 22/7/98 wherein the Appellant's objection to the jurisdiction of the High Court to hear the suit was overruled.

Notwithstanding that his counsel asked for an adjournment to appeal, the Appellant did not appeal against it.

Learned counsel for the Respondent in his Brief of Argument submitted that the ruling being on an interlocutory matter, the Appellant ought to have appealed in accordance with section 25(1), Band (2)(a) of the Court of Appeal Act and section 222(1) of the 1979 Constitution of the Federal Republic of Nigeria. Having failed to do so, the Appellant can only include an appeal in respect thereof in an appeal against the final judgment with leave of the court. Counsel then concluded that the Appellant, having failed to obtain leave to appeal against that ruling before including it in this appeal against the final judgment, the ground is incompetent. Counsel relied on *Ogigie v. Obiyan* (1997) 10 SCNJ 1 atp. 15, (1987) 10 NWLR (Pt.524) 179.

It was also pointed out on behalf of the Respondent that the Appellant was out of time for appealing against that ruling as provided by section 25 of the Court of Appeal Act and section 221(1) of the 1979 Constitution at the time this appeal

against the final judgment was filed on 1/4/99, over 8 months after the ruling was delivered.

The Appellant being in transgression of these provisions, the ground of appeal is to be struck out, being incompetent, and its related issue, issue No. 2 and the arguments in relation thereto should be discountenanced. He cited authorities in support of *Oshatoba v. Olujitan* (2000) 5NWLR (Pt.655) 159 at 172-173; *Newswatch Communications Limited v. Atta* (2000) 2 NWLR (Pt.646) 592 at 604; *Ogigie v. Obiyan* (*supra*) and *Eze v. Ejelonu* (1999) 6 NWLR (Pt.605) 134 at 142.

In his reply brief, the Appellant reacted to this Preliminary objection and the submission of learned counsel for the Respondent.

It was argued by learned counsel for the Appellant that it did not follow, since the interlocutory ruling in the court below was not appealed against, that the appellant was estopped from attacking the final judgment on that ground.

He then submitted that the law on the issue of jurisdiction is that it can be raised as many times as possible and at any stage of the proceedings, even on appeal. The case of *Petro Jessica Enterprises Limited. v. Leventis Technical Company Limited* (1992) 5 NWLR (Pt. 244) 675 at 678-679 SC cited, in support. Also, *ACB Limited. v. Awogboro* (1996) 3 NWLR (Pt. 437) 383 at 387, 393-394.

Learned counsel for the Appellant contended that the fact that an appellant failed to appeal against a ruling does not extinguish the right of appeal against the final judgment and attacking the final judgment on that ground.

A second reason was proffered for the Appellant in justification of ground 2 of the ground of appeal, raising the issue of the jurisdiction of the court below. It was submitted for the Appellant that the Appellant's choice not to appeal against the interlocutory action, which had determined the issue of jurisdiction, declaring that the court below had jurisdiction, but to marry it with the appeal against the final judgment was in line with the injunction of the *Supreme Court in ACB Ltd. v. Awogboro* (*supra*). The injunction referred to is contained in some comment in the judgment of Iguh, JSC. It is to the effect that a party does not necessarily need to appeal against every ruling particularly where the interlocutory appeal would have the effect of staying further hearing of the substantive suit.

The learned Justice of the Supreme Court advised that in some cases, in the overall interest of Justice an aggrieved party might, temporarily ignore a ruling, and, later, if need be, incorporate his complaint in his notice and grounds of appeal filed against the final judgment in the substantive suit.

This view was expressed in that suit which was stayed for 10 years while pursuing an appeal against an interlocutory injunction.

It is clear to me that ground 2 against which the Respondent now raised his objection in his notice of Preliminary Objection in the Appellant's brief of argument, is aimed at revisiting the issue of jurisdiction which the court below had determined on 22/7/98 as an interlocutory matter when it was raised on 3/6/98 by the Appellant's counsel in the course of the proceedings in the court below.

The court below delivered a considered ruling. It overruled the Appellant's objection to jurisdiction. It held that the court was seized with jurisdiction to entertain the suit.

It is worthy of note that after the ruling, the substantive suit continued in its course. After two adjournments, learned counsel for the parties delivered their final address. This was on 20/11/98.

Although the Appellant had sought an adjournment after the ruling on 22/7/98 to appeal against it, he did not file any appeal. The issue of jurisdiction as the records show, was never raised again and it was not an issue determined in the final judgment subsequently delivered on 31/3/99 by the learned trial Judge.

The real issue, in the light of the foregoing with respect to ground 2 of the grounds of appeal, is whether the Appellant could raise the issue of jurisdiction in his appeal against the final judgment without leave of the court. The Appellant's argument seems to be, simply put, that the issue of jurisdiction can be raised in the circumstances of this case without leave. On the other hand, for the Respondent, it is argued that leave must be sought and obtained. I am of the view that by the provisions of section 25(1) and (2) of the Court of Appeal Act and section 221(1) of the 1979 Constitution applicable to this matter and various binding legal authorities, leave of the court must be sought and obtained. Failure to obtain leave where necessary renders a ground of appeal and the issue distilled therefrom incompetent and must be struck out. *Arowolo v. Adimula (1991) 8NWLR (Pt. 212) 753; Ajibade v. Pedro (1992) 5 NWLR (Pt.241) 257 at 262; Oshatoba v. Olujitan (2000) 5 NWLR (Pt. 655) 159 SC.*

Section 25(1) and 2(a) of the Court of Appeal Act provides:

25(1) Where a person desires to appeal to the Court of Appeal he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by the provision of subsection (2) of this section that applies to the case.

- (2) The periods for giving notice of appeal or notice of application for leave to appeal are:-
- (a) In an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision

Also, from sections 220 (1)(a) and 221 (1) of the 1979 Constitution of the Federal Republic of Nigeria applicable to this case, it is clear that an appeal shall lie from the interlocutory decision of the High Court to the Court of Appeal only with leave of the High Court or the Court of Appeal.

220 (1) An appeal shall lie from decisions of a High Court to the Federal Court of Appeal as of right in the following cases:

- (a) Final decisions in any civil or criminal proceedings before the High Court sitting at first instance.

221 (1) Subject to the provisions of section 220 of this Constitution, an appeal shall lie from decisions of a High Court to the Federal Court of Appeal with the leave of that High Court or the Federal Court of Appeal.

The effect of these provisions is that an appeal to the Court of Appeal against an interlocutory decision of the High Court must be filed within 14 days from the date of the decision and with leave of the High Court or the Court of Appeal. A party to a suit wishing to appeal against an interlocutory judgment or ruling of the High Court has two options open to him. He may immediately after the ruling appeal to the Court of Appeal within 14 days in accordance with section 25(1) and 2(a) of the Court of Appeal Act and with leave of the High Court or the Court of Appeal pursuant to Sections 220 and 221 of the 1979 Constitution of the Federal Republic of Nigeria applicable at the time of the proceedings in this matter (sections 241 and 242 of the 1999 Constitution). In the alternative, he may for some good reason, or good cause defer or fail to file, his appeal immediately after the ruling and await the outcome of the final judgment in the suit. Should he then after the final judgment, find it expedient to appeal against the judgment and also against the interlocutory ruling or decision, he may proceed to marry both appeals, subject however, to his also obtaining leave to appeal against the interlocutory decision. If he is out of time with regard to the interlocutory decision, he shall also obtain leave to appeal out of time. If he is already out of the time of the 14 days enacted by section 25 (supra), he must obtain leave to appeal out of time.

In the present matter, the Appellant seems to be adopting the second option. For his appeal in respect of the interlocutory decision to be competent, he ought to have obtained leave to appeal and to appeal out of time as required by law as set out above. He has however not done so and this renders his appeal incompetent. *See Ogigie v. Obiyan (1997) 10 NWLR (Pt. 524) 179 at 195, also reported in (1997) 10 SCNJ 1 at 15.*

In that case, the applicable principles have been clearly set out by the Supreme Court of Nigeria. Therein, among the issues for determination are some similar to those in the preliminary objection herein. Among other issues, the apex court considered the procedures to follow where the issue determined in an interlocutory decision by the court below was not considered in the final judgment appealed against and the Appellant sought as in ground 2 herein, to appeal on it in his appeal against the final judgment.

The learned Chief Justice of Nigeria M. L. Uwais in his leading judgment had this to say:

Now, no reference was made throughout the judgment of the trial Judge to the issue of applicability of Land Use Act or Bendel State Legal Notice No. 22 of 1978. Such reference was made only in the ruling delivered on the 31st May, 1984. Can the Appellants, therefore, raise such an interlocutory issue in the appeal against the judgment?

I respectfully think not. Although a party can include an appeal against a ruling in an interlocutory application when he comes to appeal against the final judgment, and this is to be encouraged in order to avoid unnecessary delay by appealing separately, there is a procedure to be followed in order to meet the unavoidable technicalities involved. By section 25 subsection (2)(a) of the Court of Appeal Act, 1976, the period prescribed for appealing against an interlocutory decision is 14 days, while the time prescribed for appealing against a final decision

is three months. To marry two appeals together, one has to obtain leave to appeal out of time against the interlocutory ruling. Clearly, this has not been done in this case. Therefore, the appeal against the ruling of the learned trial Judge, which contains the point about the applicability of the Land Use Act and Legal Notice No. 22 of 1978 as to whether the dispute is situated in an urban area or rural area to determine the trial Judge's jurisdiction, is incompetent.

One thing is clear to me in this matter: the learned trial Judge had clearly and conclusively determined the issue of jurisdiction raised by the Appellant as an interlocutory matter before the conclusion of the hearing of the substantive suit and final judgment. The issue never arose again and did not form any part of the final judgment. A complaint against the judgment can only be made on appeal upon issues properly canvassed and adjudicated upon at the trial in the lower court and that is what the parties and the court remain bound to. *See First Bank Plc v. Abba* (1998) 10 NWLR (Pt. 569) 227 at 236 CA; *Temco Eng. Company Limited v. Savannah Bank Limited* (1995) 5 NWLR (Pt. 397) 607 CA; *Bankole v. Pelu* (1991) 8 NWLR (Pt. 211) 523 at 547; *Djukpan v. Orovuyovbe* (1967) 1 All NLR 134. No matter how diplomatically or cleverly couched, there is no escaping the conclusion that Ground 2 of the ground of appeal is not a complaint against the judgment in the substantive suit, for the issue of jurisdiction was never canvassed or adjudicated on in the suit. Rather, the issue only came up and was determined as an interlocutory matter. I do not doubt that it is against that interlocutory decision that the Appellant now complains. For this, leave must be sought and obtained. I would, with respect, disagree with learned counsel for the Appellant's submission. He stated in his reply brief that what was appealed against was the final decision of the court below.

That submission could pass for the other grounds of appeal, other than ground 2. The issue in ground 2 did not arise from the final judgment. If the Appellant wants it taken that he is raising on appeal, for the first time, the issue of jurisdiction, i.e. issue not canvassed at the trial court, the law is that he has to apply for and obtain leave to do so too. *See A.-G., Oyo State v. Fairlakes Hotels Limited* (1988) 5 NWLR (Pt. 92) 1; *Akpene v. Barclays Bank* (1977) 1 SC 47. He has not obtained leave.

Taking all the foregoing into account, there is no way the Appellant can escape the repercussion from his failure to obtain the leave of the court as required by law to be entitled to canvass the issue in ground 2 in this court. It seems to me that his Reply brief has not successfully addressed the legal issues raised by the Respondent and the legal authorities applicable.

Counsel has correctly quoted the law that the issue of jurisdiction can be raised at any time, even on appeal, citing *Petro Jessica Enterprises Limited v. Leventis Technical Company Limited*. (*supra*). He has also correctly asserted that the Appellant had a right not to appeal against the interlocutory ruling at the stage it was given and to do so with the appeal against the final judgment. He has, however, not correctly applied the principles of law regarding the need for obtaining leave. The dictum of Iguh, JSC in *African Continental Bank Limited v. Awogboro* (*supra*), which he relied on, is not applicable. That dictum could pass for a highly respectful obiter observation, and the learned Justice of the Supreme Court himself termed it an —admonition. The statement was not the ratio

decidendi determining the issue arising for determination in that case. The appeal against the interlocutory decision in that case took ten whole years to determine. That was what gave rise to that admonition.

“The Supreme Court felt that the Appellant’s counsel therein failed to realise from the nature of his case as Plaintiff, and the decision appealed against, that it would have been in the overall interest of Justice and his client to postpone his interlocutory appeal till the substantive suit was determined. Iguh, JSC, therefore, in his contribution to the leading judgment said at pages 393- 394:

There is, however, one single admonition I desire to give. It need not be every ruling of a trial court that a party necessarily needs to appeal against, particularly where such an interlocutory appeal shall have the effect of staying further hearing of the substantive suit. It may, in some cases, be more in the overall interest of Justice and the aggrieved party if certain rulings of a trial court, considered erroneous, are ignored, all-be-it, temporarily, where this would cause no harm or lead to miscarriage of Justice if the continuation of hearing of the substantive case is pursued with a view to its expeditious determination.

Thereafter, whichever party is aggrieved by such rulings may, if need be, incorporate their complaint in their notice and grounds of appeal filed against the final judgment of the court in the substantive suit. I find it necessary to make this observation as the hearing of the present suit which, in my view, could not have taken more than one, or at the very most, two days to complete, was stayed for an incredible period of 10 years in pursuit of an appeal against the trial court’s ruling on a mere application for an interlocutory injunction. Justice delayed, they say, is Justice denied and it is my advice that parties ought in future to give a more serious consideration to whether or not to ignore their grievance against a mere interlocutory ruling temporarily and proceed with the continuation of hearing of the substantive suit and canvass the correctness of the alleged offending ruling at the end of trial if need be”.

The issue whether leave ought to be obtained where the Appellant chooses to marry his interlocutory appeal with that against the final judgment was not determined in the *ACB Limited case (supra)*.

All the foregoing taken into account, the objection of the Respondent to ground 2 of the grounds of appeal is well grounded.

It succeeds. Ground 2 is incompetent and is hereby struck out, together with issue No. 1 distilled there from. In light of this decision, I consider it unnecessary to address the argument canvassed on whether the court below had jurisdiction or not. We are now left with issues 2, 3, 4, 5 and 6. Issue No. 2 is distilled from ground 3. The submission of the Appellant is that it was the interest of Union Bank of Nigeria Plc which was insured, not that of the Plaintiff/Respondent. It is not denied that the Respondent has an insurable interest. It is argued that it is not that interest that was insured. To establish this, counsel for the Appellant reviewed the pleadings particularly paragraph 3(a) and (b) of the amended Statement of Claim and the evidence of PW3 and DW3. He cited the definition of insurable interest by Lawrence, J., in the case of *Lucena v. Craufurd (1806) 2 Bos & PNR 269 and First Bank of Nigeria Plc. v. Abba (1998) 10 NWLR (Pt. 569) 227 at 235*. Learned counsel for the Appellant then concluded that from that definition, it cannot be

disputed that both the Respondent and Union Bank Plc have insurable interest over the property insured, it has been demonstrated from the pleadings and evidence in court that what was insured was the interest of the bank. It was submitted that for the Respondent to be competent to enforce the Policy, he had to show that he had liquidated the debt with a consequent abatement of the interest of the bank Mortgagee.

He cited paragraph 202 of *Halsbury's Laws of England 4th Ed., Vol. 25 at p. 121*. Counsel added that it is clear that the Mortgagee Union Bank intended that the insurance should cover only its interest. He referred this court to paragraph 3(a) of the Statement of Claim.

He concluded that the proper party to maintain the action against the Appellant was the Mortgagee Union Bank, rather as sole or Co-Plaintiff and that in its absence, the action was not properly constituted and must fail.

In response to this submission, learned counsel for the Respondent drew the attention of this court to the pleadings of the parties and paragraphs 3(a), (b), and (c) of the Plaintiff/Appellant's Statement of Claim, averring:

That Manng Nigeria Limited obtained an overdraft from Union Bank and as collateral for the facility, the Plaintiff/Appellant mortgaged his Bauchi State C of 0 No. covering his building at No.2 Gawo Road with the said Bank. He pleaded the Deed of Mortgage, that the bank acting as agent of the Plaintiff insured the property, that the Plaintiff shall contend at the trial that the effect of the... Policy is that, at the occurrence of the listed perils, the Defendant would either reinstate the Plaintiff or effect repairs on the damaged premises.

Our attention was also drawn to the fact that the Defendant/Appellant denied these averments in paragraph 3 (supra) in paragraphs 3, 4 and 5A of its statement of defence.

Learned counsel for the Respondent posited: That from the foregoing, it is clear that whilst the Plaintiff/Respondent pleaded the existence of a valid contract of insurance, the Defendant/Appellant denied it, adding that even if one existed that the Respondent could not enforce it because he had no insurable interest in the property insured, that parties had joined issues and the question before the court of trial was:

- (i) Whether there was an insurance contract between the parties and,
- (ii) Whether the Respondent had an insurable interest in the property insured.

The court below answered, in its judgment, first, that there existed a valid and enforceable contract of insurance between the parties, and secondly, that the Plaintiff had an insurable interest in the property. Counsel then submitted that the trial court duly determined the issues before it, and it was not called upon to determine whether it was the interest of Union Bank that was insured, and a trial court determines only issues which flow from the pleadings and evidence before it. *Lipede v. Sonekan* (1995) 1 SCNJ 184 at 197-198, (1995) 1 NWLR (Pt. 374) 668 and *Union Bank v. Ozigu* (1994) 3 SCNJ 42 at 57, (1994) 3 NWLR (Pt. 333) 385; *Odekilekun v. Hassan* (1997) 12 SCNJ 114, (1997) 12 NWLR (Pt. 531) 56 are cited.

Counsel also submitted that the contents of clause 10 in the Deed of Legal Mortgage Exh. PL 10, Memo 4 of the Insurance Policy Exh. PL 1 and the Proposal Form Exh, PL 12, show that the Respondent was paying the premium; Union Bank was only entitled to payment, in case of damage, only to the extent of their interest. The controversy under issue 2, therefore, is whether the insurable interest of the Respondent in the property was insured or the insurable interest of Union Bank Plc that was insured. The Appellant argues that what was insured was the insurable interest of Union Bank, not that of the Respondent. Therefore, it is the bank that ought to pursue the claim arising from the damage by tornado to the mortgaged property, not the Respondent and so the action was not properly constituted.

I have set out in some detail the argument proffered by learned counsel for the parties. Let me also set out paragraphs 3 and 4 of the Statement of Claim and paragraphs 3, 4, 5, and 5A of the Statement of Defence. I consider them helpful. Statement of Claim:

Paragraph 3(a) Sometimes in 1992, MANNG NIGERIA LIMITED obtained an overdraft facility from UNION BANK OF (NIG.) PLC. Yandoka Road Bye-pass, Branch, Bauchi, Bauchi State, as collateral for the credit facility, the Plaintiff mortgaged his Bauchi State Certificate of Occupancy No.BA/2211 covering his building premises at No.2 Gawo Road, GRA. Bauchi with the said Bank. In fulfillment of the conditions of the overdraft, the Bank perfected the Legal Mortgage on the Certificate of Occupancy. The said Legal Mortgage form dated 21/5/92 is hereby pleaded. The initial consideration was ₦100,000.00, then later increased to ₦500,000.00 and ₦750,000.00 in line with the increased value of the property.

- (a) In line with other conditions of the credit facility, the Bank, acting as the agent of the Plaintiff, insured the property covered by Certificate of Occupancy No. BA/2211 with the Defendants. The insurance covers the Plaintiff's premises at No.2 Gawo Road, Bauchi. The Bauchi State Certificate of Occupancy No. BA/2211 is hereby pleaded. The proposal Form filled in by the Bank is also hereby pleaded. The Defendant is hereby given notice to produce the original.
- (b) The building premises at No.2 Gawo Road insured for the sum of ₦100,000.00 with the Defendant against AIRCRAFT: EXPLOSION; EARTHQUAKE; RIOT & TORNADO; FLOOD BURST PIPE; IMPACT and BUSH FIRE. The insured Policy number is 734B/K411970 and a copy of the Policy dated 15/5/92 was sent to the Plaintiff. The said copy of the Policy is hereby pleaded. The Plaintiff shall contend at the trial that the effect of the above-pleaded Policy is that, at the happening of the listed perils, the Defendant would either reinstate the Plaintiff or effect repairs on the damaged premises. The provisional Cover Note No. 003933 issued to the Plaintiff before the insurance of the said Policy is also pleaded. Para. 4 (1) Subsequently, the value of the insured building premises was jerked up to ₦500,000.00 with effect from 17/3/93. A copy of the Defendant's endorsement No. E/I/KN showing the above increase and dated 15/3/93 and given to me, is hereby pleaded. The value of the insured

building premises was later increased to ₦750,000.00. This increase was based on the advice from my Bankers, UNION BANK OF (NIG) PLC, and whose interest the Defendant has noted in the Policy. This increase is evidenced by endorsement No. E/2/KN dated 23/3/94 was sent to the Plaintiff by the Defendant.

The Plaintiff shall contend that the value of the premises in issue was ₦500,000.00 in 1994, as advised by my bankers and accepted by the Defendant. The Plaintiff shall also contend at the trial that as at June 1994, the Policy of insurance was valid as the premium had earlier been paid through his bankers – UNION BANK OF(NIG.) PLC. The receipt evidencing payment of premium for 1994, dated 01/03/94 with No. 247468, is hereby pleaded. The Plaintiff denies that the premises in issue were underinsured.

Statement of Defence. Para.3 The Defendant denies the contents of paragraphs 1, 3, 4, 5, 6, 7, 8, 9 and 10 of the Statement of Claim and puts the Plaintiff to strict proof of the allegations contained therein. Para.4 In further answer to paragraph 3 of the Statement of Claim, the Defendant avers that if the Plaintiff did insure a premises situate at No.2 Gawo Road, G.R.A., Bauchi (which fact is not admitted), the Policy is invalid and unenforceable as the Plaintiff has no insurable interest in the property. The Defendant further states that the Plaintiff was in default of payment of premium by 15th June, 1994, and as such, the Policy was not in force. Para.5 In answer to paragraph 4 of the Statement of Claim, the Defendant avers that the value of the premises in issue did not and could not have appreciated from ₦100,000.00 in 1992 to ₦750,000.00 in 1994 and denies that an endorsement No. E/2/KN dated 28/3/94 or any other endorsement was sent to the Plaintiff by the Defendant increasing the sum insured to ₦750,000.00 or any other sum. Para.5a Further or in the alternative to paragraph 5 above, the Defendant avers that the value of the property at No.2, Gawo Road, Bauchi, inclusive of the boys' quarters, is at least ₦1 million. Exclusive of the boys' quarters, the value of the property is at least ₦850,000.00.

Accordingly, if the Plaintiff insured the property at No. 2 Gawo Road Bauchi for ₦750,000.00 (and this is not admitted) the property was under insured and, in accordance with the insurance Policy and the custom of insurers, the Plaintiff is his insurer for the uninsured balance so that the average condition would apply to any loss claim under the Policy.

I have considered all the foregoing as well as the oral and documentary evidence before the court below, and the judgment of the learned trial Judge. The following matters have become quite clear:

The Appellant, at page 12 of his brief, paragraph 4, admits that the Respondent has an insurable interest in the mortgaged property.

The effect of paragraph 3 of the Statement of Claim and paragraphs 3-5A of the Statement of Defence (supra), therefore, is that the parties joined issues upon whether there was a contract of insurance between the Appellant and the Respondent and not whether the Respondent had an insurable interest. The court below answered both questions in the affirmative, adducing its reasons. Now that the Appellant accepts that the Respondent has an insurable interest, what is left is

whether there is a contract of insurance between the Appellant and the Respondent.

Learned counsel for both parties have made copious submissions on the issue of whether it was the interest of Union Bank that was insured or that of the Respondent. It is my view that although issues were not overtly joined thereon they came up at the hearing. The answer to that question is subsumed in the finding made by the court below.

The learned trial Judge had examined the pleadings of the parties and reviewed the evidence of the witnesses (see pages 72-76). He also appraised these, together with the address of counsel for the parties. He adopted the 2 issues identified by the defence counsel and he determined those issues (see pages 76- 79). I hold the view that in issue No.1 at the trial, the question being raised under Issue 2 in this appeal is subsumed. It was;

whether the Plaintiff has proved that he has a valid and enforceable contract of insurance with the Defendant. The court below resolved the issue in favour of the Respondent.

The learned trial Judge said:-

“On this issue, having regard to the Plaintiff’s Statement of Claim especially para. 3a and the testimony of PW1 and PW3, and the submission of the learned Plaintiff’s counsel and having studied Exh. PL1 and the averment in para. 7 of the Plaintiff’s Statement of Claim wherein the Defendant has offered to pay the Plaintiff some amount which the Plaintiff rejected, all these are clear proof that there exists a valid and enforceable contract of insurance between the Plaintiff and the Defendant and I so hold. Similarly, I am not in any doubt from the material placed before me that the Plaintiff has insurable interest in the property and that it is that insurable interest that is insured under the Policy. To say that it is not the insurable interest of the Plaintiff that is insured is to overstretch the definition of an insurable interest. It is my opinion that the Plaintiff has insurable interest, and it is that insurable interest that is insured. The Union Bank's interest in the property in Policy it exists during the period of the loan. But the insurable interest of the Plaintiff exists before and after the mortgage transaction. On the issue of payment of the premium exh. PL 9 is very clear. The receipt for payment of premium showed 1/3/94 and the loss occurred on 15/6/94. That is three months after the payment of the premium. I say without hesitation that the premium was paid well in advance of the loss. On the whole, I resolve this issue in favour of the Plaintiff”.

I totally agree with the above decision of the learned trial Judge. I see no reason, governed by the law, proffered by the Appellant, to estop the Respondent from claiming for damage done to the property mortgaged with Union Bank by the Policy of insurance issued by the Appellant. Both parties herein admit that the Respondent and Union Bank have insurable interest. It is not, as the Appellant argued, however, that it was only the insurable interest of Union Bank which was insured and not that of the Respondent. How can that be when the Respondent retains possession of the property and is obliged to maintain it by the provisions in the deed of mortgage?

The right of the Respondent takes its bearing from the Deed of Legal Mortgage Exh. PL 10, the Proposal Form Exh. PL 12 and the Policy of Insurance Exh. PL 11.

The Respondent who was the Mortgagor and Guarantor of Manng Nig. Limited has his obligations and conditions to be fulfilled as set out in the Mortgage Deed Exh. PL 10. The terms which are particularly relevant herein show that the Respondent–Mortgagor was, by the Deed of Mortgage guaranteeing the banking facility granted by Union Bank of his company, Manng Nig. Limited. By way of additional security for the loan, the Respondent–mortgagor was required by the bank to insure, during the subsistence of the loan and continuance of this security, and to keep insured:

“...all messuages buildings and property now or for the time being comprised in or subject to the security in such state of repair and so insured against loss or damage by fire, tornado... to the full value thereof in some insurance office of repute to be approved in writing...by the Bank by a Policy of insurance containing a clause showing the interest of the Bank as Mortgagees and will in all cases be duly and punctually pay all premiums and other money necessary for effecting and keeping up such insurance, etc”. (*Italics mine*).

No default has been shown to have arisen. There is nothing in these transactions intended to deprive the Respondent/Mortgagor of his insurable interest in the mortgaged property, which he insured and paid for and remained liable for the payment of the premium. The Appellant in its brief had reasoned that but for the granting of a loan by Union Bank to Manng Nig. Limited, secured by the property of the Plaintiff/Respondent, the insurance Policy would never have been taken out either by the Plaintiff/Respondent or Union Bank. That may well be so, but I do not see how that derogates from the interest and right of the Respondent who is the insured under the Policy of insurance Exh. PL 1 or derogates from his entitlement thereunder. Union Bank on the other hand, is not deprived of its rights or claims which it may wish to pursue to the extent of the liability of Manng Nig. Limited should the company default in repayment of the loan. No default has been proved and Union Bank has not come up with any claim against Manng Nig. Limited.

If anything, the loan transaction was still subsisting at the time of this suit. The case of *First Bank v. Abba* (supra) relied on by the Appellant does not support the substance of its case, under Issue No. 2. The Court of Appeal in that case simply decided that where a mortgage insurance Policy taken out to further secure a loan made by the Appellant, First Bank of Nigeria Plc. to the Respondent was endorsed with a statement that the bank would remit to the insurance company the premium out of the account of the Respondent, it did not operate as a legally binding obligation on the part of the bank after the loan was liquidated and a further premium was not paid by the bank on behalf of the mortgagor. Therefore, the Plaintiff/Respondent could not hold the bank liable when, after he had liquidated his loan, the bank did not further remit the premium, when the mortgaged property was destroyed. He could also not recover from the insurance company. The facts of the case is not —uncannily similar to the facts of this case as submitted for the Appellant. The dictum relied on by learned counsel for the Appellant does not in any way determine the issue arising herein, or that what was insured was only the insurable interest of the bank, or that only the bank could claim during the

subsistence of the loan or the mortgage. The issue never arose in the First Bank case (*supra*).

I agree with the learned trial Judge that it was the insurable interest of both Union Bank and the Respondent that the Respondent was insured. The contract of insurance is between the Appellant and the Respondent. I hold the view that the Respondent can enforce it without Union Bank. The Respondent is entitled to bring this action as one who covenanted with Union Bank to keep the mortgaged property in repair during the subsistence of the loan, and who insured the property as required by Union Bank. Union Bank itself did not insure the property and makes no claim. Its staff testified, and it was aware of this suit. This action is therefore not vitiated by the absence of Union Bank as a party. The issue is determined in favour of the Respondent, against the Appellant. Issue No.2 and its corresponding ground of appeal on ground 3, therefore fail.

Issue No.3 questions the learned trial Judge for not holding that the Appellant's property was under-insured.

The issue, distilled from ground 4 of the grounds of appeal arose from the contention of the Appellant in the court below when he averred in paragraph 5A in its amended statement of Defence thus further or in the alternative to paragraph 5 above, the Defendant avers that the value of the property at No.2, Gawo Road, Bauchi, inclusive of the boys quarters is at least N1million. Exclusive of the boys' quarters, the value of the property is at least ₦850,000.00. Accordingly, if the Plaintiff insured the property at No.2 Gawo Road, Bauchi for ₦750,000.00 (and this is not admitted) the property was under insured and, in accordance with the insurance Policy and the custom of insurers, the Plaintiff is his insurer for the uninsured balance so that the average condition would apply to any loss claim under the Policy.

Learned counsel for the Appellant referred to the evidence of DW 1, the loss adjuster, who stated that in his view the property was underinsured and virtually repeated the averment in the Defendant's pleadings in paragraph 5A (*supra*).

The Plaintiff/Appellant's averment in connection with this is paragraph 4 of his further amended Statement of Claim ran thus: The Plaintiff shall contend that the value of the premises in issue is ₦750,000.00 in 1994, as advised by my bankers and accepted by the Defendant. Our attention was drawn to paragraph 3(a) of the Further Amended Statement of Claim. which the Appellant responded to in paragraph 4 of its statement of defence (*supra*). Paragraph 3(a) is fully set out under issue NO.2. But the relevant part of the averment to be noted is to the effect that the initial consideration was ₦100,000.00, then increased to ₦500,000.00 and ₦750,000 in line with the increased value of the property.

Learned counsel for the Appellant submitted that despite the pleadings and the evidence of PW3 on the issue, the learned trial Judge made no finding in respect thereof and had failed in his duty to hear, determine and resolve all issues properly raised before it. *Okonji v. Njokanma* (1991) 7 NWLR (Pt. 202) 131 at 150-152 and 154 cited. Also, *Leko v. Soda* (1995) 2 NWLR (Pt. 378) 432 at 444

para. A-B.

Counsel called on this court to examine the case with the pleadings and evidence, to make proper findings and apply the law. He argued that if the learned trial Judge had considered the pleadings and evidence, he would have applied average clause in the Policy and not awarded the Respondent the whole sum claimed.

In his Brief of Argument, learned counsel for the Respondent set out the averments in the pleadings of the parties and the evidence of witnesses. He then submitted that from the facts pleaded and evidence, the Respondent indeed proved that the sum insured i.e. ₦750,000 was the value of the property as advised by Union Bank of Nigeria Plc and accepted by the Appellant as evidenced by the endorsement on Exh. PL 1A and by PL3 – the Insurance Policies issued by it.

He further submitted that the Respondent gave evidence in proof of his pleadings in paragraph 4 of the Statement of Claim, but, no evidence was led by the Appellant in proof of paragraph 5 of its Statement of Defence where he introduced the issue of under insurance which the Plaintiff had denied in his paragraph 4, and this would be deemed abandoned- *Egbunike v. ACB Limited* (1995) 2 SCNJ 58 at 74-75, (1995) 2 NWLR (Pt. 375) 34 cited. Counsel urged this court to hold that the Respondent discharged the onus on him as to the value of the property insured. The burden of proving under-insurance was on the Appellant section 136 – 137 of the Evidence Act quoted, also cited – *Ukatta v. Ndinaeze* (1997) 4 SCNJ 117 at 129-130, (1997) 4 NWLR (Pt. 499) 251; *Udih v. Idemudiah* (1998) 3 SCNJ 36 at 44- 45, (1998) 4 NWLR (Pt. 545) 231; *Fadallah v. Arewailes Limited* (1997) 7 SCNJ 202 at 210, (1997) 8 NWLR (P. 518) 546.

Counsel examined the evidence led by the Appellant. It was only DW1, the loss-adjuster invited by the Appellant who proffered evidence on this but, counsel pointed out the learned trial Judge had concluded that DW1 cannot be said to be an unbiased witness and that his evidence does not carry any weight. The defence of under insurance had thus collapsed. *Iseru v. Catholic Bishop* (1997) 4 SCNJ 102 at 115, (1997) 3 NWLR (Pt. 495) 157 cited. Counsel also adopted the case of *Leko v. Soda* (supra) cited by Appellant's counsel on the duty of a trial Judge to make definite findings. However, he argued that even if the court made no definite finding on the claim of under-insurance, the error is not fatal, in view of the facts he had identified in his brief of argument, and particularly having regard to the lower court's evaluation and pronouncement that no weight can be ascribed to the evidence of DW1 on the issue. He urged this court to so hold – citing *Ukatta v. Ndinaeze* (supra); *Agwunedu v. Onwumere* (1994) 1 SCNJ 106; *IBWA Limited v. Farex Int. Company Limited* (2000) 7 NWLR (Pt. 663) 105 at 128, (1994) 1 NWLR (Pt. 321) 375.

The records show that the parties to the action joined issues with respect to the question of under insurance, again now complained of by the Appellant. I have earlier set out their pleadings in relation to this issue – paragraph 4 of the Statement of Claim and paragraph 5 of the Statement of Defence.

Learned counsel for both parties were correct when they stated that evidence was led in respect thereof. The records attest to this, particularly the evidence of PW1, PW3 and DW1, as well as Exhs. PL 1A and PL3 which are the endorsements on

the Policy of insurance as to the sum assured issued by the Appellant to the Respondent. It is trite law that a trial court is bound to make findings of fact on issues joined between parties. See *Karibo v. Grend* (1992) 3 NWLR (Pt. 230) 426 at 440; *Okonji v. Njokanma* (1991) 7 NWLR (Pt. 202) 131, at 150 F-G, Per Uwais, CJN. *Adeyemo v. Arokopo* (1988) 2 NWLR (Pt. 79) 703. There is need for a trial court always to make a specific finding of fact where there is abundant evidence to establish a point in issue, one way or the other. What did the trial Judge in this case do with the issue joined and evidence adduced by the parties before it?

Learned counsel for the Appellant complained that despite the fact that the issue of under insurance was clearly raised in the pleadings and the evidence adduced, the learned trial Judge did not deem it fit to consider the issue probably in order to avoid finding for the Appellants (See p. 18 of his brief of argument). The court therefore failed in its duty, it was submitted. Learned counsel for the Respondent argued contra, that by state of the pleadings, in paragraph 5A of the Defendant's further amended statement of Defence and 4 of the Statement of claim, the onus was on the Appellant to prove that there was under insurance which he failed to do. He cited authorities.

Counsel pointed out that the only evidence that the Appellant offered in proof of the allegation of under insurance was through DW1, the loss adjuster appointed by the Appellant. He submitted that after the court reviewed and evaluated the evidence of DW1, he came to the conclusion that he was a biased witness and his evidence was weightless. Counsel pointed out that the Appellant did not challenge that finding. The court had said:

"The evidence of DW1 who cannot be said to be unbiased witness does not carry any weight, it is weightless".

I must immediately state that looking through the judgment of the learned trial Judge, it is clear to me that in respect of some issues missing in the suit he reviewed or evaluated the evidence of the parties but did not do so in relation to the issue of under insurance. Indeed, he made no reference to the issue at all in the judgment. The finding which counsel for the Respondent relies on (*supra*) made by the learned trial Judge, regarding the evidence of DW 1 is however not one of them. It was not with regard to that issue.

Rather, it was in relation to the issue of the extent of the mortgaged property, covered by the contract of insurance, that the court of trial made findings and comments on the weight attachable to the evidence of DW1. The Respondents had claimed damages for the damage to the main building, the fence and the boys' quarters. Whereas the Appellant in repudiating the claim, insisted that the boys' quarters in the premises were not included. In the course of his appraising the evidence of DW 1 and the determination of that issue, the learned trial Judge stated among other things, at page 78 of the records as follows: "From exh. PLI2, it can be gathered that the address F1 of the property is given as No.2 Gawo Road, GRA, Bauchi. This is what is contained in the proposal Form and it is in evidence that the Boys' quarters is within the fence of No.2 Gawo Road, Bauchi. My view is that from Exh. PL 12 and Exh. PL 11 and PL 10, what is insured is what is covered by C of O exh. PL11... So, to say that the Plaintiff did not include the Boys' quarters which fall within No.2 Gawo is absurd and did not accord with the intention of the parties and common sense. So on this issue too I find that the

Boys' quarters... form part of the insured building. The evidence of DW1 who cannot be said to be an unbiased witness, does not carry any weight. It is weightless".

My finding therefore, is that in the judgment of the court, the learned trial Judge did not consider the issue of overinsurance or underinsurance raised in the Defendant/Appellant's pleadings in respect of which parties joined issues. In the record of proceedings can be found evidence adduced through DW 1 on this issue for the Appellant, who raised it in its pleadings and evidence for the Respondent through PW1 and some evidence elicited in cross-examination from DW1.

Learned counsel for the Respondent addressed the issue fully in his final address before the lower court, see p. 69 para. 3 of the records. He attacked the evidence of PW1 as contradictory in material facts. He urged the court to reject it.

Learned counsel for the Appellant in his final submission in the court below also addressed the issue of underinsurance — See page 65 (para. 3) of the records. He referred to the evidence of PW3 to show that the property was worth more than ₦750,000.00 which is the sum insured, so also the evidence of DW 1.

The foregoing notwithstanding, the learned trial Judge did not at all address the issue in his judgment. He made no finding and no pronouncement thereon, as if the issue did not exist. It is my respectful view that he was in error. What then is the effect of this error on the decision of the court below regarding the defence of under-insurance which affects the damages claimed by the Respondent?

Learned counsel for the Appellant has urged in this regard, that this court is not helpless. For an appellate court has undoubted power to examine the case as pleaded and the evidence led thereon in order to draw proper inference, make proper findings and apply proper law where the trial court failed to take advantage of trying the case at first instance and seeing and hearing the witnesses. Counsel has prayed us to make a finding in the absence of one by the learned trial Judge. I think he is correct. The Court of Appeal has powers to do so, where it is quite clear from the records that evidence has been led at the trial court to establish a fact, the appellate court will review the facts and make the necessary finding which the lower court failed to do. *Akibu v. Opaleye* (1974) 11 SC 189 at 202 (per Sowemimo, JSC; *Fatoyinbo v. Williams* (1956) 1 FSC 87; *Thomas v. Thomas* (1947) AC 484 at 487 and 488; *Woluchem v. Gudi* (1981) 5 SC 291; *Ebbav.Ogodo* (1984) 4 SC 86 at 94; *Akinola v. Oluwa* (1962) All NLR Vol. 1 (Pt. 2) 277. In such circumstances the way to proceed is to revisit the pleadings and the evidence on record adduced by both parties in support of their pleadings. For where the issue involves non-evaluation or appraisal of evidence the Appeal court is in as much a good position as the trial court to evaluate the evidence — *Abisi v. Ekwealor* (1993) 6NWLR (Pt. 302) 643 at 673 Sc. See also *Cash Affairs Finance Limited. v. Inland Bank Plc.* (2000) 5NWLR (Pt. 658) 568 at 580, (per Obadina, JCA).

This court will therefore apply these principles and proceed to evaluate the evidence on record and make necessary findings regarding the issue of under-insurance raised in the Appellant's alternative defence in paragraph 5A of its Further Amended Statement of Defence. Did the Appellant prove the alternative averment in paragraph 5a? In his brief of argument, the counsel for the Appellant

submitted that it did, and urged us to find for the Appellant. On the other hand, counsel for the Respondent urged that the Appellant did not.

The law is that he who asserts must prove, *see Okubule v. Oyagbola (1990) 4 NWLR (Pt. 147) 723; Ike v. Ugboja (1993) 6 NWLR (Pt.301) 539.*

The evidence for the Appellant relating to paragraph 5A of its Statement of Defence can be found in the testimony of DW 1 who is a loss adjuster working for the Appellant. He stated at page 51 of the records while being examined in Chief as follows: - "... we adjust (sic) the Plaintiff's claim. In the cause (sic) of adjusting the claim, I discovered the value of the insured property. I put the value of the figure at not less than 1 million naira. The 1million Naira is inclusive of the main building, the boys' quarters and the fence. If I value the property excluding the boys' quarters, I will value it at about ₦850,000.00. The entire building was insured at ₦750,000.00 and the Policy is an indemnity, Policy. This Policy means putting the insured always in the same position as he was prior to the loss. The property was inadequately insured".

The insurance practice: "If this an under-insurance, he becomes his own insurer for part of the uninsured risk. We call it an average clause under this Policy. Under cross-examination, DW1 further testified thus:- When I came to Bauchi to adjust the claim of the Plaintiff the property had already been put in its former position. I therefore could not have known the state of the property before the damage. Therefore, I could not have known the depth of the foundation. I read the Policy before I came to Bauchi. The first time I came to Bauchi, I adjusted the loss on the main building and Boys' quarters. I am not an estate valuer. The value I put on the property is from my own personal opinion and experience. It is not normal when an insurer is insuring property it will have look at the property and put a value on it. The proposal form is the basis of an insurance contract. It is not the practice for an insurer to rely on facts not contained in the proposal form".

Learned counsel for the Appellant had relied on the foregoing evidence of DW1 as proof that the insured property was underinsured. He also relied on the testimony of PW3 where he stated that, "the property of the Plaintiff is not worth less than the amount of the loan secured..."

Learned counsel for the Respondent responded that this is no proof of the averment in the Appellant's Statement of Defence to the effect that the property was under- insured.

I have examined the evidence on record and believe that learned counsel for the Respondent is on firm grounds. A look at the evidence of DW1 and DW3 reproduced above, particularly the portion underlined (supra), shows that this does not prove the averment in paragraph 5A of the Statement of Defence that the property was underinsured. What is the state of the property before the damage? DW3 said he did not know. How then could he place a value on it? Is it equitable for the Appellant who had accepted the value put on the property for which premium had been paid to it to find a new value, not supported by facts, for the property when a claim has arisen?

It is the position, as submitted for the Respondent that the burden of proof that the

property was underinsured lies on the Appellant who asserted the fact. It has a duty to establish with cogent evidence the actual value of the insured property. In doing this, it must lay bare to the court, its basis for arriving at the value which it puts on the property as its value at the time it was insured. The witness is not to speculate on it or approximate, from “personal opinion” as DW1 admits in his testimony.

The language and the testimony of DW3 falls short of the proof required to establish the value of the property at the time it was insured. DW 1 was not in a position to know, having seen the property after it was repaired, not before the damage by storm or before the repairs. The statement not less than ₦1 million, or about ₦850,000.00, sounds like guesswork, emanating from the “personal opinion” of a loss adjuster as DW1 admits, not being an estate valuer.

Learned counsel for the Appellant could, in my view be right when he pointed out that the sum of ₦750,000.00 for which the property was insured was influenced by the fact that Union Bank would not want the mortgaged property to be of value which is less than the loan it granted. This fact, added to facts elicited from DW 1 and DW3 in their evidence at the trial (supra), does not still establish the actual value of the mortgaged property before the accident or at the time the contract of insurance was entered into, nor, the basis for the value put forward by DW1 to help this court determine the extent of the under insurance, if any. The need to establish the value of the mortgaged property is in fact, under-scored by the comment relied upon by learned counsel for the Appellant at page 20 of his Brief of Argument, taken from page 383 of “General Principles of Insurance Law” by E. R. Ivamy.

The learned author states the effect of the average clause in insurance transactions, which DW1 referred to in his evidence (supra). He says that its effect is that, though in the case of total loss the assured receives the whole sum assured, he is, in the event of the loss being partial, entitled to recover only a fractional part of it, the fraction being the sum as numerator, and the value of the subject matter as denominator. The value of the subject matter, in this case, is the value of the mortgaged property. That value and the basis for arriving at it must be proved for it to qualify as a denominator, according to the learned author’s definition. I dare add that the personal opinion, or mere ipse dixit, of a loss adjuster without more can hardly be used to determine such technical and professional matter as the value of property, which is the province of Estate Valuers. Furthermore, at the tail end of paragraph 4 of the Appellant’s Statement of Claim, he denied that the premises in issue were underinsured. Then at page 10 of the records, he testified thus:- I have a document showing the present sum insured on this property. I mean the value of the property as presently renewed is ₦750, 000.

He further testified that the value of the property was as advised by Union Bank, from which he sought advice as his bankers. Evidence in proof shows that the Appellant accepted the value placed on the property set out in the Proposal Form and insured the property accordingly. See Exh. PL 1A and PL3, the Policy and the endorsement issued by the Appellant. DW 1 stated in his evidence in confirmation of this that, it is not normal when an insurer is insuring property that it will have a look at the property and put a value on it. The proposal form is the basis of the insurance contract. He added, it is not the general practice for the insurer to rely

on facts not contained in the proposal form.

Why then is the Appellant relying on the so-called average clause¹, in this case or on value not contained in the proposal form, which formed the basis for the insurance contract between the Appellant and the Respondent? The obvious answer has been provided by DW1's evidence (supra) it cannot rely on such facts now. The law does not allow it. The foregoing seems to me to put paid to the argument about the value which the Appellant is seeking to rake up from the personal opinion and experience¹ of DW 1, the loss adjuster.

In effect, it is my respectful view that although the learned trial Judge failed to perform his duty of appraising the pleadings and evidence of the parties on this issue of under-insurance, the evidence on record shows that the Appellant did not establish the application of the average clause to the insurance transaction between the parties.

This error on the part of the trial Judge does not warrant the setting aside of the judgment of the court below. In any event, it must be borne in mind that it is not every slip in the judgment of a court which will warrant the overturning of the judgment. *See Udeze v. Chidebe (1990) 1 NWLR (Pt. 125) 141.*

An error which may have the effect of an appeal being allowed or the judgment of the court below being overturned must be such as is fatal, in the sense that it has occasioned a miscarriage of Justice. *See Fadallah v. Arewa Iles Limited (1997) 8 NWLR (Pt. 518) 546 at 559; Ezeoke v. Nwagbo (1988) 1 NWLR (Pt. 72) 616.*

It cannot, in my respectful view, be said that the omission on the part of the learned trial Judge in the present case has occasioned a miscarriage of Justice. In the premises, this issue is determined against the Appellant.

In issue No.4, the Appellant questions the learned trial Judge's findings that the Respondent paid premium for Policy No. 734 B/R41197C in advance, when there were two Policy numbers on the receipt pursuant to which he so held and no attempt was made to explain why a different Policy number had been written on the receipt and cancelled.

The receipt in question was tendered at the trial as Exh. PL 9. It was for the premium for the year 1994. Parties had joined issues by their pleadings as to whether or not the premium had been paid by the Respondent at the time the damage to the insured property occurred on 15/6/94. The Respondent pleaded payment in paragraph 4 of his Further Amended Statement of Claim. He proffered evidence of payment through a Union Bank Plc. staff, PW3, and tendered his receipt, exh. PL 9 dated 1/3/94. While the Appellant, on the other hand, pleaded that the Respondent was in default of payment and as such the Policy was not in force (See paragraph 4 of the Further Amended Statement of Defence at page 36 of the records).

The Appellant led evidence denying payment of premium in the following words:

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"DW3 || ... No premium was paid in respect of the Policy before the

occurrence of the loss. The Policy No. 7346/R 5234C. This did not reflect the Policy number in respect of the Policy this claim is being made.”

The same witness further testified during cross-examination at page 54 of the records, thus:-“I dispute that the Policy No. on exh. PL 9 and PL 1 are different. The date of the incident is 1994”. I cannot remember the date of the month in which the premium is due for payment, but I know of the time the incident happened. There is no premium paid. When I see the Policy.

I can tell which month the premium is due for payment. On which date was the last premium date on Exh. PL 9 -113/94. I do not know who issued the receipt”.

The receipt bears the name of Royal Exchange. In re-examination, the witness admits that when shown the receipt, Exh. PL 9 thus: “These are the Policy numbers on the exhibit. PL 9”.

The learned trial Judge in his judgment, determining the issue whether premium was paid or not, which was the issue raised by and joined in the pleadings of the parties, held (at page 77 of the records) as follows:- “On the issue of payment of premium Exh. PL 9 is very clear. The receipt for payment of premium showed 1/3/94 and the loss occurred on 15/6/94. That is three months after the payment of the premium. I say without hesitation that the premium was paid well in advance of the loss. On the whole, I resolve this issue in favour of the Plaintiff.

It is against the foregoing decision of the court below that the Appellant complains. Learned counsel for the Appellant accused that the learned trial Judge closed his eyes to the obvious fact that Exhibit PL 9 bears two different Policy numbers. One of the numbers, 734C/52375C, was initially written on the receipt and then cancelled, even though it is still legible. The Policy number of the Policy that insured the Appellant’s house was then written on top of the column made for Policy numbers.

Learned counsel then submitted that upon making an issue of it, the onus was on the Respondent to prove he had paid a premium in advance of the loss, and the onus includes explaining the presence of two different numbers on the receipt, purported to be evidence of payment of premium in advance, but no attempt to explain this. Counsel further accused the court below of failure to have a critical look at the receipt, Exh. PL 9 to resolve the conflicting evidence regarding the payment of the premium in advance.

In response to the submission of Mr. Okoro, learned counsel for the Appellant, learned counsel for the Respondent, Mr. Madumere, invites this court to examine Exh. PL 9 in the light of section 132 of the Evidence Act to see if it contains two numbers. He submits that Exh. PL 9 bears one Policy number only and urges this court to so hold, for a number cannot be cancelled and be operative at the same time, and if it is operative according to the Appellant, then it has the onus to prove it. He urges the court to uphold the decision of the trial court.

I decided in the course of considering this issue to examine, as parties have urged, Exh. PL 9, with regard to the two numbers said by the Appellant to

appear thereon. There are not two sets of numbers but one. I find that a set of numbers which are not entirely legible to me were crossed out completely with cross bars, thus: (XX). Above them are written and in very legible numbers the Policy number 734B r41197C, the same number as in Exh. PL1, PL 1A and PL 3, which are the Policy of insurance and the two endorsements on the Policy for the value of ₦750,000.00 and ₦500,000.00, respectively. All of these were issued by the Appellant. DW3 was therefore not speaking the truth when he said the Policy number on Exh. PL 9 and PL 1 were different. It is observed that the same premium is acknowledged on the exh. PL 9 is reflected in Exh.PL 1A issued by the Appellant.

The date of payment of the premium on Exh. PL 9 for the increased value of the insured property which as Exh. PL 1A shows, took effect from 17th February, 1994, is 1/3/94.

Exh. PL 9 is on the Appellant's headed paper, as admitted by DW3. Below the Policy number, it acknowledges receipt of the sum of ₦187,500 from:- "UBN (MR MUCHAEL G. ANUMNU) being renewal premium on the above ... Policy number.

Exh. PL 9 is sealed at the left-hand bottom with the seal stamp of "Royal Exchange Assurance Nigeria Plc., Lagos" and signed and dated "01/03/94" with the printed words, "customer" copy at the right-hand bottom of the exhibit.

I have noted from the records that in the evidence of the Appellant's witnesses that no specific denial was made to its issuing Exh. PL 9. PW3 is a staff of Union Bank Plc to which Exh. PL 9 was issued by the Appellant after it paid the premium on behalf of the Respondent. To PW3, no clear question or issue whatsoever was put or raised by the Appellant and its counsel concerning the authenticity of anything on exhibit. PL 9. Nothing has been proved, as the evidence on record shows.

Appellant's counsel's cross-examination of the Appellant's witnesses at the trial raised no such issues. No court is expected to address issues not raised by the parties before it. Courts of law, as a rule, limit themselves to issues raised by the parties before them. *See Key Industries (Nig.) Limited. v. Aina (1997) 8 NWLR (Pt. 318) 208 SC.*

The learned trial Judge would therefore be right in not dealing with the issue of alteration or cancellation in the exhibit. PL 9 was not properly raised, addressed and proved at the trial.

Exh. PL 9 is clear on the face of it and the court below was right to adhere to and give effect thereto as he did. *See Union Bank v. Sax (Nig.) Limited (1994) 8 NWLR (Pt. 361) 150 at 165, also reported in (1994) 9 SCNJ 1 at 12-13.*

When an entry in a document is cancelled, it is common knowledge that the cancellation discards that entry. Any entry made replacing it becomes the operative one.

I would uphold the submission of counsel for the Respondent.

The Policy bears only one number and a number cannot be cancelled and be operative at the same time.

A cancellation amounts to the obliteration of what was cancelled. It is not the practice to write out for consideration a cancelled entry deemed obliterated or discarded leaving the uncanceled one and regarded as the live entry.

Throughout the pleadings and the hearing of the matter, there was no issue raised or suggestion by the Appellant of fraud or forgery in relation to Exh. PL 9.

If there was any such allegation of fraud or forgery or anything untoward, the Law is that it becomes an issue only when it is pleaded and it must be proved and the onus is on the party alleging or asserting it. *See Section 138 of the Evidence Act. Also, Union Bank Plc v. Ozigi (1994) 3NWL (Pt. 333) 383 at 407.* The court below had nothing of that sort before it to determine. Rather, the issue before it was whether the premium was paid in advance before the loss accrued on 15th June, 1994. The oral and documentary evidence before the court including Exh.PL 9 was that payment was duly made on 1/3/94 by Union Bank on behalf of the Respondent. This was over 3 months before the damage on 15/6/94. The evidence had to be accepted by the learned trial Judge in the absence of anything in rebuttal. I can agree that the onus, identified by the Appellant in his brief, is on the Respondent to prove that the premium was paid in advance, but that onus was indeed discharged by the Respondent. The further submission for the Appellant that the onus on the Respondent includes explaining the presence of the cancelled Policy number and the uncanceled one cannot be upheld. It was not made an issue at the trial, as I had earlier stated.

Learned counsel for the Appellant had submitted that in the face of conflicting oral evidence from the parties regarding the payment of premium in advance that the trial court should have critically examined Exh. PL 9 the receipt to resolve the conflict, since documentary evidence is usually the hanger by which to weigh and assess oral evidence. *Fashanu v. Adekoya (1974) 1 All NLR (Pt. 1) 35 at 48 and Nwosu v. Imo State Environmental Sanitation Authority (1990)2 NWLR (Pt. 135) 688 at 718 relied upon.*

In counsel's view, had the court taken a critical look at Exh. PL 9, he would have found that it did not establish payment of premium in advance in respect of Policy No. 734B/B/R41197C. With respect to the learned counsel for the Appellant, the above reasoning is faulty in the extreme and the conclusion *non sequitur* for the reasons earlier set out. There is nothing on the face of Exhibit PL 9 pointed out by Appellant to the court below, from which it could be deduced that the premium was not paid on 1/3/94 as set out therein.

As the learned trial Judge rightly stated in his judgment, the document Exh PL 9 is very clear. In my view, it speaks for itself. I had earlier set out the full import and the contents of that document. I see no reason to reject the applicable, clear and legible Policy number for a cancelled number, which must be regarded as discarded. Looking at the Appellant's defence in this respect and his counsel's argument, one cannot but observe that the Appellant was only "fishing" for something to hold onto to discredit another wise clear pleadings and evidence of the payment of premium on 1/3/94 shown in Exhibit PL9. It is my view that the

learned trial Judge made the correct finding in his judgment. Issue No.4 is therefore determined against the Appellant with its supporting ground of appeal.

Issues 5 and 6 (distilled from the grounds 6 and 7 of the grounds of appeal):-

Learned counsels for both parties treated these two issues together. Under the two issues, the Appellant complains about the lower court's decision on proof and award of damages. I shall, myself, consider both issues together. It has been argued for the Appellant that the Respondent had not proved the damages which he claimed and that in awarding damages to him, the learned trial Judge although the Appellant put the authenticity of the claim in issue, failed to apply the law relating to contract of indemnity when he considered the Appellant's claim of the sum of ₦250,070.00 as special damages, spent on the repair of the insured premises damaged by storm and tornado.

In paragraphs 8A and 11 of the Further Amended Statement of Defence, the Appellant had averred as follows:-

"8A. The Defendant further adds that the material used for the repairs of the damaged portions of the premises at No.2 Gawo Road, Bauchi, near (sic) the amount stated in the estimate of one Ray Douglas Iwueze. The said materials were supplied by the Plaintiff who is trying to make a profit from a misfortune. The Defendant shall at the trial place reliance on the report of BENEVOLENT INTERNATIONAL LOSS ADJUSTERS".

"11. The Defendant makes no admissions in respect of the averments in paragraph 8 of the statement of claim and would challenge the authenticity and admissibility of the receipts referred to therein, which are all made in anticipation of litigation."

It is helpful to also set out the Appellant's pleadings in relation to the issue of damages in his Further Amended Statement of Claim –

"5. On the 15/6/94 there was a great Tornado and Flood and as a result of heavy rainfall in Bauchi Metropolis and this caused several damages on a number of buildings within Bauchi Metropolis including premises at No.2 Gawo G.R.A. Bauchi.

Thereafter, the Plaintiff duly informed the resident representative of the Defendant here in Bauchi (S. Isah), who immediately visited the scene and saw the damage caused by the Tornado and Flood. The roof of the main building and that of the Boys' quarters were damaged badly, with the Boys' quarters having a greater percentage of the damage and also absorbing 2/3 of the total cost of repairs."

"6. The wall fence around the premises also collapsed. The photographs taken on the premises showing the damages are hereby pleaded. The Plaintiff subsequently contracted building contractors to estimate the cost of repairs on the premises. The estimate was done and the total cost of repairs was put at ₦250,070.00 by One Ray Douglas O. Iwueze. The Plaintiff immediately put up his claims to the Defendants for the sum of ₦250,070.00. Thereafter, the resident representative of the Defendant forwarded the claims of the Plaintiff to Lagos for consideration. The

report note of the resident representative (S. Isah) of the Defendant company, dated 15/6/94, which was sent to Lagos, is hereby pleaded. The claims dated 20/6/94 filed by the Plaintiff are also pleaded. The estimate of the building contract dated 18/6/94 is also pleaded.

7. The Defendant wrote to the Plaintiff on the 16/8/94 and informed him that loss adjusters would be appointed to assess the loss. The said letters dated 16/8/94 are hereby pleaded. BENEVOLENT INTERNATIONAL LOSS ADJUSTERS was later appointed and they came and assessed the loss on the main building and the boys' quarters and the collapsed fence.

However, the loss adjusters later wrote to the Plaintiff *vide* letter dated 8/2/95 that the Defendant had informed them that the boys' quarters did not form part of the insured premises and therefore could not attract any compensation. Therefore, they put their estimate at ₦77,150.00 for the repairs of the main building and the fence. Out of this sum, the Defendant agreed to pay only 65%. The said letter of 8/2/95 is hereby pleaded.

The Plaintiff rejected this offer through his solicitor's letter (Madumere, Chikwendu) dated 12/3/95. The said letter is hereby pleaded. The loss adjusters' letter dated 17/2/95 is also pleaded. The Plaintiff also pleads his letter of 14/2/95 rejecting the Loss Adjuster's offer *vide* its letter of 8/2/95.

The Defendant replied through the Loss Adjuster's letter dated 3/5/95, still persuading the Plaintiff to accept the offer. The said letter is hereby pleaded. The Plaintiff shall contend that the Boys' quarters form part of the premises covered by the said Policy.

8. As the insured premises in issue is the residential house of the Plaintiff and he could not afford to expose his family to the vagaries of weather, he commenced repairs work on the premises based on the estimate pleaded earlier on. All receipts for items bought (cash/credit) and payments made for the repairs of the premises are hereby pleaded. The Plaintiff shall contend that all purchases of materials were at the current market price/ and that the repairs were made to bring the premises into its original position."

Paragraphs 8A and II of the Further Amended Statement of Defence (*supra*) represent all that the Appellant pleaded in reaction to the issues of damages raised by the Respondent in his paragraphs 5-8 (*supra*).

At the trial, evidence led by parties on the issue of damages was, for the Respondent, from the Respondent himself – PW1, PW2, the contractor who prepared the estimate for the repairs and carried out the repairs. Various exhibits, particularly PLC 2, PL4 (Estimate) PL 7A–H (Receipts), and DF 2, also came into play for the Respondents.

For the Appellant, DW1, then its loss adjuster then testified. Then the learned trial Judge in his judgment found on the issue of damages as follows, at page 79 of the records:-

“On 3rd issue, whether the Plaintiff has proved the damages in accordance with the law. On this issue, I am of the view that the Plaintiff has sufficiently

proved his claim for special damages. He not only pleaded the damages suffered but also tendered the receipt by which he bought materials for the repairs. The receipts clearly showed the items purchased and the amount. There is sufficient proof to enable the Plaintiff to succeed in his claim for special damages. The evidence of PW1 Exh and DF 2 is all clear as to the extent of the damage suffered by the Plaintiff. I therefore hold that the Plaintiff has proved his claim of special damages against the Defendant.

On the whole, in view of my findings and reasons above, I hold that the Plaintiff has established his claim against the Defendant. Accordingly, judgment is hereby entered for the Plaintiff against the Defendant in the sum of ₦250,070.00.”

Against this judgment, the Appellant in his Brief of Argument raised several issues, to which the Respondent replied, also in his brief.

Learned counsel for the Appellant says the lower court’s findings were perverse. He says the Appellant’s special damages were not particularized in the Appellant’s claim. He placed reliance on *First Bank of (Nig.) Plc. V. Associated Motors Co. Limited. (1998) 10 NWLR (Pt. 570) 441*.

In response to this, learned counsel for the Respondent pointed out from the pleadings of the Respondent, including the Documents pleaded by the Respondent and indeed the Appellant itself, that sufficient particulars were pleaded and were possessed by the Appellant as required by law. He reproduced paragraphs 5 and 6 of the statement of claim (supra) the evidence of PW1, PW2, and DW 1.

He referred to the contents of the documents pleaded which became exhibits at the trial. These are: exh. PL 2 — letter of complaint written by the representative of the Appellant in Bauchi, one Isah, sent to Appellant’s head office in Lagos, exh. PL4: Estimate of the contractor (PW2) of the damage to the insured premises and who later carried out the repairs thereon. This had been sent to and received by the Appellant. Exh. PL 7A — H receipts for labour and of materials purchased for the repairs.

Counsel then submitted that all the foregoing showed that sufficient pleadings and proof as required by law. He further referred to exhibit DF 2, the letter and report of DW1, the loss adjuster of the Appellant which shows that full particulars of the Appellant’s claim and breakdown of repairs estimate were with the Appellants. The report contained a reproduction of Exhibit PL 4, the estimate and cost of repairs.

When the law requires that particulars must be supplied, it depends on the nature and facts of each case.

A clear inference of what is required can be drawn from the dictum of Cotton, LJ in the English case of *Philipps v. Philipps (1878-79) 4 QBD 127* where he put the essence of the rule regarding particulars thus: in my opinion it is absolutely essential, that the pleading, not to be embarrassing to the Defendants, should state those facts which will put the Defendants on their guard and tell them what they will have to meet when the case comes for trial. The

requirement to plead particulars of special damage is usually predicated on the question of fairness to the Defendant. These principles re-echo again and again in our courts. — See *A.-G., Oyo State v. Fairlakes Hotels Limited*. (1989) 5 NWLR (Pt. 121) 255 SC.

The need to particularise special damages has been reiterated and the reasons for it in the following terms:- It is in order to enable the opposite party know and meet the case being made against him. In other words, it is to obviate any surprise to the opposite party, who may not be aware of the details and circumstances from which the special damages have arisen or the basis upon which they have been calculated or arrived at by the Plaintiff who claims them based on his own precise calculation. See Agbaje, JSC in *A.-G., Oyo State v. Fairlakes Hotels* (*supra*), drawing from Macgregor on Damages 14th Edition page 16 Article 19. It is with the foregoing in view that courts ought to examine the pleadings of a Plaintiff who claims special damages, to see if there be sufficient facts available to the Defendant that would enable him to meet the claim which the Plaintiff is making against him.

In applying these principles to the present matter, I have noted that paragraphs 5-8 of the Further Amended Statement of Claim (*supra*) and the supporting documents duly pleaded, provide sufficient particulars of the claim for damages to the insured property of the Respondent, arising from the tornado. Although the heading “particulars” was not used in the Statement of Claim as is often the case in claims for damages or compensations, nor were the sums constituting the items of damages tabulated in the body of the Appellant’s pleadings, yet all the required particulars are available therein. Much of those particulars were already known to the Appellant or in the Appellant’s custody either before the Respondent took out the writ in this matter. This is the case with the estimate and cost of the repairs shown in Exh. PL 4 which also appeared in Exh. DF 2, the Appellant’s DW 1’s report to the Appellant, after he investigated and adjusted the claim of the Respondent. I stand the risk of being unduly detailed and of this judgment becoming too long, should I reproduce here the contents of Exhibits. PL4 and DF 2. I believe it will be sufficient to state that exhibit. PL4 covers a full page of a foolscap sheet. It lists out the description of the material for the repairs to the damaged premises such as cement blocks, sand, stone, cement, roofing sheets, rods, wire, timber, nails, paint, labour etc.

There are 23 items against each of which the quantity, rate and total cost are set out, calculated and totaled at ₦250,070.00 as claimed by the Respondent in his Statement of Claim. This same document had been received by the Appellant before the suit was commenced and its contents are on pages 4-5 of DW 1’s report to the Appellant, exhibit. DF 2 dated 14/12/94.

I am unable to appreciate how, in the light of the above, the Appellant can complain about the special damages not being particularised. When all the particulars required which will enable a Defendant know the case, he is meeting are with him when the action is filed, I should think the Plaintiff need not tabulate the particulars in the body of his statement of claim in order to be adjudged to have fulfilled the rule of particularising his claim for special damages.

It is sufficient if the Plaintiff sets out sufficient facts to enable the Defendant to

identify what is already in the custody of the Defendant which constitutes the object and subject of the Plaintiff's claim before the court.

The Appellant is not deceived or embarrassed or surprised. It was fully seized with the claim of the Respondent for special damage, how it arose, the details of items making same up and the values placed on each of them and the total. The Respondent has fully discharged the duty to provide particulars required by law. On the duty of strictly proving special damage which the Appellant argued was not discharged by the Respondent, I have carefully examined the evidence on record. It is certainly the law that a party claiming special damages is required to plead and provide particulars of the same. He is to strictly prove the special damages in order to succeed in his claim.

See A.-G., Oyo State v. Fairlakes Hotels Limited (No.2) (1989) 5 NWLR (Pt. 121) 255 SC; Odumosu v. ACB Limited (1976) 11 SC 55.

The recognition of the law that special damages must be strictly proved, does not convey more than a duty to supply such proof as would establish the damage, the nature of the damage, including the circumstances and extent, the value of the items at the time of the damage, what sum would be required to repair the damage, or in the case of total destruction or loss to replace the damaged or lost, item and compensate for other consequential losses which the owner may claim. *See NEPA v. Alli (1992) 8 NWLR (Pt. 259) 279 at 297.*

The Supreme Court of Nigeria has had cause in a number of its decisions to explain the implication of the term "strict proof of special damages". Such can be found in *Oshinjirin v. Elias (1970) 1 All NLR 153 at 156* where Coker, JSC stated:- that what is required, "is that the person claiming should establish his entitlement to that type of damages by credible evidence of such character as would suggest that he indeed is entitled to an award under that head...." In *Odulaja v. Haddad (1973) 1 All NLR 191 at 196*, *Irikefe, JSC* (as he then was) put it thus:-

"We are of the view that strict proof in the above can mean no more than such proof as would readily lend itself to quantification. It seems to us that the nature of proof in a given case must be dictated by the peculiar circumstances of the available evidence." *See also Oladehin v. Continental ile Mills Ltd. (1978) 1 LRN 60 at 64 per Obaseki, JSC.*

Learned counsel for the Appellant submits that no credible evidence was adduced to enable the lower court find as it did that the Respondent proved entitlement to the sum of ₦250,070.00 as special damages. He hinged his reason for this submission on a number of matters. One of them is, that exhibit. DF1 written by the Respondent to the Appellant's representative in Bauchi, after the tornado, referred only to the boys quarters and the main house, but that in cross-examination of the Respondent, when confronted with this, he stated that "the main house is not mentioned in the letter" (exhibit DF 1). Learned counsel complained that the learned trial Judge did not deem it fit to consider this very fundamental blow to strict proof needed to establish special damage.

I have examined the evidence on record and the judgment on record and the

judgment of the court below. Learned counsel for the Appellant correctly captured the fact that the court below did not consider this evidence. Whether it is a blow on the strict proof to establish special damage is another matter. I will now consider it with other evidence before the court.

It is on record that after the report, Isah, the Appellant's representative in Bauchi visited and inspected the damage. So he confirmed to DW1 as PW1 stated in Exhibit DF2. He was put in the witness box by the Appellant. He was sworn and shortly after was withdrawn by counsel for the Appellant without his testifying, except for stating that he was aware of the claim of the Respondent. DW 1 the loss adjuster of the Appellant testified as follows regarding the damage (which he said Isah confirmed to him that he inspected) and which he saw;-

"I did discover the cause of the damage. The cause of the damage was as a result of thunder storm. The location of the property is in a mashing area and the foundation was not solid enough, and this has contributed to the collapse of the fence.

In the schedule of the Policy, it is defined as building in singular, not plural and fixtures and fittings. I did see that the boys' quarters was damaged, 2 sides of Defence collapsed and a subsequent damage on the main building which the insured confirmed to us that they had to renail the sheet." (See p. 51 of the records)

In the light of the above and all the evidence before the court, it seems to me that the Appellant and the court could not have had difficulty in appreciating the extent of the damage to the insured premises, for which the Respondent submitted his claim to the Appellant and later filed the action in court.

I am unable to conclude that the fact that the main building was not mentioned in the letter Exhibit DF1 excludes it or materially affects the proof contained in the evidence (supra) and others on record. That it formed part of the insured premises damaged by the rainstorm is clear. This is so, in view of the above testimony of DW 1 and other evidence before the court. It would appear to me that to "renail the sheet", spoken of by the DW1 (supra), would make no appreciable difference to the estimate and cost of repairs put in evidence, manifestly testified to by PW1, PW2 and DW1, supported by documentary exhibits PL 4, DF2 and PL 7A-7H, the receipts for materials and labour for the repairs. In exhibit DF2 addressed to the Appellant DW1, stated at page 3: "We called at your branch office in Bauchi and the Bauchi Manager confirmed to us that the damages were inspected by him." This and other evidence on record show that the Appellant knew of the damages and loss and it was obvious to the court below. These have been strictly pleaded and proved as required by law.

The other point on which Mr. Okoro, counsel for the Appellant relied in his argument that no credible evidence was adduced by the Respondent in proof of his claim for special damages is that the Respondent made no disclosure as to what portion of the ₦250,070.00 special damages was the profit he made from the sales to himself of the building materials. This is based on the evidence that the Respondent supplied the materials which was used by PW2, for the repairs to the damaged insured premises from his company for which he made a profit.

In response to this, Mr. Madumere, counsel for the Respondent urged us to disregard the argument as this is not supported by the pleadings nor the oral testimony in court.

The argument of learned counsel for the Appellant is mainly predicated on the evidence of PW1 and PW2 from which he wants to deduce that the Appellant's claim for special damages includes an element of profit. I have carefully looked at the pleadings of the parties and the evidence adduced in court. The issue of profit purportedly made by the Respondent in the purchase of the materials used for the repairs from his company was pleaded in paragraph 8 of the Statement of Defence and did constitute an issue contested by the parties at the trial. In cross-examination, some question about profit was put to PW 1 and PW2, which they answered. The matter ought not to have been disregarded; therefore and learned counsel for the Respondent was not right in urging that it should.

The question, however, is what was the profit proved which the court should have considered was made from the purchase of building materials used for the repairs. What profit did he make and how did it affect the estimate and cost of repairs? The Respondent and his witness PW2 admitted that the Respondent bought some of the material he used from his company, Manng Nigeria Limited and other from other sellers. In cross-examination, the witnesses further testified thus:- PW1 - "I deal in building material which include the material I used to repair the house. It is not always cheaper to use my material rather than to buy from 3rd party. I am aware that if I buy from the 3rd party it may be more expensive. If there is no issue, I will use the one I have and buy the one I do not have. I bought some of the materials from my company. I bought zinc, paint, ceiling nails from my company. It is called Manng Nigeria Limited I am a shareholder, others Ikenna Vincal, Okedi Fredrick. I made a profit from the sale. The Defendant surveyed the place before insuring the house...." PW2: "The Plaintiff bought the material with which I did the job. Yes the Plaintiff supplied all the materials with which I did the job. I built it as it was before. Yes I can tell which of the building can better withstand element like storm. I want the court to believe the cost of repairs. Exh. PL4 I am aware most of the material I used came from the Plaintiff's shop. The Plaintiff is a building material dealer. Naturally he will sell them at a profit."

Counsel for the Appellant, in his Brief of Argument, informs this court that the receipts did not amount to ₦250,070.00 and do not bear the name of Maang Nigeria Limited, the Appellant's company. I have seen the receipts evidencing the cost of labour and materials used for the repairs. These are Exhs. PL 7A-H, PL 7A-C for labour charges bear the name of PW2 the Contractor who repaired the damage and made Exh. PL4 the estimate. Exhs PL 7D-E bear the names of 4 suppliers:-

PL 7D — for wood, PL 7E for sand and stone, PL 7F for Blocks, PL 7G for Iron rods. Exh. PL 7H bears the name of Maang Nigeria Limited: for zinc, nails, ceiling and paint as stated by the Respondent in his evidence in court.

They all added up to ₦250,070.00. Let me digress here to state that the learned counsel for the Appellant could thus not be correct in that regard. Learned counsel for the Appellant, however, correctly pointed out the admission of the Respondent and PW2 on the issue of profit (supra). What is its effect on the requirement of

strict proof of special damages? Together with this is the further submission that the Policy was one of indemnity, the Respondent was not entitled to make a profit from the loss. The case of *Castellain v. Preston* (1883) 11 QBD 380 at 386 per Brett L.J.) and *First Bank of Nigeria Plc. v. Justice Abubakar Abba* (1998) 10 NWLR (Pt. 569) 227 at 237 per Edozie, JCA are cited. The principle that an insured cannot recover more than the sum insured and cannot recover even the sum insured unless he proves a loss to that amount which the Appellant relies on, is not in doubt.

The issue here is whether the Respondent has proved a loss to the amount which the court below awarded him. For the Respondent, it is submitted that there is no evidence of any sort to indicate that the prices were over and above the market price. That submission to my mind is not the issue.

I must, however, admit that in resolving this issue, I had some difficulty in identifying what the profit was that the Appellant was trying to establish and which the Respondent admitted. Was it his profit as a shareholder of Mann Nigeria Ltd. (by way of dividend)?

The witnesses testified that it supplied some of the building materials. Or, was it, as the Appellant's counsel in his brief now urges, all the materials which must have been supplied by the Respondent but faked the receipts? As the Appellant who asserts that fact of the profit has not shown what it is, it seems to me that the learned trial Judge was not in error when he decided to predicate his decision after considering this point on what the evidence before him had established. It has been noted that the Respondent has not claimed any sum above the sum insured by Exhs. PL1 and PL1A issued by the Appellant. That the damage was caused by a tornado is not in dispute.

Nothing concrete has countered the estimate and cost of repairs proffered in evidence. There is only the assertion that there is an element of profit. What is the element? Nothing has been shown. I would therefore discountenance the point which only leads to speculation on what it is.

I have earlier settled the issue of under-insurance, repeated here by Mr. Okoro, counsel for the Appellant.

One other point raised for the Appellant, which calls for attention, is the defence of "betterment and use of salvage materials in paragraph 58 of the Appellant's further amended Statement of Defence." I see no concrete evidence establishing the quantity and value of the salvage material which DW1 referred to in his evidence, which would have enabled the court below to consider it in assessing the cost of repairs. Although the learned trial Judge ignored it, I am of the view that even if he considered it, there was no evidence put before him by the Appellant who asserted it which would have enabled him to determine its effect on the cost of repairs evidenced by the oral testimony and documents before the court. This is also particularly so when the testimony of DW 1 on the issue is taken into account.

DW1 had visited the damaged premises for assessment after he received the Appellant's instructions by its letter dated August 25th, 1994. This was over two months after the damage occurred. It is not controverted that the damage occurred

on 15th June, 1994, and the premises were the residence of the insured Respondent and his family. It had to be repaired from about 25th June, 1994. This was after the representative of the Appellant in Bauchi, to whom the damage was reported on 16th June, 1994, came to inspect it. DW1 stated both in his report to the Appellant – exhibit DF2 and his testimony in court that at the time he received Appellant's instructions and he went to the insured premises for the assessment, the repairs had understandably been carried out and that he was not in a position to know the state in which the property was before then. There is evidence on record that the Manager of the Appellant in Bauchi confirmed to DW1 that he inspected the damage after it was reported to him. There is, however, no evidence on record showing what the result of the Manager's inspection was. That would possibly have provided the clue as to the salvage which the Appellant thinks ought to have been taken into account in assessing the cost of repairs. Speculation on evidence is not one of the functions of a court of Justice. Rather, a court receives and acts on evidence placed before it by parties in accordance with the law. *See Seismograph Limited v. Ogbeni (1976) 4 SC 85*. The learned trial Judge in the circumstances had acted correctly in ignoring this issue of betterment and salvage as he did that of an element of profit, when no evidence was placed before him to assist him in determining the issues raised by the Appellant.

Under issues 5 and 6, learned counsel for the Appellant also submitted that the trial Judge did not base his consideration of the claim for damages on the relevant legal principles and urged that this is a proper case for an appellate court to interfere and since the damages claimed could not be proved, the only cause open to the lower court was to dismiss the claim. He placed reliance on *Sommer v. Federal Housing Authority (1992) 1 SCNJ 73 at 84, (1992) 1 NWLR (Pt. 219) 548*. Counsel urged this court to dismiss the claim.

In view of all that has been stated in the course of addressing the various points raised by the parties under issues 5 and 6, my answer and conclusion are that the learned trial Judge based his decision on legal principles, on the pleadings of the parties and the evidence before him. This is not a proper case to set aside the learned trial Judge's decision. The decision is not perverse. Issues 5 and 6 are determined against the Appellant together with their originating grounds of appeal, i.e., grounds 6 and 7.

On the whole, I would dismiss this appeal as the issues arising therefrom have been determined in favour of the Respondent and against the Appellant. I affirm the judgment of Bala Umar, J. sitting at the High Court of Justice, Bauchi, delivered on 31/3/99. Appeal dismissed with ₦5,000.00 costs against the Appellant, in favour of the Respondent.

31.4 REMARKS

Issues around Jurisdiction, Insurable interests, under insurance, and existence of two (2) policy numbers on the receipts issued were matters exhaustively dealt with in this case. This was an Appeal matter.

31.5 REFERENCES

1. *Castellain v. Preston (1883) 11 QBD 380 at 386.*
2. *First Bank of Nigeria Plc. v. Justice Abubakar Abba (1998) 10 NWLR (Pt.*

- 569) 227 at 237.
3. *Sommer v. Federal Housing Authority* (1992) 1 SCNJ 73 at 84, (1992) 1 NWLR (Pt. 219) 548.
 4. *Seismograph Limited. v. Ogbeni* (1976) 4 SC 85.
 5. *Oyo State v. Fairlakes Hotels Limited. (No.2)* (1989) 5 NWLR (Pt. 121) 255 SC.
 6. *Odumosu v. ACB Limited. (1976)* 11 SC 55.
 7. *Section 138 of the Evidence Act.*
 8. *Union Bank Plc v. Ozigi* (1994) 3NWLR (Pt. 333) 383 at 407.
 9. *Odulaja v. Haddad* (1973) 1 All NLR 191 at 196.
 10. *Oladehin v. Continental ile Mills Limited* (1978) 1 LRN 60 at 64.
 11. *Fashanu v. Adekoya* (1974) 1 All NLR (Pt. 1) 35 at 48.
 12. *Nwosu v. Imo State Environmental Sanitation Authority* (1990)2 NWLR (Pt. 135) 688 at 718 relied upon.

32.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL

DATE: 20th March, 1964

SUIT NO: SLCA/6, CIVAPP21

JUDGE: Bankole Jones, C.J.
Ames, Ag .P.
Dove-Edwin J.A.

ROYAL EXCHANGE ASSURANCE COMPANY
(Defendant/ Appellant)

vs

JENNER-WRIGHT & OTHERS.
(Plaintiff/ Respondent)

32.2 REPORTS/FACTS/ISSUES

- (1) Insurance-Motor vehicle insurance-limitations on use — burden of proof of use for contemplated purpose of policyholder: Where a policyholder seeks to recover from an insurer following an accident arising out of the use of a motor vehicle, the burden of proving that the vehicle was being used for a purpose contemplated by the Policy lies on the policyholder (page 28, lines 27-35; page 29, lines 19-21).
- (2) Insurance - motor vehicle insurance - limitations on use social, domestic and pleasure purposes - question of fact: Where a vehicle is being used at a particular time for social, domestic or pleasure purposes is a question of fact (page 28, lines 27-34).

The first Respondent brought an action against the second and third Respondents in the Supreme Court to recover damages following a road accident. The Appellants, the insurers of the second Appellant's vehicle, were joined as a third party.

The insurance Policy in force in respect of the vehicle at the time of the accident limited coverage to occasions when the vehicle was used "for social, domestic and pleasure purposes." The third Respondent was driving the vehicle (a van) with a view to buying it from the second Respondent. He was carrying in the back of the vehicle 10 cases of empty Coca-Cola bottles which he was taking to his shop. He negligently collided with the first Appellant's stationary car.

The Appellants, having been joined as a third party in the first Appellant's action against the second and third Respondents, refused to accept liability under the Policy on the ground that the vehicle was not being used for any of the purposes contemplated in the Policy.

The trial court held that the vehicle was being so used and awarded damages against the Appellants.

32.3 DECISION OF COURT.

JUDGMENT

AMES, Ag.P.:-

My two learned brothers have read this judgment of mine but are unable to agree with it. It is therefore a dissenting judgment and I dissent with all respect to them.

This appeal arises out of a motor accident. The second Respondent (the first Defendant in the lower court), who is a trader, was the owner of what the Policy of insurance describes as a Ford Van. At the time of the accident, it was being driven by the third Respondent (the second Defendant in the lower court) with the authorisation of the second Respondent. It collided with the Plaintiff's car while the latter was stationary. The Plaintiff (the first Respondent in this appeal) sued both Defendants for damages for negligence.

The first Defendant obtained an order under the Third Party Procedure of Part V of Order XII of the Supreme Court Rules joining the Appellants, an assurance company, as a third party, because he claimed to be entitled to indemnity by them under his Policy of insurance.

The suit ended with judgment for the Plaintiff against the first Defendant (so one infers: it was not so stated specifically) for damages on account of his vicarious liability for the negligence of the second Defendant and also with an order—that the assurance company are liable to indemnity the insured without prejudice of their right to any claim they could bring against the second Defendant.¶ This appeal is brought by the company against that order.

Neither Defendant nor Plaintiff has appeared at the hearing.

The appeal is not concerned with the first Defendant's liability, nor with the quantum of damages. It is concerned only with the question of whether the use covered by the policy. The case for the Appellants is that it was not, and although there were several grounds of appeal, they add up to a complaint against the learned trial judge's finding that it was.

Now, whether it was or not, as the learned judge pointed out, was a question of fact. The first Defendant was the claimant against the Appellants and so the onus was on him to establish the fact. This appeal has been by way of rehearing, as provided in r.12 of the Rules of this court, and has involved a close examination of the evidence.

I have said that the first Defendant had authorised the second Defendant to use the vehicle. In a statement (Exhibit D) made on August 15th, 1960, he said that he did so because the second Defendant "wished to purchase the van and was trying it out in order to decide whether or not he would buy it." In his affidavit of October 14th, 1961 (at p.19 of the appeal record), he said that on the day before, he had left the van

with a mechanic for some repairs to be done and, not being able to collect it himself, had “requested the second Defendant to collect the said vehicle from the said Perindo Bamin and try same for me to see that it was in working order.”

Mr. Candappa drew our attention to this inconsistency but I do not think it matters, because the vehicle was being tested, whether with a view to purchase, or on behalf of the first Defendant. The vehicle is covered by the Policy when in use only for “social, domestic and pleasure purposes.” Mr. Candappa conceded that had the use on the occasion been for the purpose of testing only, its use would have been within the coverage of the Policy. But there was something more, “because at the time of the accident the second Defendant was using the van to transport” 10 cases of empties, which, so Mr. Candappa argued, was outside the coverage. On the face of it, it looks like a commercial or business use because of the large number of cases. Even that number of cases could, however, be transported for a social or domestic or pleasure purpose. The onus was on the first Defendant to show it to be the latter. He could use the car for the latter while testing it and be within the Policy but not for the former.

How did the first Defendant attempt to discharge the onus? He did not go into the witness box or call any witness, nor did the second Defendant. Consequently, he had to rely on what evidence the Plaintiff and the third party gave.

First of all, it is to be noticed that in his affidavit filed in support of his application for third party directions he averred in para. 5: “That as the second Defendant was driving with my authority and in and about my business. . . .” And this was repeated in para. 4 of his statement of claim against the third party where he averred:

“That at the time . . . the second Defendant was driving . . . in and about the business of the first Defendant. On that basis the first Defendant was out of court completely, because the Policy has an endorsement limiting the use of the van to “Use only for social, domestic and pleasure purposes.” This endorsement is a printed one, and the print also contained the words, and for the insured’s business. But these words have been ruled through to exclude them.

The Manager of the third party company said in the witness box:

“Both Yassin and Jabber made statements which form part of our record. These are two.” The statements were admitted in evidence. That of the second Defendant includes the following:

“My reason for driving C.92 was with a view to buying it for N. Jabber and Sons. I came from Murray Town towards Freetown and, as a favour carried on back of the van 10 cases of empty Coca-Cola bottles which I was taking to my shop and these were to be collected by Freetown Cold Storage.”

The mechanic who had repaired the van happened to be near when the accident happened. He was a witness called by the third party and he said: “I rushed to the scene. Jabber was driving the van proceeding from west to east. The van was carrying 10 cases of empties. He said he was carrying them as a favour for a friend.” Under cross-examination he added: “He said he was dropping the crates for friends at the Mesurado Fishing Co.”

That is the entirety of what the first Defendant relied on to discharge the onus of

proof. There was nothing more. The learned trial judge in his judgment, after remarks about bailments which, with respect, I think were irrelevant, continued: “with regard to these crates, Bamin’s evidence was that the second Defendant said... he was carrying them as a favour for his friend.” Bamin was called by the third party and his evidence was not challenged; further, there is no other evidence from which I should conclude differently.”

It is correct that the evidence of Bamin was not challenged: but it would be more relevant to note that his evidence of what the second Defendant said was not evidence as to the truth of what he said and that as neither the second Defendant nor the friend gave evidence, the statement of the second Defendant was not substantiated, not able to be tested and of no more value than hearsay is.

The learned judge continued:

“In *Passmore v. Vulcan Boiler & Gen. Ins. Co. (1)*, *du Parcq, J.* (as he then was) said that if the insured, as a matter of kindness, courtesy or charity, gave a lift to someone who happened to be on business of his own, he would think that the proper view was that the vehicle was then being used for a social purpose - in this case domestic purpose. I am not satisfied that as a fact the second Defendant was not using the van for a domestic purpose and I also feel that the principle enunciated by *du Parcq J.* could be extended to a person who is using the vehicle within the competency of the Policy — that is, with the permission of the insured.”

What *du Parcq, J.* said in *Passmore’s* case (1) was obiter and very different. He had in mind a man with a car insured when used for social, domestic and pleasure purposes and also for purposes of his own business (but not anyone else’s business). While using the car in his own business, he sees a friend walking on his way to his place of business, and gives him a lift. That would be using the car for a social purpose and not for a friend’s business. It is not analogous to what we have here. A more correct analogy to our case would have been of a man who, with a van insured when used for social, domestic and pleasure purposes but not his business purposes (much less anyone else’s), passes a friend’s shop with 10 cases of beer stacked outside looking as if they are to be transported somewhere, and he stops and finds that they are to be delivered to a customer. Out of kindness to his friend he transports them himself and has an accident while doing so. *Du Parcq, J.* would not have called that a —social purpose: the very facts in his decision in the case before him show that he would not have done so.

Of course, the second Defendant’s alleged friend might drink Coca-Cola in such quantities as to have 10 cases of empties to return or he might have given a large party the night before. On the other hand, he might have some business in which Coca-Cola drinks are sold, and so might the second Defendant, but nowhere in the proceedings did it appear what is the business and occupation of the second Defendant. How simple it would have been, since the second Defendant had declined to explain, to have called the friend to explain the social, domestic or pleasure circumstances in which the Coca-Cola was being transported by the second Defendant while having the temporary use of the first Defendant’s van to test it.

In my view, the first Defendant failed to discharge the onus which was upon him. I

would allow the appeal, set aside the order made against the third party Appellants and give judgment for them.

BANKOLE JONES, C.J:

I have had the opportunity of reading the judgment of the learned President and it is my misfortune to disagree with him and I do so with the utmost respect.

The appeal arises out of a claim for damages from an insurance company in a road accident case. The facts can be stated shortly:

On June 30th, 1960, a Ford van belonging to the first Defendant was being driven by the second Defendant when it ran into the Plaintiff's stationary car in circumstances from which the learned trial judge found that the second Defendant was guilty of negligence.

Third party proceedings were instituted by the first Defendant, and the Royal Exchange Assurance Company, with whom the first Defendant's van was insured, were ordered to be joined as parties to the action and they were so joined. On the date of the accident, the van was insured to cover only "social, domestic and pleasure purposes" and on the face of the insurance Policy the following printed words "and for the insured's business" had been struck out. When the accident occurred the second Defendant was carrying 10 empty crates of Coca-Cola.

Both the first and second Defendants made statements to the insurance company after the accident. The second Defendant made his on August 5th, 1960, and this was what he said:

"My reason for driving C.92 was with a view to buying it for N. Jabber and Sons. I came from Murray Town towards Freetown and as a favour carried on the back of the van 10 cases of empty Coca-Cola which I was taking to my shop and these were to be collected by Freetown Cold Storage."

The statement of the first Defendant is not important in this context. Judgment, so it seems, awarding damages against the company, was given in favour of the first Defendant on the learned trial judge's finding that the second Defendant's use of the van was covered by the Policy.

The company are the Appellants in this appeal, and although there are several grounds of appeal, all add up to one question for determination by this court, namely, whether the learned trial judge's finding was right.

It conceded that at the time of the accident, the second Defendant was driving the van with the permission and authority of the insured on a test trip in order to find out whether it had been properly repaired by Perindo Bamin, a motor mechanic who gave evidence on behalf of the Appellants. Mr. Candappa contends that at the material time, the van was not being used for any of the purposes of the insured. He submitted that it was being used contrary to the limitations of use endorsed on the Policy of insurance in that, cover having been restricted to social, domestic and pleasure purposes, the van was used for the carriage of goods.

It is, as a rule, a pure question of fact, as the learned trial judge stated, whether a vehicle was on any particular occasion being used for private or business purposes,

and the onus of proof in my view, must rest on the Defendant. In this case, the Defendants did not give evidence nor were witnesses called on their behalf. This is not to say that one must not look at the entire evidence to find out whether that burden was discharged in some way or other. Looking at it very carefully, as I think I have done, it seems to me clear that the second Defendant was carrying the empty crates merely as a matter of kindness or favour for a friend of his at the Mesurado Fishing Company to his own shop, there to be collected by the Freedom Cold Storage. It is common knowledge that this Fishing Company operates its fishing business at Murray Town, from where the second Defendant stated he was proceeding to Freetown.

The evidence on the whole amounts to nothing more than this, namely, that the prime purpose of the second Defendant in driving the van was to test it and that his conveying the empty crates was merely incidental to that purpose. In principle, it would have made no difference whether he was conveying one empty crate or 10 empty crates, if this was done as a matter of favour to someone and not in the course of either the insured's business or his own or any other person's, as appears to be the case here. The quantity in my view does not matter. There was in fact, no complaint about his exceeding the carrying capacity of the van. Even if there was, he would only have been guilty of an offence under our Road Traffic Act. What I find significant is the fact that Mr. Candappa in his argument conceded that if the insured had himself been carrying these crates in the circumstances under the second Defendant carried them, the Appellants would have been liable. This, to my mind, is an admission that the second Appellant was covered under the Policy, because if the insured could have done the same thing, so to speak, with impunity, so could anyone drive his vehicle with his permission and authority. The learned trial judge in my view was therefore right in the finding of fact he arrived at.

Mr. Candappa has quarreled, and not without justification, with the manner in which the learned trial judge framed his purported award of damages. The learned trial judge stated: *"I order that the assurance company are liable to indemnify the insured without prejudice to their right to any claim they could bring against the second Defendant."* He ought, with respect, to have stated in unequivocal language that he was "awarding damages" against the third party and nothing more. I would dismiss the appeal.

DOVE-EDWIN, J.A.:

The facts in this appeal are simple. On or about June 30th, 1960, the Plaintiff's car C350 was involved in a collision with the first Defendant's Ford van No.

C.92. The Plaintiff alleged negligence on the part of the then driver of the Ford van.

C.92. The driver was the second Defendant.

In her action against both Defendants, the Plaintiff succeeded and got damages totaling about £368. 7s. 0d. The first Defendant had applied to join the Appellants, the Royal Exchange Assurance Company, who the first Defendant claimed should indemnify him against any judgment that may be given against him, as his van at the time of the collision was comprehensively insured with them.

The insurance company denied liability and said that at the time of the accident, the van was being used outside the scope for which it was insured. The learned trial judge found against them and made this order: "I order that the assurance company is liable to indemnify the insured and went on to say "without prejudice to their right to any claim they could bring against the second Defendant." It is with this order that this appeal is concerned.

The Plaintiff and the two Defendants in the main case did not appear in this court and there was no appeal from any of them.

The grounds of the appeal could easily be stated thus: "Was the vehicle C.92 at the time of the collision carrying goods which would be outside the scope for which the vehicle was insured?" It is not denied that the vehicle at the time of the collision was comprehensively insured with the Appellants. In the Policy, which is an exhibit in the case, the limitation as to use reads thus: "use for social, domestic and pleasure purposes." It is because of this that the insurance company has refused to accept liability. They say that at the time of the collision, the van was carrying goods.

It is not disputed that at the time of the collision, there were 10 cases of empty Coca-Cola bottles in the van and it is this that the company has referred to as goods.

In the affidavit of the Solicitor for the insurance company, it is said in para. 2: "The first Defendant's van C.92 was being used contrary to the limitations of use endorsed on the said policy of insurance in that, cover being restricted to social, domestic and pleasure purposes, the said motor van was being used for the carriage of goods."

Another Solicitor for the insurance company at the trial said in his submission to the court: "The second Defendant said he was carrying the crates for his friend. This was a social purpose connected with the second Defendant and not the first Defendant." As I understand, counsel who appeared for the Appellant in this court, had the first Defendant, the owner of the vehicle, been driving his vehicle at the time of the collision, the Appellants would have been liable. This view agrees with counsel's view at the trial to some extent.

In my view, the 10 cases of empty Coca-Cola bottles in the van at the time of the collision were not "goods" and I agree with the Solicitor at the trial that it was social, but disagree with him in the rest of his submission.

The vehicle, a Ford van, was being driven by the second Defendant with the consent and approval of the insured, the first Defendant. It was going through a test with a view to it being purchased by the second Defendant. To put 10 cases of empty Coca-Cola bottles at the back of the van, which by its construction could carry a load, could not make a purely social matter into a business one. It could be useful in the test. The fact that the second Defendant was driving at the time makes no difference at all, for according to the Policy:

"In terms of and subject to the limitations of the indemnity which is granted by this section to the insured the company will indemnify any driver who is driving the motor car on the insured's order or with his permission provided that such driver (a) is not entitled to indemnity under any other Policy and (b) shall as though he were the insured observe, fulfill and be subject to the

terms, exceptions and conditions of the Policy as far as they can apply.”

The second Defendant did not do anything that could be said to be outside the terms of the Policy.

It is my opinion, therefore, that this was purely social and that the insurance company must be held liable to indemnify the insured.

For these reasons, I find myself in entire agreement with the learned Chief Justice’s views dismissing the appeal and respectfully regret that I am unable to agree with the learned President’s decision to allow the appeal. I would dismiss the appeal.

Appeal dismissed.

32.4 REMARKS

This instant matter is where a policyholder sought to recover from an Insurer-claims on an accident arising from the use of a Motor Vehicle, which purpose of use was not as contemplated by the Policy.

The court refused to uphold the appeal based on opinions offered by two (2) Appeal Judges.

32.5 REFERENCES

- I. Passmore v. Vulcan Boiler & Gen. Insurance Company (1935), 52 T.L.R. 193 154 L.T. 258.*

33.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL

DATE: 26th April, 2013

SUIT NO: CA/185/2011

JUDGE: Abdu Aboki, J.C.A.
Ita George Mbaba, J.C.A.
Habeeb Adewale Abiru, J.C.A.

**UNITED BANK FOR AFRICA PLC.
(Defendant/ Appellant)**

vs

**COMRADE CYCLE LIMITED & ANOR
(Plaintiff/ Respondent)**

33.2 REPORTS/FACTS/ISSUES

COMMERCIAL LAW: – CONTRACT – TERMS OF CONTRACT-Whether parties are bound by the provisions or terms of the contract or agreement.

TORT AND PERSONAL INJURY– NEGLIGENCE: - Issue of ‘duty of care’ as synonymous with a claim in negligence and as one of the constituent elements to be established in a case predicated thereon –Where party did not predicate case on negligence and the parties did not join issues on whether or not duty of care owed was breached – Proper treatment of.

33.3 DECISION OF COURT.

JUDGEMENT

HABEEB ADEWALE OLUMUYIWA ABIRU, J.C.A. (delivering the leading judgment):

This is an appeal against the judgment of the High Court of Kaduna State in Suit No. KDH/Z/45/98 delivered by Honourable Justice Dogara Mallam on the 28th September, 2010. The claim of the Respondents, as Plaintiffs, against the Appellant, as Defendant, was for the sum of ₦10 Million as compensation for the loss of their property. The Respondents filed an Amended Statement of Claim dated the 19th of January, 2006 (pages 42 to 44 of the records).

The Appellant responded by filing a better and Further Amended Statement of Defence and Counter-Claim dated the 18th of May, 2009 (pages 100 to 102 of the records). By the Counter-Claim, the Appellant prayed for:

1. The sum of ₦2,900,000.00 (Two Million Nine Hundred Thousand Naira only) being the outstanding indebtedness of the Plaintiffs to the Defendant of principal and interest standing unpaid as a result of the Plaintiffs' breach of legal mortgage agreement dated the 13th of August, 1990 registered as No KDR 84 at page 84 in Volume 69 (Miscellaneous) of Kaduna State Land Registry at Kaduna.
2. Interest on the ₦2,900,000.00 at the current bank rate.
3. The cost of this counterclaim.

The Respondents filed an Amended Reply to the Statement of Defence and it was dated the 15th February, 2007 (pages 59 to 60 of the records).

This case of the Respondents was that the first Respondent was a customer of the Appellant and that it applied for and was granted an overdraft facility of ₦260,000.00 in 1991 on terms and conditions embodied in a Deed of Legal Mortgage registered on the 17th of January, 1991 and the Mortgage was created over a property lying and being at Zaria and covered by Certificate of Occupancy No 18056. It was their case that the first Respondent was subsequently granted an enhancement in the overdraft facility and for which the Appellant demanded for an additional property as further security and the second Respondent deposited the Certificate of Occupancy No NC17772 of his house situate at the end of Manchester Road, GRA, Zaria. It was the case of the Respondents that this said property was gutted by fire before it was embodied as additional security in the deed of Legal Mortgage.

It was the case of the Respondents that the said property was valued at ₦10 Million at the time it was deposited with the Appellant as additional security and that by the terms of the original Deed of Legal Mortgage, clauses 3(c) and 3(d) thereof, the property was to be comprehensively insured under an all-risk insurance cover by themselves or the Appellant for its true value of ₦10 million at the time of the insurance. It was their case that the Appellant opted to insure the property for its full value and assumed full responsibility for paying the premiums, and it paid the premiums by debiting the account of the first Respondent whenever the premium fell due. It was their case that in November of 1994, during the life of the insurance Policy, the property was gutted by fire and destroyed beyond economic repairs and that they thereby became entitled to the payment of compensation under the insurance Policy. It was their case that since the fire incident, they have made several demands from the Appellant for the payment of the insurance compensation, and all they received were barren promises from the Appellant to request payment of the compensation.

The Appellant, in response, admitted that it extended an overdraft facility to the first Respondent and that the loan facility was secured by the second Appellant's property situated at No 3, Hanwa Road, Zaria. It was its case that the Respondents stopped operating their account in 1991 after the facility was granted and that the valuation of the property was not ₦10 million as at the time the loan was granted. It was its case that it was a condition for the grant of the loan that the Respondents must insure the property sought to be mortgaged and that it did not enter into or sign any insurance Policy on behalf of the Respondents and it was the Respondents that entered into an insurance Policy before the disbursement of the loan sum and it only

took over the payment of the premiums to ensure effective and prompt payments thereafter.

It was the case of the Appellant that after the property was gutted by fire, the Respondents brought to it an alleged cost of repairs, claiming that the property was underinsured when it was the second Respondent who insured the property. It was its case that it empathized with the Respondents and it held discussions with the second Respondent to seek ways of assisting them and that there were pending actions, including the present action, between the parties at the time. It was its case that, as its way of assisting the Respondents, it reached an agreement with the Respondents that the Respondents pay the sum of ₦1.7 million in full and final settlement of their ₦4.6 million indebtedness to it and in return for which all pending suits, including this present one, will be withdrawn by the Respondents. It was its case that the second Respondent paid the agreed sum ₦1.7 million in full and final settlement of its indebtedness and which the Appellant accepted but surprisingly turned around to continue this case against it and that its offer was not based on admission of liability to the Respondents on the insurance claim, rather it was to save its corporate image from unnecessary litigation. It was its case that the insurance Company offered the sum of ₦193,000.00 and that several claims' Forms were sent to the second Respondent for his signature to enable the processing of the sum from the insurance Company, but that the second Respondent refused to sign the Forms.

In their reply to the Counter-Claim, the Respondents admitted that the Appellant made an offer to them to pay the sum of ₦1.7 million in full and final settlement of an indebtedness of ₦4.6 million and it was their case that it was to settle the case in Suit No KDH/Z/39/94 – *Comrade Cycle Co. (Nig) Limited v. UBA Plc & Anor.*

It was their case that they commenced that suit as a result of the Appellant's mischievous instruction to an auctioneer to sell their property at No. 3, Hanwa Road, GRA, Zaria and that they accepted the offer, paid the sum of ₦1.7 Million in full and final settlement of their indebtedness and they ceased prosecuting the said Suit No KDH/Z/39/94 and by reason whereof the suit was struck out. It was their case that the offer of compromise had nothing to do with this present case, as the issue that brought about this case arose after the offer and this suit did not form part of their discussions.

The matter went to trial, and in the course of which the Respondents called one witness and tendered exhibits, while the Appellant called three witnesses and also tendered exhibits. At conclusion of trial, the lower Court entered judgment awarding the sum of ₦6,451,651.32 to the Respondents and dismissing the Counter-Claim of the Appellant. The Appellant was dissatisfied with the judgment, and it caused a Notice of Appeal dated the 12th of October, 2010, to be filed against it, and the Notice of Appeal contained four grounds of appeal.

Counsel to the Appellant filed a Brief of Arguments before this Court and it was dated and filed on the 21st of July, 2011. The Brief of Arguments of the Respondents was dated and filed on the 17th of November, 2011. At the hearing of this appeal on the 19th of March, 2013, Counsel to the Appellant was present in Court and he adopted his Brief of Arguments while the Counsel to the Respondents was absent and the Brief of Argument was deemed argued under the provisions of Order 18 Rule 9(4) of the Court of Appeal Rules 2011.

Counsel to the Appellant distilled three issues for determination in his Brief of Arguments and these were:

1. Whether the fact of lack of due diligence and non-disclosure of all facts about the insured property was part of either party's case at the trial court, and if not, the effect of raising same *suo motu* by the trial Court.
 2. Whether the trial Court failed to evaluate the evidence led and whether such failure occasioned a miscarriage of justice.
 3. Whether the failure to act on the evidence accepted by the learned trial judge on the issue of settlement/withdrawal of this suit resulted in injustice to the Appellant.
- In the Respondents' Brief of Arguments, Counsel to the Respondents adopted the three issues as formulated by the Appellant. The issues shall be dealt with separately. On the first issue for determination, Counsel to the Appellant stated that in its judgment, the lower Court said thus:

"Since by Exhibit P.3 the Plaintiff's burnt mortgaged property is worth ₦10,296,000.00 as at the time it was insured by the Defendant for only ₦650,000.000, the reasonable inference or conclusion to be drawn from this is that the Defendant did not exercise due diligence in the discharge of their duty and omitted to or failed in their duty of care to the Plaintiffs to ensure that the proper value of the mortgaged property was insured.

Another inference to be drawn from this is that the Defendant has not disclosed all the facts or the whole truth regarding the insured value of the burnt property and the actual money paid by the insurance Company to the Defendant..." Counsel stated that neither party pleaded lack of due diligence or non-disclosure of facts about the insured property and also that no evidence was led at the trial Court suggesting either lack of due diligence by the Appellant or non-disclosure of facts about the insured property. Counsel stated that the issues were raised *suo motu* by the lower Court and that the parties should have been invited to address the Court before the Court went ahead to make the findings in its judgment. Counsel submitted that this amounted to a travesty of justice and Counsel referred to a plethora of authorities on the point. Counsel urged the Court to resolve the issue in favour of the Appellant.

In the response arguments, Counsel to the Respondents stated that the lower Court did not raise any of the issues complained about by Counsel to the Appellant *suo motu* and submitted that sometimes there is no need to call evidence to prove the materiality of a fact if such a fact is obvious in the eyes of the court, Counsel submitted that the findings of the lower Court on the issue of non-disclosure of facts was a conclusion reached from the evidence led by the parties particularly on the issue of the withholding of the cheque for the insurance sum by the Appellant. Counsel stated that the findings were a product of the evaluation of the evidence of the parties, which was the sole duty of the lower Court. Counsel urged that this issue for determination be resolved in favour of the Respondents.

It is a principle of civil litigation that parties and the court are bound by the pleadings and a court cannot make out its own case outside the pleadings of the parties. A court should not set up for parties a case different from the one set up by the parties in the pleadings, *Skye Bank Plc v. Akinpetu* (2010) 9 NWLR (pt 1198) 179 and *Baliol (Nig) Limited v. Navcon (Nig) Limited* (2010) 16 NWLR (pt 1220) 619. A court must

confine its judgment to the determination of the issues raised on the pleadings – *First Bank of Nigeria Plc v. Olaleye (2013) 1 NWLR (pt 1334) 102*.

These said, however, it must be recognized that it is part of the duty of the trial Court, in the course of evaluating the evidence led by the parties, to draw inferences and make conclusions there from. Such inferences and conclusions, where they arise from the evidence led and are on issues joined by the parties on the pleadings, cannot amount to a court setting up a different case for a party.

The full passage of the part of the judgment complained against by the Appellant read thus:

“... Exhibit D.6 is the valuation report prepared by Charlie Aniagolu and Co. a firm of Estate surveyors and valuers for and on behalf of the Defendant which puts the open market value of the burnt mortgaged property at ₦2,350,000.00 as per Exhibit D.3 which is the value of their interest in the property without consideration nor interest charges”. DW3 said that the Defendant contacted the insurance Company over the issue of the burnt mortgaged property and they paid the sum of ₦193,000.00 for the Plaintiffs and which sum they wrote the Plaintiffs to come and collect and they refused.

Since by Exhibit P.3 the Plaintiff's burnt mortgaged property is worth ₦10,295,000.00 as at the time it was insured by the Defendant for only ₦650,000.000, the reasonable inference or conclusion to be drawn from this is that the Defendant did not exercise due diligence in the discharge of their duty and omitted to or failed in their duty of care to the Plaintiffs to ensure that the proper value of the mortgaged property was insured. Another inference to be drawn from this is that the Defendant has not disclosed all the facts or the whole truth regarding the insured value of the burnt property and the actual money paid by the insurance Company to the Defendant. This is because neither the cheque nor a copy of same or the letter forwarding same to the Defendant had been made available to the Plaintiffs or tendered in evidence except the voucher evidence of the DW3 that the sum of ₦193,000.00 was paid by the Insurance Company to the Defendant and for the Plaintiffs. The insured value of the burnt property is ₦650,000.00 as per Exhibit D3 whereas, the insurance Company paid the sum of ₦193,000.00 to the Plaintiffs. The Defendant did not disclose how much was paid to it since it too has an interest in the property.” (See pages 191 -192 of the records).

Now, one of the issues joined by the parties in this matter was on the insured value of the mortgaged property. Reading through the above reproduced portion of the judgment, it is beyond contest that the inference drawn by the lower Court that the Appellant did not disclose all the facts or the whole truth regarding the insured value of the burnt property and the actual money paid to it by the insurance Company arose from the evidence led by the parties and it was on an issue joined by the parties on the pleadings. The inference was thus properly made by the lower court and did not amount to the lower court raising an issue *suo motu*.

The same cannot, however, be said for the other inference made by the lower court that the Appellant “did not exercise due diligence in the discharge of its duty and omitted to or failed in their duty of care” to the Respondents to ensure that the proper value of mortgaged property was insured. The issue of ‘duty of care’ is synonymous

with a claim in negligence; it is one of the constituent elements to be established in a case predicated on negligence – *Abubakar v. Joseph* (2008) 13 NWLR (Pt 1104) 307, *Iyere v. Bendel Feeds and Flour Mills Limited* (2008) 18 NWLR (pt 1119) 300, *GKF Investment Nigeria Limited v. Nigerian Telecommunications Plc* (2009) 15 NWLR (pt 1164) 344. The Respondents did not predicate their case in this matter on negligence and the parties did not join issues on whether or not the Appellant breached its duty of care to the Respondents. The inference by the lower Court was on a matter alien to the pleadings of the parties and was thus improper.

The Appellant has urged this court to find that this wrong inference amounted to the lower Court raising an issue *suo motu* without inviting the parties to address on it and that this has led to a miscarriage of justice in the matter.

It must be stated that the concept of miscarriage of justice is not a speculative concept and it is not considered in the abstract but in concrete terms based on the peculiar facts of each case. Therefore, a party alleging miscarriage of justice by reason of issues raised *suo motu* by a court will not succeed by merely parroting the concept, he must show in clear and real terms the injustice or injury he suffered on the face of the records and which is traceable to the issues so raised *suo motu* by the Court. In *Abubakar v. Nasumu (No 2)* (2012) 17 NWLR (Pt 1330) 523 at 588 D-E Rhodes-Vivour, JSC put the point thus:

“Miscarriage of justice” varies from case to case. The facts and circumstances of the case must be examined. It could mean failure of the court to do justice, or justice misapplied. Put in another way, it is failure of justice. In effect, there is miscarriage of justice if the order of the court is prejudicial or inconsistent with the right of a party.

The Respondents were unable to show how they were prejudiced by the Appellants’ application by letter, or how an application by letter to trigger pre-hearing session, granted by tribunal amounts to miscarriage of justice. Since the Respondents were unable to show any of the above in the tribunal or in this court, their objection was frivolous.

The Appellant, in the instant case, did not show or demonstrate the injustice or injury he suffered on the face of the records by reason of the said issue raised *suo motu* by the lower Court and it is not evident from the records that the said issue formed the fulcrum of the judgment entered by the lower Court in this matter. The Appellant thus failed to show that there was a miscarriage of justice brought about by the improper inference made by the lower Court. The first issue for determination must be resolved in favour of the Respondents.

On the second issue for determination, Counsel to the Appellant stated that what the lower court did in its judgment was to summarize or recount the evidence led at trial and then take umbrage under the worn-out phrases of “I accept” and “I believe” without evaluating the evidence. Counsel submitted that the summary of evidence was not equivalent to evaluation of evidence and he referred to the case of *Mini Lodge Limited v. Ngei* (2009) 12 SC (pt 1) 94 amongst others. Counsel reproduced the principles on evaluation of evidence enunciated by the courts in *Ukaegbu v. Nwololo* (2009) 1-2 SC (pt 1) 21 and in several other cases and submitted that the lower court did not comply with the said principles in its evaluation of the evidence led by the

parties in this matter.

Counsel to the Respondents submitted, in response, that the lower court fully discharged the responsibility placed on it and it properly and dispassionately appraised the evidence led by the parties at trial and that it carried out the evaluation of the evidence in accordance with the laid down principles enunciated in the decided cases. Counsel stated that where it is shown that the lower court satisfactorily carried out its function of evaluating the evidence of parties, the appellate Court will have no choice than to affirm the decision and he referred to the case of *Osuji v. Ekeocha* (2009) MJSC (pt 11) 74.

It is trite that a trial court has two duties with respect to the evidence led by parties in a trial. The first step is to record all relevant evidence, which is called perception. The second step is to weigh the evidence in the context of the surrounding circumstances, which is an evaluation. A finding of fact by a trial court involves both perception and evaluation. *Guardian Newspapers Limited v. Ajeh* (2011) 10 NWLR (Pt 1256) 574, *Nacenn Nigeria Limited v. Bewac Automotive Producers Limited* (2011) 11 NWLR (pt 1257) 193, *Wachukwu v. Owunwanne* (2011) 14 NWLR (pt 1266) 1.

It is the primary responsibility of a trial court to hear the parties, watch and observe the demeanour of witnesses called to testify before it, admit or reject documents tendered, ascribe probative value to the evidence and then come up with a decision. This is regulated by time-honoured procedure designed to mete out justice to both parties before the court. The procedure is crucial in its observance. The trial court is enjoined to place the totality of the testimonies of both parties on an imaginary scale. One side of the scale will contain the evidence of the Plaintiff, while the other side will harbor the evidence of the Defendant. The court must then weigh them together to see which side is heavier than the other. This is in terms of quality, not quantity. To help the court in this regard, it should consider whether the evidence led by a party in its totality is relevant, admissible, credible, conclusive and more probable than that adduced by the other party. Once these considerations fall into line, the court will then apply the relevant laws to the facts or evidence adduced, to reach a decision. The observance of the procedure for the evaluation of evidence is crucial to arriving at a just decision. Its breach will most likely lead to a perverse decision, *Mogaji v. Odojin* (1978) 4 SC 91, *Adeleke v. Iyanda* (2001) 13 NWLR (pt 729) 1, *Okoko v. Dakolo* (2006) 14 NWLR (pt 1000) 401, *Tippi v. Notani* (2011) 8 NWLR (pt 1249) 285.

Reading through the judgment, it is correct that the lower Court used the phrases, “of accept the evidence” and “I believe the evidence” in several places, but this was more a matter of style of writing rather than a lack of proper appraisal of the evidence led by the parties. A dispassionate review of the judgment shows that the lower court stated its reasons for accepting and/or believing the evidence led by the parties and that it complied substantially with the laid down principles on evaluation of evidence. Counsel to the Appellant did not point out in his Brief of Arguments the aspects of the evidence led by the parties that the lower Court failed to evaluate. It is apparent that the grouse of the Appellant is with the style of writing adopted by the lower court; the use of the phrases “I accept” and “I believe”, which appeared in several places in the judgment.

It is settled law that there is no specific format prescribed either by adjectival or substantive law for writing a judgment or ruling. Every Judge reserves the right as to his own style of writing, whether sitting at the trial or appellate level of courts. What is most paramount is that a Judge must pronounce on the issues submitted by the parties for adjudication and state the reasons for his resolving the issues one way or the other *Nwankudu v. Ibeto* (2010 2 NWLR (pt 1231) 209, *Aregbesola v. Oyinlola* (2011) 9 NWLR (pt 1253) 458 and *Ovunwo v. Woko* (2011) 17 NWLR (pt 1277) 522. The lower court in the instant case pronounced on the issues submitted by the parties and it stated the reasons for resolving the issues one way or the other.

The complaint of the Appellant on this issue for determination was not well-founded and the issue is hereby resolved in favour of the Respondents.

On the third issue for determination, Counsel to the Appellant stated that the lower Court found in its judgment thus:

“I also believe the Defendant’s evidence that they agreed to waive part of the loan or interest on conditions that the Plaintiffs paid ₦1.7 million as full and final settlement of their debt and withdraw all the cases he filed against the Defendant such as the suit in exhibit D1 which the Plaintiffs filed to stop the Defendant from exercising its right to sell the mortgaged properties under the Deed of Legal Mortgage and the instant one or suit. I also believe the evidence of the Defendant that the Plaintiffs paid the ₦1.7 million and with the suit in exhibit D1 but refused to withdraw the instant suit.”

Counsel stated that the lower court failed to act on this finding of fact and that if the lower court had acted thereon, its decision would have been different as the Respondent would have been caught by the doctrine of promissory/equitable estoppels or estoppels in pais. Counsel submitted that the continuation of this matter by the Respondents was in clear breach of the agreement as found by the lower Court after the Appellant had honoured their part of the bargain and altered their position. Counsel cited several authorities on the principle of estoppel by conduct or ***estoppels in pais*** and he urged this court to hold that the Respondents are caught by the ***doctrine of estoppels*** in pais and to strike out this suit accordingly. Alternatively, and in case this court finds that the Respondents were not caught by estoppels in pais, Counsel urged that this Court finds that the Appellant was entitled to its claims on the counter-claim.

In the response, Counsel to the Respondents stated that there was no breach of any agreement on the part of the Respondents because by the letter dated 26th of August, 1998, Exhibit D4, the agreement that the Respondent should pay the sum of ₦1.7 million in full and final settlement of their indebtedness had no condition attached to it.

Counsel submitted that it is trite that where there is oral and documentary evidence before a court, the latter should be used to evaluate the oral testimony. Counsel referred to the submission of counsel to the Appellant in the brief of argument and submitted that the Respondents cannot be said to be caught by the doctrine of ***estoppels in pais*** because it was clear from the evidence before the Court that the agreement between the parties was that the Respondents were to withdraw all the other suits except this present one and that there was no documentary evidence

presented by the Appellant proving otherwise. Counsel urged this Court to resolve this issue in favour of the Respondent.

Reading through the judgment, the lower court indeed made the statements quoted above and the findings contained therein in the course of its evaluation of the evidence led by the parties (see page 191 of the records). The Respondents have not challenged or contested the said statements of the lower court on this appeal and they will be deemed to accept the findings therein contained as correct and binding – *Inakoju v. Adeleke* (2007) 4 NWLR (pt 1025) 423. The entire submission of counsel to the Respondents on this third issue for determination was thus completely off point. Counsel to the Appellant submitted that the lower court failed to act on the statements and findings and thus occasioned a miscarriage of justice because if the lower court had done so, its decision would have been different as the continuation of his matter by the Respondent would have been caught by the doctrine of promissory/equitable estoppel or estoppels in pais. The Appellant raised this issue in its better and Further Amended Statement of Defence before the lower court and the Respondents joined issues with the Appellant thereon in their Amended Reply to the Statement of Defence.

Estoppel is an admission or something that the law views as equivalent to an admission. By its very nature, it is so important, so conclusive, that the party whom it affects is not allowed to plead against it, or adduce evidence to contradict it. Estoppel prohibits a party from providing anything that contradicts their previous acts or declarations to the prejudice of a party who, relying upon them, has altered their position. It shuts the mouth of a party – *Maya v. Oshuntokun* (2001) 11 NWLR (pt.723) 62, *Adone v. Ikebudu* (2001) 14 NWLR (pt 733) 385, *Nikagbatse v. Opuye* (2010) 14 NWLR (pt 1213) 50. It is a liability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to the disability; that is, he is not allowed to say a certain statement of fact or assertion he made is untrue, whether in reality it is true or not *Omnia (Nig) Limited v. Dyktrade Limited* (2007) 15 NWLR (pt 1058) 576, *Agbogunleri v. Depo* (2008) 3 NWLR (pt 1074) 217, *Polyvalent (Nig) Limited v. Akinbote* (2010) 8 NWLR (pt 1197) 506.

In *Ukaegbu v. Ugoji* (1991) 6 NWLR (pt 196) 127 at page 157, Karibi-whyte, JSC defined estoppels by quoting with approval the statement of Denning MR in *Moorgate Mercantile Co. Limited v. Twitching* (1976) 1 QB 225 thus:

“Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this: when a man, by his words or conduct, led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust and inequitable for him to do so.”

1. T. Mohammed, JCA (as he then was) in *Opara v. Omolu* (2002) 10 NWLR (pt 774) 177 at page 190 defined estoppels thus:

“An estoppels simpliciter is that phenomenon where a man either in express terms or by conduct, makes a representation to another of the existence of a state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts to the detriment of him who so believes and acts, then the first is stopped from denying the existence of such a state of facts.

Estoppel has many variants, and the variant canvassed by the Counsel to the Appellant in this matter is the doctrine of estoppel by representation, also known as estoppels by conduct and as estoppels in pais.

This doctrine of estoppels arises in three situations. Firstly, if a man by his own words or conduct willfully endeavours to cause another to believe in a certain state of things which the first knows to be false and if the second believes in such state of things and acts upon the belief, he who knowingly made the false statement is stopped from averring afterwards that such a state of things does not exist at the time.

Secondly, if a man, either in express terms or by conduct, makes representation to another of the existence of a state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believe and acts, the first is stopped from denying the existence of such state of facts.

Thirdly, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean certain representation and that it was a true representation and that the latter was intended to act upon it and in a particular way and he, with such belief, does act in that way to his damage, the first is stopped from denying the facts as represented – *Ige v. Amakiri* (1976) 11 SC 1, *Oyeyemi v. Commissioner for Local Government, Kwara State* (1992) 2 NWLR (pt 266) 661, *Olalekan v. Wema Bank Plc* (2006) 13 NWLR (pt 998) 617, *University of Ilorin v. Adesina* (2010) 9 NWLR (pt 1199) 331, *Afribank Nig Plc v. Anuebunwa* (2012) 4 NWLR (pt 1291) 560.

In *Kpansanagi v. Shabako* (1993) 5 NWLR (pt.291) 67, Musdapher, JCA (as he then was) stated the doctrines at page 79 thus:

“It is a rule of universal law that if a man either by word or conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it although it could not have been lawfully done without his consent and he thereby induces that other to do that from which the other party otherwise might have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of that other who has given faith to his word or the fair inference to be drawn from his conduct. In such cases proof of positive assent or concurrence is unnecessary. It is enough that the party had full notice of what was being done and the position of the other party altered.”

Similarly, in *Chukwuma v. Ifeloye* (2008) 18 NWLR (Pt 1118) 204, Ogbuagu, JSC said of the doctrine at pages 237 thus:

“Where a person or one by words and/or deed or conduct made to another a clear and unequivocal representation of a fact either with knowledge of its falsehood or with the intention that it should be acted upon, or has conducted himself that another would, as a reasonable man with his full faculties, understand that a certain representation of fact was intended to be acted upon, and that other person in fact acted upon the representation whereby his position was thereby altered to his detriment, an estoppel arises against that person who made it and he will not be allowed to say that the representation is not what he presented it to be. This is known as estoppels by conduct or estoppels in pais. In other words, where one by his words

or conduct willfully causes another to believe the existence of certain state of things and induces him to act on the belief so as to alter his previous position, the former is precluded from asserting against the latter a different state of things as existing at the same time.”

The principle upon which estoppel by representation is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt for their legal relations: *First Bank of Nigeria plc v. Sangonuga* (2007) 3 NWLR (pt 1021) 230, *Afribank Nig Plc. vs Anuebunwa* (2012) 4 NWLR (pt 1291) 560. The doctrine of estoppel by representation is a defective doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way: *Chukwuma v. Ifeloye* (2008) 18 NWLR (pt 1118) 204. Thus, where a party, by his words or action, ignites a deserving response from the other party, will be estopped from denying the truth or otherwise of his words or actions from complaining about the response of the party – *Iloabachie v. Iloabachie* (2005) 13 NWLR (pt 943) 695.

The facts as proved and accepted by the lower court were that at a point in time, the Respondents had pending actions against the Appellant, including this present matter, and that the indebtedness of the Respondents to the Appellant at the time stood at ₦4.6 Million; that as a compromise of all the pending matters, the Appellant and the Respondents agreed that the Respondents should pay the sum of ₦1.7 Million in full and final settlement of the said outstanding Indebtedness and that the Appellant should accept the said sum in return for which the Respondents would discontinue all the pending actions, including this present one; that the Respondents paid the sum of ₦1.7 Million and the Appellant accepted it in full settlement of the said indebtedness but the Respondents failed to discontinue this present matter and continued with its prosecution till judgment.

Applying the above-stated principles of estoppels by representation to these proved facts, it is clear that the continued prosecution of this matter by the Respondents was caught by the doctrine of estoppels by representation. It is unconscionable and it amounts to a fraud on the part of the Respondents to take advantage of the waiver of the sum of ₦2.9 million made by the Appellant in the belief that this action would be discontinued, only to turn back thereafter to continue the matter. It is trite that estoppel is a complete defence to an action and that the proper order to make in an action caught by the doctrine of estoppel is an order of dismissal – *Lamina v. Ikeja Local Government* (1993) 8 NWLR (Pt 314) 758. It is apparent from the records of appeal that the lower court did not act on these proved facts and did not offer any reasons for failing to do so. The lower court, having accepted and believed the facts of these representations as proved, ought to have acted on them and applied the law accordingly. This Court agrees with the Counsel to the Appellant that failure of the lower court to act on the proved facts led to a miscarriage of justice in the circumstances of this case. The third issue for determination is resolved in favour of the Appellant.

The resolution of the third issue for determination provides the merits in this appeal. The appeal is hereby allowed. The judgment of the High Court of Kaduna State in suit No KDH/Z/45/98 delivered by Honourable Justice Dogara Mallam on the 28th

of September, 2010 is hereby set aside. The continued prosecution of the suit, suit No KDH/Z/45/98, having been caught by the doctrine of estoppel by representation, the suit ought to have been dismissed and it is hereby dismissed. The parties shall bear their respective costs in this appeal. These shall be the orders of this court.

ABDU ABOKI, J.C.A:

I agree.

ITA G. MBABA, J.C.A:

I had the advantage of reading the draft of the judgment just delivered by my learned brother, HABEEB A. ABIRU JCA. As is usual with him, my Lord has carefully and admirably engaged all the issues raised for consideration and I agree with all his reasoning and conclusions. I think the lead judgment has said all that needed to be said on point of triumph of the appeal, being the valid findings of the trial court, that the Respondents reneged on the agreement which the parties had, that on payment of 1.7 Million naira by the Plaintiffs to the Defendant, in full and final settlement of their debt and withdrawal of all the cases against the Defendant, the Defendant would waive part of the loan or interest. The Plaintiffs (Respondents) had paid the amount, but failed to withdraw this suit (which was one of the cases they had a duty, under the agreement, to withdraw).

Having made that valid finding, the trial court had a duty to hold the Respondents to live up to their promise or declaration, having led the Appellant to believe and adjust to the expectations in the promise/declaration.

It is the law that:

“Where parties have entered into a contract or an agreement voluntarily and there is nothing to show that the same was obtained by fraud, mistake, deception, or misrepresentation, they are bound by the provisions or terms of the contract or an agreement. This is because a party cannot ordinarily resile from a contract or agreement, just because they later found that the conditions of the contract or agreement are not favourable to them. This is the whole essence of the doctrine of sanctity of contract or agreement”.

See the case of A.G. Rivers v. A.G. Akwa Ibom (2011) 8 NWLR (Pt. 1248) 31, ratio 1.

See also section 169 of the Evidence Act, 2011, which says:-

“When one person has, either by virtue of an existing Court judgment, deed or agreement, or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he or his representative in interest shall be allowed in any proceeding between himself and such person or such person’s representative in interest, to deny the truth of that thing.”

The Respondents were therefore stopped from going against their promise and representation.

With this and more elaborate reasons in the lead judgment, I too allow the appeal and abide by the consequential orders therein.

33.4 REMARKS

Property insurance- Total damage of property by fire – Where premium paid for property is based on an undervalued estimation of property actual value -Whether ground for court to reasonably infer failure in the exercise due of diligence in and duty of care against party charged with securing the insurance.

33.5. REFERENCES

1. *Skye Bank Plc v. Akinpetu* (2010) 9 NWLR (pt. 1198) 179.
2. *Baliol (Nig) Limited v. Navcon (Nig) Limited.* (2010) 16 NWLR (pt. 1220) 619.
3. *First Bank of Nigeria Plc v. Olaleye* (2013) 1 NWLR (pt. 1334) 102.
4. *A.G. Rivers v. A.G. Akwa Ibom* (2011) 8 NWLR (Pt.1248) 31, ratio 1.
5. *Lamina v. Ikeja Local Government* (1993) 8 NWLR (Pt 314) 758.
6. *Ige v. Amakiri* (1976)11 SC 1.
7. *Oyeyemi v. Commissioner for Local Government, Kwara State* (1992) 2 NWLR (pt 266) 661.
8. *Olalekan v. Wema Bank Plc* (2006) 13 NWLR (pt 998) 617.
9. *University of Ilorin v. Adesina* (2010) 9 NWLR (pt 1199) 331.
10. *Afribank Nig Plc v. Anuebunwa* (2012) 4 NWLR (pt 1291) 560.
11. *In Kpansanagi v. Shabako* (1993) 5 NWLR (pt.291) 67.

34.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: COURT OF APPEAL

DATE 11th May, 1998

SUIT NO CAJ/31/195

JUDGE George Adesola Oguntade, J.C.A.
Dennis Onyejife Edozie, J.C.A.
Okwuchukwu Opene, J.C.A.

LAW UNION AND ROCK INSURANCE PLC
(Defendant/ Appellant)

vs.

LIVINUS ONUOHA
(Plaintiff/ Respondent)

34.2 REPORTS/FACTS/ISSUES

INSURANCE AND REINSURANCE LAW:- Insurance Policy – claim thereunder – Insurable interest of claimant – How determined – Relevant considerations.

COMMERCIAL LAW – SALE OF GOODS:- “In good faith” as used in section 62(2) of the Sale of Goods Act, 1893 – Meaning of – Presupposition.

COMMERCIAL LAW – SALE OF GOODS:- ‘Market overt’ – Meaning of in section 22(1) Sale of Goods Act, 1893 – Incidence and doctrine of – Whether a mechanic village qualifies as such.

PRACTICE AND PROCEDURE – EVIDENCE:- Judicial notice – Duty of court to take judicial notice of all laws, Acts and enactments – Section 74 of the Evidence Act – Legal implication.

ISSUE SUMMARY, FACTS, AND RATIO OF CASE

Issues:

1. Did the Respondent at any time have an insurable interest over the car insured with the Appellant in view of the trial court’s finding that the said car was stolen from where D.W. I’s wife parked it?
2. Is there an evidential burden on the Appellant to prove that the Respondent, at the time he insured the car, was aware that the car was stolen?

FACT:

Before the Benue State High Court sitting at Makurdi, the Respondent as Plaintiff claimed against the Appellant as Defendant, the sum of ₦40,000.00 being indemnity and estimated value of a Peugeot 504, saloon car with Registration No. LA 9574 AM insured with the Defendant on Policy No. NP 99 (m).

The Appellant is an insurance company. The Respondent insured with the Appellant a Peugeot 504 saloon car for ~~N~~40,000.00. While the car was insured, it was destroyed by fire. The Respondent duly informed the Appellant. The Appellant initially showed signs it would settle the Appellant's claim. It claimed the wreck of the car and sold it for N1,000.00. Later, however, the Appellant refused to settle. It had been discovered that the car insured which was insured by the Respondent, was stolen from the place where D.W.1's wife had parked it. The car belonged to D.W.1. The Respondent in the circumstances sued, asking for an indemnity of N40,000.00.

The parties filed and exchanged pleadings. On conclusion of the trial, the trial court found in favour of the Respondent and awarded N39,000.00 against the Appellant.

Aggrieved with the decision, the Appellant appealed to the Court of Appeal. In determining the appeal, the Court of Appeal considered the provisions of Section 22(1) of the Sale of Goods Act, 1893, a statute of general application applicable to Benue State, which provides:

"22(1) Where goods are sold in market overt according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith without notice of any defect or want of title on the part of the seller."

Held (Unanimously dismissing the appeal): Anybody who sues on an insurance Policy can only sue in respect of his interest unless by special provisions, the law allowing it, the Policy is made for the sake of another, or unless some statute says the Policy shall enure for the benefit of somebody else.

- (2) On the Meaning of insurable interest - Insurable interest may be defined as the assured's pecuniary interest in the subject matter of the insurance.
- (3) On what court need consider in determining whether a claimant has insurable interest.

A court called upon to determine whether or not a particular claimant has an insurable interest in the property concerned will need to consider the issue whether the destruction or diminution in value of the property will result in a loss to the claimant.

- (4) On what qualifies as an insurable interest. -
The definition of insurable interest is very elastic, and it is not always co-terminus with the ownership, wholly or partially, of the particular goods insured. The mere possession of property is probably sufficient to give the person in possession an insurable interest in it.
- (5) On Insurable interest in an insurance Policy- A person who would foreseeably suffer financial loss from the occurrence of an event has an insurable interest in the subject matter against which it is sought to be insured against the event. The event must either cast upon the assured a legally binding liability, or it must affect a right of the assured which is recognized and protected by the courts.

34.3 DECISION OF COURT.

JUDGMENT

EDOZIE, J.C.A.:

“The dominant question posed by this appeal is whether the Plaintiff had an insurable interest in the subject-matter, that is, the Peugeot 504 saloon car he insured with the Defendant. Indemnity insurance obviously requires the assured to have an interest in the subject-matter of the insurance other than that created by the contract itself, for otherwise he will incur no loss through the happening of the event insured against and so if the assured is without a legally recognized interest, the insurer will have a good defence to any claim under such a contract if he chooses to raise it, *Macaura v. Northern Assurance Company Limited. (1925) A.C. 619*. There is no authoritative definition of insurable interest and it is probably impossible to give a general formula to cover all the recognized types of insurable interest. It is generally true that a person who would foreseeably suffer financial loss from the occurrence of an event has an insurable interest in the subject matter that it is sought to insure against the event. The event must either cast upon the assured a legally binding liability, or it must affect a right of the assured which is recognized and protected by the courts; *See Chitty on Contracts Vol 11, 23rd Edition paragraphs 993,994*.

By Section 22(1) of the Sale of Goods Act 1893 a statute of general application applicable to Benue State, 64 where goods are sold in market overt according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without knowledge of any defect or want of title on the part of the seller.” The term “market overt” applies only to an open, public and legally constituted market” and the whole transaction must be in open market. By Section 62(2) of the said Act, a thing is deemed to be done “in good faith” within the meaning of the Act when it is done honestly, whether it be done negligently or not. On complying with Section 22 of the Act, the buyer acquires a good title to the goods sold, but an action for conversion lies against the seller, for the market overt protection does not extend to him. The facts of the case show that the Plaintiff bought the car in question from the mechanic village at Apir which in my view qualified as a market overt and having in the circumstances of the sale bought it in good faith without of any defect he acquired title therein and an insurable Interest in the property to entitle him to an indemnity under an insurance Policy.”

- (6) On Exception to the general rule in *nemo dat quod non habet*- By virtue of Section 22(1) of the Sale of Goods Act, 1893 a pre-1900 statute of general application, where goods are sold in market overt according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith without notice of any defect or want of title on the part of the seller. The foregoing provision is an exception to the general rule in *nemo dat quod non habet*. It is dictated by commercial convenience and expediency. In line with the *nemo dat* rule, Section 21(1) of the Sale of Goods Act stipulates that the buyer of goods acquires no better title to the goods than the seller had.

OGUNTADE, J.C.A. “Generally speaking, the market system in major cities in Nigeria is not very well organized but it seems to me that spots set aside in any of the Nigerian towns for the sale of specific goods and

which are publicly patronized at regular hours and acknowledged as markets qualify to be described as market overt. I think that the mechanic's village at Apir in Benue State, where the Plaintiff purchased the scrap of the car, the subject matter of this dispute, qualifies to be treated as a market overt. I shall so treat it."

- (7) On Doctrine of market overt- The doctrine of market overt is that all sales of goods made therein are binding not only on parties but also on all other persons; so that if stolen goods are sold in the market a purchaser in good faith, acquires a valid title to them against the true owner by virtue of Section 22(1) Sale of Goods Act, 1893. If, however, the thief is convicted, a restitution order may be made. A sale in the market overt does not destroy the true owner's title unless made openly between sunrise and sunset. The doctrine of market overt does not apply to goods belonging to the Crown and in the case of horses, it is subject to statutory restrictions.
- (8) On Meaning and incidence of 'market overt' in Section 22(1) Sale of Goods Act-'Market overt' means 'open market.' The term 'market overt' applies only to an open, public and legally constituted market. Market overt in ordinary market terms is only held on the special days provided for the particular town by charter or prescription; but in the city of London, every day except Sunday is market day. The marketplace or spot of ground set apart for the sale of particular goods is also, in ordinary towns, the only market open, but in the City of London, every shop in which goods are exposed for sale is a market open, though only for such things as the owner professes to trade in.
- (9) On Meaning of "in Section 62(2) of the Sale of Goods Act" -
By virtue of Section 62(2) of the Sale of Goods Act, a thing is deemed to be done in good faith within the meaning of the Act when it is in fact done honestly whether it be done negligently or not.
- (10) On Judicial notice –
By virtue of Section 74 of the Evidence Act, 1990 all courts must take judicial notice of all laws, acts and enactments.

34.4 REMARKS

Insurance interest – Meaning – What qualifies as – Whether always co-terminus with ownership.

34.5 REFERENCES

- 1 *Ekwunife v. Wayne (W.A.) Limited (1989) 5 NWLR (Pt.122) 422*
- 2 *Onyuike v. Okeke (1976) NSCC. Vol. 10 146.*
- 3 *Macaura v. Northern Assurance Company Limited (1925) A.C. 619.*

FEDERAL HIGH COURT

35.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: FEDERAL HIGH COURT (IBADAN)

DATE 14th January, 1985

SUIT NO FHC/1B/5/84

JUDGE Hon. Justice S.O. Okunribido

**OLUKAYODE ABASS (TRADING UNDER THE NAME AND STYLE OF
MOAB INDUSTRIAL & COMMERCIAL STORES)
(Plaintiff)**

VS

**LIBERTY ASSURANCE COMPANY LIMITED
(Defendant)**

35.2 REPORTS/FACTS/ISSUES

The Plaintiff on 27/9/82, took out a “Warehouse – to - Warehouse” Insurance Policy with the Defendant in respect of goods freighted on board a Nigeria Airways plane from London to Lagos. The goods were described in a proforma invoice attached to the application for Insurance as “Tractor Spare Parts”, whereas in the actual invoice, they were described as “Caterpillar Spare Parts”. The goods were confirmed to have arrived at Ikeja Airport but were lost there. This was confirmed by a certificate of non-delivery issued by the Nigerian Airways. The goods were paid in Britain in Sterling without Form M from the Central Bank, nor were the goods submitted for pre-shipment inspection.

The Plaintiff brought this action claiming ₦83,651.84 being the insured sum. The Defendant contended *inter alia* that the missing goods were not the ones insured and that the contract of insurance was tainted with illegality.

35.3 DECISION OF COURT.

HELD:

1. A minor difference between a proforma invoice used for underwriting a Policy of insurance and an actual invoice later submitted to an insurer to substantiate a claim will not vitiate the right to indemnity. Here, whether the items described as “Caterpillar” spare parts or “Tractor” spare parts, the goods insured were those severally referred to in the two invoices.
2. A contract of insurance will not necessarily be regarded as illegal or unenforceable merely on the ground that the insured acted contrary to law in relation to the insured object. The test is whether the insured transaction is prohibited by law or whether the object of the statute is to increase state revenue.
3. The Defendant has not proved that the importation was illegal nor adduced evidence that sanction has been applied by the state against the Plaintiff.

4. The Defendant was liable in the insured sum less 10% Policy excess.

JUDGMENT

OKUNRIBIDO, J.

The Plaintiff's claim which was filled in the Oyo State High Court on the 4th of November, 1983 was, by order made on the 3rd May, 1984, transferred to this Court with the endorsement on the writ stating the claim of the Plaintiff as follows:

“The Plaintiff's claim against the Defendants are for: The sum of Eighty-Three Thousand, Six Hundred and Fifty-One Naira, Eighty-Four Kobo (N83,651.84) being the assured sum in respect of a contract of insurance entered into by both parties on 27th September, 1982 vide the Defendant's Certificate of Marine Insurance No. LAC/No.01137 which said assured sum became payable on loss of the insured cargoes. The Plaintiff also claims a continuing interest at the rate of 10% per annum on the assured sum until Judgement and 10% from the date of Judgement until the full satisfaction of the judgement debt and costs...”

When this matter came up for hearing on Tuesday the 30th of October, 1984 the Plaintiff gave evidence by himself and called one other witness to give evidence to the effect that he took out a Policy of Marine Insurance with the Defendants, after the required preliminaries, in respect of which he paid a premium of N1,045.65 to cover the insurance of the goods named, and described in a proforma invoice attached to his application from warehouse to warehouse from a U.K. Port to Ibadan and for which the Defendants issued him with a certificate of insurance which was admitted in evidence, without objection and marked Exh, 'C'. Subsequently, he received by post a cargo arrival advice from the Nigeria Airways on the 14th January, 1983 indicating that the goods arrived in Lagos on 3rd January, 1983.

The Plaintiff promptly went to the Nigeria Airways Offices at Ikeja, paid the required sum of N52.00 for the requisite delivery documents but discovered thereafter that the goods were nowhere to be found; He reported this to the Defendants who asked him to produce certain documents, which he duly provided them with and eventually put up his claim against them contrary to their advice to him that he should address his claim to the Nigeria Airways.

The Plaintiff paid for the goods in local currency in the United Kingdom through his witness one Mr. Oluwatoyin Davis who, at all material times, kept two bank accounts in London which made it, according to him, unnecessary for him to complete form 'M' or to submit the goods for Inspection by the S.G.S as he did not need to apply for any foreign currency through the Central bank in respect of the consignment. The goods were alleged to have been sent to the Plaintiff on Nigerian Airways flight WT 801 and although they were confirmed to have arrived at Ikeja Airport, the Airways gave the Plaintiff a certificate of cargo non-delivery to the following effect:

“2 of 575 Kgs Caterpillar spares confirmed landed but all attempts to locate same proved abortive.....”

On the basis of which they advised him to pursue his claim which he did vigorously against the Defendant in a spate of correspondence with them and when all yielded

no encouraging results, he consulted his lawyers and instructed them to institute proceeding against the Defendants which they did by this action.

At the close of the case of the Plaintiff the Defendants gave evidence by a representative and three other witnesses who gave evidence to the effect that the goods ordered by the Plaintiff were not insured by them as it was the goods which was referred to in a proforma invoice No. 633/MOAB – Exhibit ‘D’ – that they insured and not the goods described as Caterpillar spare parts in numbered invoice 677/MOAB - Exhibit ‘Q’. Furthermore, the Plaintiff as an importer failed to comply with the condition in the Certificate of Insurance – Exhibit ‘C’ – That the goods referred to in a proforma invoice should be shipped within 14 days and that, in any case, apart from failing:

- (i) To complete Form M in respect of the alleged goods;
- (ii) To obtain and exhibit the requisite import Inspection Certificate in respect of the goods;
- (iii) To apply for Bank letters of Credit as required by law, the Plaintiff also paid for the said goods in local currency in London contrary to the provisions of the Exchange Control Act, 1962.

It was also claimed that the Policy of Insurance forwarded to the Plaintiff at the address given by him was returned to sender with the remark “Unclaimed”, and in conclusion, the Defendant states that they are not under any circumstances liable to the Plaintiff in respect of the claim made against them by him

At the close of the case for the Defendants, the learned Counsel for the Defendants addressed me on their case as follows:

“The Plaintiff to succeed in his claim, has to prove that, at the time of loss, he ordered the goods described in paragraph 7 of the Statement of Claim. The goods are stated in Exh. ‘D’ and that is what the Defendant is insured by Exh. ‘C’. The validity of Exh. ‘D’ did not go beyond October 1982 and the proforma itself only had validity for 14 days, but the claim of the Plaintiff is on the goods shown in Exh. ‘Q’ No.677/MO A B. Submits that Defendants did not insure those goods. What the Defendant insured is shown in Exh. ‘C’ and that is proforma invoice No. 633/MOAB. Submits that the system in Exh. ‘C’ & ‘D’ are also shown in Exh. ‘A’ & 1^B and A² and 1^B”.

The question is, what is this system? It is the system that every good must have to be declared and insured. As Exh. 2^A shows, it is a condition of this insurance that until the completion of the contract, the assured is bound to declare hereunder each and every ship load without exception. Endorsement No. 1 is attached to the Policy. Urges the Court to hold that Plaintiff did not declare and insure the goods contained in Exh. ‘Q’. Urges the Court to disregard all the documents attached, Exh. ‘Q’. In the alternative, submits that if the Court holds that Plaintiff insured the goods described in Exh. ‘Q’ urges the Court to hold that the insurance is an insurance to break the laws of the country.

The Plaintiff has admitted before the Court that they have no form M from the Central Bank, also that they have no Letter of Credit, also that they have no Bank Guarantee and that there was no need for any pre-shipment inspection of goods. Under Section 42 of the Marine Insurance Act 1961, it is an implied warranty that the adventure insured is a lawful one and is carried out in a lawful manner. Submits that the mere

fact of making payments over there offends against the Exchange Control Act, 1962 – vide S.3 and S.8. Under the pre-shipment Inspection of Imports Act 1978, it is an offence to import into Nigeria goods that have not been pre-inspected- S.1 of the Act (goods to which Act applies); see also Section 7(3) of the Act.

Plaintiff has admitted that he has no form M from Central Bank of Nigeria, he paid money in local currency without the permission of the Minister of Finance, he had no letter of credit, he had no bank guarantee, he had no pre-shipment inspection report as required by the law and therefore urge the Court to hold that the adventure which he said he insured for is caught by Marine Insurance Act 1961. Consequently, it is an unlawful adventure. The consequence is that the Court should not give effect to it because it is an illegal contract. Refers in this connection to Eldridge on Marine Insurance (now says Marine Policies) (3rd Edition) 1938, Pg. 45. “Illegal Contract. Refers to Exhs. ‘E’, ‘F’, and ‘O’ tendered by the Plaintiff, urges the Court not to place any probative value on them because they were denied by the Defendants and the writers thereof were not called to give evidence on them.

Especially Exh. ‘U’, whose writer was confirmed to be still alive. As regards the others, especially Z-Z⁵ and Exhs. Q & Q¹ submits that these exhibits and the evidence of the Plaintiff’s first witnesses to the effect that he was paying the cost of these goods by installment, and that by 1st December, he had paid Sixty-One Thousand Pounds Sterling; gives doubt to the claim of the Plaintiff that he even imported and paid for any goods. Exh. ‘Q’ issued on 30th December, shows that payment had been made in advance, while Exh. ‘C’ written on the same day requires that payment be made by sight draft and cash against delivery on the face of the exhibits V and V1, which the Plaintiff importer sent to the Manager UBA, asking them to endorse documents to the Plaintiff.

The question then is, if the money had been paid in the first week of December 1982, would there have been a need to write Exhs. Y & Y¹? The totality of the evidence urges the Court to dismiss the claim of the Plaintiff. Now adds that Exh. ‘D’ can’t be Exh. ‘Q’. In his reply, the learned counsel for the Plaintiff addressed me as follows: “Defendants admitted through their last witness that they insured the goods contained in Exh. ‘D’, which is a proforma invoice. Under cross-examination, they also admitted that the goods contained in Exh. ‘D’ is the same as the goods listed in Exhs. Q, Q¹, Z, Z¹, Z³, Z⁴ & Z⁵. Furthermore, each of the documents speaks for itself; a close perusal of Exhs. D, Q, Q1, Z, all these mentioned above, would confirm that the spare parts (now says goods) mentioned in Exh. D was the same as mentioned in Exh. Q, Q¹, Z, Z¹, Z², Z³, Z⁴, & Z⁵.

This is further confirmed by the letter of the consignor in Exh. W, where he affirmed that what he mentioned in proforma invoice 633/MOAB of 22/9/82 was subsequently dispatched on Invoice No. 677/MOAB of 30/12/82. Urges the Court that it is the goods insured that were dispatched and air-freighted on Nigeria Airways Flight No. WT 801 on 30th December, 1982 from Heathrow Airport to Lagos Airport. Urges the Court to hold that Plaintiff did not collect the goods as they could not be traced at the airport. Further urges Court to hold that it was as a consequence of this that Nigeria Airways issued Exh. ‘U’ to the Plaintiff. Urges Court to hold that since the goods got lost at Muritala Mohammed Airport, as stated in Exh. ‘U’, the Defendant, is liable because the Insurance Certificate covered the goods from the U.K. Airport to Ibadan – Exhibits ‘C’. Urges Court to hold that the goods insured on Exhibits ‘D’ are the

same insured on Exhibits 'Q' & 'Z'. Submits Policy exhibit 'Z' was purportedly made on 15th May, 1982. Exhibit 2B (i.e., the envelope) showed that it was not dispatched until 1983. Even if it was dispatched as claimed, the Court held that it is not binding on the Plaintiff in that it was dispatched after the last transaction in 1982. In this connection refers to the case of *Wurola v. Northern Assurance Company Limited* (1967) N.M.L.R. 31. Non-receipt makes it not binding. Consequently, endorsement on Exhibit 2A has no effect in this case as it is not binding on the Plaintiff. Urges the Court to hold that the Defendant is liable to the Plaintiff. As regards Exhibit 3, I concede that there is an excess clause of 10% on Exhibit 'C' issued to the Plaintiff by the Defendant.

Consequently, I'll be urging the Court to grant Plaintiff's claim less 10%, the excess clause and consequently award the Plaintiff the sum of ₦75,286.66 as stated in Exhibit 3 tendered by the Defendant. As regards the claim to illegality, in paragraph 15, in their Statement of Defence (as amended), they listed seven documents as documents they ought to have before they could accept that the contract was legal. Bill of Entry is No. 1 on the list. Submits that the totality of effect of Exhibit Q, Q1, V, Z, Z2, Z3, Z4, and Z5 points to the effect that the goods validly entered this country via Muritala Muhammed Airport. As regards tally sheets (No.2) on the list, submits this is not applicable here as the Plaintiff did not claim the goods; this has been established by the Plaintiff in evidence, and it was never controverted by the defence. On document 3, i.e., form M. It is a legal document; it is an application to purchase foreign currency. In this particular case, no application was made for foreign currency and it is therefore not applicable. Mr. Davis and the 2nd Plaintiff witness, on oath, said that he paid for the consignment from his account in London and that the monies were monies he made when he was resident in London. He also went on to tender his statement of account (now says one of them), which is Exhibit K. This confirms that the Plaintiff has an interest in the goods. Exhibit T is a letter written to one Mr. Aluko in London and copied to the 2nd Plaintiff's witness. This document relates to the private investigation conducted by Mr. Aluko, a relative of one of the Directors of the Defendant company.

Exhibit T shows that Plaintiff is still indebted to the consignor on the goods and, consequently, he has an insurable interest in the goods. This notwithstanding, however, I submit that the statement on Exhibit V1 to the effect that payment had already been made in London is also quite correct. Continues that Exhibit V1 relates to the relationship of the consignor and the Plaintiff *vis-à-vis*. Invoice No.677/MOAB as at 14th January, 1983. Whereas Exhibit T reflects the trading position of the Plaintiff *vis-à-vis* his consignee as at 19th January, 1984. V1 states that payment has already been made in local currency in London and does not state the actual amount paid. The fact that this letter was written to the Bank should be taken into consideration. The effect of the letter is to get the document released from the Bank because the Plaintiff would no longer forward money through them, whereas Exhibit T is also addressed to a private investigator stating the present financial state of the Plaintiff with the consignor. I urge the Court to hold that the particular consignment was legally imported.

With due respect, I appreciate the points by the Hon. Court, but I will further urge the Court to hold that para. 2 of Exhibit T shows the position *vis-à-vis* all trading relations between the Plaintiff and the consignor for over 3 years. I urge the Court to hold that, if at all, the Plaintiff has not even paid for the consigned goods, that does not prevent

him from having an insurable interest in the goods if he validly holds the belief that he is still indebted to the consignor on the goods. Refers in this connection to McGillivray on Insurance, 6th Edition, paragraphs. 116 and 120.

Now says as regards the Bank guarantee required by the Defendant, it is my submission that this is not necessary since the consignee has already paid to consignor. As regards pre-shipment inspection of goods, it submits that not all goods are subject to inspection. Furthermore, there is no evidence before the Court that any forfeiture of the goods in dispute has taken place. Submits further that if, as it is claimed, spare parts fall within the category of goods that are liable to inspection, it behooves the Defendant to prove it. Submits that under S.1 (5) (c) of the Act it behooves the Defendant proves that the goods have not been exempted from pre-shipment inspection (now says there is evidence before the Court from the Plaintiff that the goods involved in this transaction were as of 1982 exempted from pre-shipment inspection and consequently the onus shifts on to the Defendant to establish that the goods were not exempted from pre-shipment inspection as of December, 1982). This onus, I submit, they failed to discharge. It is my humble contention that because a consignment was not inspected would not render that particular contract illegal. On the whole, I urge the Court to hold that the Plaintiff has established the case against the Defendant, and I urge this Honourable Court to award judgement to the Plaintiff as per his writ of summons. In summary, the claim is based on Certificate of Insurance as evidenced in Exhibit 'C' and the Claim is for the sum of ₦83,651.84, being the assured sum, which sum is stated both on the writ and on Exhibit 'C'.

Furthermore, I have earlier in my submission conceded that Exhibit 'C' contains an excess clause of 10% and consequently, notwithstanding this writ, Exhibit 'C' would entitle the Plaintiff to ₦83,651.84 less 10% excess as stipulated in the Certificate of Insurance. This is supported by Exhibit 3, which is submitted (now says tendered) by the Defendant. It is my humble contention that the contract of insurance was completed when the premium was paid by the assured to the Insurance Company. The payment is confirmed by Exhibit 'B'. On Exhibit 'B', there is no condition there saying that the contract is subject to any other thing. I urge this Court to hold that Exhibit 'C', which is the Certificate of Insurance, is mere evidence that a contract has already been concluded between the insured and the insurance company. The reference to Policy is there after the contract is already completed.

Therefore, it behooves the party that is the Defendant, which is introducing that term to the already completed contract, to bring such term to the notice of the insured. It is on evidence that this so-called Policy Exhibit 2 was not dispatched to the assured until after the loss of the goods insured, and it is also in evidence that it was never received by the assured. Furthermore, this Policy (now says the so-called Policy) XT 2A was issued on 18th May, 1982, and the premium for this particular transaction was paid on 27th September, 1982. I therefore urge the Court to hold that Exhibit 2 has no relevance to the contract concluded as per Exhibit 'B'. As regards the second leg of the claim as regards the interest being claimed, this is subject to the discretion of the Court, but I urge the Court to consider the fact that an Insurance Company trades with premiums collected from their insured as required by the Insurance Act of 1976". After the address of learned counsel for the Plaintiffs, Mr. Esan, Learned Counsel for the Defendants drew the attention of the Court to the decision of the Supreme Court in the *Wuraola* case which, he said, overruled the 1967 decision and was reported in (1969) 1 N.M.L.R. 1.

The issues that I have to resolve is whether or not on the facts before me, the Plaintiff is entitled to succeed in this action. The Certificate of Marine Insurance on which he relies for his claim states *inter-alia* as follows: “Sum insured ₦83,651.84 Description of goods (PROFORMA INVOICVE No. 633/MOAB) on consignment of Tractor Spare Parts packed in cases or pallets or any other professional mode of packing as contained in the Proforma Invoice of 22nd September, 1982 insured against all risk (AR) loss or damage to the subject matter and subject to the clauses hereon: Inst. cargo clauses (All Risks) claims to be adjusted according to the conditions of the Policy which contains *inter-alia*, the following clauses:

Premium: ₦1,045.65

Excess: 10% of claim (subject to warehouse to warehouse and warranted section 1. ABC of the Inst. Cargo clause varied 14 days after discharge.

In the event of loss or damage for which the company may be liable under this certificate, immediate notice must be given to:

Liberty Assurance Company Limited
P.O. Box 1505
Ibadan.”

And to succeed, the Plaintiff has to establish that:

- (i) The goods complained of are those referred to in Proforma Invoice No. 633/MOAB dated the 22nd of September, 1982;
- (ii) The goods were packed in cases or pallets or any other professional mode of packing;
- (iii) The goods were lost or damaged; and
- (iv) Immediate notice of the loss or damage to the said goods for which, as he claims, the Defendants are liable, was given to the Defendant.

The Plaintiff gave evidence to the effect that the goods referred to in the Proforma Invoice No. 633/MOAB - Exhibit ‘D’ and subsequently dispatched and confirmed on Invoice No. 677/MOAB - Exhibit Q & Q1 were shipped on board Nigeria Airways Flight No. WT 801 and landed in Nigeria on or about the 3rd day of January, 1983; the Defendant said that he made every effort to collect the goods upon being notified of their arrival in Lagos but that, after paying the requisite handling charges, he was informed that every effort to trace the goods had proved abortive; a certificate to which effect was issued to him by the Nigeria Airways.

The Plaintiff then promptly notified the Defendants of the facts and of his resulting claim in the matter. In the face of this claim, however, and of the evidence given in support of it the Defendants answer as follows:

- (i) The goods claimed to have been shipped by the Plaintiff are not the goods insured by them as the goods insured were those referred to in the Proforma Invoice No.677/MOAB - Exhibit Q & Q1 as having been shipped.
- (ii) The goods not having been shipped within 14 days as stipulated in the Policy, there is no liability in the Defendants.

- (iii) The contract between the Plaintiff and the Defendants is an illegal contract in that it was made in violation of the laws of the country which prohibit the payment for goods abroad in a foreign country without the completion of Form M, the securing of letters of credit and the securing of a Pre-Shipment Certificate of Inspection. It ought to be noted in passing that the Defendants have not, apart from some unsubstantiated suggestion that no goods were imported by the Plaintiff, denied the allegation that some goods imported by the Plaintiff and certified by the Nigerian Airways to have been duly landed in Nigeria were lost at the airport. Now, as regards the claim of the Defendants that the goods insured by them were not those shipped on Invoice No. 677/MOAB. I have no doubt in my mind, after reading the various letters written by the Consignor on the matter - Exhibit W, Y, & Y1, and I am satisfied, that, whether they be described as "Caterpillar" Spare Parts or "Tractor" Spare Parts, the goods which the Defendants insured were those severally referred to in Exhibit D and Q and Q1.

As regards the claim that the goods were not shipped within the time stipulated in the Policy of Insurance, there is no evidence before me to substantiate that allegation and I therefore find it difficult to accept the claim of the learned Counsel in his address to that effect. Finally, as regards the allegation that the contract is illegal, there is no evidence before me to substantiate this allegation. It is true, however, that evidence was given to the effect that, unless in cases where such goods are exempted from the provisions of the law, an importer is required to complete Form M in respect of them and to open letters of credit in respect of them, and also to subject them to pre-shipment inspection by S.G.S. The consequences of failure to comply with these provisions of the law are that the goods will be forfeited to the Federal Government.

The Plaintiff gave evidence to the effect that his goods are not subject to any of the alleged provisions of the law and that there was no duty of obligation on him to apply on Form M, most especially as he was not applying for foreign exchange, or to obtain letter of credit when he had the funds available or to subject his goods to pre-shipment inspection at all and the Defendants gave no evidence to contradict any of these assertions by the Plaintiff. In any case, even if, as is alleged, the Plaintiff acted contrary to the law, which is, in any case, denied by the Plaintiff, would that make the contract of insurance between him and the Defendants illegal and therefore unenforceable?

I would think not. In this connection one may recall the statement of the guiding principle set out by Cheshire and Fifoot in *Furmston's* ninth edition of their *Law of Contract* at page 321 as follows:

"What must be ascertained is whether the object of the Legislature is to forbid the contract. In pursuing this enquiry, a variety of tests have been applied, for instance, if the sole object of the Statue is to increase the National Revenue, as for instance by requiring a trader to take out a license; or to punish the contracting party who fails to furnish certain particulars, the contract that he may have made is not prohibited and is in no sense tainted with illegality... .."

In this particular case, however, the effect of non-compliance with the provisions of the law, in the event of the exemption claimed by the Plaintiff not subsisting, is, even

upon the evidence for the Defendants, to lead to a forfeiture of the goods so imported and perhaps some other sanctions as e.g. imprisonment; and, the Defendants having not given evidence of any such sanction being applied to the Plaintiff or even contemplated or, that any investigation has duly taken place leading to the conclusion that the Plaintiff has contravened the alleged provisions of law, they have failed to establish their allegation that the contract of Insurance between them and the Plaintiff is either illegal or otherwise tainted with illegality.

Even if, however, there was, in fact, any taint of illegality in the contract because of the conduct of the Plaintiff as suggested by the Learned Counsel for the Defendants, the only effect of such illegality could only be to render the goods forfeited. There is, however, no evidence before me to the effect that the goods were not, as alleged by the Plaintiff, lost, but that they were, in fact, duly forfeited by operation of law. In these circumstances therefore, the Defendants having failed to produce evidence to negative the claim of the Plaintiff that, under the conditions set out in the Certificate of Insurance issued to him by the Defendants, they are liable to pay to him on the ground of the loss of his goods in transit, the contract price – i.e. the assured value of the goods less 10% excess stipulated therein, the Plaintiff's claim would appear to succeed.

There will therefore be judgement for the Plaintiff in the sum of seventy-five thousand two hundred and eighty-six Naira and sixty-six kobo only (₦75,286.66) plus interest at the rate of 3% per annum with effect from today.

35.4 REMARKS

This case is essentially about goods in a 'Warehouse to Warehouse' Insurance Policy. It has been established that a minor difference in what is stated in the Proforma Invoice used in underwriting the Risk will not vitiate the right to indemnity.

35 5 REFERENCES

1. *Wuola v. Northern Assurance Company Limited*. (1967) N.M.L.R. 31.
2. *Cheshire and Fifoot in Furmiston's 9th Edition of "The Law of Contract" on page 321.*

36.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: FEDERAL HIGH COURT (LAGOS)

DATE: 26th April, 1988.

SUIT NO: Suit No. FNC/L/72/87.

JUDGE: Hon. Justice S.A. Sowemimo.

UNITY LIFE & FIRE INSURANCE COMPANY LIMITED
(Plaintiff/ Respondent)

VS

CITY INSURANCE BROKERS
(Defendant/Applicant)

36.2 REPORTS/FACTS/ISSUES

The Defendant was authorised 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.

36.3 ISSUES:

- (i) 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.
- (ii) The Plaintiff was competent to institute the proceeding without first reporting to the Director of Insurance.
- (iii) The fact that the failure of the Defendant to pay over within a specific period the amount of premiums collected by him will entail criminal sanction does not deprive the insurer of instituting civil action to recover such premiums.

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 who 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:-

- (i) Heyting v. Dupont & Another (1963) 1 WLR 1192 in particular, Pg. 1194.
- (ii) 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 Defendant's Counsel, who is not a deponent. Referred to as Gleeson v. J. Wippel & Company Limited (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 on which the Defendant has based his objection is contained in Section 28(3) of the Insurance Act, 1976, and that the 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 the power to enter upon civil causes; it is limited only 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 paragraphs 16 to 17 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 Limited. & 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:

- (i) The value of premiums due from the Defendant to the Plaintiff on nine Marine Insurance Certificates numbers 8483 to 8490 & 8492.
 - (ii) Further or in the 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 of 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 Plaintiff contends 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 ₦ 1000.00
- (c) For the third offence be liable to a fine of ₦ 2000.00 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 damages 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 a specific period the amount of premiums so collected will entail a penalty does not deprive the Insurance company of instituting Civil action to recover such premiums already collected or for his negligence in collecting such premiums. I agree 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 filed 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 that 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.

36.4. REMARKS

As stated above

36.5. REFERENCE

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

37.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: FEDERAL HIGH COURT

DATE 23RD SEPTEMBER, 1985

SUIT NO Suit No. FHC/B/4/84

JUDGE Before Hon. Justice P.C. Akpamgbo

JESSICA TRADING COMPANY LIMITED
(Plaintiff)

vs

BENDEL INSURANCE COMPANY LIMITED
(Defendant)

Marine Open Cover - Constructive Total Loss - Compromise of Claim - Damages
for Delayed Settlement

37.2 REPORTS/FACTS/ISSUES

The Plaintiff imported 1,000 metric tons of granulated sugar from the U.K., 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 and 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 burned on the high seas off the coast of Abidjan. The ship was declared a constructive total loss and a Notice of Abandonment was given to the Insurer.

However, for 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 a 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 the Defendant had not made any declaration of the consignment and no Policy had yet been issued. Further, the Cover granted was "Free From Particular Average," and therefore, there was no liability in the event of total loss.

37.3 COURT DECISION
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 the 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 the 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 in 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 the "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).

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.

The Memorandum of Association of the Plaintiff company empowers it to engage, inter alia, in the import/export of commodities like sugar and cement, and in this connection, she is required by the laws of this country.

2. 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 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 195 Creighton Avenue, London N29BN, 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 negotiations with its Banker, Messrs New Nigeria Bank Limited, Ring Road, Benin City, about 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 was dispatched to the suppliers directly by the Banker, who also sent to the Plaintiff the Customer's Copy. The Plaintiff will rely 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, N218,589.75 (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 documents relating to this transaction.

8. The condition of the Policy is as overleaf the said Certificate, which was itself based 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. The 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. The 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 a copy of their Export Invoice PEX 252/78 and also copy of B/L No. 12. They also enclosed a 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 burned 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's 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 had 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 the 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 interests should make immediate arrangements to collect their cargo.
15. So soon as Plaintiff received this information about the disaster of the M/V Vori, Plaintiff transmitted the same with great dispatch to the Defendants. The 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 the 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 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 these operations is of the order of ~~N~~314,740.00.
18. Plaintiff concluded that the overall cost, namely, ~~N~~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 other people's property of far greater value than Plaintiff's 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 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 because 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. The Plaintiff will at the trial rely on these letters 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 Nordhavnsgrade, Denmark. On the 9th of March, 1979, Plaintiff received a letter from Messrs Bleasbjerg & Co. notifying Plaintiff of a debit to Plaintiff of N29,375.00 as Plaintiff share of the general contribution by all cargo interests. Attached to the letter were details explaining how the figure N29,375.00 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 the cover of letter No. BIC/MAR/98/78 dated 3/4/79, the original shipping documents, bill of lading, Insurance Certificate and shipping invoice. The 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 N17,400.60; 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.

Having paid to Messrs Bleasbjerg & Co. K/S Plaintiff's proportion of the General Average Expenses, namely ₦29,375.00, Plaintiff took steps to ascertain as best he could the quantity of the sugar consignment that was on board. A representative of the 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 handwritten 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.

29. 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.
30. Plaintiff pleads malice and will lead evidence to show that Defendant's delay in paying 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 Limited.
31. The Chairman of the Defendant Company was at all material times the Chief Legal Officer of the New Nigeria Bank Limited. He knew that Plaintiff financed the sugar on overdraft from the New Nigeria Bank Limited. He knew too that the controlling shareholder of the Defendant Company (about 80%) is also the controlling shareholder (60%) of the New Nigeria Bank Limited.
32. 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 a revenue of some 60% of ₦143,000 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.
33. In support of the averments made in paragraphs 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 *~~N~~9,701.06*. dated 18/6/79;
 - (vi) Bendel Insurance Company Limited payment Voucher dated (H/Office) 18/6/79, stamped PAID for ~~N~~9, 701.06, payee Niki Manufacturing Company
 - (vii) Plaintiff's Bank Statement at Ring Road Branch of New Nigeria Bank Limited, Benin City- Account No. 7909, for the relevant period.
 34. 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.
 35. Plaintiff claims and pleads that the Contract evidenced 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.
 36. 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.
 37. 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 ~~N~~319,994.19.
 38. Alternatively, the said sum of ~~N~~319,884.19 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:
- (i) Damages for Breach of the Contract of 3/4/79, to wit.
 - (a) ~~N~~146,138.18 being the cost of 13371 bags of sugar lost;
 - (b) ~~N~~29,375.00 being money paid to Messrs Bleasbjerg on the authorisation of the Defendant;
 - (c) ~~N~~2,000.00 being expenditure on overtime services authorized by the Defendant;
 - (d) ~~N~~142,371.01 being the loss suffered by the Plaintiff as interest on the Bank overdraft due to the Defendant keeping the Plaintiff out of his (Plaintiff's) money,
 - (ii) Alternatively, payment of the said sum of ~~N~~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:-

- (i) SAVE AND EXCEPT as hereinafter expressly admitted, the Defendant denies each and every allegation of fact contained in the same, which are set out

SERIATIM and specifically traversed.

- (ii) The Defendant admits paragraphs 3 & 4 of the Statement of Claim.
- (iii) 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.
- (iv) 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 Limited being on the other hand are Res Inter Alia Actos, the Defendant being not a party thereto and hence irrelevant to the present proceedings.
- (v) With reference to paragraph 7 of 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 an 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 the Marine Insurance business at the trial of this suit.
- (vi) 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.
- (vii) The Plaintiff failed to make any such DECLARATION of his consignment of granulated sugar in 1978 or at any other time.
- (viii) The Defendant emphatically denies paragraph 8 of the Statement of Claim and repeats paragraphs 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.
- (ix) In further answer to paragraph 8 of the Statement of Claim, the Defendant will say that:
 - (a) There was no Policy in existence, and 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-à-vis a shipment of Plaintiff's granulated sugar.
- (x) In answer to paragraphs 9 and 11 of the Statement of Claim, the Defendant avers 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, in fact, come into existence by then. 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.
- (xi) 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.
 - (xii) 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.
 - (xiii) In further answer to paragraph 10 of the statement of Claim, the Defendant will say that the averment to the effect that "THE CERTIFICATE ALSO SHOWS CLEARLY THAT the SUGAR WAS REGISTERED" is vague. A Marine Certificate does not constitute a Marine Insurance Policy/Contract.
 - (xiv) The Defendant denies paragraphs 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.
 - (xv) 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.
 - (xvi) 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.
 - (xvii) 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 vein hope of finding some support for a patently false claim.
 - (xviii) The alleged conclusion which put the overall cost at ₦314,740.00 as per paragraph f the Statement of Claim has no basis whatsoever.
 - (xix) 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.
 - (xx) 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.
 - (xxi) 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 ₦29,375.00 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.
- (xxii) 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.
- (xxiii) 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.
- (xxiv) 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.
- (xxv) 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 the Plaintiff was to finance his said importation of granulated sugar. Any knowledge about the transaction in possession of the 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.
- (xxvi) In further reply to paragraph 33 of the Statement of Claim, the Defendant will say that it owes the Plaintiff a kobo or anything at all. the Defendant has nothing to do with the alleged debit of ₦142,371.01 since the Defendant was not instrumental to the Plaintiff's decision to negotiate, arrange, and receive an overdraft loan from the New Nigeria Bank. There is none of Plaintiff's money in the possession of the Defendant.
- (xxvii) With reference to paragraph 35 of the Statement of Claim, the Defendant further repeats paragraphs 5, 6, and 7 of the Statement of Defence. The Defendant will therefore insist on very strict proof of all averments contained therein.
- (xxviii) 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 that has never been in existence. No declaration on the M/V Vori was made by the Plaintiff.
- (xxix) 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.
- (xxx) 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 because 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.
- (xxxi) 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 was any loss. The 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.

(xxxii) The Defendant avers that the action is instituted mala fide 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 ₦146,138.18 or to overtime 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.

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

(xxxiv) 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 costs.

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 was 6629 bags. The 2nd P.W. Andrew Iyere Wilson testified that he entered into a Marine insurance contract with the Defendant company as per Open Cover Insurance Exhibit “D-D8”. He opened an irrevocable letter of credit with its bankers on 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 stating that the M.V. Vori had been burnt off the coast of Abidjan. He wrote to his Bankers, endorsed the 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 of the Defendants. The Plaintiff company surveyed the possibility of going to Abidjan to collect the sugar from M/V Vori midstream. but the cost was excessive and the operation was 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 the 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 agreed on certain points. The agreement was reduced to writing, and this was tendered as Exhibit 'T'. He fulfilled his 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 ₦146,138.18 as being value for 13,371 bags of sugar lost: ₦29,375.00 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 the 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 Exhibits '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' were to remain open for the full amount irrespective of the 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 a 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 not being 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 dissociated himself from what the Defendant was doing to the 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 does this company have with your importation of sugar?

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

Question: They insured the sugar for you?

Answer: This is not possible by law, we are prevented from insuring with an 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 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. Limited to pay ₦20,000.00 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 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 Limited, Bank official of New Nigerian Bank Limited 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 the 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 he 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 in July 1977, he contacted the Defendant company for the issuance of an Open Policy Cover. he identified Exhibit 'F' as a Marine Insurance Certificate issued by the Defendant company on 13/7/77 to 6/7/78, which meant that the insurance took effect from 7/7/77 for one year and was 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 the Defendant's company with a 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 a Marine Insurance Certificate and said that if the Marine Insurance Certificate is being issued on an Open Marine Cover Policy, the Policy must have been in force or renewed. Exhibit 'F', was issued, and the conditions for issuing a certificate were not completely satisfied. He said that the Plaintiff wrote to the 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 an 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, and 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 referred 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 a premium of ₦1,092.95 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 vs. 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 effect 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. The 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 vs. Ceekey Traders Ltd. (1961) 5 S.C. 81 at pages 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 Sections 65, 66, 71, 72 and 73 of the Marine Insurance Act of 1961 and submitted that where there was partial loss, the assured would be entitled to a proportion, not the whole and asked that the Plaintiff's 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 based on 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 attached till the cargo is discharged. She said it was a "Voyage Policy"; she said that only 6629 bags of sugar were collected. She submitted that 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 was 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', the 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 the warranty was broken. Referred to Ship Glenlivet- 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 into scraps. She said that Exhibit 'T' was a binding contract and could not be repudiated by the Defendant. She submitted that the Plaintiff had 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 set out in Exhibit 'T'. The Plaintiff is suing to recover as per the 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 ₦1,092.95k as a 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 ₦218,598.75k. 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 minimise 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' to settle the matter out of Court. Due to a 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 rescind Exhibit 'F' and Exhibit 'T'.

Exhibit 'T' reads as follows:

COPY

Our Ref. BIC.MAR/98/78
The Managing Director
Jessica Trading Company Limited
P. O. Box 568, Benin City.

3rd April, 1979

Sir,

Our Claim N. MAR. 98/78 Our Policy No. 3195/77

Insured Jessica Trading Company Limited

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:

- (i) That you should collect all available bags of your imported sugar on board the M/V Vori and any loss or discrepancy sustained should be forwarded for settlement.
- (ii) That you should pay the General Average for towage as invoiced to you by Bleasbjerg and company, which is ₦29,375.00. However, the necessary receipt for the payment of the said amount should be forwarded for reimbursement.
- (iii) That the company will be responsible for the overtime liability in respect of the customs men to be posted to the site during discharge.

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

Yours faithfully,
for: BENDEL INSURANCE COMPANY LIMITED

Sgd (C.B.EDO OSAGIE)
Marine Claim Manager.

This is the document that 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 authorised in Exhibit 'T' above, and all cross-examination to the effect that it was excessive appears 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.

"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, it is no part of the debt or the sum stipulated in the contract to be paid. If it can be recovered, it must be like damages".

The question now arises whether or not I can award damages. In *Incar (Nig.) v Limited V. 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 the cost of 13371 bags of sugar; ₦29,375.00 being money paid to Messrs. Bleasbjerg on the

authorisation of the Defendant company; ₦2,000.00 being expenditure or overtime 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 the Plaintiff's money.

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

Costs assessed at ₦3,000.00.

37.4 REMARKS

As Stated above

37.5 REFERENCES

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

38.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: FEDERAL HIGH COURT (LAGOS)

DATE 16th October, 1985

SUIT NO FHC/L/45/84

JUDGE Hon. Justice M. B. Belgore

**ALHAJI G. O SHOBOWALE (CARRYING ON BUSINESS UNDER THE NAME
AND STYLE OF "G.O. SHOBOWALE & SONS")
(Plaintiff)**

vs

**THE MANILA INSURANCE COMPANY LIMITED
(Defendant)**

38.2 REPORTS/FACTS/ISSUES

A Marine Insurance Policy was insured by the Defendant to cover a consignment of rice shipped from Bangkok to Apapa. The rice was insured by Geocomsa & Co. Nig. Limited, who were Agents of the Plaintiff. Both the insurance Certificate and Policy were issued in the name of Geocomsa. On arrival at Apapa what out of the 5,000 bags ordered, 500 were shortlanded, while 500 bags were damaged. Consequently, the Plaintiff claimed indemnity against the Defendant through his agent, Geocomsa Limited. The Defendant repudiated liability and offered ex gratia payment of ₦500.00. The Plaintiff instituted an action in Court in his name claiming ₦23,870.00 as special and general damages. Counsel for the Defendant submitted inter alia that there was no privity of contract between him and the Defendant. The Plaintiff, on the other hand, answered that the Policy had been assigned to him by delivery.

38.3. COURT DECISION

- (i) If in a contract, the principal is undisclosed, as in the case, the proper person to be sued on the contract is the agent. Here, the contract was so personally made with Geocomsa without any apparent connection with the Plaintiff. Geocomsa was thus the party to sue.
- (ii) The delivery of the Marine Insurance Policy by Geocomsa to the Plaintiff did not constitute an assignment of the Policy as required under Section 5(1) of the Marine Insurance Act. 1961, as there was no evidence that a mere delivery was a customary manner of assigning a Marine Policy.
- (iii) Consequently, there is no privity of Contract between the Plaintiff and the Defendant, and the Plaintiff cannot sue on the contract.
- (iv) The Plaintiff's action was dismissed.

BELGORE, J.

The Plaintiff's claim against the Defendant is for a sum of ₦23,870.00, being special

and general damages resulting from the loss of 1,000 bags of long grain rice covered by a Marine Insurance Policy issued by the Defendant. There is not much dispute as to the facts of the case and the main defence of the Defendant was on various legal points. The facts of the case are as follows: The Plaintiff, who is a businessman, placed through their agent, an order for some quantity of rice from Bangkok, and by the end of March 1977, the rice, whose details were contained in invoice No. 77003 and valued at ₦75,000.00 were shipped in a vessel called Eurolink. The rice was insured for all risks with the Defendant by Messrs Geocomsa & Co. (Nig.) Limited (hereinafter called Geocomsa), who were agents of the Plaintiff. Both the Certificate of Insurance and the Insurance Policy were issued in the name of Geocomsa. When the bags of rice arrived at Apapa, out of the 5,000 bags ordered, 500 were short landed, while another 500 bags were damaged, being partly wet and partly caked. The Plaintiff claimed to have lost ₦7,500.00 on the 500 bags of rice short-landed, while he lost ₦5,000.00 on the partly damaged 500 bags that were delivered.

The Plaintiff claimed the Defendant through Geocomsa by a letter dated 18th January, 1978, which was admitted as Exhibit 'G', which the Defendant replied by a letter dated 19th January, 1978, which was admitted as Exhibit 'J'.

The Defendant replied to the insured's request for settlement by a letter dated 19th January, 1978, which was admitted as Exhibit 'K'. In respect of the damaged rice, the Defendant held it was due to inherent vice in the rice; hence, they were not liable as loss through inherent vice was exempted in the Policy. In another letter dated 14th May, 1978, which was admitted as Exhibit 'L', the Defendant proposed to give an ex-gratia sum of ₦500.00. Under cross-examination, the witness admitted that Exhibit 'A'. 'D1' and 'D2' were in the name of Geocomsa.

The witness also admitted accepting and reselling the 500 damaged bags of rice, but he sold them at a reduced price. He also admitted that this suit was instituted in 1984. That was the Plaintiff's case, and the Defendant rested their case on that of the Plaintiff. In his submission, Counsel for the Plaintiff stated that the first issue for determination was when the action arose. He went on to say that the action was filed on 18th July, 1984, but the loss occurred in 1977. Cause of action, Counsel submitted, could not have arisen until negotiation broke down on 19th July, 1978, as contained in Exhibit 'K'. For this proposition, Counsel cited a case of *Lasisi Fadare & others v. Attorney General of Oyo State*, 1982 4. S. C. 1 at 25.

Counsel further submitted that Exhibit 'M' showed that the Defendant was still contemplating settlement and that constituted an acknowledgement of a debt which, by virtue of Section 37(1) of the Limitation Act 1966, affected the time for action. For the definition of debt, Counsel referred to Section 33(a) of the 1966 Act.

Counsel for the Plaintiff concluded his submission by stating that the Plaintiff had proved their case, citing a case of *British and Foreign Marine Insurance Co. v. Gaunt*, 1921 2. All. L.R. 447 at 450, and that the general damages claimed were to be considered under three factors namely, the long delay of the Defendant in settling the Plaintiff's claim, the loss had occurred since 1977; secondly the deceit of the Defendant on Exhibit 'M' and the status of the Plaintiff and his reason for insuring the goods. In his submission, Counsel for the Defendant stated that the first issue was when time began to run, and that it started when the Plaintiff was aware that some goods were short-landed and some were damaged. Section 33(a) of the Limitation

Act 1966 affected only liquidated damages and not a general claim. Six years had passed since the goods were short-landed and damaged, and the action came under Section 7 of the 1966 Act. The action was that of a simple contract; it was therefore statute-barred and should be dismissed. Cases of *S.O. Akintola v. N.J Akinyoshoye & Another* 1971 U.I.L.R; *Nufutau Olabode & Three Others v. M.A. Semoh* 1959 4 P.S.C 27; *Savage v. Rotibi* 10 W.A.C.A. 264 and *G.M. Nigerian Railways Corporation v. U.A.C (Nig.) Limited* 14 W.A.C.A 631 were cited in support of the argument Counsel submitted on his second point that Exhibit 'C' was taken in the name of Geocomsa and there was no evidence that it was endorsed to the Plaintiff as required by Section 51(1) of the Marine Insurance Act 1961. He cited the case of *Baker v. Adam*, 1910, 102 L.T. 248. There was no privity of contract between the Plaintiff and the Defendant, and therefore, the claim should be dismissed on the two points raised. In his reply. Counsel for the Plaintiff submitted that the assignment could be made by simple delivery of the Policy.

I will consider the legal objection raised by the Defendant before I consider, if necessary, the issue of facts. The first point raised was that of Limitation of time, while the second was that of privity of contract between the Plaintiff and the Defendant. It is equally necessary to consider the issue of privity before that of time of action, for if there is no contract between the parties, the issue of when the action commences on it is irrelevant. The defence of privity was unhappily worded in paragraph 3 of the Statement of Defence, it reads: "The defence admits paragraphs 3 and 4 of the Statement of Claim but will contend at the trial that even though a Marine Policy is assignable, the Defendant had no previous notice of the said Policy being assigned by Geocomsa and Company Nigeria Limited to the Plaintiff". On the evidence before the Court. Exhibit 'B' and 'C', which are the Certificates of Insurance and Policy, respectively, are both in the name of Geocomsa, showing that the company was the party taking up the insurance.

The Plaintiff claimed that Geocomsa is their agent, which may be so since I have no other evidence than that of the Plaintiff on it, but does that entitle the Plaintiff to sue in their name rather than in the name of the Insured, Geocomsa? The general rule is that a contract made by an agent acting within the scope of his authority for a disclosed Principal is a contract of the Principal, and the Principal and not the agent, is the proper person to sue or be sued upon such a contract, but if the agent contracts personally, as the case here, so that the contract with him, although it may be made for the benefit of his disclosed or undisclosed principle, then the agent could sue and be sued.

Also, if the principal is not disclosed and there is nothing on the face of the contract connecting him with it, the agent is the proper person to sue or be sued on it. If the Plaintiff was a disclosed Principal, though there was no evidence that he was such, the contract with the Defendant was so personally made with Geocomsa without any apparent connection with the Plaintiff that Geocomsa is the only person, without any evidence of assignment, that can sue or be sued on it. if, as I believe they are, Geocomsa was acting as agent of the Plaintiff in entering into the contract of Insurance with the Defendant, then the Plaintiff must be an undisclosed Principal, and Geocomsa is the proper party to sue. If it can be said that the Bill of Lading. Exhibit 'D' was presented to the Defendant before the contract in Exhibits 'B' and 'C' were entered into, the consignee of the goods was "To order of Nigerian Acceptance, Lagos" and the notifying Party was 'G.O. Shobowale c/o Geocomsa &

Co. (Nig.) Limited. P.O. Box 4702 Lagos”, it cannot be said that this information was sufficient to show that one party was an agent of another. It is to be noted that evidence of most, if not all, the documentary exhibits tendered during the trial relating to the claim were between the Defendant and Geocomsa. Exhibit ‘E’ was a reply by the Defendant to Geocomsa acknowledging the latter’s letter, and Exhibit ‘G’ was a letter from Geocomsa to the Defendant forwarding some documents relating to the insured goods. Exhibits ‘J’, ‘K’, & ‘L’ were also correspondences between the Defendant and Geocomsa relating to the claim.

In view of the state of the law and according to the evidence before me, the contract was between Geocomsa and the Defendant. It is either of these two parties that can sue or be sued on that contract. Counsel for the Plaintiff submitted further that the contract had been assigned to them by delivery of the Policy-Exhibit ‘C’. Assignment of Policy of insurance is a question of law, and the law allowing such an assignment lays down the method the assignment can be effected. Section 51 of the Marine Insurance Act 1961 lays down the method.

The Section reads:

- ’51 (1) A Marine Policy shall be assignable unless it contains terms expressly prohibiting assignment; and a Marine Policy may be assigned either before or after loss.
- (2) Whether a Marine Policy has been assigned to pass the beneficial interest in such Policy, the assignee of the Policy shall be entitled to sue thereon in his own name; and the Defendant shall be entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the Policy was effected.
- (3) A Marine Policy may be assigned by endorsement thereon or in other customary manner.” The delivery of the Policy by Geocomsa to the Plaintiff does not constitute an assignment by indorsement, and I have no evidence that mere delivery was a customary manner of assigning a Marine Policy. The case of *Baker v. Adams* 1910, 102 L.T. 248, appears to be to the point. Hamilton J. at Pg. 249 said. “I do not entertain any doubt that Messrs Chandler, Hargreaves, and Co. handed over the Policy with the assent and concurrence of the assured, the Messrs Green, who had been their principals, and I think it is clear also that they handed it over with the intention, whether it was an effectual intention or not, to assign such interest in the Policy as could be assigned. Section 50 of the Marine Insurance Act 1906 provides that ‘a marine Policy may be assigned by indorsement thereon, or in other customary manner, and it is suggested that what Messrs Chandler, Hargreaves, and Co. did amount to an assignment in a customary manner - namely by delivery. In any case,
- (4) I think it is clear that the delivery, to satisfy those words, must be one to assign, and I think there is sufficient evidence to show that there was such an intention to assign, but I do not think that, so far as the Marine Insurance Act is concerned, that mode of dealing with the Policy constituted any sufficient assignment. What is the customary manner of assigning a Marine Policy appears to me to be essentially a question of evidence. In this case, there is neither evidence of intention to assign nor evidence of customary manner of

assigning, and I do not hold mere delivery as an assignment. The contract of Insurance was between Geocomsa and the Defendant, and there is no evidence that Geocomsa assigned the contract or any right or obligation under it to the Plaintiff. There is therefore no privity of contract between the Plaintiff and the Defendant, and the Plaintiff cannot sue on the contract. I will not decide on the other issue raised since I hold that this action should be dismissed on the question of privity. The action is dismissed.

38.4 REMARK

As above

38.5 REFERENCES

1. *Limitation Act. 1966*
2. *Marine Insurance Act, 1961*
3. *Akinola v. Akinyoshoye & Anor 1971 U.I.L.R*
4. *Baker v. Adams 1910 102 L. T. 248*
5. *British & Foreign Marine Insurance Co. v. Gaunt 2 All L.R.447*
6. *G.M. Nigerian Railways Corporation v. U.A.C. (Nig) Limited. 14W.A.C.A. 631.*
7. *Lasisi Fadare & Ors. v. Attorney. General of Oyo State 1982 4 S.C.1*
8. *Lovesy v. Palmer 1961 2 ch. 233*
9. *Mufutau Olabode & Ors. v. M.A. Semoh 1959 4. P.S.C.27*
10. *Savage v. Rotibi 10 W.A.C.A. 264*

NATIONAL INDUSTRIAL COURT

39.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: NATIONAL INDUSTRIAL COURT OF NIGERIA

DATE: 15th July, 2022

SUIT NO: NICN/AK/32/2012.

JUDGE: Honourable Justice K.D. Damulak

**MRS. M. E. EGIEBOR
(Plaintiff)**

vs

**BENDEL INSURANCE PLC.
FELIX IMAGBE OBOH ESQ
(Defendants)**

39.2 REPORTS/FACTS/ISSUES

This suit was filed along with 12 sister cases by learned counsel, R.O. Imafidon Esq. on 3/9/2012 and 11/9/2012. The thirteen suits were registered as suits numbers NICN/AK/22/2012 to NICN/AK/34/2012 with (1) BENDEL INSURANCE PLC, (2) EDO STATE GOVERNMENT, (3) MINISTRY OF FINANCE EDO STATE and (4) ATTORNEY GENERAL AND COMMISSIONER FOR JUSTICE, EDO STATE as the Defendants. The thirteen suits were consolidated with NICN/AK/22/2012 on 30/1/2013. On 2/6/2014, Felix Imagbe Oboh Esq., who had been appointed the liquidator to Bendel Insurance Plc, was joined as 2nd Defendant in the consolidated suits. Upon his joinder, the Claimants amended the processes as to reflect the joinder and the claimant filed amended processes dated 9/3/2015 on 17/3/2015. Upon service on the 2nd Defendant, he filed a conditional appearance and Statement of Defence on 27/4/2015 through his counsel, Rotji Emmanuel Esq.

The three Claimants in NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012 filed motions to further amend their processes on 6/6/2017, 6/6/2017 and 21/11/2017 respectively and the various motions were granted on 16/4/2018. Whereas the 1st Defendant filed a Statement of Defence and an additional witness statement on oath through its counsel, Alex Ogbekhiulu Esq., 1st Defendant and counsel never took part in these proceedings while the 2nd Defendant and his counsel filed no amended defence to the 3rd amendments in these three consolidated suits. Parties have been inordinately exploring out-of-court settlements in the 13 suits without settling. On 29/1/2020, both counsels informed the court of their resolve to continue settlement in the other suits but to proceed to hearing on three suits: No. NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012. This means ten of the sister cases are still undergoing out-of-court settlement.

The consolidated suits were heard from 29/1/2020 to 13/10/2021 when the matter was adjourned for adoption of final written addresses. Both counsels have filed joint final

written addresses in respect of the three consolidated suits. By the 3 amendments of 6/6/2017 granted on 16/4/2018, the Claimant seeks the following reliefs;

- (a) Declaration that the contract of service between the Claimant and the Defendant before the Claimant was disengaged from service of the 1 Defendant, is governed by the Applicable Terms and Conditions of Service for Senior Staff as amended by. Board resolutions as well as various Collective Agreements of 2002 and 2005 inclusive.
- (b) A Declaration that the purported removal or termination or disengagement of the Claimant from the service of the Defendant or the government of Edo State through the Ministry of Finance, Edo State *vide* a letter dated 4 April, 2012 is altogether unlawful and illegal, being a breach of the contract of service between the Claimant and the Defendant.
- (c) ₦ 15,000,000.00 (Fifteen Million Naira) as general damages for breach of contract.
- (d) ₦ 23, 120,475.96 as special damages.
- (e) 20% interest on the total claim from the inception of this case till Judgment is given and until final settlement of the claim.

CASE OF THE CLAIMANT.

This claimant testified on 30/1/2020 as CW2 in the consolidated suits by adopting her witness depositions of 6/6/2017 found at pages 390 to 394 of the court's file and tendered fifteen documents in evidence. The first seven documents were admitted and marked exhibits MEE12 to MEE18, while the last 8 documents, which were objected to, were marked exhibits MEE19 to MEE26 "tendered" and ruling reserved till judgment.

The evidence of the claimant went thus "I was employed by the 1st Defendant as a clerical assistant by a letter of appointment dated 20th November 1978. My name then was Miss Mary Edugie Uduebor. That upon confirmation by a letter of 11/10/1979, the 1st Defendant's pension contributions were steadily deducted monthly from my salary in line with the conditions of service of the 1st Defendant.

I rose through the ranks and subsequently became the substantive head of the marketing department. I became acting head, admin and personnel, assistant general manager and head, management team. As a senior staff member of the 1st Defendant, my appointment was governed by the Terms and Conditions of Service for Senior Staff.

As an Insurance Company, the 1st Defendant is a member of the Nigeria Employers Association of Banks, Insurance and Allied institution, which body negotiate with the Association of Senior Staff of Banks, Insurance and Financial Institutions (ASSBIFI) from time to time. Between when I became a senior staff and when I was disengaged on 1st April 2012, my appointment was governed by the said Conditions of Service for Senior Staff as well as the Collective Agreements of 2002 and 2005, which both took effect from 1 October 2002 and 1 April 2005, respectively.

The 2005 Collective Agreement, which took effect from 1 April 2005, approved 35% increase in salaries and all monetized allowances for all cadres of senior staff across the board, which was accepted and implemented by the 1st Defendant for its staff, including me. That the salaries and allowances paid to me by the 1st Defendant were based on the said Collective Agreement.

The 1st Defendant implemented a self-administered contributory pension scheme where pensions were steadily deducted from my salary monthly in the ratio of 5:15 between. Staff and 1st Defendant. The total amount deducted as pension contribution from my salaries by the 1st Defendant from October 1979 to February 2007 is ₦1,212,851.92, as the Defendant stopped deducting pension contribution from staff salaries in March 2007.

The 1st Defendant also implemented the contribution to the Nigeria Social Insurance Trust Fund, where contributions were made to the fund from the salaries and allowances of staff, including me. Deductions made from my salary between October 1979 to 2007 amounted to ₦1,091,562.78.

I was given a handbook titled Bendel Insurance Company Limited Terms and Conditions of Service for the Senior Staff of Bendel Insurance Company Limited.

The 1st Defendant had been taken over by the Edo State Government through the Ministry of Finance, notwithstanding the appointment of the 2nd Defendant by the National Insurance Commission and the Federal High Court as Receiver.

That I had served the 1st Defendant for 33 years, four months and 12 days. That since the letter of disengagement served on me by the 1st Defendant, I had waited patiently to be paid my terminal benefits, which up till now remains unpaid”.

The claimant tendered fifteen documents in evidence. The first seven documents were admitted and marked exhibits MEE12 to MEE18, while the last 8 documents, which were objected to, were marked exhibits MEE19 to MEE26 “tendered” and ruling reserved till judgment.

CW2 was cross-examined by Rotji Emmanuel Esq. of counsel for the 2nd Defendant on 30/1/2020. Under cross-examination, she testified that on exhibit MEE15, there is no pension deduction. There is an office in the Defendant’s office that computes terminal entitlements of retired staff. “The Defendant did not give me my calculated entitlement, but the roaster was in the department, so we went there and looked at it. The Defendant was going through liquidation, so everybody’s entitlement was calculated”.

CASE OF THE 2ND DEFENDANT

The 2nd Defendant testified on 13/10/2021 by adopting his witness deposition of 27/4/2015. His defence is that “the Defendant has been liquidated and I was appointed Receiver/Liquidator by the National Insurance Commission. The 1st Defendant was wound up by an Order of the Federal High Court, Benin Division.

The collective agreement is not enforceable against the 1st Defendant and the 1st Defendant is not a signatory to it. The 1st Defendant never approved any collective

agreement.

The purported approval by the 1st Defendant was given on 22nd May 2006 to take effect on 1st May 2006. The request for the approval of the collective agreement addressed to the supervising ministry was dated 31st August, 2006 and the approval was conveyed via a letter dated 14th September, 2006 and the approval was made effective 31st August, 2006.

There was never a structuring of the claimants' terminal benefits in line with any collective agreement whatsoever and the 1st Defendant, not being a signatory to the agreement, is not in possession of the original copy of the agreement".

Under cross-examination, the cross-examination under NICN/AK/23/2012 was adopted by consent of both counsels, wherein this witness said, among other things, that since 2013 to date, the Edo State government is yet to formally hand over to me. Up till now, I have not had access to the head office. I do not have access to the 1st Defendant's file, including the files of the Claimants. I am not in a position to validate the documents of the Claimants or invalidate them. I have never been a staff member of the 1st Defendant. I am not in a position to know if the 1st Defendant made deductions from the salaries of the claimants by way of NSITF. I am not aware that the claimant has put in 21 years of service. To my knowledge, the 1st Defendant is yet to pay the terminal benefits of the claimant. The witness also said we have yet to pay any of the former staff their terminal benefits. The Claimant is entitled to her terminal benefits.

FINAL WRITTEN ADDRESS OF 2ND DEFENDANT'S COUNSEL

Learned Rotji Emmanuel Esq. of counsel for the 2 Defendants formulated a lone issue as:

“Whether from the totality of the pleadings and evidence on record (oral and documentary), the claimant has proved his/her case on the preponderance of evidence and is entitled to the reliefs sought”?

Counsel then argued that all three claimants seek declaratory relief in their prayer (A). A declaratory relief is one in equity and the party seeking the grant of such relief must prove its case on the strength of evidence and not rely on the admission of the Defendant. A declaratory relief which must be proved by cogent and compellable evidence.

The claimants are relying on the Collective agreement purportedly entered into between the Association of Senior Staff of Banks, Insurance and Financial Institutions (ASSBIFI). It is worthy of note that the Association is not a party in this suit.

The 1st Defendant is not a signatory to the collective agreement and therefore the agreement does not bind the Defendants. Before an agreement can be binding, the Defendant in this case, there must be proof that the collective agreement has been incorporated into the contract of employment. This is a question of fact to be proved by the Claimant through credible evidence. The document, the memorandum of understanding, sought to be relied upon has no binding force but is a mere gentlemen's agreement which does not carry any intention to bind the signatories.

That Claimant has not also placed evidence of his membership of the Association to enable him to benefit from the Collective agreement. It is only a bona fide member of an Association that benefits from the Collective agreement. As a senior member of Staff, membership of an Association is not assumed. Section 3 (1) Labor Act.

That Relief (b) in NICN/ AK/23/2012 and NICN/ AK/32/2012 are similar and are declaratory, as is the case with relief (b) in NICN/AK/31/2012, so he adopted his earlier argument on that point. That both Claimants, via their pleadings, did not state how and why their termination is altogether unlawful and illegal or a breach of their contract of employment throughout the Pleadings in NICN/AK/23/2012 and NICN/AK/32/ 2012.

That relief (c) of the claimants all ask for various sums in millions as general damages. The court does not award general damages in cases of contract. It is further submitted that in the instant case, the Claimants claim for general damage as well as special damages. It is therefore not tenable for a court to award both general damages and special damages in a case of contract.

Relief (d) is a claim for specified sums as special damages. Special damages must be specifically pleaded and strictly proved. In the instant case, there is no evidence of specified damages claimed, nor did the claimant lead any shred of evidence on any perceived special damages. The law is now well settled that where a party claims special damages, the burden is on him to prove the claim to the last kobo. He has to do this by leading credible evidence most time by way of documentary evidence.

FINAL WRITTEN ADDRESS OF CLAIMANT COUNSEL.

Learned R.O. Imafidon Esq. of counsel for the claimants formulated a single issue for determination as”

“Whether the claimants in the three consolidated suits have proved their case (s) as would entitle them to the reliefs sought from the totality of the evidence led, viz-a-vis the completely uncontroverted and unchallenged evidence by the 1 and 2 Defendants”.

Submitting on the lawfulness or otherwise of the claimants in NICN/AK/23/2012 and NICN/ AK/32/2012, learned counsel said this appears to be the simplest issue in these cases. He drew the attention of the court to some paragraphs in the pleadings of the claimants in NICN/AK/23/2012 and NICN/ AK/32/2012.they are paragraphs 5 and 24 to 30 of the statements of facts which, according to claimant counsel, were not denied. If the letters of appointment and confirmation of the claimants were not issued and signed by Edo State Government or its predecessors-In-title, on what basis should the Ministry of Finance issue the disengagement letters? See page 6 paragraph 5 of Exhibit E01 which provides as follows:

“... appointment, confirmation, promotion, termination of a management and senior staff shall be made by the Board ...”

That Section 63 (1) part III of the Companies and Allied Matters Act,1990, as amended, provides as follows:

“A company shall act through its members in a general meeting or its board of directors...” “

That since the disengagement letters were issued to the Claimants in NICN/AK/23/2012 and NICN/AK/32/2012 did not emanate from the appropriate authority, their disengagement from the service of the 1st Defendant is undoubtedly unlawful and illegal. The Claimants in NICN/AK/23/2012 and NICN/AK/32/2012 had put in 33 and 21 years of service, respectively and are entitled to payment of their terminal benefits and other allowances claimed.

The claimant in NICN/AK/31/2012 also amended her complaints via a motion on notice dated 20 November 2017, which was filed on 21 November 2017. We also adopt our legal arguments on this issue in NICN/AK/23/2012 and NICN/AK/32/2012. The claimant is requesting her terminal benefit balance of ₦990,566.61. On 30/01/2022, the 2nd Defendant adopted his outdated written statement on oath filed on 27/4/2015, which had been overtaken by events. The said Defendant's statement on oath filed on 27/4/2015 by this witness was overruled by events when all 3 three claimants in NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012 filed their statement on oath on 6/6/2017 and 21/11/2017.

That the general rule that general damages will not be awarded for breach of admits or exceptions where the conduct of those in authority is punitive, oppressive, vindictive and arbitrary, as in this case. *Marine Management Association v. National Maritime Authority (2012) 8 NWLR (Pt. 1133) 504*. That all the figures given under general and special damages were not controverted by the Defendants.

39.3 DECISION OF COURT.

JUDGMENT

HONOURABLE JUSTICE K.D. DAMULAK: -

Before considering the merits of the case, it is pertinent to rule on documents objected to, which were marked “tendered” and ruling reserved till judgment.

Ruling on the Admissibility of exhibits MEE19 tendered to MEE26 tendered.

The learned Rotji Esq. objected to the admissibility of exhibits MEE19 tendered to MEE26 tendered. These documents are all from Edo State Ministry of Finance, except exhibit MEE20 tendered, which is from the 1st Defendant. The objection of learned Rotji to these documents is that they are uncertified photocopies of public documents. Learned Imafidon responded by admitting that they are uncertified photocopies of public documents, but excuses it on the ground that the liquidated company is under lock and key and so no one to certify for them and that it is a ground for the court to invoke section 12 of the National Industrial Act, 2006 and admit them.

The problem with the argument of learned counsel for the claimant is that this suit was instituted in September 2012 and the company was wound up in January 2014. That was enough time to have gotten these documents certified if that was not done before instituting this suit. Again, if the liquidated company was under lock and key and so no one to certify the documents, in this era of frontloading, that explanation should have been in the pleadings and evidence of the claimant, not for counsel to tell the court upon objection by the opposing counsel.

These documents were pleaded in paragraph 24 of the Statement of Facts and testified to in paragraph 25 of the Claimant's depositions testified about. These documents

were pleaded in support of the averment that, though the 1st Defendant is a limited liability company, the Edo State Government, through its Ministry of Finance, has hijacked the management of the company. Unfortunately, the Edo State Government is not a party to this suit and there is no relief sought in relation to that allegation of fact.

Documents are admitted in a legal proceeding not for the sake of admission but to aid the court in arriving at justice, particularly where the documents are objected to by the opponent. What is the purpose of these documents?

Besides the response of learned claimant counsel to the objection on these documents during trial, which has been summarized above, learned claimant counsel still used two pages in his final written address to submit on why the documents are admissible and should be admitted, but in the entire 50 pages final written address, there is not a single line on the usefulness of any of these documents to the establishment of whatever fact or point in the Claimant's case.

The only reference to these documents is at the counsel's 2nd leg of paragraph 9.36 as follows:

“The claimant in NICN/AK//32/2012 adopted her written deposition on oath of 6/6/17 and tendered exhibits MEE12 to MEE26 and was cross-examined. Submit paragraphs B,5,14,16,17,21,22,25,26,17,28, and 29”.

It should be noted here that the provision of section 12 of the National Industrial Court Act, 2006, is meant to be invoked in the interest of justice where the departure will not prejudice the other party. A clear want of diligence on the part of counsel, both in terms of preparing for his case as well as in terms of drafting his processes, is not accommodated under the interest of justice contemplated by the said section.

For all the above, counsel has not shown the interest of justice in relation to this case to be served so as to warrant any departure from the provisions of the Evidence Act 2011 to admit these documents. Exhibits MEE19 to MEE26 are accordingly rejected and are to be so marked. Another preliminary issue is the argument of claimants' counsel that the written statement on oath filed on 27/4/2015 and adopted by DW2 on 30/1/2022 is out- dated having been over taken by events, to wit, the amendment of NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012 on 6/6/2017 and 21/11/2017.

This is what counsel submitted;

On 30/01/2022, 2nd Defendant adopted his outdated written statement on oath filed on 27/4/2015 which had been overtaken by events. The said Defendant's statement on oath filed on 27/4/2015 by this witness was overruled by events when all three claimants in NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012 filed their statement on oath on 6/6/2017 and 21/11/2017.

The above submission is a misunderstanding of law and procedure. The position of the law is that an amendment dates back to the date of the initial filing of that process. See Dr. Kayode Fayemi vs. Adebayo Segun Oni & Ors (2019).

The Amended Originating Summons takes effect right from the beginning of the suit as the Originating Summons that commenced the suit. See A-G Ekiti State V Adewunmi (2002) 1 SC 47 in which the Supreme Court restated the law point thusly - The principle is that an amendment duly made takes effect from the date of the original document sought to be amended and this applies to every successive further amendment of whichever nature and at whatever stage it is made. Therefore, when a Writ of Summons is amended, it dates back to the date of the original issue of such writ and consequently, the action would continue as if the amendment had been inserted from the beginning.

Accordingly, a Defendant or Claimant is not bound to amend his own process upon amendment by the other party. It is his choice, depending on whether in his judgment, he needs to also amend to respond to any new issue or fact introduced in the amendment by his opponent. The failure to make a consequential amendment does not affect that party's process nor does an amendment by one party render his opponent's existing process outdated. The 2-Defendant Statement of Defence and witness deposition filed on 27/4/2015 and adopted on 30/1/2022 is not outdated.

On the merits of the case, the issues submitted by both counsels are similar and proper. The court adopts the issues as whether or not the claimant has proven his entitlement to any of the reliefs claimed. In determining this issue, it shall be pertinent to set out each head of claim and determine the same as per the issue for determination. That, the court shall do anon.

- (a) A Declaration that the contract of service between the Claimant and the Defendant before the Claimant was disengaged from service of the 1st Defendant, is governed by the Applicable Terms and Conditions of Service for Senior Staff as amended. Board resolutions as well as various Collective Agreements, 2002 and 2005 inclusive.

It is a rule that in every employment relationship, there are always terms and conditions of service. Being a consolidated suit, the terms and conditions of service have been tendered in evidence (Exhibit E01). There is also proof of approval and implementation of the collective agreements (Exhibit EO10 and EO11) by the 1 Defendant for its staff, (Exhibits EO7 and MEE17). I have no difficulty, therefore, in holding that this relief succeeds and the court accordingly so declares.

- (b) A Declaration that the purported removal or termination or disengagement of the Claimant from the service of the 1 Defendant or the government of Edo State through the ministry of finance, Edo State vide a letter dated 4 April, 2012 is altogether unlawful and illegal, being a breach of the contract of service between the Claimant and the Defendant.

Learned Rotji Esq. contended as follows;

That both Claimants, via their pleadings, did not state how and why their termination is altogether unlawful and illegal or a breach of their contract of employment throughout the Pleadings in NICN/ AK/23/2012 and NICN/AK/32/ 2012.

Learned Imafidon Esq. drew the attention of the court to some paragraphs in the pleadings of the claimants in NICN/AK/23/2012 and NICN/ AK/32/2012, which are

paragraphs 5 and 24 to 30 of the statements of facts, which, according to claimant counsel, were not denied. Worthy of note is paragraph 30, which is as follows;

Claimant shall contend at the hearing of this suit that his removal by the Government of Edo State through the Ministry of Finance, Edo State, is unlawful and illegal.

It must be borne in mind that a pleading that the claimant will contend at the hearing that a particular act is unlawful and illegal is not a matter for the claimant to prove by evidence but a legal matter for his counsel to argue at the written address stage. What is required is for the claimant to prove that he was a staff member of the 1st Defendant and his termination was done by the Government of Edo State through the Ministry of Finance, Edo State. This, the claimant has done by his pleadings, oral evidence, and documentary evidence, his appointment and termination letter (exhibits MEE12 and MEE18).

What, then, is the contention of learned counsel for the Claimant at the trial on this point? It is as follows;

If the letters of appointment and confirmation of the claimants were not issued and signed by the Edo State Government or its predecessors-in-title, on what basis should the Ministry of Finance issue the disengagement letters? See page 6, paragraph 5 of Exhibit E01, which provides as follows:

“... appointment, confirmation, promotion, termination of a management and senior staff shall be made by the Board ... “

That Section 63 (1) part III of the Companies and Allied Matters Act, 1990, as amended, provides as follows:

“A company shall act through its members in a general meeting or its board of directors ... “

That since the disengagement letters were issued to the Claimants in NICN/AK/23/2012 and NICN/AK/32/2012 did not emanate from the appropriate authority, their disengagement from the service of the 1st Defendant is undoubtedly unlawful and illegal.

I agree with the above submissions or contention of learned Imafidon Esq. for the claimants. Even if the Edo State Government were the majority shareholder or had controlling shares in the company, it cannot take over the functions of the Board of the company through its Ministry of Finance. The termination of the claimants by the Edo State Ministry of Finance made the said Ministry of Finance a meddlesome interloper and the termination cannot stand. It is hereby declared unlawful, null and void.

- (a) ₦15,000,000.00 (Fifteen million Naira) as general damages for breach of contract.

When it comes to damages for breach of contract, damages are awarded against the person in breach. Unfortunately, there is no allegation of breach of contract against the 1st and 2nd Defendants. EDO STATE GOVERNMENT, MINISTRY OF

FINANCE EDO STATE and ATTORNEY GENERAL AND COMMISSIONER FOR JUSTICE, EDO STATE who were initially sued as 2nd to 4th Defendants, are no longer parties to this suit and the court cannot penalize the present 1st and 2nd Defendants for the acts of persons who are no longer parties to this suit. The claim for general damages fails.

(b) ₦23,120,475.96 as special damages.

The prayer in relief (d) is for the sum of ₦23,120,475.96. The particulars of the special damages are as follows;

1. Terminal Benefits	₦13,019,691.31.
2. Money had and received by way of unremitted pensions contribution deducted by the Defendant from the Salaries of Claimant	₦1,212,851.92.
3. Salary Arrears (2010-2012)	₦1,917,942.13.
4. Annual Leave Allowance Arrears (2007 - 2012)	₦743,170.00.
5. Outstanding Arrears Collective Agreement (2002 – 2006)	₦1,681,537.30.
6. Money had and received by way of unremitted Contributions to the Nigeria Social Insurance Trust Fund from Oct. 1979 – Feb. 2007	₦1,091,562.78.
7. Unpaid salaries and allowances from April 2012 to 6 Nov. 2014 i.e, from the time of wrongful disengagement to the actual time of retirement.	₦3,453,720.52.
TOTAL	₦23,120,475.96

The law is that a claim for special damages must be strictly proven. See Dr. George Nyong Ikpe Udofia v. Akwa Ibom State Civil Service Commission & Ors. (2011) LPELR-4055(CA) where the court held;

"... it is the law that a party who claims special damages must not only plead it specifically, he must also prove it strictly."

We shall now consider the proof of each item of the special damages.

1. Terminal Benefits ₦13,019,691.31.

What is the evidence of the claimant as relating to his claim of ₦13,019,691.31? terminal benefits? I have searched carefully, over and over again, through the Claimant's 29 paragraph Statement of Facts and 30 paragraph deposition for the pleadings and evidence as to how the claimant arrived at ₦13,019,691.31 as her terminal benefit. I see none except paragraphs 28 of the Statement of Facts and paragraph 29 of the witness deposition, which is as follows;

That since the letter of disengagement was served on me by the 1st Defendant, I had waited patiently to be paid my terminal benefits, which up till now remain

unpaid.

Apart from the above, there is neither a pleading nor a deposition as to how the claimant came about this amount as her terminal benefits. Rather, she testified under cross-examination as follows;

There is an office in the Defendant's office that computes terminal entitlements of retired staff. The Defendant did not give me my calculated entitlement, but the roaster was in the department, so we went there and looked at it.

From the above, although it cannot be argued that the Claimant is not entitled to terminal benefits, the claim for the sum of ₦13,019,691.31, being the Claimant's terminal benefits, has not been proven and the same is hereby dismissed.

2. Money had and received by way of unremitted pension contributions deducted by the Defendant from the salaries of Claimant ₦1,212,851.92

The pleadings and evidence relating to this item are as in paragraphs 21 and 22 of the statement of facts and deposition, respectively. It is as follows;

The 1st Defendant implemented a self-administered contributory pension scheme where pensions were steadily deducted from my salary monthly in the ratio of 5:15 between Staff and 1st Defendant. That the total amount deducted as pension contribution from my salaries by the Defendant from October 1979 to February 2007 is ₦1,212,851.92, as the Defendant stopped deducting pension contribution from staff salaries in March 2007.

There is no denial of this claim in the Defendant's Statement of Defence. By the very evidence of the 2nd Defendants in cross-examination that he has no access to the 1st Defendant's file, including the Claimant's file, any such denial of this claim by him will be of no moment. In proof of these deductions, the claimant tendered his pay advice for January 2007, February 2007 and August 2010 in evidence, exhibits MEE15 and MEE16. It is to be noted that the claimant said the Defendant stopped deducting pension contributions from staff salaries in March 2007. The pay advice for August 2010, exhibit MEE15, simply confirms this position, as the pay advice for January and February 2007, exhibit MEE16, all show a pension fund deduction of ₦3,686.48. Accordingly, this claim for pension contribution succeeds and is accordingly granted.

3. Salary Arrears (2010 – 2012). ₦1,917,942.13

There is no iota of pleading and evidence relating to this head of special damages in the claimants' processes. The claim cannot succeed and the same is dismissed.

4. Annual Leave Allowance Arrears (2007 -2012) ₦ 743,170.00

There is no iota of pleading and evidence relating to this head of special damages in the claimants' processes. The claim cannot succeed and the same is dismissed.

5. Outstanding Arrears Collective Agreement (2002 – 2006). ₦,681,537.30.

The pleadings and evidence relating to this item are as in paragraphs 16 and 17 of the statement of facts and depositions, respectively. It is as follows;

The 2005 Collective Agreement, which took effect from 1st April 2005, approved 35% increase in salaries and all monetized allowances for all cadres of senior staff across the board, which was accepted and implemented by 1st Defendant for its staff, Claimant inclusive.

This pleading and evidence, as it stands, rather suggest that the said allowances were paid. There is no pleading and evidence to the effect that there were any arrears, let alone unpaid. Accordingly, this head of claim fails and is dismissed.

6. Money had and received by way of unremitted Contributions to the Nigeria Social Insurance Trust Fund from Sept. 1991– Feb. 2007

₦1,091,562.78.

The pleadings and evidence relating to this item are as in paragraphs 22 and 23 of the statement of facts and deposition, respectively. It is as follows;

The 1st Defendant also implemented the contribution to the Nigeria Social Insurance Trust Fund, where contributions were made to the fund from the salaries and allowances of the staff Claimant. Deductions made from my salary between October 1979 to February 2007. A total sum of ₦1,091,562.78 was deducted within that period.

The problem with this head of claim is that the claimant did not tell the court in her pleading and evidence that she discovered that the said deductions were not remitted and how she found out. This claim cannot succeed by the claimant simply pleading and testifying that such deductions were made, since it is not her claim that the deductions were illegal. Claimant needs to prove to the court that the deductions were not remitted before she can claim the same as money had and received for a purpose but not remitted. Accordingly, this claim fails and is dismissed.

7. Unpaid salaries and allowances from April 2012 to 6 Feb. 2026, i.e., from the time of wrongful disengagement to the actual time of retirement

₦3,453,720.52.

The court has declared the disengagement of the claimant, a staff member of the 1st Defendant, by the Edo State Ministry of Finance as null and void. The implication is that she remains in the employ of the 1st Defendant till legally terminated or till retirement. In the circumstances of this case, where a receiver/liquidator was appointed for the 1st Defendant on 17/6/2013 and the 1st Defendant was wound up by the Federal High Court on 28/1/2014, could the employment of the claimant legally exceed that date? I think not. I accordingly hold that the claimant is only entitled to salaries and allowances from April 2012 to January 2014, a period of 22 months.

From paragraphs 27 of the Statement of Facts and paragraph 28 of the witness deposition, the Claimant's monthly net salary is ₦147,332.72. If that is multiplied by 22 months, it will give us **₦3,241,319.84**. His annual leave allowance was ₦141,160.00. Since the claimant was unlawfully disengaged in April 2012 and the company was wound up in January 2014, the claimant is entitled to annual leave allowance for 2012 and 2013 only, which is ₦141,160 x 2 = **₦282,320.00**. The Claimant's 13th-month salary is ₦73,729.50. The claimant is entitled to 13th-

month salaries for 2012 and 2013 only which is N73, 729.50.x2= **₦147,459.00**
Now, **₦3,241,319.84 + ₦282,320.00 + ₦147,459.00 = ₦3,671,098.84**. This head of claim

succeeds in part in terms of Unpaid salaries and allowances from April 2012 to 1st April, 2014 in the sum of **₦3,671,098.84**.

8. 20% interest of the total claim from the inception of this case till Judgment is given and until final settlement of the claim.

It is a settled principle of law that prejudgment interest can only be awarded on proof from the agreement of the parties. See *Elijah Adebisi (Trading Under the Style of Delock Association) & Ors v. National Institute of Public Information & Ors* (2013) LPELR- 22628 (CA), where the court of appeal held as follows;

"The general rule at common law is that pre-judgment interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. Thus, pre judgment interest will, be payable where there is an express agreement to that effect and such agreement may be inferred from a course of dealing between the parties or where an obligation to pay interest arises from the common practice or usage of a particular trade or business - *Alfontrin Limited vs. Attorney General, Federation* (1996) 9 NWLR (Pt 4750) 634, *Diamond Bank Limited vs. Partnership Investment Company Limited* (2009) 18 NWLR (pt 1172)67. Consequently, a Plaintiff, to succeed in a claim for prejudgment interest, must show how the entitlement to such interest arose, that is, whether by law, by contract or agreement, or he must plead facts showing that the claim is part of the loss or special damages which the Defendant's wrong imposed on him. It is not enough to merely say that the Plaintiff is claiming interest. The basis of the claim of interest must be made manifest on the pleadings - *Ekwunife vs. Wayne (W.A.) Limited* (1989) 2 NWLR (pt 122) 422, *Sani Abacha Foundation for Peace & Unity vs. United Bank for Africa Plc* (2010) 17 NWLR (pt 1221)192."

There is no such proof before the court. The claim for pre-judgment interest fails and is dismissed. Post-judgment interest is permitted by the rules of court.

SUMMARY

In summary, the claims of the claimant succeed in part as follows;

1. Prayer A succeeds.
2. Prayer B succeeds.
3. Prayer C for general damages fails.
4. Prayer D for special damages succeeds in part as follows
 - (i) Terminal Benefits ... **₦13,019,691.31.**, ... Dismissed.
 - (ii) Pensions Contribution **₦1,212,851.92** ... Granted.
 - (iii) Salary Arrears (2010 – 2012) ...**₦1,917,942.13** Dismissed.
 - (iv) Annual Leave Allowance Arrears (2007 - 2012) ... **₦743,170.00** ... Dismissed.
 - (v) Arrears of Collective Agreement (2002 – 2006) **₦1,681,537.30** ...Dismissed.
 - (vi) Unremitted Contributions to NSITF from Sept. 1979 – Feb. 2007 ...**₦1,091,562.78** ...Dismissed.
 - (vii) Unpaid salaries and allowances from April 2012 to 1 April 2014 (as

modified by the court instead of till retirement) ₦3,671,098.84 ...
Granted.

COURT'S ORDER

For the avoidance of doubt, it is hereby declared and ordered as follows.

1. A Declaration that the contract of service between the Claimant and the Defendant before the Claimant was disengaged from service of the 1st Defendant, is governed by the Applicable Terms and Conditions of Service for Senior Staff as amended. Board resolutions as well as various Collective Agreements of 2002 and 2005 inclusive.
2. A Declaration that the purported removal or termination or disengagement of the Claimant from the service of the 1st Defendant by the government of Edo State through the Ministry of Finance, Edo State vide a letter dated 4th April, 2012 is altogether unlawful, null and void.
3. The Defendants are to pay the claimant special damages as follows;
 - (a) Pensions Contributions ₦1,212,851.92.
 - (b) Unpaid salaries and allowances from April 2012 to 1 April 2014 ₦3,671,098.84.
- TOTAL ₦4,883,950.76.**
4. The judgment sum of **₦4,883,950.76** is to be paid within 21 days of this judgment, or the sum shall attract 10 % interest per annum.

This is the judgment of the court and it is entered accordingly.

39.4 REMARKS

A contract of service between two parties is solely governed by all the applicable Terms and Conditions of service between the parties (Employer/ Employee relationship).

39.5 REFERENCES

1. *Alfontrin Limited vs. Attorney General, Federation* (1996) 9 NWLR (Pt. 4750) 634.
2. *Diamond Bank Limited vs. Partnership Investment Company Limited* (2009) 18 NWLR (pt 1172) 67.
3. *Ekwunife vs. Wayne (W.A.) Limited* (1989) 2 NWLR (pt. 122) 422.
4. *Sani Abacha Foundation for Peace & Unity vs. United Bank for Africa Plc* (2010) 17 NWLR (pt. 1221) 192.
5. *Elijah Adebisi (Trading Under the Style of Delock Association) & Ors vs. National Institute of Public Information & Ors* (2013) LPELR-22628 (CA).
6. *Dr. George Nyong Ikpe Udofia vs. Akwa Ibom State Civil Service Commission & Ors.* (2011) LPELR-4055(CA).
7. *Ohn Kayode Fayemi vs. Adebayo Segun Oni & Ors* (2019).
8. *A-G Ekiti State vs. Adewunmi* (2002) 1 SC 47.

40.1 ARRANGEMENT OF MATTER, COURT, DATES.

COURT: NATIONAL INDUSTRIAL COURT OF NIGERIA (ABUJA DIVISION).

DATE: 27th March, 2019

SUIT NO: NICN/ABJ/28/2015.

JUDGE: Honourable Justice E.N. Agbakoba

**ALIYU SANI & 18 ORS.
(Plaintiff/Respondent)**

vs

**NATIONAL INSURANCE COMMISSION
(Defendant/ Applicants)**

40.2 REPORTS/FACTS/ISSUES

The Claimant, by Amended General Form of Complaint filed on 29th June, 2017, with the accompanying frontloaded documents, approached the Court for the following reliefs:

WHEREOF the Claimants claim against the Defendants jointly and severally as follows:

DECLARATION that the Claimants are entitled to Payment of Pension from the 1st Defendant.

A DECLARATION that the decision of the Defendants to stop payment of Pensions to the Claimant is Unlawful, null and void.

AN ORDER directing the Defendants to resume the payment of Pension to the Claimants forthwith.

The Sum of **₦10,000,000.00 (Ten Million Naira)** only is the general damages for the hardship, severe mental anguish and embarrassment occasioned to the Claimants and their families as a result of the Defendants' failure and or refusal to pay their Pension as and when due.

Cost of instituting and prosecuting this Suit.

The Defendants filed their **STATEMENT OF DEFENCE** on 16th November, 2017.

The Defendants aver that sometime in September 2007, the Federal Ministry of Finance sought the approval of the President and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, among other things for the

complete reorganization, restructuring and automation of the 1st Defendant as recommended by Technical Review Committee (TRC) on the Verification of Recertification of Insurance Companies and the Repositioning of the National Insurance Commission (NAICOM).

Defendants averred that by a publicly advertised process in accordance with the due process requirements of the Federal Government of Nigeria, the 1st Defendant appointed the Firm of H Pierson Associates Limited as Human Resources Consultants for the restructuring of the 1st Defendant in line with the approval of the Technical Review Committee's report by the President as stated above. Furthermore, the Human Resources Consultants, in consultation with the Project team Members, carried out the restructuring exercise and reported to the Defendants.

The Defendants stated that in accordance with the approved implementation plans, the affected Staff of the 1st Defendant including the Plaintiffs were disengaged as a result of the reorganization/restructuring as recommended by the Technical Review Committee (TRC) were duly paid all their agreed/stipulated terminal benefits and it was never pension; and that each Staff collected their respective cheques.

WHEREOF THE DEFENDANTS pray the Honourable Court to dismiss the suit for lacking a reasonable cause of action, same being speculative, frivolous and constituting an abuse of the process of the Court.

COUNTERCLAIM OF THE DEFENDANTS.

The Defendants/Counterclaimants repeat and adopt Paragraphs 1-13 of their Statement of Defence in proof of their counterclaim. Because of the foregoing, the Defendants/Counterclaimants aver that the Plaintiff should refund all sums paid as pension as they are not entitled to the same, as this act amounts to misrepresentation or non-disclosure and counterclaims against the Plaintiffs/Defendants to the Counterclaim as follows:

- (i) **An Order** directing that the Plaintiffs/Defendants to the Counterclaim return and refund the total sum paid to Defendants/Counterclaimants, as said payments were in breach of the Pension Reform Act 2004.
- (ii) **An Order** directing the Plaintiffs/Defendants to Counterclaim to equally refund all interest (with the prevailing Central Bank of Nigeria interest rate) made on the said payment to the Defendants/Counterclaimants.

The Defendants filed a **NOTICE OF PRELIMINARY OBJECTION** on 16th November, 2017, supported by a 4-paragraph affidavit deposed to by Paul Omoluabi, seeking **AN ORDER** dismissing the Plaintiffs' Suit in its entirety.

GROUND FOR THE OBJECTION

1. The subject matter of this suit with the same parties was adjudicated upon by a court of competent jurisdiction.
2. That Plaintiffs and about 50 others were affected and bound by the judgment of previous litigation before Hon. Justice G. Kolawole in suit NO:

3. That out of the entire Parties, 19 Parties herein filed again before this Honourable same prayers already adjudicated upon by the previous court, particularly court, at page 3 paragraph (f) of Justice Kolawole's judgment dated 11/7/2014 compare with paragraphs i and ii at page 2 of the Amended General Form of Complaint dated and filed 29th June, 2017.
4. The Suit is frivolous, vexatious, speculative, hypothetical, academic and an abuse of Court process.
5. This Honourable Court lacks the requisite jurisdiction and competence to entertain and/or determine this Suit.
6. It is in the interest of justice to dismiss the Suit.

THE DEFENDANTS' WRITTEN ADDRESS IN SUPPORT OF THE PRELIMINARY OBJECTION.

ISSUE.

Whether this Honourable court has the requisite jurisdiction to entertain and determine this suit, considering the grounds upon which this application is brought. It is counsel's submissions that this suit is incompetent on the ground that it is in breach of the principles of estoppel per rem judicatam, in other words, this suit has been adjudicated upon before by the same parties, privies and on the same subject matter by a court of competent jurisdiction and a verdict was validly delivered. *Omiyale v. Macaulay (2009) 7 NWLR (Part 4111) 597, 613D, per Oguntade, JSC.*

He submitted that the Originating Processes amount to abuse of court processes and that where a process constitutes an abuse of Court process, the proper order a Court can make is an order of dismissal. *Ojo v. Attorney-General, Oyo State (Supra) at Pages 327-328 H-A, per Akintan, JSC; Arubo & Ors v. Aiyeleru & Ors (1993) 3 NWLR (Part 280) 126, 142A-B, per Nnemeka—Agu, JSC; Onyeabuchi v. Independent National Electoral Commission & Ors (2002) NWLR (Part 769) 417, 441-442 G-A.*

Counsel further submitted that this Honourable Court is deprived of jurisdiction to entertain this suit and for reasons adduced above. *Madukolu v Nkem Dilim (1962) 1 ALL NLR 587, 594.*

The CLAIMANTS/RESPONDENTS WRITTEN ADDRESS IN OPPOSITION TO THE DEFENDANT/APPLICANT'S NOTICE OF PRELIMINARY OBJECTION DATED 1ST NOVEMBER, 2017 was filed on 27th April, 2018.

ISSUE

Whether this Honourable Court has the requisite jurisdiction to entertain and determine this suit, considering the grounds upon which this application is brought.

Learned Counsel submitted that contrary to the Defendant/Objector's contention, this suit is not caught up by the principle of estoppel per rem judicatam. per Ngwuta, JSC in *Adeyefa v. Bamgboye (2014) 11 NWLR (Pt 1419) 520 at 542- 543 paragraph H-A.*

Furthermore, for the plea of Res Judicata to arise, all these conditions must exist concurrently and the absence of one condition will lead to the failure of the plea of res judicata. *Adeyemi – Bero vs. LS.D.P.C (2013) 8 NWLR (Pt. 1356) 238 at 305 Paras B-H, per Ariwoola JSC.*

He submitted that it is already settled law that to sustain a plea of “res judicata,” the party who is pleading it must satisfy the required conditionalities, which are:

1. The parties (or their privies, as the case may be) are the same in the present case as in the previous case.
2. That the issue and subject matter are the same in the previous suit as in the present suit.
3. That the adjudication in the previous case must have been given by a Court of competent jurisdiction;
4. That the previous decision must have finally decided the issues between the parties.

M.O. Odutota v. Chief Z. Oderinde & Ors (2004) 6 SCM 161 at 167, (2004) 12 NWLR (Pt. 888) 574, (2004) 30 WRN 1, (2004) 18 NSCQR 577; Nkanu & Ors v. Onun & Ors (1977) 5 SC 13; Dzungwe v. Gbishe (1985) 2NWLR (Pt. 8) 528; Udo v. Obot (1989) 1 NWLR (Pt. 95) 59; 5.0 Ntuks & Ors v. Nigerian Ports Authority (2007) 10 SCM 127, (2007) 13 NWLR (Pt. 1051) 392.

Counsel argued that, moreover, the reliefs before the Federal High Court in Suit No: FHC/ABJ/CS/2009 are different from the reliefs in this present suit before this Honourable Court.

Reliefs before the Federal High Court are reproduced as follows:

A DECLARATION that the Defendants lack the requisite power to carry out any restructuring exercise without the relevant approvals.

A DECLARATION that the ongoing Restructuring/Reform exercise being carried out by the Defendants is ultra vires, null and void and of no effect whatsoever, the Defendants having failed to obtain the necessary approvals or observe the proper procedure laid down by the Guidelines for the Reform of Government Parastatals.

A DECLARATION that the purported termination of the Plaintiff’s employment with the Defendant is unlawful.

AN ORDER compelling the Defendants to forthwith reinstate the Plaintiffs to their various duty posts.

AN ORDER compelling the Defendants to pay the Plaintiffs all their monthly salaries and allowances starting from the date of the last payment until their employment is properly determined.

AN ORDER compelling the Defendants to release forthwith its (sic) statutory contributions to the Plaintiff’s Pension Funds and all deductions made from the

Plaintiff's various monthly salaries for Pension Fund, which were never remitted to their various Pension Fund Administrators and their contributions to the National Housing Fund, which were deducted monthly from their salaries.

AN ORDER compelling the Defendants to release forthwith the Plaintiffs' various Tax Clearance Certificates.

IN THE ALTERNATIVE to (c), (d), (e), above, One Billion Naira against the Defendants as general damages for the Defendants' wrongful and unlawful acts."

Furthermore, the reliefs herein contained in this suit as presently constituted are as follows:

"A DECLARATION that the Claimants are entitled to payment of Pension from the 1st Defendant.

A DECLARATION that the decision of the Defendants to stop payment of Pensions to the Claimant is unlawful, null and void.

AN ORDER directing the Defendants to resume the payment of Pension to the Claimants forthwith.

The Sum of ~~N~~**10,000,000.00 (Ten Million Naira)** only is general damages for the hardship, severe mental anguish and embarrassment occasioned to the Claimants and their families as a result of the Defendants' failure and or refusal to pay their Pension as and when due.

Cost of instituting and prosecuting this Suit."

Counsel submitted that the reliefs sought in the suit before the Federal High Court and this suit, as presently constituted are different. The Claimants/Respondents in the instant suit sought four (4) reliefs which pertain to non-payment of the Claimants/Respondents' pension, which was unilaterally stopped, while the six (6) reliefs contained in the suit before the Federal High Court bothers unlawful dismissal of employment. Thus, the principle of estoppel does not apply to this case and the cases of *Omiyale v. Macaulay* (2009) 7 NWLR (Pt. 4111) 597 and *Jimoh v. Akande* (2009) 5NWLR (Pt. 1135) 549 do not apply.

Counsel submitted that it is trite that when a party sues in a representative capacity, such capacity should be indicated under the party's name in the title of the suit. *MTN Nigeria Communications Limited v. Emegano* (2016) LPELR-41090.

It is counsel's submission that the main reason why a person is made a party to an action in Court is so that he should be bound by the result of the action. Hence, when a person is not a party to a suit, he is nothing but a stranger to that suit and thus cannot be bound by the Judgment of the Court. *Olawoye vs. Jimoh* (2013) 13 NWLR (Pt. 1371) 362; *N.D.P V. I.N.E.C* (2013) 6 NWLR (Pt. 1350) 392at 426, Para F, per *Fabiyi, JSC*.

Counsel submitted that the order of a Court of competent jurisdiction is binding on all parties until set aside by a higher Court and all parties must obey it. per *Okoro*,

JCA in *Popoola v. Babatunde* (2012) 7 NWLR (Pt 1299) page 302 at 322 paragraph F; *Dauda v. First Bank of Nigeria* (2003) All FWLR(Pt 694) 135.

Counsel contended that the Notice of Preliminary Objection filed by the Defendant/Applicant dated 8th November, 2017 and filed 9th January, 2018, is an abuse of Court process. That this objection, having been decided upon by this Honourable Court, was filed to annoy and harass the Claimant/Respondents. R – *Benkey Nigeria Limited vs Cadbury Nigeria Limited* (2012) LI'ELR-7820(SC).

The Defendants filed their **REPLY ON POINTS OF LAW** on 19 May 2015.

Learned Counsel to the Defendant submitted that the claimants in this suit were privies to the previous suit adjudicated upon by a court of competent jurisdiction, urging the Court to hold that the Plaintiffs are privies and therefore the same parties.

Counsel also submitted that the claimants' depositions in their Counter Affidavit are false and no evidence to substantiate the facts deposed therein and that such facts deposed are deemed abandoned. *N.A.S. Limited vs. UBA Plc* (2005) 14 NWLRT (part 945), 436 C, per Akintan, JSC.

Furthermore, the Plaintiffs never exhibited any evidence reflecting any form of payment whatsoever, no document reflecting when their cause of action arose and any other relevant document to support their assertions. *N.A.S. Limited vs. UBA Plc* (supra) 437 D-F, per Akintan, JSC.

Counsel to the Defendant moved his Preliminary Objection on and adopted his Written Address and Reply on Point of Law, both with adumbration. Counsel to the Claimant adopted his counter affidavit and Written Address and the matter was adjourned for ruling. Thereafter the parties were requested to address the court with regard to the import of *Pan Atlantic Shipping And Transport Agencies Ltd v. Abayomi Babatunde* [2007] LPELR 4826 CA Where it was established even though a cause of action may give rise to several remedies once one remedy had been claimed in one separate action that claim would act as a bar to all other remedies stemming from the same cause of action by the plea of *res judicata*. See *Gafarafu vs. UAC Limited* [1961] All NLR 785 and *Savage vs. Uwechie* [1972] 1 All NLR(Part 1) 251.

Both parties filed Further Addresses.

On the 12th December 2018 parties adopted their respective Written Addresses and adumbrated their positions accordingly and this matter was adjourned for ruling.

40.3 DECISION OF COURT.

JUDGMENT

HONOURABLE JUSTICE E.N. AGBAKOBA. :-

Having carefully summarized the position of both sides, the arguments of opposing Counsel and having carefully reviewed all the authorities cited, read through all the relevant processes and digested the contention of the parties and their written submission, are herewith incorporated in this Ruling and specific mention would be made to them where the need arises. The issue for determination in this suit, to my

mind, is whether there is any merit to the Defendant's application.

The position of the law as regards Res Judicata is as was stated in the case of *Dauda v. A.G. Lagos* 46 NSCQR "Where a judgment, i.e. a final judicial decision has been pronounced on the merit by a court with the requisite jurisdiction over the parties and the subject matter, any party in such suit as against any other party is estopped in a subsequent suit from disputing such decision on the merits. Once it is a final decision is made on the same question and between the same parties, it is binding until upset on appeal. Res judicata gives effect to the Policy of the law that parties to a judicial decision should not afterwards be allowed to re-litigate the same question even if the decision is wrong. This is premised on the fact that a court has jurisdiction to decide wrongly as well as correctly, and if it makes any mistake, its decision is binding unless corrected on appeal." ***Per Bode-Rhodes-Vivour, JSC at P. 180.***

The case continued that —Where a party sets up res judicata by way of estoppel as a bar to the other party's claim, the following must be established:

- (a) There must be a judicial decision;
- (b) The court that rendered the decision must have had jurisdiction over the parties and the subject matter;
- (c) The decision must be final and on the merits;
- (d) The decision must determine the same question as that raised in the later litigation; and
- (e) The parties to that later litigation were either parties to the earlier litigation or their privies, or the earlier litigation was in rem.¶ *Per Bode-Rhodes-Vivour, JSC at P. 180.*

See also, *A.G. Nasarawa V. A.G. Plateau* 50 NSCQR Where it was held that "Otherwise known as estoppel by record arises when an issue of fact has been judicially determined in a final matter between the parties by court or a tribunal having jurisdiction, concurrent or exclusive in the matter and the same issue comes directly in question in subsequent proceedings between the parties or their privies. The parties affected are estopped from bringing a fresh action before any court on the same case and on the same issue already pronounced upon by the court in a previous action." ***Per O.O. Adekeye JSC at P. 375.***

On what a party pleading Estoppel per rem judicatam must prove to succeed:

- (a) That the parties or their privies involved in both the previous and the current proceedings in which the plea is raised are the same;
- (b) That the claim or issue in dispute in both proceedings is the same;
- (c) That the res or the subject matter of the litigation in the two cases is the same;
- (d) That the decision relied upon to support the plea is valid, subsisting and final;

"The court that gave the previous decision relied upon to sustain the plea was a court of competent jurisdiction. The burden is on the party who sets up the force of estoppel per rem judicatam to establish the above pre-conditions conclusively." ***Per O.O.***

Adekeye JSC at P. 375.

The Apex Court continued that “The plea of Res Judicata is used as a shield and not as a sword. As a successful plea constitutes a bar to any fresh action as between the parties or their privies. It is as a plea, a bar, and as evidence, it is conclusive. Once a plea of Res Judicata has been established, the jurisdiction of the court would be ousted.” **O.O. Adekeye JSC at P. 376.**

(a) Now bearing in mind that there are: – “Three essential elements are involved in the plea of res judicata, namely: –

1. An earlier decision on the issue;
2. A final judgment on the merits; and
3. the involvement of the same party, or parties in privity with the original parties” as Per Awala, JCA in Abe v. Adeniyi [2007] 4 N.W.L.R. (PT. 1023) 191 at 218 Paragraphs A – B (CA) and juxtaposing the former case FHC/ABJ/CS/2009 against this instant suit I am satisfied that the parties in FHC/ABJ/CS/2009 include the 19 Claimant in this instant hence the parties in both suit are the same, i.e. the same parties in this suit are the same (included in) the parties to FHC/ABJ/CS/2009. Secondly, from the certified true copy of the judgment of FHC/ABJ/CS/2009 tendered, it would appear in satisfaction of the principle stated in Ikeme vs VC, University CF Nig. & Ors. (2014) 40 NLLR (PT.123) 466 NIC @ 470 that “the Defendants or any party alleging an abuse of court process must place before the court concrete evidence such as the processes of the other pending case or any such material particulars to enable the court make a finding that would enable it decide on whether or not the facts and circumstances of the case indeed amount to an abuse of court process” I find that FHC/ABJ/CS/2009 culminated in a final decision of a competent court of record. Also, I find that the reliefs in this suit could substantially be subsumed in reliefs (f) of FHC/ABJ/CS/2009. Bearing in mind the position of the law is that parties are precluded to litigate their remedies in piecemeal where a given cause of action gives rise to more than one remedy and once one remedy had been Claimed in an action that claim would act as a bar to any and all other remedies derivable from the same cause of action by virtue of the plea of res judicata Pan Atlantic Shipping And Transport Agencies Limited vs. Abayomi Babatunde [2007] LPELR 4826 CA.

All in all, I find that the Defendant’s preliminary objection has merit and succeeds. This suit is caught up by the doctrine of res judicata; hence, this court cannot / is precluded by law, from further entertaining or making any determination in respect of this suit.

This suit is hereby dismissed. I make no order to costs.

40.4 REMARKS

Res judicata doctrine is about a matter already judged, which prevents such a case from being retried or re-litigated once it has been finally decided by a Court of competent jurisdiction.

40.5 REFERENCES.

1. *Ojo vs Attorney-General, Oyo State (Supra) at Pages 327-328 H-A.*
2. *Arubo & Ors vs. Aiyeleru & Ors (1993) 3 NWLR (Part 280) 126, 142A-B.*
3. *Onyeabuchi vs. Independent National Electoral Commission & Ors (2002) NWLR (Part 769) 417, 441-442 G-A.*
4. *Pan Atlantic Shipping and Transport Agencies Limited vs. Abayomi Babtunde [2007] LPELR 4826 CA.*
5. *Abe vs. Adeniyi [2007] 4 N.W.L.R. (PT. 1023) 191 at 218 Paras. A – B (CA).*
6. *Ikeme vs. VC, University of Nig. & Ors. (2014) 40 NLLR (PT.123) 466 NIC @ 470.*
7. *A.G. Nasarawa vs. A.G. Plateau 50 NSCQR.*

41.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: NATIONAL INDUSTRIAL COURT OF NIGERIA (ABUJA DIVISION)

DATE: 12th July, 2024

SUIT NO: NICN/ABJ/259/2023.

JUDGE: Honourable Justice O.A. Obaseki-Osaghae

MR. CHRISTOPHER EMENIKE ORJI
(Plaintiff)

vs

INDUSTRIAL AND GENERAL INSURANCE PLC
(Defendant)

41.2 REPORTS/FACTS/ISSUES

The Claimant filed this complaint against the Defendant on September 22, 2023, together with the accompanying processes, seeking the following reliefs:

1. An Order for the Defendant to pay the Claimant the sum of ₦12,934,759.63 (Twelve Million Nine Hundred and Thirty Four Thousand Seven Hundred and Fifty-Nine Naira Sixty-Three Kobo only) being the outstanding balance of the Claimant's entitlements from the Defendant upon termination of his employment by the Defendant.
2. An Order for the Defendant to pay the Claimant the sum of ₦3,770,145.00 (Three Million Seven Hundred and Seventy Thousand One Hundred and Forty-Five Naira Only) being the gratuity/ special redundancy payment due to the Claimant upon termination of his employment by the Defendant.
3. An Order for the Defendant to remit, up to the date of termination of the employment of the Claimant, the pension deductions and contributions of the Claimant, in the prescribed statutory percentage to his Pension Fund Administrator and deliver proof of same to the Claimant within 60 days from the day judgment is delivered in this case.
4. An Order for the Defendant to remit, up to date of termination of the employment of the Claimant, the National Housing Fund contribution deductions from the Claimant's salaries, and deliver proof of same to the Claimant, within 60 days from the day judgment is delivered in this case.
5. An Order for the Defendant to pay, up to the date of termination of the employment of the Claimant, the PAYE taxes deducted from the Claimant's salary, and to obtain and deliver the Tax Clearance Certificate of the Claimant within 90 days from the day judgment is delivered.

6. An Order for the Defendant to pay the Claimant the sum of ₦130,000.00 (One Hundred and Thirty Thousand Naira Only) being the refund of the payments made by the Claimant in settlement of Abia State Infrastructural levies for the years 2015, 2016 and 2017 on behalf of the Defendant.
7. An Order for the Defendant to pay damages to the tune of ₦5,000,000 (Five Million Naira Only) to the Claimant.
8. An Order for the Defendant to pay ₦1,000,000 (One Million Naira Only) to the Defendant as the cost of this suit.
9. An Order for the Defendant to pay 10% interest per annum on the judgment sum from the day judgment is delivered till the judgment sum is fully liquidated.

The Defendant did not enter an appearance or file a defence in spite of being served the originating processes and hearing notices.

Case of the Claimant.

The Claimant's case on the pleadings is that the Defendant employed him by letter dated November 1, 2007. The Claimant averred that he was promoted to the rank of Manager by a letter dated November 12, 2014, and with effect from 30 November 2014, with a revised salary and breakdown of its components. He stated that from November 2014, his monthly salary was set at ₦478,238.26 after all deductions, and this is evidenced in his pay slips.

The Claimant averred that the Defendant, by a letter dated 9 December 2019, terminated his employment with effect from 31 December 2019. He stated that in the letter of termination, he was asked to hand over all Company properties in his possession and also complete exit clearance forms, after which all his entitlements would be paid to him and he complied with the directives, but after almost four years, the Defendant has failed to fully pay his entitlements as promised.

The Claimant averred that before the termination of his appointment, he was owed several months arrears of salaries which remains unpaid till date and that sometime in 2015, the Management of the Defendant notified staff including him that as a result of paucity of funds, it would adjust salaries of staff downwards temporarily to cushion the effect from September, 2015. During this period, his salary was adjusted to ₦382,590 (Three Hundred and Eighty-Two Thousand Five Hundred and Ninety-Nine Naira Only) monthly, till it was stopped in March 2018, and the full salary of ₦478,238.26 was restored.

The Claimant averred that after the termination of his appointment and after several appeals to the Defendant, the Defendant by email sent on 29 July, 2021 wrote to him offering the sum of ₦10,185, 446.56 (Ten Million, One Hundred and Eighty-Five Thousand, Four Hundred and Forty-Six Naira, Fifty-Six Kobo Only) as his total entitlement, which is less than what his entitlement is. The Claimant stated that he responded in protest, challenging the calculation done by the Defendant, and offered what he believed was the correct figure, breaking down the components. However, to date, the Defendant has never responded to his email.

The Claimant averred that to date, only the sum of ₦1,007,057.72 (One Million Seven Thousand and Fifty-Seven Naira, Seventy-Two Kobo only) has been paid to him by the Defendant, leaving the balance of the sum of ₦12,934,759.63 (Twelve Million Nine Hundred and Thirty-Four Thousand Seven Hundred and Fifty-Nine Naira Sixty-Three Kobo only). He stated that by his employment contract and the Defendant's employee handbook (particularly paragraph 3.6.1 on page 24), he is entitled to 12 weeks' basic salary for each completed year of service as gratuity.

The Claimant averred that he had repeatedly reached out personally, through phone calls and emails, to the Defendant to demand his entitlements, all to no avail. He stated that he wrote a letter through his lawyers, Sterling Solicitors, to demand his full entitlements to be paid to him to avoid legal action to recover the same, but that the Defendants have still not paid his entitlements almost 4 years after they terminated his appointment.

The Claimant averred that the Defendant has consistently deducted employee pension contributions, national housing fund deductions, and PAYE taxes from his salary. That from enquiries made with his Pension Fund Managers, Radix Pension Managers, Federal Mortgage Bank, and the State Internal Revenue Service, there is an indication that these have either not been fully remitted or have only been partly remitted by the Defendant.

The Claimant averred that sometime in 2017, while still in the employment of the Defendant, as Manager of Aba Branch of the Defendant he had to source for the sum of ₦130,000 (One Hundred and Thirty Thousand Naira) from his personal funds to clear arrears of Abia State Infrastructural levies for the years 2015, 2016 and 2017 to prevent the harassment, arrest and possible prosecution of the staff of the Company as well as sealing of the business premises, having experienced a similar thing in November, 2015 for similar reasons. He stated that despite repeated demands for the refund of the sum of ₦130,000 paid by him, the Defendant has failed or refused to make the refund.

The Claimant averred that he offered unblemished services to the Defendant for several years and has suffered untold hardship, including major health challenges as a result of the refusal by the Defendant to pay his entitlements having lost his job suddenly without notice and having no other source of income and has been unable to meet his obligations to himself and family as a result of the Defendant's actions.

The Claimant testified in support of his case. He adopted his statement on oath, which was in terms of the pleadings, and he relied on his admitted documents.

Final Address

The Claimant's final address is dated and filed on April 3, 2024. Learned counsel adopted the final address and submitted one issue for determination:

Whether the Claimant has adduced sufficient evidence in proof of his case as to be entitled to the reliefs sought.

Learned counsel argued that it has been settled in a long line of authorities that in cases of ordinary contract of employment where the terms provide for a specific period of notice before termination or salary in lieu thereof, the remedy available to

an employee who is wrongfully terminated is the award of salary for the period of the notice and other legitimate entitlements due to him at the time the employment was brought to an end. He relied on the cases of *Chukwumah v. Shell Petroleum (Nig) Limited* (1993) LPELR-864 (SC) (Pp 28-28 Para D–G) and *UBN Plc vs. Toyinbo* (2008) LPELR-5056 (CA) (Pp 64-70 Para EA).

Learned Counsel submitted that the Defendant failed to give one month's notice or payment of one month's salary instead of the termination; and also, an entitlement of 12 weeks' basic salary for each completed year of service, amongst others. Counsel further submitted that the Claimant was not given a month's notice before terminating his employment, nor was he paid a month's salary in lieu. And was not only paid the sum of ₦1,007,057.72 (One Million Seven thousand and Fifty- Seven Naira, Seventy Kobo only) out of the ₦13,289,301.96 full terminal benefits.

Learned Counsel to the Claimant argued that, having worked for the Defendant until his termination, he is entitled not just to his wages but also his gratuity/special redundancy payment as stated in Exhibit C10, which is the Claimant's employee's handbook, particularly page 24 paragraph 3.6.1. He submitted that the law is trite that uncontroverted evidence of a witness is deemed admitted. He relied on the case of *Okoebor v. Police Council* (2003) 12 NWLR (PT 834) 444, the Supreme Court, Per ABIRU, J.C.A. in Pp. 54-55, paras. G-G and stated that the Defendant, who was duly served with court processes but did not appear in Court and was not represented by Counsel, has admitted the claims, thereby entitling the Claimant to all the reliefs.

Counsel submitted that the Claimant is entitled to be paid damages caused by the Defendant's failure or refusal to pay the Claimant's entitlement from 2017 till his employment was terminated. He relied on *Olaniyan & Ors vs. Unilag & Anor* (1985) LPELR-2565 (SC).

41.3 DECISION OF COURT.

JUDGMENT

HONOURABLE JUSTICE O.A. OBASEKI-OSAGHAE. :-

I have carefully considered the originating processes, the evidence, the submissions of counsel and the authorities relied on in the final address. The Defendant did not file any defence. This, therefore, is a matter that is undefended. The effect of a party's failure to defend a claim against him/her is that he/she is presumed to have admitted the case made against him/her by the other party; and a trial court has little or no choice but to accept the unchallenged and uncontroverted case placed before it by the Claimant. See *Ifeta v Shell Petroleum Development Corporation of Nigeria Limited* supra, *Consolidated Res Limited vs Abofar Ventures Nigeria* [2007] 6 NWLR (Pt 1030) 221, *Okolie v Marinho* [2006] 15 NWLR (Pt 1002) 316. This, however, does not mean automatic victory for the Claimant because he must succeed on the strength of his case and not rely on the fact that there is no defence before the Court. The absence of a defence does not exonerate the Claimant of the evidential burden of proof placed on him in Section 131 (1) & (2) Evidence Act 2011, see also *Ogunyade vs Oshunkeye* [2007] 15 NWLR (Pt 1057) 218.

The law is settled that in the determination of employment rights, it is the employee who complains that his employment contract has been breached who has the burden

to place before the court the terms and conditions of his employment that provides for his rights and obligations. See *Okoebor v Police Council* [2003] 12 NWLR (Pt 834) 444, *Okomu Oil Palm Co. vs Iserhienrhien* [2001] 6 NWLR (Pt. 710) 660 at 673, *Idoniboye-Obe vs. NNPC* [2003] 2 NWLR (Pt. 805) 589 at 630. It is also the law that whoever desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist, section 131 (1) & (2) of the Evidence Act 2011, see *Calabar Cooperative Limited vs Ekpo* [2008] 1-2 SC 229 at 255. The Claimant has placed before the Court his letter of employment (exhibit C1), promotion letter (exhibit C2), pay slip (exhibits C3), disengagement letter (exhibit C4), salary adjustment (exhibit C5), update of terminal benefit (exhibit C6), final entitlement (exhibit C7), Internal memo (exhibits C8 & C12), demand letter (exhibit C9), extract (exhibit C10).

The issue that arises for determination is:

Whether the Claimant adduces credible evidence in proof of his claim?

The Claimant has established that the Defendant employed him in November 2007 (exhibits C1, C2, and C3) and that his employment was terminated with effect from 31st December 2019 (exhibit C4). In evidence is the Defendant's computation of the Claimant's final entitlements (exhibit C6), which it put as ₦10,185,446.56 (Ten Million, One Hundred and Eighty-Five Thousand, Four Hundred and Forty-Six Naira, Fifty-Six Kobo. This figure was communicated to the Claimant and he disputed it by his letter to the Defendant (Exhibit C7), wherein he gave his own computation and stated that the amount outstanding was ₦13,941,817.35 (Thirteen Million, Nine Hundred and Forty-One Thousand, Eight Hundred and Seventeen Naira Thirty-Five Kobo). The Defendant did not reply him.

It is the unchallenged evidence of the Claimant that the only sum paid the Defendant paid to him is ₦1,007,057.72 (One Million Seven Thousand and Fifty-Seven Naira, Seventy-Two Kobo only) leaving a balance of ₦12,934,759.63 (Twelve Million Nine Hundred and Thirty- Four Thousand Seven Hundred and Fifty-Nine Naira Sixty-Three Kobo only) outstanding in respect of his terminal benefits. I am satisfied that the Claimant is entitled to be paid this sum as his outstanding terminal benefits.

The Claimant has made a claim for gratuity/special redundancy payment upon the termination of his employment. He has not placed before the Court the handbook or document that entitles him to this benefit. What is placed before the Court is an extract (photocopies), and it is unknown where it came from. There is no evidence that the extract (Exhibit C10) is from the Defendant's handbook. There is also no proof that the sum of ₦130,000.00, which the Claimant states he paid in settlement of infrastructural levies for the years 2015, 2016, and 2017, has not been refunded by the Defendant. These two claims have not been proved, and they are refused. There are no particulars in the pleadings in respect of pension deductions, PAYE tax, and National Housing Fund. These are in the realm of special damages that must be particularized and strictly proved. See *Luke Onyiorah vs Benedict Onyiorah & Anor* LER (2019) SC 254/2008; *Anyanwu vs Uzowuaka* (2009) 13 NWLR (Pt 1159) 445; *Nwanji vs Coast Services Zfe* (2004) LPELR-2016 (SC). The orders sought in this regard are refused. The period of four years has no doubt caused him hardship. The value of the Naira in December 2019/2020, when the Defendant ought to have paid the Claimant, was much higher than it is today. This is occasioned by the gradual

devaluation of the Naira over the period. The essence and purpose of general damages in this instance is to compensate the Claimant for the pecuniary loss arising naturally from the failure and/or refusal of the Defendant to pay his terminal benefits as at when due in till date, see Chief S. I. Agu vs General Oil Limited (2015) 17 NWLR (Pt 1488) 329.

The Claimant is entitled to an award of damages pursuant to the provisions of section 19 (d) of the National Industrial Court Act 2006. I award the Claimant the sum of ₦1,434,714.78 (One Million Four Hundred and Thirty-Four Thousand, Seven Hundred and Fourteen Naira, Seventy-Eight Kobo), being the equivalent of three months' salary as general damages.

For the reasons given above, I hereby make the following orders:

1. The Defendant is to pay the Claimant the sum of ₦12,934,759.63 (Twelve Million Nine Hundred and Thirty- Four Thousand Seven Hundred and Fifty-Nine Naira Sixty-Three Kobo only) being the outstanding terminal entitlements due to the Claimant.
2. The Defendant is to pay the Claimant the sum of ₦1,434,714.78 (One Million, Four Hundred and Thirty-Four Thousand, Seven Hundred and Fourteen Naira, Seventy-Eight Kobo) as general damages.
3. Costs in the sum of ₦500,000.00 (Five Hundred Thousand Naira) awarded to the Claimant.
4. All sums are to be paid within 30 days. Thereafter, any sum outstanding will attract simple interest calculated at the rate of 10% per annum.

Judgment is entered accordingly.

41.4 REMARKS

This is an undefended matter as the Defendant did not file any defence. This is an admission of the case where a party fails to defend a claim against them, and it will be presumed that the party has admitted the case against them by the other party.

41.5 REFERENCES

1. *Chukwumah vs. Shell Petroleum (Nig) Limited* (1993) LPELR-864 (SC) (Pp 28-28 Para DG).
2. *UBN Plc vs. Toyinbo* (2008) LPELR-5056 (CA) (Pp 64-70 Para EA).
3. *Okoebor vs. Police Council* (2003) 12 NWLR (PT 834) 444.
4. *Olaniyan & Ors vs. Unilag & Anor* (1985) LPELR-2565 (SC).
5. *Consolidated Res Limited vs Abofar Ventures Nig.* [2007] 6 NWLR (Pt 1030) 221.
6. *Okolie vs. Marinho* (2006) 15 NWLR (Pt 1002) 316.
7. *Ogunyade vs. Oshunkeye* (2007) 15 NWLR (Pt 1057) 218.
8. *Okomu Oil Palm Co vs Iserhienrhien* (2001) 6 NWLR (Pt. 710) 660 at 673.
9. *Idoniboye-Obe vs. NNPC* (2003) 2 NWLR (Pt. 805) 589 at 630.
10. *Calabar Cooperative Limited vs Ekpo* (2008) 1-2 SC 229 at 255.
11. *Luke Onyiorah vs Benedict Onyiorah & Anor* LER (2019) SC 254/2008.
12. *Anyanwu vs Uzowuaka* (2009) 13 NWLR (Pt 1159) 445.
13. *Nwanji vs Coast Services Zfe* (2004) LPELR-2016 (SC).
14. *Chief S. I. Agu vs General Oil Limited* (2015) 17 NWLR (Pt 1488) 329.

42.1 ARRANGEMENT OF MATTER, COURT, DATES.

COURT: NATIONAL INDUSTRIAL COURT OF NIGERIA (AKURE DIVISION).

DATE: 15th July, 2022

SUIT NO: NICN/AK/31/2012.

JUDGE: Honourable K.D. Damulak

MRS. E. OFOROFUO.
(Plaintiff)

vs

1. BENDEL INSURANCE PLC.

2. FELIX IMAGBE OBOH ESQ.
(Defendant)

42.2 REPORTS/FACTS/ISSUES

This suit was filed along with 12 sister cases by the learned R.O., Imafidon Esq., on March 9, 2012, and November 9, 2012. The thirteen suits were registered as suits numbers NICN/AK/22/2012 to NICN/AK/34/2012 with 1. BENDEL INSURANCE PLC, 2. EDO STATE GOVERNMENT, 3. MINISTRY OF FINANCE, EDO STATE and 4. ATTORNEY GENERAL AND COMMISSIONER FOR JUSTICE, EDO STATE, as the Defendants. The thirteen suits were consolidated with NICN/AK/22/2012 on 30/1/2013. On 2/6/2014, Felix Imagbe Oboh Esq., who had been appointed the liquidator to Bendel Insurance Plc, was joined as the 2nd Defendant in the consolidated suits. Upon his joinder, the claimants amended the processes to reflect the joinder, and the claimant filed amended processes dated March 17, 2015. Upon service on the 2nd Defendant, he filed a conditional appearance and statement of defence on 27/4/2015 through his counsel Rotji Emmanuel Esq.

The three Claimants in NICN/AK/23/2012, NICN/AK/31/2012, and NICN/AK/32/2012 filed motions to further amend their processes on 6/6/2017, 6/6/2017, and 21/11/2017, respectively, and the various motions were granted on 16/4/2018. Whereas the 1st Defendant filed a statement of defence and an additional witness statement on oath through its counsel, Alex Ogbekhiulu Esq., the 1st Defendant and counsel never took part in these proceedings while the 2 Defendant and his counsel filed no amended defence to the 3 amendments in these three consolidated suits. Parties have been inordinately exploring out-of-court settlements in the 13 cases filed without settling. On 29/1/2020, both counsels informed the court of their resolve to continue settlement in the other suits but to proceed to hearing on three suits, No NICN/AK/23/2012, NICN/AK/31/2012, and NICN/AK/32/2012. This means ten of the sister cases are still undergoing out-of-court settlement. The consolidated suits were heard from 29/1/2020 to 13/10/2021 when the matter was adjourned for adoption of final written addresses. Both counsels have filed a joint final written address in respect of the three consolidated suits. By the 3 amendments of 21/11/2017 granted on

16/4/2018, the claimant seeks the following reliefs;

- (a) A Declaration that the contract of service between the Claimant and the Defendant before the Claimant was disengaged from service of the 1st Defendant, is governed by the Applicable Terms and Conditions of Service for Senior Staff as amended. Board resolutions as well as various Collective Agreements 2002 inclusive.
- (b) A Declaration that the and or refusal of the Defendants to pay to the Claimant her salary arrears, allowances. Contributions, entitlements and terminal benefits after her disengagement since 6th July. 2004 is a breach of contract.
- (c) ₦5,000,000.00(Ten million naira) as general damages for breach of contract.
- (d) ₦990,566.61 as special damages.
- (e) 20% interest of the total claim from the inception of this case till the Judgment is given and until final settlement of the claim.

CASE OF THE CLAIMANT

This claimant testified on 30/1/2020 as CW3 in the consolidated suits by adopting his witness depositions of 21/11/2017 found at pages 191 to 194 of the court's file and tendered 8 documents in evidence which were admitted and marked exhibits EOO27 to EOO34 and further identified exhibits EO1, EO3 and EO10 as the terms and condition of service and memorandum of understanding he referred to in his deposition.

The evidence of the claimant is that "I was employed by the 1st Defendant as a confidential secretary grade I by a letter of appointment dated 24 November 1987. I was placed on probation and later confirmed on 7/6/1988. As an Insurance Company, the 1st Defendant is a member of the Nigeria Employers Association of Banks, Insurance and Allied institution, which body negotiate with the Association of Senior Staff of Banks, Insurance and Financial Institutions (ASSBIFI) from time to time.

From the time of my appointment to the time of my disengagement in 2004, my appointment was governed by the said Conditions of Service for senior staff as well as the Collective Agreement of 2002, which took effect from 1st October 2002.

The 1st Defendant also implemented the contribution to the Nigeria Social Insurance Trust Fund, where contributions were made to the fund from my salaries and allowances by the 1st Defendant at source, amounting to ₦49,318.48 from the time of my confirmation of appointment in June 1988 to July 2004.

That since the letter of termination was served on me by the 1st Defendant, the 1st Defendant only paid the sum of ₦154,760.00 (pensions), ₦222,548.00 (outstanding 5 months' salaries, December 2003 and January to April 2004). ₦8,566.76 (Christmas Bonus) on 21st December, 2006, and ₦100,000.00 (part payment of terminal benefits); leaving a balance of ₦990,566.61.

That since the 21st December 2006, when the 1st Defendant made the payments mentioned in paragraph 21 above. I have waited patiently to be paid my outstanding

terminal benefits, which up till now remain unpaid.

The Claimant tendered 8 documents in evidence, which were admitted and marked as exhibits EOO27 to EOO34. CW3 was cross-examined by Rotji Emmanuel Esq. of counsel for the 2nd Defendant on 30/1/2020. Under cross-examination, he testified that it is the personnel and administration who computed my retirement entitlement. My retirement entitlement was never computed and given to me; I had to go and find out by myself. When I went to find out, it was never given to me in writing. The entitlement I am claiming is what the personnel and admin told me.

I have never asked for my insurance certificate from NSITF because the Defendant never remitted the same to NSITF. I know they did not remit because I was Part of the Defendant. I have no other evidence apart from my knowledge as a staff member.

CASE OF THE 2ND DEFENDANT

The 2nd Defendant testified on 13/10/2021 by adopting his witness deposition of 27/4/2015. His defence is that “the 1st Defendant has been liquidated and my appointment as a Receiver/Liquidator by the 1st Defendant. The 1st Defendant, now in liquidation, is not indebted to the claimant as claimed. The collective agreement is not enforceable against the 1st Defendant as it is not a signatory to the agreement. The purported approval given by the Board of the collective agreement is not enforceable. The purported approval by the 1st Defendant was given on 22nd May, 2006 to take effect on 1st May 2006, the request for the approval of the collective agreement addressed to the supervising ministry was dated 31st August, 2006 and the approval was conveyed via a letter dated 14th September, 2006 and the approval was made effective 31st August, 2006.

There was never a structuring of the Claimants’ terminal benefits in line with any collective agreement whatsoever, and the 1st Defendant, not being a signatory to the agreement, does not have the original copy of the agreement”.

Under cross-examination, learned Imafidon Esq. adopted his cross-examination of this witness in NICN/AK/23/2012 and NICN/AK/32/2012. The testimony in cross-examination, among other things, is that “since 2013 to date, the Edo State government is yet to formally hand over to me. Up till now, I have not had access to the head office. I do not have access to the 1st Defendant’s file, including the files of the claimants. I am not in a position to validate the documents of the claimants or invalidate them. I have never been a staff member of the 1st Defendant. I am not in a position to know if the 1st Defendant made deductions from the salaries of the claimants by way of NSITF. I am not aware that the Claimant has put in 21 years of service. To my knowledge, the 1st Defendant is yet to pay the terminal benefits of the Claimant. We have not paid her because of this suit.

FINAL WRITTEN ADDRESS OF 2ND DEFENDANT’S COUNSEL

Learned Rotji Emmanuel Esq. of counsel for the 2nd Defendant formulated a lone issue as;

“Whether from the totality of the pleadings and evidence on record (oral and documentary), the Claimant has proved his/her case on the preponderance of evidence

and is entitled to the reliefs sought?”

Counsel then argued that all three claimants seek declaratory relief in their prayer (A). A declaratory relief is one in equity, and the party seeking the grant of such relief must prove its case on the strength of evidence and not rely on the admission of the Defendant. A declaratory relief must be proved by cogent and compellable evidence. The claimants are relying on the Collective agreement purportedly entered into between the Association of Senior Staff of Banks, Insurance and Financial Institutions (ASSBIFI). It is worth noting that the Association is not a party in this suit. The 1st Defendant is not a signatory to the collective agreement and therefore the agreement does not bind the Defendant. Before an agreement can be binding on the Defendant in this case, there must be proof that the collective agreement must have been incorporated into the contract of employment. This is a question of fact to be proved by the Claimant through credible evidence. The document, memorandum of understanding, sought to be relied upon has no binding force but is a mere gentlemen's agreement which does not carry any intention to bind the signatories.

That Claimant has not also placed evidence of his membership of the Association to enable him to benefit from the Collective agreement. It is only a bona fide member of an Association that benefits from the Collective agreement. As A senior member of Staff, membership of an Association is not assumed. Section 3 (1) Labor Act.

That Relief (b) in NICN/ AK/23/2012 and NICN/ AK/32/2012 are similar and are declaratory, as is the case with relief (b) in NICN /AK/31/2012, so he adopted his earlier argument on that point.

That both Claimants, via their pleadings, did not state how and why their termination is altogether unlawful and illegal or a breach of their contract of employment throughout the Pleadings in NICN/ AK/23/2012 and NICN/AK/32/ 2012.

That relief (C) of the Claimants all ask for various sums in millions as general damages. The court does not award general damages in cases of contract. It is further submitted that in the instant case, the Claimants claim for general damages as well as special damages. It is therefore not tenable for a court to award both general damages and special damages in a case of contract.

Relief (d) is a claim for specified sums as special damages. Special damages must be specifically pleaded and strictly proved. In the instant case, there is no evidence of specified damages claimed, nor did the claimant present any shred of evidence on any perceived special damages. The law is now well settled that where a party claims special damages, the burden is on him to prove the claim to the last kobo. He has to do this by leading credible evidence most time by way of documentary evidence.

FINAL WRITTEN ADDRESS OF CLAIMANT COUNSEL

Learned R.O. Imafidon Esq. of counsel for the claimants formulated a lone issue for determination as whether the claimants in the 3 consolidated suits have proved their case (s) as would entitle them to the reliefs sought from the totality of the evidence led, viz-a-vis the completely uncontroverted and unchallenged evidence by the 1st and 2nd Defendants.

Submitting on the lawfulness or otherwise of the claimants in NICN/ AK/23/2012 and NICN/ AK/32/2012, learned counsel said this appears to be the simplest issue in these cases. He drew the attention of the court to some paragraphs in the pleadings of the claimants in NICN/ AK/23/2012 and NICN/ AK/32/2012. they are paragraphs 5 and 24 to 30 of the Statements of Facts, which, according to Claimant counsel, were not denied. If the letters of appointment and confirmation of the claimants were not issued and signed by Edo State Government or its predecessors-in-title, on what basis should the Ministry of Finance issue the disengagement letters? See page 6, paragraph 5 of Exhibit E01, which provides as follows:

“... appointment, confirmation, promotion, termination of a management and senior staff shall be made by the Board ...”

That Section 63 (1) part III of the Companies and Allied Matters Act, 1990, as amended, provides as follows:

“A company shall act through its members in a general meeting or its board of directors ...”

That since the disengagement letters issued to the Claimants in NICN/AK/23/2012 and NICN/AK/32/2012 did not emanate from the appropriate authority, their disengagement from the service of the 1st Defendant is undoubtedly unlawful and illegal. The Claimants in NICN/AK/23/2012 and NICN/AK/32/2012 had put in 33 and 21 years of service, respectively and are entitled to payment of their terminal benefits and other allowances as claimed.

The Claimant in NICN/AK/31/2012 also amended her complaints via a motion on notice dated 20 November 2017, which was filed on 21 November 2017. We also adopt our legal arguments on this issue in NICN/AK/23/2012 and NICN/AK/32/2012. The claimant is asking for her balance of ₦990,566.61 as a terminal benefit.

On 30/01/2022, the 2nd Defendant adopted his outdated written statement on oath filed on 27/4/2015, which had been overtaken by events. The said Defendant's statement on oath filed on 27/4/2015 by this witness was overruled by events when all 3 three claimants in NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012 filed their statement on oath on 6/6/2017 and 21/11/2017.

That is the general rule that general damages will not be awarded for breach of admits or exceptions where the conduct of those in authority is punitive, oppressive, vindictive, and arbitrary, as in this case. *Marine Management Association vs National Maritime Authority* (2012) 8 NWLR (Pt 1133) 504. That all the figures given under general and special damages were not controverted by the Defendants.

42.3 DECISION OF COURT.

JUDGMENT

HONOURABLE JUSTICE K.D. DAMULAK. :-

Before considering the merit of this case, a preliminary issue to be first considered is the argument of claimants' counsel that the, written statement on oath filed on 27/4/2015 and adopted by DW2 on 30/1/2022 is out- dated having been over taken by

events, to wit, the amendment of NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012 on 6/6/2017 and 21/11/2017.

On 30/01/2022, the 2nd Defendant adopted his outdated written statement on oath filed on 27/4/2015, which had been overtaken by events. The said Defendant's statement on oath filed on 27/4/2015 by this witness was overruled by events when all 3 three claimants in NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012 filed their statement on oath on 6/6/2017 and 21/11/2017.

The above submission is a misunderstanding of law and procedure. The position of the law is that an amendment dates back to the date of the initial filing of that process. See *Ohn Kayode Fayemi vs. Adebayo Segun Oni & Ors* (2019) LPELR- 46623(CA) where the court held;

The Amended Originating Summons takes effect right from the beginning of the suit as the Originating Summons that commenced the suit. See *A-G Ekiti State vs. Adewunmi* (2002) 1 SC 47 in which the Supreme Court restated the law point thusly- The principle is that an amendment duly made takes effect from the date of the original document sought to be amended, and this applies to every successive further amendment of whichever nature and at whatever stage it is made. Therefore, when a writ of summons is amended, it dates back to the date of the original issue of such writ, and consequently, the action would continue as if the amendment had been inserted from the beginning.

Accordingly, a Defendant or Claimant is not bound to amend their process upon amendment by the other party. It is his choice, depending on whether, in his judgment, he needs to also amend to respond to any new issue or fact introduced in the amendment by his opponent. The failure to make a consequential amendment does not affect that party's process, nor do amendments by one party render his opponent's existing process outdated. The 2nd Defendant's statement of defence and witness deposition filed on 27/4/2015 and adopted on 30/1/2022 is not outdated.

On the merits of the case, the issues submitted by both counsels are similar and proper. The court adopts the issues as whether or not the claimant has proven his entitlement to any of the reliefs claimed. In determining this issue, it shall be pertinent to set out each head of claim and determine the same as per the issue for determination. That the court shall do anon.

- (a) **A Declaration that the contract of service between the Claimant and the Defendant before the Claimant was disengaged from service of the 1st Defendant, is governed by the Applicable Terms and Conditions of Service for Senior Staff as amended. Board resolutions as well as various Collective Agreements of 2002, inclusive.**

It is a rule that in every employment relationship, there are always terms and conditions of service. In this case, the terms and conditions of service have been tendered in evidence (Exhibit E01). There is also proof of approval and implementation of the collective agreements (exhibit EO10 and EO11) by the 1st Defendant for its staff (exhibit EO7 and MEE17). However, these documents show that this approval came on 14/9/2006, and the claimant was disengaged on 6/7/2004 before the approval. Accordingly, his employment, which was terminated on 6/4/2004, was not regulated by the 2002 collective agreement, which became part of the contract of employment

on 14/9/2006. This relief fails and is dismissed.

- (b) **A Declaration that the failure and or refusal of the Defendants to pay to the Claimant her salary arrears, allowances. Contributions, entitlements and terminal benefits after her disengagement since 6th July. 2004 is a breach of contract.**
- (c) **₦5,000,000.00(Ten million Naira) as general damages for breach of contract.**

These heads of claim shall be considered after considering the claim for special damages.

The prayer in relief (d) is for the sum of ₦990,566.61. The particulars of the special damages are as follows;

1. Terminal Benefits	₦676,850.4
2. Money had and received by way of unremitted Contributions to the Nigeria Social Insurance Trust Fund from Oct. 1992 – July. 2004	₦49,318.48
3. Outstanding Arrears Collective Agreement (2002 – 2004)	₦264,397.67

TOTAL	₦990,566.61

The law is that a claim for special damages must be strictly proven. See Dr. George Nyong Ikpe Udofia v. Akwa Ibom State Civil Service Commission & Ors. (2011) LPELR-4055(CA) where the court held;

"... it is the law that a party who claims special damages must not only plead it specifically, he must also prove it strictly."

We shall now consider the proof of each item of the special damages.

1. Terminal Benefits ₦676,850.46.

What is the evidence of the claimant as relating to his claim of ₦676,850.46 terminal benefits? I have searched carefully, over and over again, through the claimants 22 paragraph statement of facts and 23 paragraph deposition for the pleadings and evidence as to how the claimant arrived at ₦676,850.46 as his terminal benefit. I see none except paragraphs 20 and 21 of the statement of facts supported by paragraphs 21 and 22 of the witness depositions, respectively, which are as follows:

That since the letter of termination was served on me by the 1st Defendant, the 1st Defendant only paid the sum of ₦154,760.00 (pensions), ₦222,548.00 (outstanding 5 months salaries, Dec. 2003 and Jan. to April, 2004). ₦8,566.76 (Christmas Bonus) on 21 December 2006 and ₦100,000.00 (part payment of terminal benefits); leaving a balance of ₦990.566.61.

That since 21 December. 2006, when the 1st Defendant made the payments mentioned in paragraph 21 above. I have waited patiently to be paid my outstanding terminal benefits, which up till now remain unpaid.

The Claimant, under cross-examination, testified as follows;

It is the personnel and administration who computed my retirement entitlement. My retirement entitlement was never computed and given to me; I had to go and find out by myself. When I went to find out, it was never given to me in writing. The entitlement I am claiming is what the personnel and admin told me.

From the above, it is clear that the claim for outstanding terminal benefits in the sum of ~~₦~~676,850.46 is baseless, lacks credible evidence, fails, and ought to be dismissed and the same is hereby dismissed.

**2. Money had and received by way of unremitted Contributions to the Nigeria Social Insurance Trust Fund from Sept. 1992 – Feb. 2004
~~₦~~49,318.48.**

There is neither pleading nor evidence relating to this head of claim. Moreover, the claimant testified under cross-examination as follows;

I have never asked for my insurance certificate from NSITF because the Defendant never remitted the same to NSITF. I know they did not remit because I was Part of the 1st Defendant. I have no other evidence apart from my knowledge as a staff.

This again is a situation where not only is pleading and evidence lacking, but evidence under cross-examination totally negates the claim. From the above, it is clear that the claim for unremitted Contributions to the Nigeria Social Insurance Trust Fund from September 1992 to February 2004 in the sum of ~~₦~~49,318.48 is baseless, lacks credible evidence, and ought to be dismissed, and the same is hereby dismissed.

**3. Outstanding Arrears Collective Agreement (2002 – 2004)
~~₦~~264,397.67**

Having found and held that the collective agreement of 2002 does not apply to the claimant, this head of claim, besides the fact that there are neither pleadings nor evidence relating to it, the claim cannot succeed, it fails and is dismissed.

4. 20% interest of the total claim from the inception of this case till the Judgment is given and until final settlement of the claim.

It is a settled principle of law that pre-judgment interest can only be awarded on proof from the agreement of the parties. See *Elijah Adebisi (Trading Under the Style of Delock Association) & Ors v. National Institute of Public Information & Ors* (2013) LPELR-22628(CA), where the court of appeal held as follows;

"The general rule at common law is that pre-judgment interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. Thus, pre judgment interest will, be payable where there is an express agreement to that effect and such agreement may be inferred from a course of dealing between the parties or where an obligation to pay interest arises from the common practice or usage of a particular trade or business - *Alfontrin Limited vs. Attorney General, Federation* (1996) 9 NWLR (Pt 4750) 634, *Diamond Bank Limited vs. Partnership Investment Co Ltd* (2009) 18 NWLR (pt 1172) 67. Consequently, a Plaintiff, to succeed in a claim for pre-

judgment interest, must show how the entitlement to such interest arose, that is, whether by law, by contract or agreement, or he must plead facts showing that the claim is part of the loss or special damages which the Defendant's wrong imposed on him. It is not enough to merely say that the Plaintiff is claiming interest. The basis of the claim of interest must be made manifest on the pleadings - *Ekwunife vs. Wayne (W.A.) Limited* (1989) 2 NWLR (pt 122) 422, *Sani Abacha Foundation for Peace & Unity vs. United Bank for Africa Plc* (2010) 17 NWLR (pt 1221) 192."

There is no such proof before the court. The claim for pre-judgment interest fails and is dismissed.

There is no basis for any claim for breach of contract or general damages; accordingly, reliefs B and C fail and are hereby dismissed.

On the whole, and for the avoidance of doubt, the entire claim of the Claimant fails and is dismissed for want of merit.

This is the judgment of the court, and it is entered accordingly.

42.4 REMARKS

Employer/ Employee relationships were espoused in this case, with about 12 similar cases consolidated against Bendel Insurance Plc, and the Edo State Government, etc.

The entire claims of the claimants fail and are dismissed for want of merit.

42.5 REFERENCES

1. *Marine Management Association v. National Maritime Authority* (2012) 8 NWLR (Pt 1133) 504.
2. *Ohn Kayode Fayemi v. Adebayo Segun Oni & Ors* (2019) LPELR-46623(CA).
3. *A-G Ekiti State v. Adewunmi* (2002) 1 SC 47.
4. *Dr. George Nyong Ikpe Udofia v. Akwa Ibom State Civil Service Commission & Ors.* (2011) LPELR-4055(CA).
5. *Elijah Adebisi (Trading Under the Style of Delock Association) & Ors v. National Institute of Public Information & Ors* (2013) LPELR-22628(CA).
6. *Alfontrin Ltd vs. Attorney General, Federation* (1996) 9 NWLR (Pt 4750) 634.
7. *Diamond Bank Limited vs. Partnership Investment Company Limited* (2009) 18 NWLR (pt 1172) 67.
8. *Ekwunife vs. Wayne (W.A.) Limited* (1989) 2 NWLR (pt 122) 422.

43.1 ARRANGEMENT OF MATTER, COURT, DATES.

COURT: NATIONAL INDUSTRIAL COURT OF NIGERIA (AKURE DIVISION)

DATE: 15th July, 2022

SUIT NO: NICN/AK/23/2012.

JUDGE: Honourable K.D. Damulak

MR. EMMANUEL. OMONZEJELE.
(Plaintiff)

Vs

1. BENDEL INSURANCE PLC.

2. FELIX IMAGBE OBOH ESQ.
(Defendants)

43.2. REPORTS/FACTS/ISSUES.

This suit was filed along with 12 sister cases by learned R.O. Imafidon Esq. on 3/9/2012 and 11/9/2012. The thirteen suits were registered as suits numbers NICN/AK/22/2012 to NICN/AK/34/2012 with 1. BENDEL INSURANCE PLC, 2. EDO STATE GOVERNMENT, 3. MINISTRY OF FINANCE, EDO STATE, and 4. ATTORNEY GENERAL AND COMMISSIONER FOR JUSTICE, EDO STATE, as the Defendants. The thirteen suits were consolidated with NICN/AK/22/2012 on 30/1/2013.

On 2/6/2014, Felix Imagbe Oboh Esq., who had been appointed the liquidator to Bendel Insurance Plc, was joined as the 2nd Defendant in the consolidated suits. Upon his joinder, the claimants amended the processes to reflect the joinder, and the Claimant filed amended processes dated March 17, 2015. Upon service on the 2nd Defendant, he filed a conditional appearance and statement of defence on 27/4/2015 through his counsel, Rotji Emmanuel Esq.

The three Claimants in NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012 filed motions to further amend their processes on 6/6/2017, and 21/11/2017, respectively and the various motions were granted on 16/4/2018. Whereas the 1st Defendant filed a statement of defence and an additional witness statement on oath through its counsel, Alex Ogbekhiulu, the 1st Defendant and counsel never took part in these proceedings, while the 2nd Defendant and his counsel filed no amended defence to the 3 amendments in these three consolidated suits.

Parties have been inordinately exploring out-of-court settlements in the 13 cases filed without settling. On 29/1/2020, both counsels informed the court of their resolve to continue settlement in the other suits, but to proceed to a hearing on three suits: No. NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012. This means ten of the sister cases are still undergoing out-of-court settlements.

The consolidated suits were heard from 29/1/2020 to 13/10/2021, when the matter was adjourned for the adoption of final written addresses. Both counsels have filed a joint final written address in respect of the three consolidated suits.

By the 3rd amendment of 6/6/2017 granted on 16/4/2018, the Claimant seeks the following reliefs;

- (a) A Declaration that the contract of service between the Claimant and the Defendant before the Claimant was disengaged from service of the 1st Defendant, is governed by the Applicable Terms and Conditions of Service for Senior Staff as amended. Board resolutions as well as various Collective Agreements 2002 and 2005, inclusive.
- (b.) A Declaration that the purported removal or termination or disengagement of the Claimant from the service of the 1st Defendant or the government of Edo State through the ministry of finance, Edo State vide a letter dated April, 2012 is altogether unlawful and illegal, being a breach of the contract of service between the Claimant and the Defendant.
- (c) ₦10,000,000.00 (Ten million Naira) as general damages for breach of contract.
- (d) ₦17, 730,397.94 as special damages.
- (e) 20% interest of the total claim from the inception of this case till the Judgment is given and until final settlement of the claim.

CASE OF THE CLAIMANT

This claimant testified on 29/1/2020 as CW1 in the consolidated suits by adopting his witness depositions of 6/6/2017 found at pages 401 to 405 of the court's file and tendered nine documents in evidence which were admitted and marked exhibits EO1 to EO9, except exhibit EO3 which was objected to and same was further marked "tendered" and ruling reserved till judgment.

The evidence of the claimant is that I was employed by the 1st Defendant as a typist grade II by a letter of appointment dated 5th February, 1991 with effect from 6th February 1991 on a salary of ₦2,281.00 Per annum. I was placed on probation and later confirmed. That upon confirmation by the 1st Defendant, pension contributions were steadily deducted monthly from my salary in line with the conditions of service of the 1st Defendant.

That by virtue of a letter dated 13th June, 1995, with Ref No. P.1713/94 I was converted to Confidential Secretary grade III on a basic salary of ₦7,800.00 per annum with effect from 24th May, 1995. My acting appointment as Confidential Secretary grade 1 was confirmed with effect from 1st July 2001. The 1st Defendant management approved my conversion to the administrative cadre (officer status) in the company. As a senior staff member of the 1st Defendant, my appointment was governed by the Terms and Conditions of Service for Senior Staff.

As an Insurance Company, the 1st Defendant is a member of the Nigeria Employers Association of Banks, Insurance and Allied institution, which body negotiate with the Association of Senior Staff of Banks, Insurance and Financial Institutions (ASSBIFI)

from time to time. Between when I became a senior staff and when I was disengaged on 1st April, 2012, my appointment was governed by the said Conditions of Service for Senior Staff as well as the Collective Agreements of 2002 and 2005, which both took effect from 1st October, 2002 and 1st April, 2005, respectively.

That the 2005 Collective Agreement which took effect from 1st April, 2005 approved 35% increase in salaries and all monetized allowances for all cadres of senior staff across the board which was accepted and implemented by 1st Defendant for its staff as contained in a letter dated 15th September, 2006 showing my new salary structure arrived at based on the Collective Agreement of 2005 which the 1st Defendant domesticated, accepted and implemented while the salary arrears from 2002 to 2006 were worked out based on the 2002 Collective Agreement.

The 1st Defendant implemented a self-administered contributory pension scheme where pensions were steadily deducted from my salary monthly in the ratio of 5:15. Staff and 1st Defendant. The total amount deducted as pension contribution from my salaries by the 1st Defendant from October 1992 to February 2007 is ₦310,860.00, as the Defendant stopped deducting pension contribution from staff salaries in March 2007.

The 1st Defendant also implemented the contribution to the Nigerian Social Insurance Trust Fund, where contributions were made to the fund from the salaries and allowances of staff, including me. Deductions made from my salary between October 1992 to 2007 amounted to ₦345,175.20.

The computation of my terminal benefits is structured after the 2005 Collective agreement between NEABIAI and ASSBIFI dated 01/ 06 2005. I was given a handbook titled Bendel Insurance Company Limited's terms and conditions of service for the Senior Staff of Bendel Insurance Company Limited.

The 1st Defendant had been taken over by the Edo State Government through the Ministry of Finance, notwithstanding the appointment of the 2nd Defendant by the National Insurance Commission and the Federal High Court as Receiver.

That was on 4th April, 2012, when I received a letter of disengagement from the Ministry of Finance, Edo State. I had served the 1st Defendant meritoriously without blemish for 21 Years and one month. That since the letter of disengagement served on me by the 1st Defendant, I had waited patiently to be paid my terminal benefits, which up till now remain unpaid.

The claimant tendered 11 documents in evidence, which were admitted and marked as exhibits EO1 to EO11 but exhibits EO3, EO10 and EO11 were further marked "tendered" and ruling reserved till judgment on the objection of 2nd Defendant's counsel.

CW1 was cross-examined by Rotji Emmanuel Esq. of counsel for the 2nd Defendant on 30/1/2020. Under cross-examination, he testified that the computation of my terminal benefits per my claim was calculated by officers of the Defendants' personnel and administrative department. The document for the calculation of my terminal benefits is in the possession of the 2nd Defendant. The 1st Defendant gave me a copy of my terminal benefits calculation. I did not come with the document to the court. The deduction for pensions is not on all the slips.

CASE OF THE 2ND DEFENDANT

The 2nd Defendant testified on 13/10/2021 by adopting his witness deposition of 27/4/2015. His defence is that the 1st Defendant has been liquidated and I was appointed Receiver/Liquidator by the National Insurance Commission. The 1st Defendant was wound up by an Order of the Federal High Court dated 28th January, 2014. The 1st Defendant, now in liquidation, is not indebted to the Claimant as claimed.

The collective agreement is not enforceable against the 1st Defendant and the 1st Defendant is not a signatory to it. The 1st Defendant never approved any collective agreement.

The purported approval by the 1st Defendant was given on 22nd May, 2006 to take effect on 1st May 2006. The request for the approval of the collective agreement addressed to the supervising ministry was dated 31st August, 2006 and the approval was conveyed via a letter dated 14th September, 2006 and the approval was made effective 31st August, 2006.

Here was never a structuring of the Claimant's terminal benefits in line with any collective agreement whatsoever and the 1st Defendant, not being a signatory to the agreement, does not have the original copy of the agreement.

Under cross-examination, this witness said, among other things, that since 2013 to date, the Edo State government has yet to formally hand over to me. Up till now, I do not have access to the head office. I do not have access to the 1st Defendant's file, including the files of the Claimants. I am not in a position to validate the documents of the Claimants or invalidate them. I have never been a staff member of the 1st Defendant. I am not in a position to know if the 1st Defendant made deductions from the salaries of the Claimants by way of NSITF. I am not aware that the Claimant has put in 21 years of service. To my knowledge, the 1st Defendant is yet to pay the terminal benefits of the claimant.

FINAL WRITTEN ADDRESS OF 2ND DEFENDANT'S COUNSEL

Learned Rotji Emmanuel Esq. of counsel for the 2nd Defendant formulated a lone issue as;

“Whether from the totality of the pleadings and evidence on record (oral and documentary), the Claimant has proved his/her case on the preponderance of evidence and is entitled to the reliefs sought?”

Counsel then argued that all three Claimants seek declaratory relief in their prayer (A). A declaratory relief is one in equity and the party seeking the grant of such relief must prove its case on the strength of evidence and not rely on the admission of the Defendant. A declaratory relief that must be proved by cogent and compellable evidence.

The Claimants are relying on the Collective agreement purportedly entered into between the Association of Senior Staff of Banks, Insurance and Financial Institutions (ASSBIFI). It is worth noting that the Association is not a party in this suit.

The 1st Defendant is not a signatory to the collective agreement and therefore the agreement does not bind the 1st Defendant. Before an agreement can be binding, the Defendant in this case must provide proof that the collective agreement has been incorporated into the contract of employment. This is a question of fact to be proved by the Claimant through credible evidence. The document, the memorandum of understanding, sought to be relied upon has no binding force but is a mere gentlemen's agreement which does not carry any intention to bind the signatories.

That Claimant has not also placed evidence of his membership of the Association to enable him to benefit from the Collective agreement. It is only a bona fide member of an Association that benefits from the Collective agreement. As A senior member of Staff, membership of an Association is not assumed. Section 3 (1) Labor Act.

That Relief (b) in NICN/ AK/23/2012 and NICN/ AK/32/2012 are similar and are declaratory, as is the case with relief (b) in NICN /AK/31/2012, so he adopted his earlier argument on that point. That both Claimants, via their pleadings, did not state how and why their termination is altogether unlawful and illegal or a breach of their contract of employment throughout the Pleadings in NICN/ AK/23/2012 and NICN/AK/32/ 2012.

That relief (C) of the Claimants all ask for various sums in millions as general damages. The court does not award general damages in cases of contract. It is further submitted that in the instant case, the Claimants claim for general damages as well as special damages. It is therefore not tenable for a court to award both general damages and special damages in a case of contract.

Relief (d) is a claim for specified sums as special damages. Special damages must be specifically pleaded and strictly proved. In the instant case, there is no evidence of specified damages claimed, nor did the claimant lead any shred of evidence on any perceived special damages. The law is now well settled that where a party claims special damages, the burden is on him to prove the claim to the last kobo. He has to do this by leading credible evidence most time by way of documentary evidence.

FINAL WRITTEN ADDRESS OF CLAIMANT COUNSEL

Learned R.O. Imafidon of counsel for the Claimants formulated a lone issue for determination as:

Whether the claimants in the 3 consolidated suits have proved their case (s) as would entitle them to the reliefs sought from the totality of the evidence led, viz-a-vis the completely uncontroverted and unchallenged evidence by the 1st and 2nd Defendants.

Submitting on the lawfulness or otherwise of the claimants in NICN/ AK/23/2012 and NICN/ AK/32/2012, learned counsel said this appears to be the simplest issue in these cases. He drew the attention of the court to some paragraphs in the pleadings of the claimants in NICN/ AK/23/2012 and NICN/ AK/32/2012. they are paragraphs 5 and 24 to 30 of the statements of facts, which, according to claimant counsel, were not denied. If the letters of appointment and confirmation of the claimants were not issued and signed by Edo State Government or its predecessors-1n-tit1e, on what basis should the Ministry of Finance issue the disengagement letters? See page 6, paragraph 5 of Exhibit E01, which provides as follows:

“... appointment, confirmation, promotion, termination of a management and senior staff shall be made by the Board ...”

That Section 63 (1) part III of the Companies and Allied Matters Act, 1990, as amended, provides as follows:

“A company shall act through its members in a general meeting or its board of directors...”

Since the disengagement letters issued to the Claimants in NICN/AK/23/2012 and NICN/AK/32/2012 did not emanate from the appropriate authority, their disengagement from the service of the 1st Defendant is undoubtedly unlawful and illegal. The Claimants in NICN/AK/23/2012 and NICN/AK/32/2012 had put in 33 and 21 years of service, respectively and are entitled to payment of their terminal benefits and other allowances as claimed.

The Claimant in NICN/AK/31/2012 also amended her complaints vide a motion on notice dated 20/11/17, which was filed on 21 /11/2017. We also adopt our legal arguments on this issue in NICN/AK/23/2012 and NICN/AK/32/2012. The claimant is asking for her balance of ₦990,566.61 as a terminal benefit.

On 30/01/2022, 2nd Defendant adopted his outdated written statement on oath filed on 27/4/2015, which had been overtaken by events. The said Defendant’s Statement on Oath filed on 27/4/2015 by this witness was overtaken by events when all 3 three claimants in NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012 filed their statement on oath on 6/6/2017 and 21/11/2017.

That is the general rule that general damages will not be awarded for breach of admits or exceptions where the conduct of those in authority is punitive, oppressive, vindictive, and arbitrary, as in this case. *Marine Management Association vs National Maritime Authority* (2012) 8 NWLR (Pt 1133) 504. That all the figures given under general and special damages were not controverted by the Defendants.

43.3 DECISION OF COURT.

JUDGMENT

HONOURABLE JUSTICE K.D. DAMULAK. :-

Before considering the merits of the case, it is pertinent to rule on documents objected to, which documents were marked “tendered” and the ruling reserved till judgment.

Decision on Admissibility of exhibit EO 3, EO 10 tendered and EO 11 tendered.

The learned Rotji Esq. objected to the admissibility of exhibit EO3, EO10 tendered and EO11 tendered. These documents are Memorandum of Understanding dated 2/5/2006, collective agreements of 1/4/2005 and 1/10/200 respectively.

Exhibit EO 3 tendered.

Exhibit EO 3 tendered is a Memorandum of understanding dated 2/5/2006, The

objection to this document is that it is a photocopy and it is not admissible because the whereabouts of the original is not disclosed. Secondly, the Defendants had denied the existence of the document when put on notice to produce. The Claimant's counsel responded that the claimant and officers of the 1st Defendant executed the document. From the heading of the document, the original must be in the possession of the 1st Defendant.

From the opposition of the Defendant's counsel, that the whereabouts of the original is not disclosed and that the Defendants had denied the existence of the document when put on notice to produce, these are irreconcilable. If the Defendants were put on notice to produce the original, as done in paragraph 20 of the Statement of Facts, the simple meaning is that the claimant is saying the original has the Defendants, the denial of being in possession by the 2nd Defendant does not mean the whereabouts of the original is not explained, rather it entitles the Claimant to produce any copy thereof.

Paragraph 6 of the Statement of Facts of 2/9/2012 and that of 6/6/2017 put the 1st Defendant on notice to produce. In paragraph 7 of the Statement of Defence, the 2nd Defendant made denials on behalf of the 1st Defendant. It is on record that Rotji Esq. does not represent the 1st Defendant. More so, it is the evidence of the 2nd Defendant under cross-examination that;

Since 2013 to date, the Edo State government is yet to formally hand over to me. Up till now, I do not have access to the head office. I do not have access to the 1st Defendant's file, including the files of the Claimants. I am not in a position to validate the documents of the claimants or invalidate them.

This disqualifies the 2nd Defendant, either by himself or through his counsel, from disputing the existence or otherwise of the said Memorandum of Understanding.

I have looked at the signatories to the document, it is executed by the Claimant and officers of the 1st Defendant and I am satisfied of the existence of the document and that the original ought to have been with the 1st Defendant and based on the fact that the 2nd Defendant was not the one put on notice to produce the same and the evidence of the 2nd Defendant above quoted, the 2nd Defendant is not the right person to object to this document on the grounds stated.

Accordingly, the objection is dismissed and the document is admitted in evidence and is to be marked as exhibit EO3.

Exhibits EO10 and EO11 tendered.

These two documents are collective agreements of 1/4/2005 and 1/10/2002, respectively. The objection of counsel to these documents is that they are private documents, photocopies and no foundation was laid. The certification of the document, being a private document, does not save the situation, as it is not required for a private document, but rather the explanation of the whereabouts of the original.

It is to be observed that counsel and Claimant referred to exhibits EO10 and EO11 as dated 1/10/2002 and 1/4/2005. A look at the documents reveals that 1/10/2002 and 1/4/2005 are the effective dates of the documents, but the documents are dated 23/7/2003 and 1/6/2005, respectively. This is just a call on learned counsel to be more

careful in understanding what is meant by —dated in a document and not to go by what he is told by his client. However, even the 1st Defendant in exhibit EO7 referred to these documents as 2002 and 2005 collective agreements. I am accordingly satisfied that the documents tendered are the documents pleaded.

The court agrees with learned Rotji that a private document does not require certification but explanation. In paragraph 18 of the Statement of Facts, the Claimant averred to the acceptance and implementation of the Collective Agreement by the 1st Defendant by a letter of 15/9/2006 (exhibit EO7). Paragraph 12 of the statement of defence is that the purported approval given by the Board of the purported Collective Agreement is invalid, null and void. Paragraph 9 of the 2nd Defendant's deposition is as follows;

The purported approval by the 1st Defendant was given on 2nd May 2006 to take effect on 1st May, 2006, the request for the approval of the Collective Agreement addressed to the supervising Ministry was dated 31st August, 2006 and the approval was conveyed via a letter dated 14 September, 2006 the approval was made effective 31st August, 2006.

From the above, the existence and approval of the Collective Agreements by the 1st Defendant are attested to by the 2nd Defendant. Similarly, Exhibit EO7 informs the claimant of the implementation of the 2002 and 2005 Collective Agreements negotiated by NEABIEI and ASSBIFI.

In the circumstances, where the existence and approval of the Collective Agreements by the 1st Defendant is attested to by the 2nd Defendant, this is one clear instance where section 12 (b) of the National Industrial Court Act, 2006 can be invoked to admit the document in the interest of justice without any prejudice to the 2nd Defendant although the documents are photocopies. See *Mr. Victor Adegboyu vs. United Bank for Africa*, Appeal No.CA/IL/20/2021, (unreported), a judgment delivered on 14/4/2022. I so invoke the provision of section 12 of the National Industrial Court Act, 2006, and depart from the requirement of the Evidence Act, 2011 and admit the Collective Agreements in evidence and they are to be marked as exhibits EO10 and EO11.

Another preliminary issue is the argument of Claimants' counsel that the Written Statement on Oath filed on 27/4/2015 and adopted by DW2 on 30/1/2022 is out- dated having been over taken by events, to wit, the amendment of NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012 on 6/6/2017 and 21/11/2017. This is what counsel submitted;

On 30/01/2022, the 2nd Defendant adopted his outdated Written Statement on Oath filed on 27/4/201, which had been overtaken by events. The said Defendant's Statement on Oath filed on 27/4/2015 by this witness was overruled by events when all 3 three Claimants in NICN/AK/23/2012, NICN/AK/31/2012 and NICN/AK/32/2012 filed their Statement on Oath on 6/6/2017 and 21/11/2017.

The above submission is a misunderstanding of law and procedure. The position of the law is that an amendment dates back to the date of the initial filing of that process. See *Ohn Kayode Fayemi v. Adebayo Segun Oni & Ors* (2019) LPELR-46623(CA) where the court held;

The Amended Originating Summons takes effect right from the beginning of the suit as the Originating Summons that commenced the suit. See *A-G Ekiti State vs Adewunmi* (2002) 1 SC 47 in which the Supreme Court restated the law point thusly - The principle is that an amendment duly made takes effect from the date of the original document sought to be amended and this applies to every successive further amendment of whichever nature and at whatever stage it is made. Therefore, when a writ of summons is amended, it dates back to the date of the original issue of such writ, and consequently, the action would continue as if the amendment had been inserted from the beginning.

Accordingly, a Defendant or Claimant is not bound to amend their process upon amendment by the other party. It is his choice, depending on whether, in his judgment, he needs to also amend to respond to any new issue or fact introduced in the amendment by his opponent. The failure to make a consequential amendment does not affect that party's process, nor do amendments by one party render their opponent's existing process outdated. The 2nd Defendant's statement of defence and witness deposition filed on 27/4/2015 and adopted on 30/1/2022 is not outdated.

On the merits of the case, the issues submitted by both counsels are similar and proper. The court adopts the issues as whether or not the Claimant has proven his entitlement to any of the reliefs claimed. In determining this issue, it shall be pertinent to set out each head of claim and determine the same as per the issue for determination. That the court shall do anon.

- (a) A Declaration that the contract of service between the Claimant and the Defendant before the Claimant was disengaged from service of the 1st Defendant, is governed by the Applicable Terms and Conditions of Service for Senior Staff as amended. Board resolutions as well as various Collective Agreements 2002 and 2005, inclusive.

It is a rule that in every employment relationship, there are always terms and conditions of service. In this case, the terms and conditions of service have been tendered in evidence (Exhibit E01). There is also proof of approval and implementation of the collective agreements (exhibit EO10 and EO11) by the 1st Defendant for its staff (exhibit EO7). I have no difficulty, therefore, in holding that this relief succeeds and the court accordingly so declares.

- (b) A Declaration that the purported removal or termination or disengagement of the Claimant from the service of the 1st Defendant or the government of Edo State through the Ministry of Finance, Edo State *vide* a letter dated 4th April, 2012 is altogether unlawful and illegal, being a breach of the contract of service between the Claimant and the Defendant.

Learned Rotji Esq. contended as follows;

That both Claimants, via their pleadings, did not state how and why their termination is altogether unlawful and illegal or a breach of their contract of employment throughout the Pleadings in NICN/ AK/23/2012 and NICN/AK/32/ 2012.

Learned Imafidon Esq. drew the attention of the court to some paragraphs in the pleadings of the Claimants in NICN/AK/23/2012 and NICN/ AK/32/2012, which are

paragraphs 5 and 24 to 30 of the Statements of Facts, which, according to Claimant counsel, were not denied. Worthy of note is paragraph 30, which is as follows;

Claimant shall contend at the hearing of this suit that his removal by the Government of Edo State through the Ministry of Finance, Edo State, is unlawful and illegal.

It must be borne in mind that a pleading that a claimant will contend at hearing that a particular act is unlawful and illegal is not a matter for the Claimant to prove by evidence but a legal matter for his counsel to argue at the written address stage. What is required is for the claimant to prove that the act complained of was done. This, the claimant has done by his pleadings, oral and documentary evidence, his appointment and termination letter (exhibits EO4 and EO9).

What, then, is the contention of learned counsel for the claimant at the trial on this point? It is as follows;

If the letters of appointment and confirmation of the claimants were not issued and signed by the Edo State Government or its predecessors-in-title, on what basis should the Ministry of Finance issue the disengagement letters? See page 6, paragraph 5 of Exhibit E01, which provides as follows:

“... appointment, confirmation, promotion, termination of a management and senior staff shall be made by the Board ... “

That Section 63 (1) part III of the Companies and Allied Matters Act, 1990, as amended, provides as follows:

“A company shall act through its members in a general meeting or its board of directors...”

Since the disengagement letters issued to the Claimants in NICN/AK/23/2012 and NICN/AK/32/2012 did not emanate from the appropriate authority, their disengagement from the service of the 1st Defendant is undoubtedly unlawful and illegal.

I agree with the above submissions or contention of learned Imafidon Esq. for the claimants. Even if the Edo state Government were the majority shareholder or had controlling shares in the company, it could not take over the functions of the Board of the company through its Ministry of Finance. The termination of the claimants by the Edo state ministry of finance made the said Ministry of Finance a meddlesome interloper and the termination cannot stand. It is hereby declared unlawful, null and void.

(c) ₦10,000,000.00 (Ten million Naira) as general damages for breach of contract.

When it comes to damages for breach of contract, damages are awarded against the person in breach. Unfortunately, there is no allegation of breach of contract against the 1st and 2nd Defendants. EDO STATE GOVERNMENT, MINISTRY OF FINANCE, EDO STATE and ATTORNEY GENERAL AND COMMISSIONER FOR JUSTICE, EDO STATE who were initially sued as 2nd to 4th Defendants, are no longer parties to this suit and the court cannot penalize the present 1st and 2nd Defendants for the

acts of persons who are no longer parties to this suit. The claim for general damages fails.

(d) ₦17,730,397.94 as special damages.

The prayer in relief (d) is for the sum of ₦17,730,397.94. The particulars of the special damages are as follows;

1.	Terminal Benefits	₦3,386,264 60
2.	Money had and received by way of unremitted pension contribution deducted by the Defendant from the salaries of Claimant	₦310,860.00
3.	Salary Arrears (Sept. – Dec.2010, Jan. – June & Dec. 2011, & Jan. - March 2012	₦863,554.02
4.	Annual Leave Allowance Arrears (2007 - 2012)	₦ 325.988.00
5.	Outstanding Arrears Collective Agreement (2002 – 2006)	₦ 783, 789.08
6.	Money had and received by way of Unremitted Contributions to the Nigerian Social Insurance Trust Fund from Sept. 1991 – Feb. 2007	₦345,175.20
7.	Unpaid salaries and allowances from April 2012 to 6 Feb. 2026, i.e, from the time of wrongful disengagement to the actual time of retirement.	₦11,714,767.63
TOTAL		₦17,730,397.94

The law is that a claim for special damages must be strictly proven. See Dr. George Nyong Ikpe Udofia v. Akwa Ibom State Civil Service Commission & Ors. (2011) LPELR-4055(CA) where the court held;

"... it is the law that a party who claims special damages must not only plead it specifically, he must also prove it strictly."

We shall now consider the proof of each item of the special damages.

1.	Terminal Benefits	₦3,386,264.60

What is the evidence of the Claimant as relating to his claim of ₦3,386,264.60 terminal benefits? I have searched carefully, over and over again, through the Claimant's 30-paragraph statement of facts and 31-paragraph witness deposition for the pleadings and evidence as to how the claimant arrived at ₦3,386, 264. 60 as his terminal benefit. I see none except paragraphs 29 and 30, respectively, which are as follows;

That since the letter of disengagement was served on me by the 1st Defendant, I had waited patiently to be paid my terminal benefits, which up till now remain unpaid.

The Claimant also testified in chief that;

The computation of my terminal benefits is structured after the 2005 Collective agreement between NEABIAI and ASSBIFI dated 01/ 06 2005.

It was learned counsel for the 2nd Defendant who rocked the board to his advantage

when he obtained the following answers from the claimant under cross-examination. Hear the claimant under cross-examination;

The computation of my terminal benefits per my claim was calculated by officers of the 1st Defendant's personnel and administrative department. The document for the calculation of my terminal benefits is in the possession of the 2nd Defendant. The 1st Defendant gave me a copy of my terminal benefits calculation. I did not come with the document to the court.

If it is true that the 1st Defendant gave the Claimant a copy of his terminal benefits calculation and he did not come with the document to the court to prove the said calculated amount, after ten years of the institution of this case, then the claimant and his counsel are like soldiers on the war front without weapons. Maybe the claimant and counsel are waiting for another appropriate opportunity to bring the same to court as evidence and not to this court. But this court can only decide based on what is placed before it.

From the above, although it may not be argued that the claimant is not entitled to terminal benefits, the claim for the sum of ₦3,386,264.60, being the Claimant's terminal benefits, has not been proven and the same is hereby dismissed.

2. Money had and received by way of unremitted pension contributions deducted by the 1st Defendant from the salaries of the Claimant ...~~₦~~310,860.00

The pleadings and evidence relating to this item are as in paragraphs 21 and 22 of the statement of facts and witness depositions, respectively. It is as follows;

The 1st Defendant implemented a self-administered contributory pension scheme where pensions were steadily deducted from my salary monthly in the ratio of 5:15 between Staff and the 1st Defendant. That the total amount deducted as pension contribution from my salaries by the 1st Defendant from October 1992 to February 2007 is ~~₦~~310.860.00. as the 1st Defendant stopped deducting pension contribution from staff salaries in March 2007.

There is no denial of this claim in the Defendant's Statement of Defence. By the very evidence of the 2nd Defendant in cross-examination that he has no access to the 1st Defendant's file, including the Claimant's file, any such denial of this claim by him will be of no moment.

In proof of these deductions, the Claimant tendered his pay advice, Exhibit EO2. From October 1992 to February 2007 is 14 years 2 months, making 170 years. The claimant tendered only ... receipts in evidence, which would have been okay in the absence of denial, but unfortunately, it was demonstrated under cross-examination that deductions were not made in respect of pension contributions on all the receipts tendered in evidence. This is what the claimant said in cross-examination;

The deduction for pensions is not on all the slips.

This casts a doubt on the claim as to how long or how many times the deductions were made and amounting to how much? The amount of ₦310.860.00, being the total amount deducted as pension contribution from Claimants' salaries by the 1st Defendant

from October 1992 to February 2007, is not established by the evidence before the court; the claim fails and is hereby dismissed.

3. Salary Arrears (Sept. – Dec.2010, Jan. – June & Dec. 2011, & Jan. - March 2012) ~~₦~~863,554.02

There is no iota of pleading and evidence relating to this head of special damages in the Claimant's processes. The claim cannot succeed and the same is dismissed.

4. Annual Leave Allowance Arrears (2007 - 2012) ~~₦~~325.988.00

There is no iota of pleading and evidence relating to this head of special damages in the claimants' processes. The claim cannot succeed and the same is dismissed.

5. Outstanding Arrears Collective Agreement (2002 – 2006) ~~₦~~783, 789.08

The pleadings and evidence relating to this item are as in paragraphs 18, 19, 20 and 21 of the Statement of Facts and witness depositions, respectively. It is as follows;

That the 2005 Collective Agreement which took effect from 1st April, 2005 approved 35% increase in salaries and all monetized allowances for all cadres of senior staff across the Board which was accepted and implemented by 1st Defendant for its staff as contained in a letter dated 15th September, 2006 showing my new salary structure arrived at based on the Collective Agreement of 2005 which the 1st Defendant domesticated, accepted and implemented while the salary arrears from 2002 to 2006 were worked out based on the 2002 Collective Agreement.

The said letter dated 15 September 2006 is in evidence, but what is missing in the pleadings and evidence is the fact that the said calculated salary arrears were not paid and remain unpaid, and such cannot be assumed without the claimant first averring the same to allow the Defendants to admit or deny. Accordingly, this head of claim fails and is dismissed.

6. Money had and received by way of unremitted Contributions to the Nigeria Social Insurance Trust Fund from Sept. 1991 – Feb. 2007 ...~~₦~~345,175.20

The pleadings and evidence relating to this item are as in paragraphs 22 and 23 of the statement of facts and witness depositions, respectively. It is as follows;

The 1st Defendant also implemented the contribution to the Nigeria Social Insurance Trust Fund, where contributions were made to the fund from the salaries and allowances of staff, including me. Deductions made from my salary between October 1992 to 2007 amounted to ~~₦~~345,175.20.

The problem with this head of claim is that the Claimant did not tell the court in his pleading and evidence that he discovered that the said deductions were not remitted, and how he found out. This claim cannot succeed by the Claimant simply pleading and testifying that such deductions were made, since it is not his claim that the deductions were illegal. The Claimant needs to prove to the court that the deductions were not remitted before he can claim the same as money had and received for a purpose but not remitted. Accordingly, this claim fails and is dismissed.

7. Unpaid salaries and allowances from April 2012 to 6 Feb. 2026, i.e, from the time of wrongful disengagement to the actual time of retirement.
 $\text{₦}11,714,767.63.$

The court has declared the disengagement of the Claimant, a staff member of the 1st Defendant, by the Edo State Ministry of Finance as null and void. The implication is that he remains in the employ of the 1st Defendant till legally terminated or till retirement. In the circumstances of this case, where the company went into liquidation and a receiver/liquidator was appointed for the 1st Defendant on 17/6/2013 and the 1st Defendant was wound up by the Federal High Court on 28/1/2014, could the employment of the Claimant legally exceed that date? I think not. I accordingly hold that the Claimant is only entitled to salaries and allowances from April 2012 to January 2014, a period of 22 months.

From paragraphs 28 of the Statement of Facts and paragraph 29 of the witness deposition, the Claimant's monthly net salary is $\text{₦}61,475.69$. if that is multiplied by 22 months, it will give us $\text{₦}1,352,465.18$. His annual leave allowance was $\text{₦}62,093.30$. Since the Claimant was disengaged in April 2012 and the company was wound up in January 2014, the Claimant is entitled to annual leave allowance for 2012 and 2013 only which is $\text{₦}62,093.30 \times 2 = \text{₦}124,186$. The Claimant's 13th-month salary is $\text{₦}32,340.26$. Since the Claimant was disengaged in April 2012 and the company was wound up in January, 2014, the Claimant is entitled to 13-month salaries for 2012 and 2013 only which is $\text{₦}32,340.26 \times 2 = \text{₦}64,680.52$. Now, $\text{₦}1,352,465.18 + \text{₦}124,186 + \text{₦}64,680.52 = \text{₦}1,541,331.7$. This head of claim succeeds in part in terms of unpaid salaries and allowances from April 2012 to 1 April 2014 in the sum of $\text{₦}1,541,331.7$.

8. 20% interest of the total claim from the inception of this case till the Judgment is given and until the final settlement of the claim.

It is a settled principle of law that pre-judgment interest can only be awarded on proof from the agreement of the parties. *See Elijah Adebisi (Trading Under the Style of Delock Association) & Ors v. National Institute of Public Information & Ors (2013) LPELR-22628(CA)*, where the court of appeal held as follows;

"The general rule at common law is that pre-judgment interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. Thus, pre-judgment interest will be payable where there is an express agreement to that effect and such agreement may be inferred from a course of dealing between the parties or where an obligation to pay interest arises from the common practice or usage of a particular trade or business - *Alfontrin Limited Vs. Attorney General, Federation (1996) 9 NWLR (Pt 4750) 634*, *Diamond Bank Limited vs. Partnership Investment Co Limited (2009) 18 NWLR (Pt 1172) 67*. Consequently, a Plaintiff, to succeed in a claim for pre-judgment interest, must show how the entitlement to such interest arose, that is, whether by law, by contract or agreement, or he must plead facts showing that the claim is part of the loss or special damages which the Defendant's wrong imposed on him. It is not enough to merely say that the Plaintiff is claiming interest. The basis of the claim of interest must be made manifest on the pleadings - *Ekwunife vs. Wayne (W.A.) Limited (1989) 2 NWLR (pt 122) 422*, *Sani Abacha Foundation for Peace & Unity vs. United Bank for Africa Plc (2010) 17 NWLR (pt 1221) 192*."

There is no such proof before the court. The claim for pre-judgment interest fails and is dismissed. Post-judgment interest is permitted by the rules of court.

SUMMARY

In summary, the claims of the claimant succeed in part as follows;

1. Prayer A succeeds.
2. Prayer B succeeds.
3. Prayer C for general damages fails.
4. Prayer D for special damages succeeds in part as follows

1. Terminal Benefits	~~₦~~ 3,386,264.60	Dismissed.
2. Pensions Contribution	~~₦~~ 310,860.00	Granted.
3. Salary Arrears (Sept. – Dec.2010, Jan. – June & Dec. 2011, & Jan. - March 2012.	~~₦~~ 863,554.02	Dismissed.
4. Annual Leave Allowance Arrears (2007 - 2012)	~~₦~~ 325,988.00	Dismissed.
5. Arrears of Collective Agreement (2002 – 2006)	~~₦~~ 783,789.08	Dismissed.
6. Unremitted Contributions to NSITF from Sept. 1991 – Feb. 2007	~~₦~~ 345,175.20	Dismissed.
7. Unpaid salaries and allowances from April 2012 to 1 April 2014 (as modified by the court instead of till retirement)	~~₦~~ 541,331.7	Granted.
8. 20% pre-judgment interest		Dismissed.

COURT'S ORDER

For the avoidance of doubt, it is hereby declared and ordered as follows.

1. A Declaration that the contract of service between the Claimant and the Defendant was governed by the Applicable Terms and Conditions of Service for Senior Staff as amended, Board resolutions as well as various Collective Agreements of 2002 and 2005 inclusive.
2. A Declaration that the purported removal or termination or disengagement of the Claimant from the service of the 1st Defendant by the government of Edo State through the ministry of finance, Edo State vide a letter dated 4th April, 2012 is altogether unlawful, null and void.
3. The Defendants are to pay the Claimant special damages as follows;

(a) Pensions Contributions	~~₦~~ 310,860.00
(b) Unpaid salaries and allowances from April 2012 to 1 April, 2014	~~₦~~ 1,541,331.7
TOTAL	~~₦~~1, 852, 191. 7
4. The judgment sum of ~~₦~~1,852,191.7 is to be paid within 21 days of this judgment or the sum shall attract 10 % interest per annum.

This is the judgment of the court and it is entered accordingly.

43.4 REMARKS.

Another Employer/Employee matter before the High Court. The disengagement of the

Claimant from the service of Bendel Insurance Plc by the Government of Edo State through the Ministry of Finance, Edo State, was declared “altogether unlawful, null and void.”

The Defendants were ordered to pay a total sum of N1,852,191.7 to the claimant within 21 days of the Judgment.

43.5 REFERENCES.

1. *Marine Management Association v. National Maritime Authority* (2012) 8 NWLR (Pt 1133) 504.
2. *Kayode Fayemi v. Adebayo Segun Oni & Ors* (2019) LPELR-46623(CA).
3. *Dr. George Nyong Ikpe Udofia v. Akwa Ibom State Civil Service Commission & Ors.* (2011) LPELR-4055(CA).
4. *Elijah Adebisi (Trading Under the Style of Delock Association) & Ors v. National Institute of Public Information & Ors* (2013) LPELR-22628(CA).
5. *Alfontrin Ltd vs. Attorney General, Federation* (1996) 9 NWLR (Pt 4750) 634.
6. *Diamond Bank Ltd vs. Partnership Investment Co Ltd* (2009) 18 NWLR (pt 1172) 67.
7. *Ekwunife vs. Wayne (W.A.) Ltd* (1989) 2 NWLR (pt 122) 422.
8. *Mr. Victor Adegboyu v. United Bank for Africa, Appeal No.CA/IL/20/2021, (unreported).*
9. *Sani Abacha Foundation for Peace & Unity Vs. United Bank for Africa Plc* (2010) 17 NWLR (pt 1221) 192.
10. *A-G Ekiti State v. Adewunmi* (2002) 1 SC 47.

44.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: NATIONAL INDUSTRIAL COURT OF NIGERIA (ABUJA).

DATE: 18th April, 2023

SUIT NO: NICN/ABJ/392/2019.

JUDGE: Hon. Justice O.O. Oyewunmi

MRS. AGNES OMEYI ADOGA.
(Plaintiff)

vs

1. THE NIGERIAN NAVY.
2. CHIEF OF THE NAVAL STAFF.
(Defendants)

44.2 REPORTS/FACTS/ISSUES

The case of the Claimant in this case is that she is the widow of an officer of the 1st Defendant who died in active service, known as Late Commodore Onche Ebenehi Adoga, having been initially married to him under native law and custom and subsequently statutorily formalized at Oriade Local Council Development Area of Lagos State Marriage Registry. According to her, the entitlements of the deceased upon his death were made vide his Declaration of Distribution of Personal Estate to Beneficiaries pursuant to the Armed Forces Act and that several entitlements of her deceased husband was duly paid by the 1st Defendant and same was shared amongst his noted beneficiaries as stipulated in the deceased Next of Kin declaration. She averred further that she had applied to the 1st Defendant for the payment of her husband's entitlements as stipulated in his declaration Form NN78, as she was mentioned as the sole beneficiary of the deceased's Group Life Insurance. The family was able to receive all the terminal benefit of the deceased from the 1st Defendant after his burial except his benefits under the Group Life Insurance Scheme to which she is the sole beneficiary. After several unfruitful attempts to recover the said benefits from the 1st Defendant, she hired a lawyer who wrote a letter of Demand and a reminder letter to the 1st Defendant with no response. She equally wrote to the 3rd Defendant for his intervention with no response from him too. She also applied for a certified true copy of her late husband's biodata form in the custody of the Defendant but was not obliged with it. She maintained that the failure of the 1st Defendant to pay her the benefits of her deceased husband under the Group Life Insurance has subjected her and her children to much hardship, suffering and deprivation.

44.3. DECISION OF COURT.

JUDGMENT

HON. JUSTICE O.O. OYEWUNMI. :-

It is against this backdrop that the Claimant took out a Complaint against the Defendants wherein she sought the following reliefs;

1. A Declaration that the failure of the Defendants, particularly the 1st Defendant,

to compute and pay to the Claimant, the benefits due to her deceased husband under the Group Life Insurance scheme of the Armed Forces, is wrongful.

2. An Order of the Honourable Court compelling the Defendants to compute and ascertain the amount due to the Claimant as the widow and sole beneficiary of Late Commodore Onche Ebenhi Adoga under the Group Life Insurance Scheme of the Nigerian Navy.
3. An Order of this Honourable Court compelling the Defendants to pay the Claimant the sum of ₦20,000,000 only. (Twenty Million Naira) being aggravated damages for emotional trauma, delay and inconvenience occasioned by the negligence of the 1st Defendant in refusing to pay the Claimant the Group Life Insurance within time.
4. ₦5,000.000 (Five Million Naira) only as the cost of this action.
5. 10% interest rate on the sum accruing to the Claimant from the date of the judgment until the final liquidation of the judgment sum.

The Defendants, in response to the Claimant's claims, admitted that the Claimant is the wife of the deceased Officer of the Defendant, whose due entitlement was duly paid to her, but they have no idea of how it was shared. They maintained that the Next of Kin Declaration Form NN78 (Revised) of the deceased did not reflect the Claimant as the Next of Kin and that only the person named in the Next of Kin Declaration Form NN78 can relate to the 1st Defendant on issues relating to a deceased officer's benefit and not beneficiaries. As such, the Claimant cannot relate to the 1st Defendant on issues relating to the deceased Officers' benefit and also lacks the locus to institute and maintain this action. They prayed the Court to dismiss this suit with substantial costs against the Claimant as it is baseless, frivolous, vexatious and lacking in merit.

At the close of pleadings, parties *vide* their respective counsel informed the Court of their voluntary consent to adopt the Argument on Record procedure pursuant to Order 38 Rule 33 of the National Industrial Court (Civil Procedure) Rules 2017. By this special procedure, parties have dispensed with the need for oral hearing and the case is to be tried on record by considering the pleadings of parties, Witness Statements on oath of their witnesses and documents frontloaded. Subsequently, parties were ordered to file their respective written addresses. As it is customary to do in this special procedure, learned counsel on behalf of the Claimants filed his final written address first and then the Defendants filed.

On the 21st day of April, 2022, learned Counsel on behalf of Claimant filed his final written address which was adopted on the 2nd day of February, 2023 wherein he formulated a sole question for determination thus; Whether the Plaintiff have, on a preponderance of evidence, and particularly documentary evidence, has proven her case entitling her to the Reliefs sought in this Suit.

On this sole issue, learned counsel submitted that both parties are relying on the same document, which is Form NN78 and that which documentary evidence, as admitted by the parties, should form the basis of this case. He relied on the following cases: Adebayo v. State (2007) ALL FWLR (Pt. 365) 498@519 – 520, Paras. HB; Salawu v. Yusuf (2007) 12 NWLR (Pt.. 1049) 707@ 734, Paras. F – H and Olufosoye

& Ors. v. Olorunfemi [1989] 1 NWLR (Pt. 95) 26. He posited that both parties are estopped from denying the contents of the said document. He maintained that the Defendants' position in paragraphs 8-13 and 14 of the Witness Statement on Oath that of Commodore BT Yeldin, and in paragraphs 5 – 8 of the Defendants' Statement of Defence that the Claimant not being named as the Next of Kin of the deceased disentitled her to the entitlements under Clause 14 – Beneficiaries of any Cheque, Cash or any other Monies Likely to be paid by Group Life Insurance of the said Form NN 78 is untenable as he who asserts must prove with credible evidence. He relied on the following cases: A.G, Rivers State v. A.G, Bayelsa State (2013) 3 NWLR (Pt. 1340) 123@ 161, Paras. B – C and; C.B.N. v. Auto Import Export (2013) 2 NWLR (Pt. 1337) 80@131, Paras. A – B. He further maintained that nowhere in the said Form NN78 was it stated that only persons named as Next of Kin can access the benefit in Form NN78.

According to him documentary evidence is best evidence. He relied on the following cases; Egharevba v. Osagie [2009] 18 NWLR (Pt. 1173) 299 @327, Paras. B – C, 310, paras. D – E, 327, paras. D-G; Afribank (Nig.) Plc. v. Adigun [2009] 11 NWLR (Pt. 1152) 329@350, Paragraphs. D – F; Agbareh v. Mimra [2008] 2 NWLR (Pt.1071) 378 at 411, Paras. B and; Dana Impex Ltd v. Awukam [2006] All FWLR (Pt. 311) 1924 @ 1940-1941. Learned counsel also contends that admission of Defendants of the payments of benefits to the Claimant herself by the 1st Defendant under Clauses 10, 11 and 12 in pages 5-8 of Form NN 78 the Defendants' arguments in paragraphs 8-13 and 14 of the said Witness Statement on Oath of Commodore BT Yeldin, and in paragraphs 5 – 8 of the Statement of Defence and as such are estopped from denying that the Claimant not being named as the Next of Kin (NOK) of the deceased disentitled her to the benefits under Clause 14– Beneficiaries of any Cheque, Cash or any other Monies Likely to be paid by Group Life Insurance of the said Form NN78. He relied on the following cases; Oguejiofor v. F.R.N (2002) 16 NWLR (Pt.793) 262 at 274 - 275, paras. D – D; Adone v. Ikebudu [2001] 14 NWLR (Pt.733) 385@411, Paras. E–H; Onamade v A.C.B Ltd [1997] 1 NWLR (Pt. 480) 123@141 - 142 paras. H – A; Hein Nebelung Isensee K.G v. U.B.A Plc [2012] 16 NWLR (Pt.1326) 357@384-386 Paras. H – H; Okonkwo v. Kpajie [1992] NWLR (Pt. 226) 633@655, Paras. E- G; U.B.N. v. Nwaokolo [1995] 6 NWLR (Pt.400) 127@142, Paragraphs E-F; Agbakoba v. INEC [2008] 18 NWLR, (Pt. 1119) 489 @ 539, paras. F-G and Section 169 of the Evidence Act, 2011.

In furtherance of his submission, learned counsel posited that the Defendants are not allowed to approbate and reprobate as was done when after the initial admitted payments of Clauses 10, 11 and 12 in pages 5–8 of Form NN78, they turned around to refuse to pay the same Claimant her entitlement under Clause 14 Beneficiaries of any Cheque, Cash or any other monies likely to be paid by Group Life Insurance.

In the same vein, learned counsel is of the view that the Defendants' failure to respond to the letters of demand written at the instance of the Claimants is fatal to their defence. He relied on the following cases: Zenon Pet. & Gas Ltd. v. Idrisiyya Limited [2006] 8 NWLR. (Pt. 982) 221@248, Paras. D – F, 251, Paras. A – D; Owners, M.V. Gongola Hope v. S.C (Nig.) Limited [2007] 15 NWLR (Pt. 1056) 189@215 - 216, Paragraphs. E-G, Paras. C – H and; F.B.N Plc. & Ors. v. A-G., Federation & Ors. (2014)12 NWLR (Pt.1422) 470 at 492-493, paras. G – B. He posited that the letters are business letters, which by their nature require a response. He cited the following cases in support: Kate Enterprises Limited v. Daewoo Nig. Ltd [1985] 2 NWLR (Pt. 5) 116@128-129, Paras.

G - C; Vaswani v. Johnson [2000] 11 NWLR (Pt. 679) 582 @588-589, Paras G -F and; C.A.P Plc v. Vital Investment Limited [2006] 6 NWLR (PT. 976) 220 @267 H – 268 B. He urged the Court to so hold and to also grant the Claimant's claims on the strength of the above arguments and authorities.

Learned counsel on behalf of the Defendants filed his final written address on the 9th day of June 2022, which was deemed adopted vide Order 45 Rule 7 of the Rules of this Court, 2017. Therein, he submitted a sole issue for determination, thus, whether, having regard to the facts and circumstances of this case, this suit, having been initiated by the Claimant in her capacity without appropriate Letters of Administration, is incompetent, thereby robbing the Court of jurisdiction to hear and determine the same.

On the sole issue so raised, learned counsel posited that there is no privity of contract between the Claimant and the Defendants in respect of the Group Life Insurance benefits of her deceased husband, as there was only privity between the Late Commodore and the Defendants. He submitted that a person who is not a party to a contract cannot apply to the Court to enforce it. He relied on the case of Adeoye & Ors v. Olopo & Ors (2020) LPELR-51017 (CA). He also posited that the Group Life Insurance benefits of the Claimant's late husband, by operation of law, have become an Estate of the deceased who died intestate, and in law, only an Administrator or Trustee, or Executor who has applied for letters of administration would have the requisite vires over such estate. **He relied on the case of Union Bank v. Mkena [2019] LPELR47197(CA).** He argued that paragraph 1 of the Claimant's Statement of Facts is clear as to where she believed to have the right to institute this action and which belief is wrong, as the Claimant is neither an Administrator, Trustee, or Executor of the Estate of the deceased and as such lacks the locus standi to sue in respect of the Estate. It is his position that the only thing that could confer a right to sue on the Claimant is a Letters of Administration.

Learned counsel also submitted further that the Claimant in this case does not have a Letters of Administration, as it was never referred to or pleaded in the Claimant's pleadings. He maintains that the mere mention of the Claimant as a beneficiary of the Estate in the Next of Kin Declaration Form 78 without more does not confer on her the right to sue in the absence of letters of administration. According to counsel, the Claimant is not the proper party to sue in this case, having not obtained letters of Administration empowering her to administer the estate of her deceased husband. He relied on the case of **Cotecna International Limited v. Churchgate Nigeria Limited & Anor (2011) All FWLR (Pt 575)252@286**. Finally, he urged the Court to hold on the strength of the above authorities that the Claimant, having initiated this suit in her capacity without a Letters of Administration, is incompetent to sue and thereby robs this Court of the requisite jurisdiction to entertain this case.

Upon a painstaking perusal of the Originating processes, the Statement of Facts together with other processes filed by the Claimants, the Statement of Defence, and the final Written Addresses of parties, I am of the respectful view that the issues that would best determine this action are, viz;

1. Given the facts of this case, is this suit competent and thus cloths this Court with the requisite jurisdiction to entertain the same? And where this is answered in the affirmative;

2. Whether on the balance of probabilities, the Claimant is entitled to the reliefs sought in this case.

With regards to issue one, it is the submission of the learned Defence counsel that for there to be a right to sue on a contract, there must be privity of contract. It is his position that the Claimant has no locus standi to bring this action and that the Court is thus robbed of jurisdiction because the Claimant failed to produce a Letters of Administration to the effect that she was appointed an administrator of the Estate of the deceased husband. Learned counsel had relied on the case of *Union Bank v. Mkena*, supra. Now, locus standi, which is also known as the right to sue, is the legal capacity to institute an action in Court. It focuses on the party that approaches the Court seeking relief. See: *Mulima v. Borno State Housing Corp. & Anor* (2021) LPELR-54827(CA)1@24-26, Paras. D-D and *Re: Ijelu* (1992) LPELR- 1464(SC)1@14-15 Paras. D-D. The Law is firmly settled that where the party suing has no legal right to sue, they cannot confer jurisdiction on the Court to entertain the action/suit. See *Nyesom v. Peterside & Ors* (2016) LPELR40036(SC)1@ 39-40 Paras C; *Daniel v. INEC & Ors* (2015) LPELR-24566(SC)1@ 47, Para. A; *Basinco Motors Limited v. Woermann-Line & Anor* [2009] 13 NWLR (Pt. 1157) 149 SC and; *Disu v. Ajilowura* (2006) 14 NWLR (Pt. 1000) 783. In *Ajayi v. Adebiyi & Ors* (2012) 11 NWLR (Pt. 1310) 137, Adekeye, JSC (Rtd) held thus as regards the interconnectivity of locus standi and jurisdiction;

“Locus standi and jurisdiction are interwoven in the sense that locus standi goes to affect the jurisdiction of the Court before which an action is brought. Thus, where there is no locus standi to file an action, the Court cannot properly assume jurisdiction to entertain the action. Locus standi, being an issue of jurisdiction, can be raised at any stage or level of the proceedings in a suit, even on appeal at the Court of Appeal, by any of the parties without leave of the Court or by the Court itself suo motu. The issue can be raised, after the Plaintiff has duly filed his pleadings by a Motion and or in a Statement of Defence. Locus standi to institute proceedings in a Court is not dependent on success or merits of a case; it is a condition precedent to the determination of a case on the merits...”

Jurisdiction is the very basis on which any Court tries a case; it is the lifeline of all trials. A trial without jurisdiction is a complete and outright nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal even at the Supreme Court for the first time; a fortiori, the Court can suo motu raise it. See the following cases: *Moore Associates Limited v. Exphar S.A.* (2023)3 NWLR (Pt 1872)619@665-656, Paras E-D; *Ajayi v. Adebiyi* supra; *Nasir v. Civil Service Commission, Kano State* (2010) 6 NWLR (Pt. 1190) 253 @ 276 (SC) and *Usman Dan Fodio University v. Kraus Thompson Organisation Limited* [2001] 15 NWLR (Pt. 736) 305.

The law is notorious that a party will have locus standi in a matter only if he/she has a special right or if he/she can show that he/she has sufficient or special interest in the performance of the duty sought to be enforced, or where his interest is adversely affected. See; *Agbakoba v. A-G, Federation & Anor* [2021] LPELR-55906(CA)1@74, Para A and *Adetona & Anor. v. Zenith International Bank Plc* [2011] LPELR- 8237(SC)1@40-41, Para. E. Claimant vide paragraph 1 of her Statement of Facts averred that she is a widow to late Commodore Onche Ebenehi Adoga, who died in active service of the 1st Defendant. She equally averred

that she is the sole beneficiary of the deceased's entitlements under Group Life Insurance as stipulated in Form NN78. The position of the law is that where a person wants to bring an action on behalf of the estate of a deceased, to have locus standi, he must show his or her Letters of Administration, which appoints him or her as the beneficiary of the deceased's estate. However, the point must be made that as firm as the above legal principle is, it is not unchangeable or immoveable like the Rock of Gibraltar. By the doctrine of stare decisis, lower Courts are enjoined to follow the decisions of Superior Courts. See *State v. Gbahabo & ors* [2019] LPELR-48117(SC)1@15-17, Para. F and; *PDP v. Oranezi & Ors* [2017] LPELR-43471(SC)1@9-10, Para. E. However, it must be noted that what earlier decisions establish is only a principle, not a rule. Rules are unchangeable and immoveable because they operate in an all-or-nothing dimension, while principles, on the other hand, merely incline decisions one way or the other and, as such, form a starting point. Where one ultimately lands from that starting point will largely depend on the peculiar facts and circumstances of the case at hand. The apex Court per Oputa JSC (of blessed memory) in the case of *Western Steel Works Ltd & Anor v. Iron & Steel Workers Union & Anor* [1986] LPELR-3479(SC)1@28-30, Paragraph G held thus as regards the differences between a rule and principle:

“...The important thing to note is that what emerges from the consideration of these cases is merely a Principle and not a Rule. As Ronald Dworkin noted, "A rule is a normative proposition making certain legal results depend upon the establishment of certain factual situations stipulated in the antecedent part of the rule." Rules generally determine the outcome of the dispute in which they are applied. It is not so with "principles". Principles are broader statements of conduct, and they do not necessarily decide the outcome of the dispute. They merely incline the decision one way or the other depending on the facts and surrounding circumstances of the case at hand. A principle (from the Latin word principium) merely forms the starting point. Thus, a legal principle is a comprehensive rule or doctrine that furnishes a basis for the consideration of the case in which the principle is meant to apply. Principles simply incline a decision one way or the other, but they are not conclusive, and they survive intact when they do not prevail. The point I am making is that in applying any principle, the peculiar facts of the case in hand as well as the surrounding circumstances will dictate whether the principle will apply or not. The principles laid down in the various cases reviewed by Karibi-Whyte, J.S.C. in *Omonuwa's case supra* will have to be applied against the background of the facts of this case, which merely dealt with the existence or absence of jurisdiction.” See also: *Sahara Energy Resources Limited v. Oyebola* [2020] LPELR-51806(CA)1@44, Paras G-B.

The above position is the reason cases are decided based on their peculiar facts and circumstances. This is because a case is an authority for the law and fact; it is determined not for a separate and distinct set of facts, as cases cannot be decided outside their factual milieu. This is what the authors of a book titled “How To Do Things With Rules: William Twining and David Miers Law in Context Fifth Edition at page 70, call “Context first” is a good working rule of thumb, provided that it is not interpreted and applied too rigidly” Cases are thus decided based on their peculiar facts in the light of the enabling law. See: *PTF v. Fidelity Bank Plc* (2022)9 NWLR (Pt 1836)475@536, Paras F-G (SC) and *Ila Ent. Limited v. Umar Ali & Co (Nig) Limited* (2022)18 NWLR (Pt 1862)501@534, Para D (SC). Thus, lower Courts are only allowed to depart from the decisions of higher Courts where they can distinguish the cases from those decided by the higher Courts. In all the cases referred to by the

Defendants as to the locus standi of a person to sue in respect of the estate of a deceased, none of them originated from the National Industrial Court as a trial Court. In the instant suit, unlike those cases, the National Industrial Court, which is a specialized Court on employment claims, is the trial, Court. The specialised nature of the National Industrial Court was recognized by the appellate Court per Ogakwu JCA in the case of Sahara Energy Resources Limited v. Oyebola, supra @52, thus “...It has to be remembered that the National Industrial Court is a specialised Court exclusively established primarily for labour and employment-related matters. In that regard, except where patently and manifestly wrong, there has to be some deference to the decisions of that Court in that area of the core competence and specialisation of the Court...”

It is no longer in doubt that this Court is the only Court in this clime imbued with jurisdiction over labor, employment, and all matters connected thereto, including terminal benefits, pensions, et al. See Section 254 C (1) of the 1999 Constitution of the Federal Republic of Nigeria, as amended (hereafter referred to as the Constitution). In pursuance of the jurisdiction of this Court above, the Constitution vide Section 254 F (1) vests the power to make Rules regulating the practice and procedure of the National Industrial Court in the Honourable President of the National Industrial Court of Nigeria. In exercise of this power, the National Industrial Court (Civil Procedure Rules) 2017 was made, thereby making it a subsidiary legislation to the Constitution. The Rules specifically make provision for who can sue in respect of the entitlement of a deceased employee and how such a person can sue.

Ordinarily, it is the pleadings of the Claimant that would be considered to find if the Claimant has locus standi. See the following cases: Abu & Anor v. Kura & Ors (2017) LPELR42489(CA)1@14-15, paras. D-D and Bewa ji. v. Obasanjo [2008] 9 NWLR (Pt. 1093)540 @ 568 – 569; Ajagunbade III v. Adeyelu II (2001) 16 NWLR (Pt. 738) 126 @ 184 and Adesokan v. Adegorolu (1999) 3 NWLR (Pt. 493) 261. However, the apex Court in the case of Karshi v. Gwagwa (2022) 9 NWLR (Pt 1834) @159, Paras A-C, 161, Paras B-F, 162, Paras A-D held that to pursue substantial justice of a matter when a trial Court considers the point of objection together with the main suit, the Court in determining the objection especially where it is done at the stage of judgment is obliged to look at all the processes brought before it for consideration. The Court was of the view that the approach of limiting oneself to only the pleadings when considering the issue of jurisdiction on whether an action is statute barred even when the objection is considered at the stage of judgment after conclusion of a case makes the Court to ignore other evidence that may be applicable to determine the issue and pretend as if it does not exist and which violates the principle of fair hearing that requires a Court to consider all evidence before it in its judgment or to consider all evidence on a point in determining that point. In applying the above principle to this case, although the ordinary position is that a Court should limit itself to pleadings when considering the issue of jurisdiction on locus standi, however, in the pursuit of substantial justice and fair hearing, in considering whether Claimant has locus standi, the Court will look at the pleadings of the Claimant together with all other processes filed in this case.

Claimant vide her pleadings has averred that she is the widow of the Late Commodore who died in active service and also the sole beneficiary of his benefits under the Group life Insurance policy. The Claimant, in support of this, relied on Form NN78. From the facts and circumstances of this case, as averred in the Claimant’s pleadings, the deceased, who is the husband of the Claimant, has not been said to have died testate.

By the provision of Section 167 of the Evidence Act, 2011, this Court may presume that he died intestate. Order 11 of the Civil Procedure Rules of this Court 2017 makes copious provisions for the way and manner the entitlements of a deceased employee who died intestate may be claimed. For the sake of clarity and comprehension, I will proceed to reproduce the salient provisions of Order 11 of the Rules, 2017. It stipulates thus;

ORDER 11

ENTITLEMENT OF DECEASED EMPLOYEE (INTESTATE)

Proof of status as kinship.

1. Where a case involves the outstanding salary, gratuity, pensions, benefit or any other entitlement of a deceased employee who died intestate but had named the next of kin or beneficiary in the deceased's employment bio-data form, if such next of kin or beneficiary is the Claimant(s).
 - (a) shall provide proof of the next of kinship or relationship, either by—

Certified True Copy of Employment form.

- (i) a Certified True Copy (CTC) of the employment bio-data form in which the Claimant was named as next-of-kin or beneficiary on the form obtained from the employer of the deceased employee; or
- (ii) a copy of the employment biodata form of the deceased, which may be in the custody of the Claimant(s), in which the Claimant(s) has deposed to an affidavit;

Letter of Administration from Probate Registry.

- (b) attach Letter(s) of Administration obtained from the appropriate Probate Registry of a High Court, or

Order from the Customary or Sharia Court of Appeal, etc.

- (c) an order from a Customary Court of Appeal or Sharia Court of Appeal.

Application for the order to produce the Employment biodata form.

2. The Claimant may apply to the Court for an Order compelling the employer of the deceased to produce before the Court a copy of the employment biodata form of the deceased in which the Claimant was named as next-of-kin or beneficiary.

Claimant may use a document in the Claimant's possession.

3. Where the employer fails, refuses, or neglects to comply with the Order of the Court, the Claimant shall be at liberty to make use of any copy of the same employment bio-data form in the Claimant's possession to prove the claim.

Where there is no next of kin.

4. Where a case involves the outstanding salary, gratuity, pensions, benefits, or any other entitlement of a deceased employee who died intestate and did not name a next of kin or beneficiary, the Claimant shall, in addition to any other document,
 - (a) attach Letter(s) of Administration obtained from the appropriate Probate Registry of a High Court, or
 - (b) an order from a Customary Court of Appeal or a Sharia Court of Appeal.

Proof of custom and practice.

5. Where the Claimant is unable to satisfy the provisions of rules 1, 2, 3 and 4 of this Order, the Claimant may attach;
- (a) any proof related to or connected with inheritance emanating from the custom or tradition of the deceased employee, or
 - (b) any proof related to or connected with inheritance emanating from the traditional ruler or custodians of custom and tradition of the deceased employee's place of origin;

Provided that the Court may also accept the evidence of traditional rulers or Chiefs or other persons having special knowledge of the Customary law and custom of the place of origin of the deceased employee; or

- (c) any book or manuscript recognised as legal authority by people indigenous to the community in which such law or custom applies and is admissible.

Provided that such proof or evidence is not repugnant to natural justice, equity and good conscience.

When an intestate action will not be entertained.

6. Any action filed before the Court concerning the entitlement of a deceased employee who died intestate, which does not comply with the provisions of rules 1, 2, 3, and 4 of this Order may be incompetent and may not be entertained by the Court.

Admissibility of process or order from the Sharia or Customary Court of Appeal, or other proof of custom.

7. A process or any order of a Customary Court of Appeal or Sharia Court of Appeal, or any proof related to or connected with inheritance emanating from the customs or traditions of the people or the traditional Ruler or Custodian of the customs or traditions of the place of origin of the deceased employee, presented before the Court, shall be presumed to be true and authentic, unless the contrary is proved.

When there is more than one Letters of Administration or any other proof or conflicting proof of custom.

8. Where there are conflicting Letters of Administration or any proof or Order of the Customary Court of Appeal or Sharia Court of Appeal or any proof related to or connected with inheritance emanating from the customs or traditions of the people or from the traditional Ruler or Custodian of customs or traditions of the place of origin of the deceased employee, the authenticity or otherwise of the conflicting Letters of Administration or any other process or the custom of the deceased employee, shall be resolved by the Probate Registry, Customary Court of Appeal or Sharia Court of Appeal or the traditional Ruler or other Custodians of the customs and traditions of the deceased employee from which the letters or proof or order were obtained.

Court may invite the custodian of customs.

9. Where there is conflicting evidence or other proof of the custom or tradition of the deceased employee, the Court may, suo motu, invite the traditional Ruler or any other Custodian of custom as it relates to inheritance to give evidence or expert opinion on the matter.
10. Any process related to or connected with outstanding salary, benefits, allowances, gratuity, pension, or any other entitlement of a deceased person filed in any of the Registries of the Court shall be placed on fast track.

It is clear from the above provision of Order 11 Rule 1 that a Claimant who is a next of kin or beneficiary named in the Bio Data Form of a deceased can claim for the benefits of a deceased employee and he can do so if he proves kinship by first producing any of the following; Certified True Copy of Employment form/ a copy of the employment biodata form of the deceased which may be in custody of the Claimant or; Letters of Administration from Probate Registry or; Order from Customary or Sharia Court of Appeal etc. The effect of the above is that the next of kin or beneficiary named in a deceased employee Bio Data Form will have locus to institute an action claiming for the benefit of the deceased employee where he or she is able to show proof of kinship or relationship by any of the above means which means that a Letter of Administration is not the only means through which such a claimant can acquire locus standi to sue. The Claimant in this case is suing in respect of the deceased, Commodore Onche Ebenehi Adoga's benefits under the Group

Life Insurance Scheme of the Nigerian Navy.

She annexed to her claim the deceased employee's employment form NN78, which includes a particular form that contains the details of the beneficiary to his benefits under the Group Life Insurance as seen at page 36 of the Record. According to the Claimant in her pleadings, she has written as part of a myriad of letters to the Defendants, a letter requesting that the 1st Defendant issue her a Certified True Copy of her deceased husband's biodata form, but the letter, just like others, was not responded to by the Defendants. By the provisions of Order 11 Rule 2 of the Rules of this Court captured above, a beneficiary may apply to the Court for an order compelling the employer to produce a certified true copy of the employment biodata form in which the Claimant was named beneficiary or next of kin. Rule 3 goes further to say that an employee who could not get a certified true copy of the deceased relative Employment bio data form can use any employment bio data form in his/her possession where the employer fails to produce a certified true copy of the employment bio data form wherein the Claimant is named as beneficiary or next of kin. Incidentally, in the instant case, the said Form NN78, which the claimant is relying on in this case, is the same one the Defendants are relying on and the certified copy of which they annexed to their joint statement of defence at pages 81 -91 of the record.

I have perused both documents relied on by both Claimant and Defendants, and there is no dispute as to the authenticity or contents of form NN78 placed before the Court by the Claimant. It is clear from the said form, as seen at pages 36 and 90 of the Record, that the Claimant is the sole beneficiary of the deceased's benefits under the Group Life Insurance. In line with Order 11 Rule 1 Claimant, in my view, is the right person with locus to sue in respect of the benefits under the Group Life Insurance, being its sole beneficiary. It is a misconception for learned counsel on behalf of the Defendants

to argue that the Claimant cannot sue without a Letters of Administration, when as shown by the provisions of the Rules of this Court above, she can sue as a beneficiary once she has shown her kinship or relationship with the deceased. The Rules of this Court, specifically Order 11 Rule 1, have given the Claimant, as a beneficiary of the Group Life Insurance, the right to sue in respect of the Group Life Insurance policy.

Besides, the Court of Appeal in the case of *Majomi & Ors v. Hon. Minister, FCT & Ors* [2018] LPELR-44446(CA)1@18- 19, Para. A per Mustapha JCA has held that even where Letters of Administration are not obtained, a suit cannot be struck out, merely on that account, because the personal representatives of a deceased, who died intestate, will have capacity to sue in respect of the estate to which the deceased is entitled to, by operation of the law. The Court also went further than nothing bars the Plaintiffs/Appellants in that case from suing in their names, for themselves, as beneficiaries of the estate of the deceased, as they have disclosed their interests in the property in question sufficiently. It is thus clear that there is nothing wrong with the Claimant in this case suing in her name as the sole beneficiary of the Life Group Insurance Policy. Thus, the submission of learned counsel on behalf of the Defendants in his final written address that the Claimant suing in her capacity as beneficiary without a Letters of Administration is fatal to her case, is misconceived. In the same vein, the Court of Appeal per Bolaji Yusuf J.C.A in *Muoghalu & Anor v. Muoghalu & Ors* (2019) LPELR-47257(CA) 1@33-35, Paras. C held inter alia that by virtue of clause 12 of the Will in that case, ownership of the document became vested in the Respondent and they are entitled to sue to recover the document.

The Court further held that, assuming that there is a need for a Deed of Assent before the document can be released to Moghalu Jnr, upon his death intestate, the Respondents, as heirs and beneficiaries, are entitled to sue to protect their equitable interest in the estate. Now, applying the above reasoning of the appellate Court to the present case, by virtue of the Claimant being the sole beneficiary of the benefits of the deceased under the Group Life Insurance as seen on page 36 of the Record, she is entitled to sue to recover the sum accruing to the deceased under the Group Life Insurance and she is equally entitled to sue to protect her equitable interest in the estate specifically the Group Life Insurance benefit. In fact, Claimant has sufficiently disclosed her interest in the said benefits under the Group Life Insurance, and her case cannot be thrown out because of the absence of a Letters of Administration. In my humble view, the document on pages 36 and 90 of the Record shows that she is the sole beneficiary of the deceased's benefits under the Group Life Insurance and as such one with an equitable interest over the said benefits, which is in possession of the Defendants. She can thus sue to protect her equitable interest, and the Defendants and the Court cannot deny her such right.

In the same light, the Claimant herein, as shown on record by her pleadings and documents on record, is the widow of the deceased Commodore Onche Ebenhi Adoga who died intestate. The Court per Mbaba, J.C.A in his dissenting view in *Uwazuruike v. Iwe & Anor* [2014] LPELR-23774(CA)1@18-19, Para. E held thus as regards the locus of a widow to sue in respect of her late husband's estate; "I will be surprised if a widow or a son of a deceased is said not to have locus standi to sue or challenge a trespasser to the estate of their deceased husband/father, whether or not they have been, officially issued with a Letters of Administration of the estate by the Government. I believe even by tradition or convention, members of a deceased family have equitable right and interest to protect the deceased estate, even while awaiting a Letters of

Administration, where applicable. And where the property is governed purely by statute and English law, I do not see anything stopping them from coming to Court as beneficiaries of the estate praying that they be declared to be entitled to obtain the Letters of Administration and seeking a restrain against trespassers from the property while they are in possession, pending the issuance of the Letters of Administration, as delay to take action can be fatal.”

No matter how one looks at it, put differently, no matter how a coin is tossed, head or tail, the Claimant has every right to bring this action against the Defendants to recover the benefits of the deceased under the Group Life Insurance. In view of all reasons *supra*, I am of the unwavering view that the Claimant has the requisite locus to institute this action against the Defendants. Issue one is thus resolved in favour of the Claimant and against the Defendants.

Respecting issue two, it is important to bear in mind that the suit of the Claimant is declaratory. The position of law on declaratory actions is clear. The duty is on the Claimant to succeed on the strength of her own case and not on the weakness of the Defendants’. However, she can take advantage of the weakness in the Defendants’ case where the same supports her stand. See the following case: *Luke v. R.S.H. & P.D.A.* (2023)3 NWLR (Pt 1871)221@251-252, Paragraphs C-D &H-A; *Mohammed v. Bormu* [2023]4 NWLR (Pt 1874)343@362,363, Paras B-D; *Ministry of Land and Survey, Nasarawa State v. Nwafor & Ors* [2021] LPELR-56254(CA)1@32- 3, Paras. C-C.

The Claimant’s relief 1 is essentially a declaratory relief. A declaratory relief is an equitable relief in which a party prays the Court, in the exercise of its discretionary jurisdiction, to pronounce or declare an existing state of affairs in law in his favour as may be discernible from the averments in the Statement of Claim. To be entitled to a declaration, a person must show the existence of a legal right, subsisting or in the future and that the right is contested. Thus, a declaratory action is discretionary and would only be granted upon convincing evidence. See the following cases; *Bamigboye & Anor v. Owolabi & Ors* (2022) LPELR56885(CA)1@18- 19, Para. D; *A-G Rivers State v. AG Akwa Ibom State & Anor* [2011] LPELR- 633(SC)1@154, Para. A and *Dantata v. Mohammed* [2000] 7 NWLR (Pt.664)176. Claimant in this case, as reasoned *supra*, is the widow of Late Commodore Onche Ebenehi Adoga, who died in active service. See paragraphs 1 and 2 of the Statement of Facts. Thus, it stands proved and the onus is now on the Defendants to disprove the same. The Defendants on the other hand, who have the onus to disprove the same admitted Claimant’s averments as per her relationship with the deceased and the fact that he died in active service. See paragraph 1 of the joint statement of defence. Ordinarily, facts admitted needs no further proof. This is because there is no burden to prove what has already been admitted.

See *Eweje v. O. M. Oil International Limited* [2021] 4 NWLR (Pt 1765)1@142, Paras E-G; *Danjuma v. Nasiru & Anor* [2015] LPELR-25922 (CA)1@10-11, Para E and; *Aliyu Balogun v. Shitu Labiran* [1988] 6 SCNJ 71 2 85.

However, since this action is declaratory in nature, it will not succeed merely on an admission, as a declaratory action is an exception to the rule of admission. See *Achir & Anor v. Chabo & Ors* (2019) LPELR-48763 (CA)1@26-28, Para A; *Alhassan & Anorv. Ishaku* (2016) LPELR-40083(SC)1@ 20, Paras E-F and; *Okonkwo v.*

Okonkwo [2010] LPELR9357(SC)1@34. Thus, Claimant still has the burden to discharge the onus on her. In the case of Bamgbegbin & Ors v. Oriare & Ors (2009) LPELR- 733(SC)31, Para F, the apex Court held, amongst other things, that a party in a civil action discharges the onus of proof by adducing cogent and sufficient evidence in support of his claim. In discharging that onus, as to proof of her claims as to her relationship with the Late Commodore and the fact that he died in active service was supported by the documents at pages 24, 25 and 26 of the Record. There is thus no doubt as to the Claimant's relationship with the Late Commodore Onche Ebenehi Adoga. It is the Claimants' averment that she is equally the sole beneficiary of the Group Life Insurance benefits of her deceased husband, which, unlike other benefits of the deceased, has not been paid. As reasoned earlier in this judgment, the provisions of Order 11 of the Rules of this Court have clearly laid down the requirement for claiming entitlements or benefits of a deceased employee Claimant in her averments pleaded a particular Next of Kin Declaration Form of the deceased, known as FORM NN78, which entitles her to the benefit claimed. In the case of Oguebie v. FBN Plc [2020] 4 NWLR (Pt 1715)531@ 550, Paras C-E, the apex Court held that a party who relies on a document in proof of his case has the duty to present at least secondary evidence of the document. Claimant annexed a photocopy of the said form to her processes and which is what this Court will consider in this special type of trial.

The contents of the said Form NN78 were not denied by the Defendants as reasoned supra. In fact, as rightly submitted by learned counsel on behalf of the Claimant in his final written address, the same Form is what the Defendants pleaded in their Statement of Defence and annexed it to their processes as seen at pages 81 to 91 of the Record as a document they are relying on. It is well settled in law that documents, legally speaking, speak for themselves. See the case of Ezeanochie v. Igwe [2020] 7 NWLR (Pt 1724) 430 (SC); Eze v. APGA [2020] 3 NWLR (Pt 1712) 413 (SC); Eco Bank Plc v. Kunle (2019)10 NWLR (Pt 1679)90@109-110 and Enilolobo v. NPDC Limited [2019] 18 NWLR (Pt 1703)168@197. As such, the Court is not concerned with the interpretation given to a document by parties or witnesses or what they understand it to mean. See the case of Yadis (Nig) Limited v. G.N.I.C Limited (2007) 14 NWLR (Pt 1055) 584 @610, Paras F-H (SC). I have perused the said document which both parties are relying on and I find that the Claimant truly is a beneficiary of any benefit payable to the deceased under the Group Life Insurance. Apparently written on Form NN78 marked as Exhibit MOD1 by the Defendants at paragraph 5 of their Statement of Defence and specifically at page 10 paragraph 14 of that Form is the name of the Claimant "AGNES ADOGA WIFE 100% beneficiary of any cash, cheque, or any other monies to be paid by the Group Life Insurance" and signed by the deceased Claimant's late husband dated 6 April, 2015. In the case of Ohochukwu v. Attorney General of River State & Ors [2012] LPELR-7849 (SC)1@ 37, Para E, the Supreme Court per Aloma Mukhtar JSC(CJN) (Rtd) held that it is only when a Plaintiff has proved his case that the burden of proof shifts to the Defendant. See also Oguejiofor v. Access Bank [2020] LPELR-49583(CA). It is only when the Claimants have discharged the burden placed on them that the burden shifts to the Defendants and it is only then that this Court will consider the defence put up by the Defendants. The Claimant having proven her entitlement to the said benefits under the Group Life Insurance by placing the requisite form before the Court, the burden then shifts to the Defendants. The Defendants in this case are not saying that there is no benefit payable or accruable to the deceased under the Group Life Insurance; rather, they contend that Claimant is not the one entitled to institute this action to reclaim the said sum since she is not a next of kin and does not have a Letters of administration.

I have captured the provisions of Order 11 Rule 1 of the Civil Procedure Rules of this Court which allows even a beneficiary to claim for the benefit of a deceased person who died intestate. The Claimant in this case has satisfied the requirement that says that she must prove kinship or relationship with the deceased in order to be entitled by placing before the Court Form NN78 which shows that she is the sole beneficiary of the said benefits under the Group Life Insurance. The Claimant having shown that she is entitled as a Beneficiary cannot be denied her entitlement to the benefits under the Group Life Insurance by the Defendants on the ground that she is not a Next of Kin. In fact, I believe that the defence of the Defendants in this case that only a next of kin can be paid is an after-thought because if not why did they not pay the Group Life Insurance benefits of the deceased together with the other sums they have admitted paying to the person named as the NOK at page 82 of the record. Why was it only the benefits under the Group Life Insurance to which Claimant is the sole beneficiary that was left out? A perusal of the said Form NN78 shows that only two sons of the deceased are his next of kin and there are several beneficiaries of the deceased benefits under several schemes apart from the said two next of kin.

The Defendants admitted paying these other benefits to which the next of kin were not the only beneficiaries. In fact, from a perusal of the said Form NN78, there is equally a benefit of the deceased which the Claimant herein was also the sole beneficiary, just like that of the Group Life Insurance and which is any Balance Salary/Allowances paid by CPO and the Defendants admitted to have paid. See page 52 of the Record. The Defendants who have admitted paying other benefits which includes any Balance Salary/Allowances paid by CPO which Claimant is equally the sole beneficiary just like the benefits under the Group Life Insurance cannot at this stage by saying that Claimant is not entitled to claim the benefits under the Group Life Insurance because she is not a next of kin or with letters of administration. That is just as submitted by learned counsel on behalf of the Claimant, speaking from two sides of their mouth and blowing hot and cold, which is not allowed in law. A party cannot speak differently from both sides of the mouth at the same time. **See: Oladapo v. Bank of the North Limited [2000] LPELR-5284(CA)25-26, Paras F-A; Out & Anor v. Ani [2013] LPELR-21405 (CA)112, Para G; SCOA Nig Plc v. Taan & Ors [2018] LPELR-44545 (CA)55- 56, Paras A-E. A party cannot be allowed to spew cold and hot water from its mouth at the same time.** It is my humble view that having admitted to having paid other benefits, including any balance Salary/Allowances paid by CPO, which the Claimant is equally the sole beneficiary of, just like the benefits under the Group Life Insurance, they are estopped by their conduct from refusing to pay the **Claimant the benefit under the Group Life Insurance. See Section 151 of the Evidence Act, 2011 (hereinafter referred to as "Evidence Act") and also the following cases; A.G. Nassarawa State v. A.G. Plateau State [2012] LPELR9730 (SC) 59-60, Paras G-A and Ude v. Nwara & Anor [1993] LPELR-3289(SC)27-28, Paras A-A.**

It is deducible from Form NN78 that the deceased Officer of the 1st Defendant, the late husband of the Claimant filled out the Form expressing his voluntary last wishes on how his benefits should be shared in his absence. Infact, Form NN78 is an official form filled by Officers of the 1st Defendant who dies intestate wherein an Officer expresses his last wishes on the distribution of his benefits and entitlements accruable to him if he dies whilst in active service. I say this in view of Paragraph 6, which specifically states that the Form is to show the Distribution of Personal Estate to beneficiaries listed in part 3 of the Form at paragraphs 9-14.

Clearly stated in paragraphs 9 -14 are the names of beneficiaries of each of his accrued entitlements. Paragraph 14 is the name of the beneficiary of his Group Life Insurance, who is the Claimant in this case. One then wonders why the Defendants are withholding the Claimant's entitlement to the life Insurance when they admitted that they had already complied with all the other portions of the Official entitlements of the deceased Officer of the 1st Defendant, except paragraph 14 which touches on payment of the Group Life Insurance to the Claimant. This is a blatant disrespect to the last wishes of the deceased as expressed by him officially in Form NN78.

Also, I have in sight the several letters written by the Claimant and at her instance to the Defendants concerning her entitlement to the said benefits under the Group Life Insurance. It is my considered and firm view that the Defendants had a duty to respond to the Claimant's letters of demand and reminders (as seen on pages 57- 63 of the Record) if they had reason to dispute their contents. Failure to do so amounts to an admission. There are myriad of judicial authorities on this principle as to the import of failure to respond to a letter of demand or any letter that requires a response.

See these cases: *Arocom Global Investment Limited v. United Parcel Service Limited* (2021) LPELR-52891(CA)1@26-27 paras. E-E; *Nagebu & Co. Nigeria Limited. v. Unity Bank Plc.* (2014) 7 NWLR (Pt. 1405) 42 @ 81; *Chemical Allied Products Plc v. Vital Investments Limited* (2006) 6 NWLR (Pt. 976) 220 at 267; *Trade Bank Plc. v. Chami* [2003] 13 NWLR (Pt. 336)158 @ 219 - 220; *Vaswani v. Johnson* [2000]11 NWLR (Pt. 679) 582; and *Gwani v. Ebule* [1990] 5 NWLR (Pt. 149) 201@ 207. It is thus clear that the Defendants are not disputing the Claimant's entitlement to the said benefit of the deceased. In the eye of the law, since they admitted to have paid the other benefits except the Group Life Insurance to which Claimant is the sole beneficiary and did not respond to any of Claimant's letters which demand a response, their agitation now that Claimant is not entitled because she is not a next of kin comes with the firmament of an afterthought. See *Lawal v. State* [2010] LPELR-4622(CA)1@ 23, Para. B and; *Agbo v. State* [2006] LPELR-242(SC)1@ 43-44, Paras. G.

I am mindful of the position of the Defendants vide paragraph 6 of their Joint Statement of Defence that only a person named in the Next of Kin Declaration Form NN78 can relate to the 1st Defendant on issues relating to the deceased officer's benefit and not beneficiaries. As reasoned supra, I have read through the whole of the said Form NN78, which both parties are relying on, and I cannot find anything in the said Form that states that only a person named as Next of Kin in the Form can relate to the 1st Defendant over the benefits of the deceased officer and not a beneficiary. Besides, it is a settled position of the law that he who asserts a fact must prove it. This is because the burden of proof as to any particular fact lies on that person who wishes the Court to believe its existence unless it is provided in any other law that the burden of proof of that particular fact shall rest on a particular person. See Section 136 of the Evidence. It is not enough for the Defendants to assert that only a person named as Next of Kin in the Form NN78 is entitled to relate to the 1st Defendant as regards the benefit and not the beneficiary. They must also provide evidence in proof of this assertion, which must be credible. In the case of *Womiloju v. Anibire* (2010)10 NWLR (Pt. 1203) 545@562, Para H, the Supreme Court held thus: "He who asserts must prove. The language of Section 135 (1) Evidence Act Chapter E14 LFN 2004 is that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." See also the following cases: *Onigbinde v. S.B. Olatunji Global Nigeria Limited* (2015) LPELR-

25943(CA)1@ 22-23, Paras. E; *Fyneface v. Fyneface* (2007) 9 NWLR (Pt. 1040) 588@607, Paras D - F; *Yari v. Ibrahim* [2002] 5 NWLR (Pt. 761)587. The Defendants herein have failed to prove by any credible evidence oral or documentary that only a next of kin named in the NN78 can approach the 1st Defendant in respect of the deceased benefits They equally failed to canvass any evidence to prove that the Claimant was not paid the benefit in paragraph 11 at page 7 of Form NN78, which is the payment of balance salary, allowances paid by CPO as a sole beneficiary; also, they could not prove by any cogent evidence that Claimant was not paid 70% of her deceased husband's NN Welfare and Insurance scheme (NAVIP) at paragraph 10 of Form NN78. In the absence of any evidence in proof of all these, I do not believe their assertion that it is only a Next of Kin that can approach the 1st Defendant in respect of the benefit of the deceased. Given all reasons supra, I am of the respectful view that the Claimant is entitled to be paid the benefits of her deceased husband under the Group Life Insurance and cannot be denied for any reason. The failure of the Defendants to pay the Claimant the benefits of her deceased husband under the Group Life Insurance scheme is an orchestrated, deliberate and wicked ploy by the Defendants to disentitle the Claimant of her late husband's accrued benefit. It is inhuman, unreasonable, callous and wrongful. Accordingly, relief 'a' succeeds.

Claimant vide relief 'b' is seeking an order compelling the Defendants to compute and ascertain the amount due to her as the sole beneficiary of the benefits of her husband under the Group Life Insurance. There is no doubt that this relief flows from relief 'a' above. It is worth noting that a Court is empowered to make consequential orders flowing from the declaration made, even where not sought by a claimant, as the power is inherent in its jurisdiction to try the case. See the following cases: *DEC Oil & Gas Limited v. Shell Nig. Gas Limited* (2019) LPELR49347(SC)1@30-31, Para D; *APC v. John & Ors* [2019] LPELR-47003(CA)1@63-67, Para E and; *A.P.C. & Ors v. Karfi & Ors* (2017) LPELR-47024(SC)1@15-17, Para F. However, the Claimant in this case specifically sought an order compelling the Defendants to compute the accruable benefits under the said Group Life Insurance scheme. Although in that relief, the Claimant did not include a consequential order that she should be paid after the said computation, she sought. This Court, in its inherent jurisdiction, can, in addition to ordering that Defendants compute and ascertain how much the benefit under the Group Insurance is can order that the said computed sum be paid to the Claimant even where she has not specifically sought it. This is because authorities abound to the effect that the Court can, as in any other equitable remedy, grant an order of injunction where it is not specifically claimed but appears to it incidentally necessary so as to protect an established right on record. See in *Amaechi v. INEC & ors* (2008) LPELR-446(SC) 1@189, Paras. F-F. Given reliefs 'a and 'b', it is only expedient that, in addition to ordering that the benefits be computed, the same should also be paid to the Claimant. Thus, Claimant's relief b succeeds with a consequential Order that she should be paid the said computed benefits under the Group Life Insurance Policy. Claimant vide relief "c" claims for aggravated damages against the Defendants. The point must be reiterated that there is really no difference between aggravated damages and general damages. The apex Court per Obaseki JSC (of blessed memory) in *Eliochin Nigeria Limited v. Mbadiwe* [1986] 1 NWLR (PT 14) 47@67, Paras E-F held thus: "it was not possible to say there was a dividing line between them (general damages) and aggravated damages." Judicial authorities are in agreement that both general and aggravated damages are compensatory damages for the wrongful act of the Defendant. See *Western Publishing Company Limited & Anor v. Fayemi* [2015] LPELR-24735(CA)1@ 61-73, Paras. D and; *Chief F.R.A. Williams v Daily Times of Nigeria*

Limited [1990] 1 NWLR (Pt. 124) 11. A Claimant need not plead all factors necessitating the grant of aggravated damages in her pleadings.

The Court, Per Ugo, J.C.A. in *Western Publishing Company Limited & Anor v. Fayemi*, supra held as follows as regards aggravated damages;

“... I should add that the factors evidencing malice and aggravated damages are so varied that they are incapable of being all captured in a pleading, again contrary to the suggestion of learned silk that they must be all captured and particularized in the statement of claim. In fact, some of these aggravating factors include what may only relate to how the Defendant pleads his/her case in his/her statement of defence while others may only stem from the manner the trial is conducted by him/her, both of which postdate the filing of the statement of claim and so cannot be pleaded there talk less of being particularised in it...”

Claimant vide paragraph 20 of her Statement of Facts averred that failure of the 1st Defendant to pay her deceased husband’s Group Life Insurance benefits to her has subjected her and her children to much hardship, suffering and deprivation. I am of the firm view that the Claimant would have suffered untold hardship by the refusal of the 1st Defendant to pay the said benefits of her deceased husband under the Group Life Insurance for no just cause, even when they had paid other benefits as reasoned supra. The National Industrial Court Act, 2006, specifically by Section 19(d) empowers this Court to award compensatory damages in deserving cases where the Court has jurisdiction. In my view, this is one of the deserving cases in which this Court can award compensatory damages. This Court, in its discretion, awards damages in the sum of ₦500,000.00 as aggravated damages against the 1st Defendant for unreasonably withholding the Claimant’s entitlement under her late husband’s officially accrued benefits.

The Claimant *vide* relief “d” is asking for the cost of the action. The position of the law on costs is now clear and it is to the effect that costs, including the cost of action, are at the discretion of the Court. Judicial authorities have restated the principle that a successful party is entitled to costs unless he has misconducted himself or there are special reasons why he or she should be deprived of his or her entitlements. See the following cases; *Ezennaka v. C.O.P.* (2022) 18 NWLR (Pt 1862)369@420, Paras D-F (SC); *Cappa and Dalberto (Nig) Plc v. NDIC* (2021) 9 NWLR (Pt. 1780)1@ 14, Paras G-H and; *First Bank v. Orosanye* (2019) LPELR47205(CA)1@22-29, Para F. It is also settled that Cost of action is not special damages that needs to be proved before it is granted and it may be granted by the Court once its Rules empowers it so to do. See the case of *Mekwunye v. Emirates Airlines* [2019] LPELR-46553(SC)1@ 67-73, Para E. I am also fortified in my humble view by the provisions of the Rules of this Court, particularly Order 55 Rules 1,2,3,4 and 5, which empower this Court to grant costs of action at its discretion. In the instant suit, there is nothing on record to show that the Claimant has misconducted herself, nor is there any special circumstance shown disentitling her from costs. Thus, in exercise of the discretion of this Court under Order 55 Rules 1, 2, 3, 4 and 5, this Court finds that she is entitled to costs for the successful prosecution of her case before this Court. Accordingly, I award the sum of ₦250,000 to the Claimant as the cost of the action.

Claimant vide relief ‘e’ claims 10% interest on the judgment sum until the total judgment sum is finally liquidated. There is no doubt that what the claimant seeks by this relief is post-judgment interest. It is trite that post-judgment interest may be

awarded even where it was not pleaded because it is statutory and is at the discretion of the Court. See the case of *Ifemesia v. Ecobank* [2018] LPELR46589 (CA)1@60-61, Paras A-A. However, the Rules of Court regulate the discretion of the Court by setting the rate or percentage at which such post-judgment interest may be awarded. In the case of *Bolanle v. Access Bank* (2015) LPELR40994(CA)1@26-28, Para B, the Court of Appeal held that the power of a court to grant post judgment interest is statutory as it derives its root from the Rules of Court and the National Industrial Court as the trial Court in that case derives such power from the National Industrial Court Rules. By the provisions of Order 47 Rule 7 of the NIC Rules, 2017, this Court is empowered to grant post-judgment interest at a rate not less than 10% per annum. The claimant in this case has sought and gotten monetary claims and, as such, can ask for post-judgment interest, which can only be granted where there is a monetary claim. I therefore exercise my discretion in favour of the claimant by awarding post-judgment interest on the judgment sum. Accordingly, this judgment is to be complied with within 14 days; failure to which it will attract 10% post-judgment interest.

For the avoidance of doubt and the reasons earlier given, I declare and order as follows;

1. The failure of the Defendants to pay the Claimant, who is the sole beneficiary of her deceased husband's benefits under the Group Life Insurance, is wrongful.
2. That the Defendants must compute and ascertain the amount due as the deceased benefit under the Group Life Insurance and pay the same to the Claimant forthwith.
3. That the cost of ₦500,000.00 (Five Hundred Thousand Naira) only is awarded against the 1st Defendant as aggravated damages.
4. That the Claimant is awarded the sum of ₦250,000.00 (Two Hundred and Fifty Thousand Naira) only as the cost of the action.
5. That the judgment sums, which include the accrued benefit under the Group Life Insurance, damages, and costs, are to be paid to the Claimant within 14 days from the delivery of this judgment; failure of which it will attract 10% simple interest per annum.
6. That the Defendants are to produce evidence of the total amount accrued under the Group Life Insurance of the deceased to the Court within 7 days and evidence of payment of same to the Claimant within the 14 days as in paragraph 5.

Judgment is accordingly entered.

44.4 REMARKS.

Failure to pay off benefits to the sole beneficiary under Group Life Insurance is wrong and unlawful. Except where extraneous circumstances or development arise on the matter, there should be no excusable reason to act accordingly.

44.5 REFERENCES.

1. *Bolanle v. Access Bank* (2015) LPELR40994(CA)1@26-28, Para B.
2. *Ifemesia v. Ecobank* (2018) LPELR46589 (CA)1@60-61, Paras A-A.
3. *Mekwunye v. Emirates Airlines* (2019) LPELR-46553(SC)1@ 67-73, Para E.
4. *Ezennaka v. C.O.P.* (2022)18 NWLR (Pt 1862)369@420, Paras D-F (SC).
5. *Cappa and Dalberto (Nig) Plc v. NDIC* (2021)9 NWLR (Pt. 1780)1@ 14, Paras G-H.
6. *First Bank v. Orosanye* (2019 LPELR47205(CA)1@22-29, Para F.
7. *Eliochin Nigeria Limited v. Mbadiwe* (1986) 1 NWLR (PT 14) 47@67, Paras E-F.

45.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: NATIONAL INDUSTRIAL COURT

DATE 4th July, 2024

SUIT NO: NICN/LA/187/2016

JUDGE: Hon Justice M. N. Esowe.

NIYI ODUSI.
(Claimant)

Vs

GLANVILL ENTHOVEN & COMPANY NIGERIA LIMITED
(Defendant)

45.2 REPORTS/FACTS/ISSUES

An Industrial matter involving a foremost Insurance Brokers in Nigeria, and a former employee of the Company.

45.3 DECISION OF COURT.

JUDGMENT

HON JUSTICE M. N. ESOWE:

The Claimant was an Insurance Practitioner in the employment of the Defendant, an insurance brokerage company and was subsequently appointed as a Deputy General Manager (DGM) via a letter of appointment dated June 1, 2010. In the course of the Claimant's employment with the Defendant, the Claimant was redeployed from DGM Technical Department to DGM Business Development Department. It is the Claimant's averment that several incentives were attached to his appointment including; increase in the salary of the employee at the discretion of the company and an automatic payment of 30% "introductory commission" to the employee who introduces any contact that eventually crystalizes into an appointment of the Defendant as Broker/Consultant on insurance matters.

The Claimant alleges that he secured a contact at Addax Petroleum as a result of which the Defendant was appointed as its broker and was paid a commission, the sum of ₦3,680,403.97 (Three Million Six Hundred and Eighty Thousand Four Hundred and Three Naira Ninety-Seven Kobo) for its Non-Oil Business and \$15,000.00 (Fifteen Thousand Dollars) for its Oil Business by Addax Petroleum. After the said payment and contrary to the natural expectation of the Claimant, the Claimant was not paid the agreed 30% introductory commission on the said sums despite several letters demanding for the payment of the said commission.

However, the Defendant on 09/08/2013, wrote a letter informing the Claimant that the introductory commission had already been paid and enclosed a cheque in the sum of

₦125,860.90 (One Hundred and Twenty- Five Thousand, Eight Hundred and Sixty-Nine Naira Ninety Kobo only) which is 60% of the approved 20% of the introductory commission on Addax Petroleum business. It is the Defendant refusal to pay the balance of the 30% commission and other commission from the renewal of its business with Addax Petroleum that has warranted the institution of this suit wherein the Claimant seeks the following reliefs against the Defendant:

A DECLARATION that the Claimant is entitled to the introductory commission of 30% of ₦3,680,403.97 (Three Million Six Hundred and Eighty Thousand Four Hundred and Three Naira Ninety-Seven Kobo) and \$15,000.00 (Fifteen Dollars) paid by Addax Petroleum, as commission, to the Defendant for Non-Oil Business and Oil Business respectively.

- i. AN ORDER compelling the Defendant to pay the Claimant the sum of ₦978,260.21 being the balance of ₦1,104,121.19 representing 30% of ₦3,680,403.97 paid by Addax Petroleum, as commission, to the Defendant for Non-Oil Business.
- ii. AN ORDER compelling the Defendant to pay the Claimant the sum of \$4,500 representing 30% of \$15,000.00 paid by Addax Petroleum, as commission, to the Defendant for Oil business.
- iii. AN ORDER directing the Defendant to account for all monies received, as commission, on the renewal of Addax Petroleum's contract with the Defendant.
- iv. AN ORDER compelling the Defendant to pay to the Claimant 30% of all monies received, as commission, by the Defendant from the renewal of the contract of Non-Oil Business and Oil Business with Addax Petroleum.
- v. INTEREST of 21% on all the monies accruable to the Claimant from the Defendant and remain unpaid by the Defendant to the Claimant from January 9, 2013, being the 1st day of demand for such monies.
- vi. THE SUM of ₦750,000.00 is the cost of this action.

TRIAL

Upon commencement of the hearing, Niyi Odusi, the Claimant, testified as CW1; he adopted his witness statement on oath as his evidence before the Court and tendered six (6) documents in evidence, admitted and marked as exhibits C1 to C6 and D1 respectively. CW1 was then cross-examined, thereafter the Claimant closed its case. Mr. Afolabi Dauda, the Accountant to the Defendant, testified as DW1, he adopted his Written Deposition on Oath as evidence. Through him, one (1) document was tendered in evidence, admitted and marked Exhibit D2. DW1 was duly cross-examined and the Defendant closed its defence and the matter was adjourned to enable the parties file and exchange their respective final Written Addresses to be adopted on the adjourned date.

CLAIMANT'S FINAL WRITTEN ADDRESS.

The Learned Counsel to the Claimant raised a sole issue for determination in his final written address: "Whether the Claimant is entitled to the reliefs sought against the Defendant in his Statement of Fact".

The Learned Counsel to the Claimant submits that during trial, DW1 admitted under cross-examination that not all entitlements and incentives of staff are contained in the letter of employment and that some are contained in circulars, memos, and directives of the Defendant. The Defendant's witness also admitted that the Claimant had been paid an introductory commission in the past. He maintains that from the foregoing parties are at a consensus ad idem that the Claimant's employment is governed by the Claimant's contract of employment and the company's Policy, including the Policy on introductory commission.

That the point of divergence is whether or not it was the Claimant that introduced the Defendant to Addax Petroleum, thereby entitling him to payment of 30% introductory commission and 10% commission on subsequent renewals of the business with Addax Petroleum. Counsel maintains that the Claimant had discharged the burden of proof on him by tendering Exhibit D1 (letter written to Addax Petroleum) and other document in prove of his assertion and that the burden shifted to the Defendant who claims that a staff in the Oil and Gas department was the one who introduced the business which it had failed to do. Counsel argues that the admission of DW1 that he was not sure that there was any correspondence with Addax Petroleum prior to Exhibit D1 and that the Defendant staff who cosigned D1 was not laying claim to the commission, lends credence and corroborates the Claimant's stance. That the Defendant failed to cross-examine the Claimant on the sums he was claiming, which amounts to an admission. He asserts that the payment of the commission was not discretionary and failure to pay amounted to a breach of the contract between the parties.

DEFENDANT'S FINAL WRITTEN ADDRESS.

The Learned Counsel to the Defendant raised a sole issue for determination in his final written address, to wit: "Whether on the strength of the Claimant's evidence, he proved his case to enable the Court grant him the reliefs sought".

In arguing the issue for determination, Counsel to the Defendant submits that upon cross-examination, CW1 admitted that he was not in the Oil and Gas Department but in the Business Development Department. He admitted that it was the primary duty of Mrs. Fumi Imona to bring oil and gas business to the company. Counsel further submitted that the Claimant admitted that it was stated in the letter regarding his payment was made ex-gratia at the discretion of the Defendant not as a right. Counsel argued that commission is paid to only registered agents as required by the National Insurance Commission and that the Claimant was no longer in the employment of the Defendant to benefit from the renewal by Addax Petroleum. That oil and gas business renewal came with a peculiarity, bidding, terms and conditions which makes it similar to a new business coming to the Defendant.

Learned Defendant's Counsel objected to the tendering of Exhibit D1 on the grounds that it was neither pleaded nor front loaded by the Claimant. He urged the Court to hold that the Claimant has failed to prove his case to the satisfaction of the Court considering the evidence elucidated during cross examination.

CLAIMANT'S REPLY ADDRESS

The Claimant filed a reply address as response to the issues raised by the Counsel to the Defendant's final address wherein, he argued extensively his position and supported same with legal authorities.

RESOLUTION

I have considered the facts and circumstances of this suit, the pleadings of parties herein, the evidence adduced and the submissions of Learned Counsel, and hereby distill the following sole issue for determination: Has the Claimant discharged the burden of proof by evidence to entitle him to the reliefs sought.

The Defendant raised an objection to the admissibility of Exhibit D1 (letter to Addax Petroleum) on the ground that same was not pleaded nor frontloaded contrary to the law that unpleaded facts elicited during cross examination go to no issue. *Ojoh v. Kamulu* (2005) 18 NWLR part 958 page 523 at 548, H.

The argument of Counsel is in line with the requirement of Order 3 Rule 10 which provides that a Complaint be accompanied by a schedule listing the documents and the number of document and exhibits that are material and relevant to be used at the proceedings. The innovation of front loading of documents in a suit ensures that there is no trial by ambush and expedite the hearing. It is to enable the parties know not only the case they are to meet at the trial but also the oral and documentary evidence by which the case is to be proved. See *Adegbuyi v. Mustapha* (2010) LPELR 3600, *GE Int'l Operations Limited. v. Q-Oil & Gas Services* (2015) 1 NWLR (Pt. 1440) 244 p. 264, paragraphs. F-G.

Notwithstanding, in *Registered Trustees of IPMAN v. Sterling Bank Plc* (2022) LPELR-56845(CA) (pp.43-44, paras. E-C), the Court of Appeal per Abba Bello Mohammed, JCA held “it is important to stress that averments in pleadings are only required to contain material facts on which a party relies for his claim or defence. It is not supposed to contain the evidence by which those facts are to be proved. See *Odunsi v. Bamgbala & Ors* (1995) LPELR-2248(SC), per Ogwuegbu, JSC at page 11 para. E; *Sani v. Kogi State House of Assembly & Ors* (2019) LPELR-46404(SC), per Okoro, JSC at page 27 para. D and pillars (Nig.) Limited v. Desbordes & Anor (2021) LPELR-55200(SC), per Ogunwumiju, JSC at page 23, para. A. In other words, documents need not be pleaded provided facts which the documents are intended to substantiate have been averred in the pleadings”.

The Claimant at paragraphs 12 and 13 of his Statement of Facts alluded to facts which exhibit D1 is intended to substantiate. Besides, from the records of the Court, the Claimant had given notice to the Defendant to produce the original of Exhibit D1 which was in its possession. The document was then tendered during cross-examination. That being the case, I do not therefore see how the Defendant may have been surprised by the said Exhibit D1 being a document it does not deny knowledge of its existence or deny that it had custody of such document. It is on the strength of this Learned Counsel to the Defendants’ objection is overruled. I so hold.

In *Mbanefo v. Agbu & Anor* (2014) LPELR-22147(SC) (pp.51-51 paras. B-D), the Supreme Court held that “the law is settled that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist. It is also trite that in civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the Court would be given if no evidence were produced on either side, regard being had to any presumptions that may arise on the pleadings”. See Sections 131, 132 and 133 of the Evidence Act 2011, as amended.

The Claimant for his relief “a” is seeking Declaration that he is entitled to the introductory commission of 30% of ₦3,680,403.97 (Three Million Six Hundred and Eighty Thousand Four Hundred and Three Naira Ninety-Seven Kobo) and \$15,000.00 (Fifteen Thousand Dollars) paid by Addax Petroleum, as commission, to the Defendant for Non-Oil Business and Oil Business respectively. The name of this relief is declaratory and is such that should be granted only in circumstances in which the Court is of the opinion that the party seeking it is, when all the facts are taken into account, fully entitled to the exercise of the Court’s discretion in his favour. This means that it is not granted as a matter of course or even on the admission by the Defendant or the failure of the Defendant to put up a defence to the same. The Claimant must adduce credible and sufficient and satisfactory evidence in proof of the same. See *Jako- Jako v. Yahaya & Ors* (2021) LPELR 56350(CA).

Order 3 Rule 12(1) of the Rules of this Court provides; where a party files an originating process arising from or connected with payment or non-payment of any monetary claim or salary, allowances, pensions, gratuity or benefit arising from any employment, the party shall clearly state in the statement of claim – (a) the source of the claim; (b) the amount being claimed or owed; (c) when the amount for payment became due; (d) when the demand(s) for payment was or were made; (e) how the demand(s) for payment was or were made; and (f) the response, if any, of the Defendant to the demand(s) for payment being made.

May I note that parties are agreed on the fact that the Claimant was at the material time an employee of the Defendant as evidenced by exhibit C1. The Claimant alleges that he is entitled to a 30% commission having introduced the business of Addax Petroleum to the Defendant and that the Defendant failed to pay him the entire sum despite repeated demand.

It is the Defendants’ contention that although the payment of introductory commission was part of company’s incentives, it was never an automatic payment but was done at the discretion of the management, depending on the company Policy at the given time. This raises two issues to wit: did the Defendant operate a Policy of 30% introductory commission upon introduction of businesses? Is the Claimant entitled to same to warrant the grant of his relief “a”?

The Claimant maintains that the terms of his employment were not all contained in the contract of employment and that the policies of the company were contained in other documents which formed part of his condition of service. Upon cross examination, DW1 admitted that not all the incentives of staff are contained in one document but draws from the Defendant’s circulars and memos. Page 4 of exhibits C2 (minutes of staff open forum held 27/07/2012) contains the Managing Director’s explanation that a new profit-sharing scheme had been approved including introductory commission. Also, exhibit D2 (email of the minutes of Ad hoc Committee) lends credence to the fact that there was an existing Policy that 30% introductory commission be paid for a new business introduced in the first year. This corroborates the Claimant’s stance that the Company had a Policy on introductory commission.

In *ASO Savings & Loans Plc v. Iwunamara* (2021) LPELR-55878(CA) pp. 27- 28, paras. F-C) the Court of Appeal held the law is trite that where the contract agreement is contained in a series of documents or letters or correspondences as in the instant case, the Court is under a duty to consider the whole of what has passed between the

parties and their conduct in order to determine the issues before it regarding their contractual relationship. See also the cases of *Int'l Starchem Industries Limited v. African Newspapers of Nigeria Limited* (2014) LPELR-23244(CA) and *Rainson Industries Limited v. Abia State Commissioner for Health and Social Welfare & Ors* (2014) LPELR-23771 (CA). Parties have a duty to honour and abide by the sanctity of an agreement which they solemnly and voluntarily entered into. *Okocha v. Chibuogwu* (2022) LPELR-59016(CA) pp. 17-17, paras. C-D. On the strength of the above judicial authorities and the totality of exhibits C2, D2, the testimony of DW1 inclusive, it is the considered view of this Court that the Defendant indeed maintained a Policy that required the payment of 30% introductory commission to staff upon their introduction of new businesses.

On the second question, when a person's actions or representations lead another person to alter their legal position, then the doctrine of Estoppel will operate and serve as a safeguard against unfairness in legal proceedings, preventing such a person from asserting facts contrary to their previous representations, especially when those representations have influenced someone else's actions or decisions. The onus, therefore, lies on the Claimant who is seeking the relief to successfully discharge the burden of proof placed on him by the law. For it is trite that civil cases are decided on the preponderance of evidence or the balance of probabilities – *Anazodo v. Pazmeck Intertrade (Nig.) Limited* (2023) 10 NWLR (Pt. 1891) 1, *I.T. (Nig) Limited v. B.A.T. (Nig) Limited* (2023) 11 NWLR (Pt. 1894) 29.

The law places a burden on the party who asserts the existence of certain facts to produce, show credible, cogent and convincing evidence in proof of such assertion – *Sections 131-134 of the Evidence Act (as amended)*. The Claimant presented evidence that he had made demands for payment of a 30% introductory bonus for introducing the business of Addax Petroleum to the Defendant via exhibits C4 and C6. He also tendered Exhibit D1 through DW1 during cross-examination titled “Application for Appointment as your Insurance Brokers” signed by O. O. Odusi, Head (Business Development) the Claimant and Mr. Odun Akinola (Executive Director (Operations)). The letter reads in part: “We humbly wish to introduce our organization to you, with a request that you consider appointing us as your Insurance Broker/Consultant...”

The position of the law has since been that documentary evidence is the best evidence, and a document is the best proof of its contents; no oral evidence is allowed to discredit or contradict the contents of a document, except in those cases where fraud is pleaded. See *Gbenga v. APC* (2020) NWLR (Pt. 1744) 248 at 274. I have carefully examined the exhibit and I find nothing on the face of it hinting on any conversation or engagements with Addax Petroleum prior to this letter as claimed by the Claimant nor is there any other evidence indicating that the Claimant introduced the business of Addax Petroleum to the Defendant in a capacity other than exercising his role as Head of Business Development as alleged by the Defendant as can be gleaned from the face of the letter.

Also, the fact that the said document was signed by the Claimant and another employee leaves room for speculation as to whether they both introduced the business to the Defendant or whether it was the other party who initiated the transaction with the Claimant merely supporting or it was simply a correspondence practice or culture for two persons to sign a document in the Defendant. To infer, as the Claimant's Counsel has done, that because the co-signatory of Exhibit D1 did not demand commission, it

meant he never introduced the business, to my mind, is still in the realm of speculation. Speculation has no place in our Courts. Neither the parties nor the Court is permitted or entitled to speculate on anything. *Ikenta Best (Nig) Limited v. A.G. Rivers State* (2008) LPELR-1476(SC) (pp.51 – 51 Paras D – D).

On the part of the Defendant, it averred at paragraph 9 of its Statement of Defence that the Claimant did not introduce the business of Addax Petroleum and, as such, cannot lay claim to the 30% introductory commission from Addax Petroleum businesses. The Defence maintains that the Claimant was charged with the responsibility of generating and growing the business of the company and also assisting staff in securing businesses if need be, as part of carrying out his job as the Deputy General Manager, Business Development. The business was introduced by the Oil and Gas department and the Claimant gave it an official follow-up. The Defendant further averred at paragraph 14 of its Statement of Defence that the introductory commission for the Addax contract was paid to the Claimant since September 2013, albeit ex-gratia. This to my mind, amounts to approbating and reprobating. In one breath, the Defendant claims the Claimant is not entitled to the 30% introductory commission from the business of Addax yet it turns around to say that the commission has since been paid. Be that as it may, since the Defendant denies the Claimant stance that he introduced the said business, the law requires the Claimant who is claiming his entitlement to 30% commission to put forward evidence to back up his claims and to discharge the burden of proof placed on him not by his oral testimony alone except if corroborated by some other credible evidence.

In *Maranro v. Oyegoke* (2022) LPELR (SC) (pp.31 – 32, paras B - A) the Supreme Court held “It is settled that a Claimant seeking declaratory reliefs, must succeed on the strength of his own case, not on the weakness of the Respondents’ case, therefore, the burden of proof on the Claimant is quite heavy in the sense that such declaratory reliefs are not granted, even on admission by the Defendant, where he fails to establish his entitlement to the declaration by his evidence. See *Emenike v. PDP* (2012) 12 NWLR (Pt. 1315) 556, and *Dumez Nig. Ltd v. Nwakhoba* (2008) 18 NWLR (Pt. 1119) 361. What this boils down to is that a Claimant is not allowed to point fingers at any weakness, omission, or default on the part of the Respondent. He must stand or fall on the strength of his case; if his case is strong, he wins, and if his case is weak or shaky, then he loses.” See also *Obe v. MTN Nig Comm. Ltd* (2021) 18 NWLR (Pt. 1809) 415.

In this instant case, since the Claimant has failed to discharge the onus to adduce satisfactory evidence in proof of this leg of his relief; that is cogent evidence to show that he introduced or solely introduced the business of Addax Petroleum to the Defendant, and it is the requirement of the law that his claims must succeed on the strength of his case and not on the weakness or absence of the defence, this Court cannot grant this leg of the Claimant’s claim for want of satisfactory evidence. Accordingly same must fail. I so hold.

The Claimant’s in his reliefs b and c is alleging that he is entitled to ₦978,260.21 being the outstanding sum from ₦1,104,121.19 representing 30% of ₦3,680,403.97 paid by Addax Petroleum, as commission, to the Defendant for Non-Oil Business after being paid the sum of ₦125,869.80; and the sum of \$4,500 representing 30% of \$15,000.00 paid by Addax Petroleum, as commission for Oil business.

The Claimant's agitation is that in reaction to his letters of demands particularly Exhibits C4 (letter to the Chairman Odua Investment Company Ltd informing the Chairman of the attempts to deny him the credit for the Business of addax), the Defendant on 18/09/2024 wrote a letter (exhibit C5) with an enclosed cheque in the sum ₦125,860.90 being 60% of the approved 20% introductory commission. The letter also informed the Claimant that the commission had already been paid.

Exhibit C5 reads: —EX-GRATIA- INTRODUCTORY COMMISSION ON ADDAX PETROLEUM — Please find enclosed our Wema Bank Cheque number 02629365 in the sum of ₦125,869.80 (One Hundred and Twenty-five Thousand, Eight Hundred and Sixty-nine Naira, Eighty Kobo only) being 60% of the approved 20% of the introductory commission on Addax Petroleum Business as ex-gratia. This is being paid gratuitously because the introductory commission had been paid earlier on.”

The Defendants contend that the payment was made ex-gratia as the introductory commission had been paid earlier and because the business was not introduced by the Claimant. It is trite law that in interpreting a document, the Court cannot go outside the four walls of the document. To this end, the words used in a document must be given their ordinary meaning in the context in which they appear and in no circumstance may new and extraneous words be imported into the text of the document. The Court must give full interpretation to the portion of the document relating to the issue before it.

Nwegbu v. Nwegbu (2017) LPELR-42680(CA) (pp. 13 – 15, paras E-A).

Similarly, in labour relations, the burden is on the Claimant who claims monetary sums to prove not only the entitlement to the sums, but how he/she came by the quantum of the sums; and proof of entitlement is often by reference to an instrument or document that grants it. *Mr. Mohammed Dungus & Ors v. ENL Consortium Limited* (2015) 60 NLLR (Pt. 208) 39. It is not enough for the Claimant to ask or claim by mere word of mouth; he must put forward proof of his entitlement to the same. The words “ex-gratia” contained in exhibit C5, which the Claimant strongly relies on in basing these legs of his claims, connotes “something done as a favour not compelled by legal right”.

To be entitled to the balance sought, CW1 must at least prove satisfactorily to the Court he had or has a legal right to the percentage claimed and used in calculating the balance sought. In the absence of any evidence by the Claimant evidencing his entitlement to the sums of money he claims, his reliefs b and c cannot succeed. They hereby fail. I so hold.

The Claimant in his relief four is seeking “an order directing the Defendant to account for all monies received, as commission, on the renewal of Addax Petroleum’s contract with the Defendant. The Claimant in his reply to the Defendant’s Statement of Defence averred that the Defendant has on several occasion paid 10% commission on subsequent renewal of the contract brought by staff’s contact even though the said staff did not partake in any further work in respect of the contract and that he benefitted from such payment in the past. During cross examination, CW1 testified that the process of obtaining Addax Petroleum did not involve bidding and that he did not partake in the renewal of the business and was no longer in the employment of the Defendant when the business was renewed. DW1 upon cross examination and his

avermment in his statement on oath maintains that the Addax business was never renewed, that Addax had only paid for a year.

Even though Counsel has made a heavy weather as to why the Court should grant Claimant's claim for this relief, the Claimant has failed to show or place any evidence before this Court as to how the Defendant owes him a duty to account for the monies received as commission from the renewal of its contract with Addax Petroleum, other than his averment at paragraph 21 of his Statement of Facts that Addax Petroleum had on several occasion renewed his contract with the Defendant to enable the Court to conclude.

The fact that the Defendant had paid commission to some staff upon renewal of the contract is not in itself sufficient to prove the Claimant's claim. It is important to note that the address of Counsel is not evidence and no fine speech in an address can make up for a lack of evidence to prove or establish a fact or disprove and demolish a point in issue. In other words, the address of Counsel not based on pleadings and evidence is inconsequential, and goes to no issue. It has no probative value and is not worth a dime in the scale of evidence for consideration by the Court. *Hamidu & Anor v. Kaduna Electricity Distribution Plc & Anor* (2019) LPELR-48281(CA) (pp.16 – 16, paras A – E). Consequently, the Court cannot grant this claim in the absence of substantial evidence. The Claimant's relief "d" hereby fails. I so hold.

Relief "e" is for an order compelling the Defendant to pay to the Claimant 30% of all monies received, as commission, by the Defendant from the renewal of the contract of Non-Oil Business and Oil Business with Addax Petroleum. It is settled that Courts are not expected to make orders at large and without specific restrictions to those pleaded before them. It is not the duty of the Court to go on a voyage of discovery. Thus, prayers placed before the Court need to be specific, decisive, precise and to the point in such a way that there can be no question as to what is asked for. *AMAC v. The Occupier* (GW163902) (2022) LPELR-56473(CA) (Pp 29 – 29 Paras B – D). Likewise, a Judge is not an explorer, so the law forbids the Court from going outside the facts in Court. *Frontline Holdings Ltd & Anor v. Wema Bank Plc & Ors* (2017) LPELR- 50020(CA) (Pp 48 – 48 Paras B – F). DW1, during cross-examination, testified that there was no renewal of Addax Petroleum business and that the business lasted for just one year. If the Claimant believes otherwise, he ought to have pleaded facts supported by evidence to support this claim. It is in the light of the following that the Court cannot grant this leg of the Claimant's claim; accordingly, same fails. I so hold.

The Claimant's relief "f" is for pre-judgment interest of 21% on all the monies accruable to the Claimant from the Defendant and remain unpaid by the Defendant to the Claimant from January 9, 2013, being the 1st day of demand for such monies. Pre-judgment interest is usually claimed by a Claimant on a principal sum in a judgment at the pre-judgment interest rate from the date the cause of action accrued to the judgment date. It is claimed as of right. See the cases of *Ngerem v. Crown Realities Plc* (2021) 4 NWLR (Pt. 1767) 476 at 509- 510, Paras A-H; *Africa Prudential Registrars Plc v. Macaulay* (2020) 18 NWLR (Pt. 1755) 1 at 30, Paras A-B; *Fouani Nigeria Limited v. Idoko* (2020) 2 NWLR (Pt. 1709) 401 at 435 – 436, Paras G-C. To obtain an order as this, a party seeking a prejudgment interest must show that the parties had agreed on the payment of interest. See the case of *Afribank v. Akara* (2006) All FWLR (Pt. 304) 401; *Eseigbe Engineering Company Limited v. Aikhomu & Anor*

It is trite that prejudgment interest is only to be awarded where the facts that support its award are pleaded and evidence is led to support. See the cases of *Skymit Motors Limited v. U.B.A Plc* (2021) 5 NWLR (Pt. 1768) 123 at 145, paras F-A; *Unity Bank Plc v. Raybam Eng Limited* (2018) 12 NWLR (Pt. 1633) 214. In the case at hand, the Claimant merely claimed for the pre-judgment interest of 21% but failed to support the same with averments in the Statement of Facts, nor did he provide evidence to support the claim. In the absence of anything on the part of the Claimant to show that the parties had envisaged prejudgment interest at the beginning of their contract of employment, his claim to prejudgment interest is liable to fail and thus fails. I so hold.

The Claimant's relief "g" is for the sum of ₦750,000.00, being the cost of this action. Order 55 Rule 1 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017 provides: "In every suit, the costs of the whole suit, and each particular proceeding therein, and the costs of every proceeding in the Court, shall be at the discretion of the Court as regards the person by whom they are to be paid." The import of the foregoing is that the award for the cost of action lies at the discretion of the Court, which discretion must be exercised judicially and judiciously. In this case of *Yakubu c. Min. Housing & Environment, Bauchi State* (2021) 12 NWLR (Pt. 1791) 465, it was held that, the general rule is that costs follow event and a successful party is entitled to costs and the award or refusal of costs is at the discretion of the Court provided it is exercised judicially and judiciously. The Court is of the opinion that it would be injudicious to exercise its discretion in favour of the Claimant, having dismissed all the reliefs above, accordingly, the Claimant's relief —g— fails and is hereby dismissed. I so find and so hold. On the whole, the Claimant's claims fail in their entirety and are all dismissed. I so hold and I so hold. I make no orders as to cost; parties to bear their respective costs. Judgment is accordingly entered.

45.4 REMARKS.

Matter handled by the Firm of Adegboyega Adepegba & Co. Commended at the Yaba Magistrate Court in 2014, and was concluded in the National Industrial Court of Nigeria NICN in 2024.

It was a matter that Insurance Firms must get familiar with and have a clear-cut and unambiguous written policy on Agents/Principal relationship and the payment of Commission.

45.5 REFERENCES.

1. *Yakubu C. Min. Housing & Environment, Bauchi State* (2021) 12 NWLR (Pt. 1791) 465.
2. *Skymit Motors Limited v. U.B.A Plc* (2021) 5 NWLR (Pt. 1768) 123 at 145, paragraphs F-A.
3. *Unity Bank Plc v. Raybam Eng Ltd* (2018) 12 NWLR (Pt. 1633) 214.
4. *Ngerem v. Crown Realities Plc* (2021) 4 NWLR (Pt. 1767) 476 at 509-510, Paras A-H.
5. *Africa Prudential Registrars Plc v. Macaulay* (2020) 18 NWLR (Pt. 1755) 1 at 30, Paras A-B.
6. *Fouani Nigeria Limited vs Idoko* (2020) 2 NWLR (Pt. 1709) 401 at 435-436, Paragraphs G-C.
7. *NAICOM Act 2004*.

8. *Insurance Act 2003.*
9. *NAICOM Act 2004.*
10. *Insurance Act 2003.*

STATE HIGH COURT

46.1 ARRANGEMENT OF MATTERS, COURT, DATE.

COURT: HIGH COURT, LAGOS STATE.

DATE: APRIL 2023.

SUIT NO: LD/ADR/3149/2020.

JUDGE: Hon. Justice K.A Jose (Mrs.).

ALHAJA SHAFI AHMED MOGAJI
(Claimant)

vs

AIICO INSURANCE PLC.
(Defendant)

46.2 REPORTS/FACTS/ISSUES.

Claimant's Claims 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. He (Claimant) also declared that he 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. Claimant asked the Court to grant the following orders.

- (i) Court to direct the Defendant to pay him (Claimant) the sum of ₦7,500,000 (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 (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 (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 (Two Million Naira) to him (Claimant).

46.3 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 (PWI), and he testified in chief *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 (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 sped 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 Dubal to receive treatment for his eyesight though the damage could not be remedied. The Claimant subsequently filed 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 several calls to it. The Claimant consequently started to incur expenses of having hire vehicle at a sum of ₦25,000 (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 Solicitors 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:

- (a) S.K Hassan & Associates' letters to the Defendant dated 13th of February, 2020 and 20th of September, 2020 Exhibits P1 & P2.
- (b) Vehicle papers. Exhibit P3
- (c) Receipt Issued to the Claimant by Alhaja Musilimant Igbhin dated 12th October, 2020 Exhibit P4
- (d) Defendant's Insurance Motor Vehicle Certificate Exhibit P5
- (e) Defendant's Insurance official Exhibit P6
- (f) Nigerian Police Force Investigation Report dated 19th of December. 2019 Exhibit P7

Under cross-examination Pw1 stated that the incident occurred at about 1am 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 insured 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 30 days before the claim crystallizes. Dw1 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 acknowledge 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. Dw1 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: 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. Sherif 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 subsisted at the time of the accident but no claim was lodged by the claimant with Royal Exchange on the fire incident. A search from Auto Check Vehicle History Report revealed that the car was a 2011 Model Mercedes C Class C300 worth ₦5,500,000 (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.

- (1) DBY Recoveries Agency Ltd. Fire Incident Private Investigation Report-Exhibit D1
- (2) Proof of ownership certificate-Exhibit D2
- (3) Vehicle License-Exhibit D3
- (4) Certificate of Road Worthiness-Exhibit D4
- (5) Ministry of Works & Transport Referral Note-Exhibit D5
- (6) Kwara State Road Taxes Payment Advice-Exhibit D6
- (7) Alhaja Musilimant Igbhin cash receipt dated 12/10/2019-Exhibit D7
- (8) Defendant's Vehicle Inspection report-Exhibit D8
- (9) Customer Risk Profile-Exhibit D9
- (10) Defendant's official receipts dated 23/10/19-Exhibit D10&D11
- (11) Defendant's Motor Vehicle Certificate-Exhibit D12
- (12) Defendant's Insurance Claim Form-Exhibit D13
- (13) Premium Hospital Cash receipt dated 9/12/19 Exhibit D14
- (14) Police case request for medical treatment & report-Exhibit D15
- (15) Claimant's Driver's License-Exhibit D16
- (16) Nigerian Police Force Investigation Report dated 19/12/19-Exhibit D17
- (17) The Defendant's form filled by the Claimant-Exhibit D18
- (18) Nigeria Customs Service Declaration Form-Exhibit D19
- (19) DBY Recoveries Agency Limited Certificate of Compliance dated 6/2022-Exhibit D20

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:

- (1) Defendant's Auto Insurance Plan Flier-Exhibit D21
- (2) Defendant's Private Motor Individual Insurance Policy dated 22/10/2019 to 21/10/2020. Exhibit D22
- (3) 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 *uberima fides*, 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 NWLR (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 LIMITED 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 ₦5,500.00 as opposed to ₦7,500.000 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:

- (1) 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.
- (2) 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 is 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 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 witnesses called by each party, but by the quality or the probative value of the testimony of that 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 that in a contract of Insurance, therefore, 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, paras.F-A).

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 ones 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 rigors 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 ₦1.2 million as special damages and ₦5 million, as general damages. As regards claim (e) the Claimant claimed to have spent ₦25,000 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 LIMITED. V. WEST AFRICAN PORTLAND CEMENT (2016) LPELR42254(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) LIMITED (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) LIMITED 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 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 shows 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 he did so was of no effect.

Counsel also asserted 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 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 Application 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 74 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.

The above provision shows that indeed an insurer ought to pay on a claim or repudiate same within 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 bonafide 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.

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. Relief d is for an order of the honourable court directing the Defendant to pay the Claimant the sum of ₦7,500,000 (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 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 Mercedes-Benz C Class C300 worth ₦5,500,000 (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 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.

Relief (e) is for an order of the honourable court directing the Defendant to pay to the Claimant the sum of ₦1,200,000 (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.

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 (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 ₦2Million to him under this head.

Relief (g) is for an order of the honourable court directing the Defendant to pay as cost the sum of N2,000,000 (Two Million Naira) to the Claimant. in IMPERIAL HOMES MORTGAGE BANK V. D-VAR CONSULTING LIMITED (2016) LPELR-40319(CA) PP. 14-15 PARAS. E, Nimpair 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 N1 Million as costs of the action.

46.4 REMARKS

As above

46.5 REFERENCES

1. *Royal Exchange Assurance Nig. Limited. v. Chukwurah* (1976) LPELR 2962.
2. *Abiodun v. F.R.N* (2018) II NWLR (pt1629)86
3. *Mogaji v. Odojin* (1978) LPELR.S.C372/1976
4. *Yadis Nigeria Limited v. Great Nigeria Insurance Company Limited* (200) LPELR- 3507(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.
7. *Imperial Homes Mortgage Bank v. Dvar Consulting Limited* (2016) LPELR-40319 (CA) PP s14-15.

47.1. ARRANGEMENT OF MATTERS, COURT, DATE

COURT: ANAMBRA STATE HIGH COURT (ONITSHA)
DATE: 22nd May, 1989
SUIT NO: Suit No. 0/304/86
JUDGE: Hon. Justice A. I. Iguh

CHIEF F.N EJIOFOR
(The Plaintiff/Applicant)

vs

ARROWHEAD INSURANCE COMPANY (NIG.) LIMITED
(The Defendant/Respondent)

47.2 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 whereupon he instituted an action in court claiming the sum of ₦20,000.00. The Defendant did not file pleadings nor defend the suit.

47.3 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 negated 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 condition's 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 for 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, was 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 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 indemnity only. It expressly stipulates that if the insured's stock-in-trade is 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 endorsements 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 principal 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 ₦10,000.00. 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 be 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 was 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 the Plaintiff is entitled to under the Policy.

In the case at hand, it is not that some evidence that is not credible was adduced on the issue. It is a case in which there is a 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 & another v. Akpala Ofune & Other* (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 has 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 30 days of the loss or such other time as the company may in

writing allow, deliver to the company a claim showing an account of the several properties 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 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 MacGillivray Insurance Law 6th Edition by Dennis Brown explained on 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 to enable 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”.

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 negates 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 circumstances 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 also *Farrel vs. Federated Employers Insurance Association Limited* (1970) 1 ALL E.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 the statute provided that an Appellant should enter into recognisance immediately after giving Notice of Appeal, the Court of Queens 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 hand, in the Canadian case of *North Lethbridge Garage Limited. 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 vs. 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 is right to mention that the notice to the Defendants was 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 Defendant. 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 properties 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 vs. 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 Defendant's liability under the Policy, was complied with by the Plaintiff. In my view, and this being an express condition precedent to recovery thereunder, failure to establish that the required particulars were duly furnished to the Defendant within this stipulated time puts an end to the Defendant's 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 circumstances, no liability may attach 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 but 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 throughout 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 circumstances, I must decline to make any order as to costs:

47.4 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 term. The omission was presumably because the claim here was based on a contract made in 1984, i.e., before the promulgation of Decree 40 of 1988.

47.5 REFERENCES

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

48.1. ARRANGEMENT OF MATTER, COURT, DATE.

COURT: HIGH COURT OF LAGOS STATE

DATE: 6TH OF FEBRUARY 2023

SUIT NO: LD/ADR/2919/2020

JUDGE: HON. JUSTICE J. O. PEDRO

ANTHONY BASSEY NYONG
(Claimant/Applicant)

vs

STANDARD ALLIANCE INSURANCE PLC.
(Defendant/Respondent)

48.2. REPORTS/FACTS/ISSUES

As in the Judgement below

48.3 DECISION OF COURT

The Claimant filed this suit on 8th January 2020 *vide* Writ 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 6th 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 a 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 insurance 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 V NNPC* (1991) 8 NWLR (Pt. 212) 652.

Learned Counsel to the Defendant/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 affidavits in support. He argued that the motion for summary Judgment is incompetent and liable to be struck out with costs. He submitted that the Claimant/Respondent should not be heard to argue that noncompliance with the Rules of this Court would nullify proceedings since the reliefs sought by the Respondent fall within the province of the discretion of the Court, which must be exercised judicially and judiciously, and that the Claimant/Respondent is not entitled to the grant of the 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 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 *Okorocho 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 vs. 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 Claimant/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 the 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) Policies are mature, including the two (2) policies that are originally 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 to determine if there is a reasonable cause of action. She cited the case of

Holec Projects (Nig) Limited. vs Dafeson International Limited (1999) 6 NWLR (Pt. 607) 490 at 500, paras G.H and the Supreme Court case of Thomas vs. 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 the filing fee was duly paid, the Court has jurisdiction to make an 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 these proceedings. Learned Silk for the Respondent submitted that there is no 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/Applicant is frivolous, vexatious and filed to waste the precious time of the Court. She humbly urged the Court to dismiss the application with substantial costs.

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 the 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 because the four (4) Policies/Agreements which the Claimant set out in his Statement of Claim are separate and distinct from each other and therefore amount to a misjoinder of cause of action. He argued that this suit is premature because 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 the 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 vs. 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 the Appeal courts”.

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

- (a) The court is properly constituted as regards the number and qualification of the members of the bench
- (b) The subject matter of the action is within the jurisdiction of the court, and
- (c) The case before the court is initiated by due process of law, or that the condition precedent to the exercise of jurisdiction is complied with. See the cases of *Madukolu vs. Nkemidilim* (1962) 2 All NLR 581; *Chris vs. 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 the Summons and Statement of Claim. See the case of *Abdul-Raheem vs. 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 amount 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 of together that the judge orders a 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 a separate trial of such causes. I hold that this suit does not amount to a misjoinder of causes 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 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 their entitlements in that respect from the Defendants."

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

"The Claimant states that the Defendant requested the original copies of the four Policy documents to enable it to process the Claimant's claims, and the Claimant availed the Defendant 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 mature while the other two 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 the Court process.

Learned Counsel has urged the Court to hold that this suit is an abuse of the 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 defer 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 the 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 the Court process lies in both proper and improper use of the Judicial process in litigation, such as when a party uses the issue of the Judicial process to the irritation and annoyance of his opponent and the efficient administration of Justice. This includes instituting a multiplicity of actions on the same issues. The term abuse of Court process also applies to a proceeding which is wanting in bona fides and is frivolous, vexatious, and oppressive. See the case of *Saraki vs 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 Paragraphs F-G; See also *Okorochoa vs 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 require the Defendant's answers. The Application fails and it is dismissed.
And I so hold.

Per, Hon. Justice Jumoke Olusola Pedro 31/05/2022

48.4 REMARKS

As above

48.5 REFERENCES

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

49.1 ARRANGEMENT OF MATTER, COURT, DATE

COURT: HIGH COURT OF LAGOS STATE

DATE: 31ST MAY 2022

SUIT NO: LD/29

JUDGE: JUSTICE J. O. PEDRO

ANTHONY BASSEY NYONG
(Claimant/Respondent)

vs

STANDARD ALLIANCE INSURANCE PLC.
(Defendant/Applicant)

49.2 REPORTS/FACTS/ISSUES.

As in the Ruling below

49.3. COURT DECISION/RULING

By Motion on Notice dated 24th June, 2020 and brought pursuant to Orders Rule 1 (2) and Order 43 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 2019, and under the inherent Jurisdiction of this Honourable Court, the Applicant prays this Court for:

- (a) AN ORDER striking out or dismissing the case against the Defendant/Applicant on the grounds set out hereunder;

Grounds of Objection:

1. The suit is incompetent for misjoinder of cause of action, i.e., the Four (4) Policies/contracts that are separate and distinct;
2. The suit is premature because two (2) of the policies are to mature in 2021 and there is no evidence of their being validly terminated before maturity.
3. The suit is an abuse of Court processes as the Claimant pleaded the four (4) Policies he is claiming under, but exhibited only one (1)

In support of the Application is an 8-paragraph Affidavit deposed to by one Adebanye Adelola, a Legal Practitioner in opposition, the Respondent filed a 5-paragraph Counter affidavit deposed to by one Nojeem Mayowa, a Litigation Clerk of 6B, Insha Allah Street, Off Ramat Crescent, Ogudu G.R.A., Lagos State. In their written address, Learned Counsel to the Applicant formulated one issue for determination, to wit: Whether this Honourable Court has the Jurisdiction to entertain this suit. Learned Counsel for the Applicant argued that the issue of Jurisdiction, once raised by the Defendant, is so fundamental and goes to the root of proper proceedings and ought to be properly determined first before further proceedings. He relied on the case of *Ogunleye vs Jegede* (1991) 6 NWLR (Pt. 1991) 594.

He further argued that it is settled that the determinants of Jurisdiction are as follows:

- (a) The proper parties are before the court
- (b) The subject matter of the suit falls within the jurisdiction of the Court
- (c) The composition of the court as to its members and their qualifications
- (d) The action is initiated by the due process of law, and the conditions precedent to the

assumption of jurisdiction are fulfilled. He cited the cases of *Madukolu vs Nkemdilim* (1962) 2 SCNLR 341; *Ajao vs Obele* (2005) NWLR (Pt. 918) 400 at 414 paras. H.C ratio 2

Learned Counsel to the Applicant submitted that the action of the Claimant/Respondent is not sustainable in view of the fact that the Four (4) Policies/Agreements which the Claimant referred to as set out in his statement of claim are separate and distinct from each other and thereby amount to a misjoinder of cause of action. He further submitted that this suit is premature in view of the fact that two (2) of the policies are meant to mature in 2021 and there is no evidence of their being validly terminated before maturity.

Learned counsel also submitted that the suit is an abuse of the Court process and that the Claimant pleaded four (4) policies but exhibited only one (1) Policy. He argued that an abuse of court process connotes the improper use or misuse of the process of the Court to the irritation, annoyance of the opponent, which interferes with the administration of justice. He argued that an abuse of the Court process is not in the species of sins called an irregularity but must be struck out with costs in appropriate circumstances. He argued that it behooves a Trial Court to discourage the improper use of its process. He cited the case of *Saraki vs Kotoye* (1992) 9 NWLR (Pt. 264) 156. The contract between the parties is tantamount to a 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, Two Kobo) being the Claimant's entitlement resulting from the insurance contract between the parties.
- (c) AND 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 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.

When this matter came up for hearing of the Motion on Notice for summary Judgement on 17th November, 2022, the Learned SAN withdrew the reliefs in the Statement of Claim Paragraphs 30 a, c & d and in Paragraphs 1 a, c & d of the Motion on Notice for Summary Judgment and urged the court to strike out same. Paragraphs 30a, c, & d of the Statement of claim and also reliefs 1a, c, & d of the Motion on Notice were struck out, leaving out only reliefs b, c, & f of the prayers.

In support of the application is a 35-paragraph affidavit deposed to by the Claimant/Applicant. The Applicant also filed a written address. The Defendant/Applicant did not file any counter-affidavit in opposition but filed a Statement of Defence.

In moving the application, Learned SAN to the Applicant formulated a sole issue for determination, to wit: Whether the Claimant/Applicant is entitled to the prayers as per his application for summary judgment. Learned Counsel submitted that the maxim interest rei publicue ut sit finis litium is the mother of the procedure of the application brought pursuant to Order 13 Rule 1 of the Rules of this Honourable Court. He submitted that there should be an end to litigation and that it has been the policy that the courts are enjoined by the Rules of the Court to adhere to *stricto sensu*.

Learned Counsel further submitted that the objective behind the procedure for summary judgment is geared towards the prevention of sham defence by the Defendant/Respondent from defeating the rights of the Claimant/Applicant by delay and at the same time causing great loss to the Claimant/Applicant who is endeavouring to enforce his rights. She cited the case of *Nishizawa vs. S.M. Jethwani* (1984) 12 S.C 234. She also submitted that every action where liquidated money demand or claims have been claimed or even unliquidated money demand or claims, may be recovered under the rules of summary Judgment if there is no real defence to the action. She cited the decision in *Brown vs. Brown* (1953) 1 Q.B. 710.

Learned SAN also submitted while placing reliance on the decision of *Macauley vs. NAL Merchant Bank Limited* (1990) 4 NWLR (Pt. 144) (sic) that once it is discovered that the Defendant does not have a bona fide defence to the Claimant/Applicant's claim, the Court is duty bound to enter final Judgment in favour of the Claimant/Applicant. She there submitted that the instant application is viewed from the prism of that law and fact. She urged the Court to enter summary judgment in favour of the Claimant.

RESOLUTION

I have carefully considered this application. The Claimant/Applicant brought this application pursuant to the provisions of Order 13 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 2019, therein seeking an order of this Court entering summary judgment on the ground that the Defendant/Respondent has no defence to the suit.

The Rules guiding the principle of summary judgment are contained particularly under Order 13, Rules 1, 4, and 5 of the High Court of Lagos State (Civil Procedure) Rules 2019, which it provides thus:

Where a Claimant believes that there is no defence to his claim, he may file with his originating process the Statement of claim, a list and copies of documents to be relied upon, a list and the

1. depositions of his witnesses and an application for summary Judgment supported by an affidavit stating the grounds for his belief, and a written brief in respect of the same.
4. Where Defendant intends to defend.
Where a party served with the processes and documents referred to in Rule 1 of this Order intends to defend the suit, he shall not later than the time prescribed for defence, file:
 - (a) his Statement of Defence;
 - (b) a list of depositions of the witnesses
 - (c) a list and copies of all documents to be used in his defence; and
 - (d) a counter-affidavit and a written brief in reply to the application for summary judgment.
5. (1) where it appears to a Judge that a Defendant has a good defence and ought to be permitted to defend the claim, he may be granted leave to defend. (2) where it appears to a Judge that the Defendant has no good defence, the judge may enter judgment for a Claimant. Thus, the combined provision of Order 13 Rules 1, 4 & 5 when read together shows that the court has the power to enter judgment summarily for a claim where there is no good defence or grant leave to a Defendant where the Defendant has a good defence.

The issue now is:

Whether the Claimant/Applicant is entitled to summary judgment as prayed. It is trite law that the summary judgment procedure is for disposing of virtually uncontested cases. It applies to cases where there can be no reasonable doubt that the Claimant/Applicant is entitled to Judgment and where it is inexpedient to allow a Defendant/Respondent to defend for mere purposes of delay. It is for plain and straightforward cases. See the case of *Lewis v. U.B.A. Plc.* (2016) 6 NWLR (Pt. 1508) 329 SC.

In *Matab Oil & Gas Limited vs. F.F.S Limited* (2020) 17 NWLR (Pt. 1752) I Pp. 16-17, paras. F-A, the court, in describing the nature of summary judgment, held thus:

By the provision of Order 11 of the High Court of Lagos State (Civil Procedure) Rules 2012, summary judgment procedure is a procedure whereby the court gives judgment in favour of a party without a full trial. The purpose of a summary judgment is to save time and cost where the Defendant has no defence to the action. It is for disposing of, with dispatch, virtually uncontested cases. The procedure is for the plain and straightforward cases, not the devious and crafty.

Flowing from the foregoing, the court in the Case of *Carling International Limited vs. Keystone Bank Limited* (2017) 9 NWLR (Pt. 1571) 345 held that; at the hearing of a motion for summary judgment, what the court considers in the affidavit of the parties in which the particulars of the claim and the nature and specific facts of the defence should be set out clearly, to determine if a good defence exists or is disclosed. The court is mandated to look carefully at the affidavit evidence to see what the particulars and details of the defence are. Also, as to whether or not they specifically and effectively deal with the particulars of claims, to controvert them in such a manner as to raise triable issues in the case. However, it is incumbent to state that at that stage, the law does not concern itself with whether the defence should be a complete defence to the claims or that it is likely to succeed at the trial.

In bringing the application, the Applicant relied on the 35-paragraph Affidavit deposed to by Anthony Bassey Nyong, the Claimant. The relevant paragraphs are hereby reproduced as follows:

In February 2010, I bought and registered four insurance Policies with the Defendant and paid all premiums on the said four Policies upfront.

1. That the four insurance Policies I bought and registered with the Defendant, with respective premiums.
2. My investment in the four Policies came to a total of ₦26,899, 306.00 (Twenty-Six Million, Eight Hundred and Ninety-Nine Thousand, Three Hundred and Six Naira)
3. The Policies IPP/10/0008670/IKJ and IPP/10/00094449/IKJ became mature and payable to me by the Defendant as far back as March 30, 2017, and June 30, 2017, respectively and upon demand for payment of my benefits, the Defendant requested me to sign off on the Defendant's discharge vouchers dated 26/6/2017 and 18/9/2017, and I did exactly that, but the Defendant, for no reason whatsoever and however described, failed, refused, and/or neglected to pay my entitlements.
4. Consequent upon the Defendant's failure and/or neglect to pay up my entitlements flowing from the maturity of Policies IPP/10/0008670/IKJ and IPP/10/00094449/IKJ. I was compelled to terminate Policy number SFP/12/001090/IKJ and Policy number SFP 12/001159/IKJ respectively whose maturity dates were ordinarily in 2021, respectively and accordingly demanded my entitlements in that respect from the Defendant.

5. The Defendant requested the original copies of the four Policy documents to enable it to process my claim, and I provided the Defendant with the original copies of the Policy documents and yet the Defendant refused to pay my entitlements.
6. I was disturbed by the continued refusal of the Defendant to pay up my entitlements. I engaged the services of The Global Alliance Insurance Brokers Limited to help pursue my claims and notified the Defendant of the development via letter dated 14/7/17, yet the Defendant refused to budge.
7. The Defendant wrote to me claiming that cheques had been issued as part payment of my entitlement and that the cheques would be due for payment on 10th April 2019, 25th May 2019, and 16th May 2019 respectively, but the Defendant refused to make the cheques available to me or make the payment.
8. I instructed my Solicitors, Prime view Legal to make a demand on the Defendant to pay up his entitlements and my solicitors via letter dated August 30, 2019 wrote the Defendant and copied the National Insurance Commission and the Nigeria Insurers Association, hoping that the said organization would be able to prevail on the Defendant to do the needful to forestall any resort to litigation but the Defendant spurned the letter and the intervention of both the National Insurance Commission and the Nigeria Insurers Association.
9. Despite my repeated demands for payment of the Defendant's indebtedness to me, computed as ₦29,383, 619.92 (Twenty-Nine Million, Three Hundred and Eighty- Three Thousand, Six Hundred and Ninety Naira, Ninety-Two Kobo), the Defendant has refused, neglected and failed to pay the same.

The Defendant/Respondent did not file any counter-affidavit in opposition to this application, but filed a Statement of Defence, relevant portions of which I hereby reproduce as follows:

1. The suit is an abuse of Court processes as the Claimant pleaded the four (4) policies he is claiming under, but only exhibited one (1) Policy, which is even unreadable.
2. The suit is premature because two (2) of the policies are to mature in 2021 and there is no evidence of their being validly terminated before maturity.
3. The suit is also an abuse of court processes as the Claimant's written statement on oath is defective because it carries the date 8th January 2019.

I have earlier stated that the Respondent did not file any counter-affidavit in opposition, in compliance with the Rules of this Court, though they filed a Statement of Defence. I will, however, consider the Statement of Defence in the determination of this application. Having carefully considered the affidavit in support of the application, especially the averments as contained in Paragraphs 4, 5, 7, 8, 10, 11, 12, 15, 19 & 30 and the Exhibits and the averments of the Defendant/Respondent as contained in their Statement of Defence.

I find that the Defendant/Respondent in this case has no genuine defence to the claims of the Claimant/Applicant. What is more, the Defendant/Respondent in their paragraphs 2 and 3 of their Statement of Defence acknowledged the existence of the 4 insurance policies executed and registered on behalf of the Claimant/Applicant with them. I find that although in their Defence, they averred that the suit is premature because two of the insurance Policies are to mature in 2021. I find that the Defendant/Respondent merely averred to the premature state of two of the Policies without putting before this Court the particulars or any material facts whatsoever as regards those Policies. I find that in paragraph 15 of the affidavit in support of this application, the Defendant wrote to the Applicant claiming that cheques had been issued as part payment for the Applicant's entitlements and that the cheques would be due for payment on 10th April, 2019, 25th May, 2019 and 16th May, 2019, respectively. For purposes of clarity, I have decided to bring the contents of the said letter to the fore:

Dear Mr. Nyong,
Trust you are doing great.

We like to inform you that the delay in payment of your claim is not intentional. It was due to some circumstances beyond our immediate control.

Please note that the processing and release of your cheque has been scheduled, the details is as stated below:

	Policy number	Amount due	Date due for payment
1.	SFP/12/0001159/APP	~~₦~~ 4,539,841.14	10 th April, 2019
2.	IPP/10/0008670/IKJ	~~₦~~ 4,700,026,74	25 th April, 2019
3.	IPP/10/000944/IKJ	~~₦~~ 9,284,287,18	16 th May, 2019

The Policy SFP/120001090/IKJ is not scheduled for payment yet because you refuse to sign the discharge voucher. You may send mail as a form of reminder (SIC) as the dates get closer.

Upon a careful perusal of the contents in Exhibit F1, which is in the email sent by the Defendant/Respondent to the Claimant/Applicant on the 31st of January 2019, I find that the Defendant/Respondent did not only acknowledge the existence of the 4 insurance Policies but went further to state reasons for the delay in the payment of the 4 insurance Policies and their various due dates for payment. I find that none of the reasons stated in it were a result of non-maturity; rather, it was a result of “some circumstances beyond our immediate control and the alleged refusal of the Applicant to sign the discharge voucher for the Policy SFP/12/0001090/IKJ.”

This is a clear acknowledgment on the part of the Defendant/Respondent and the law is trite that a party cannot blow hot and cold all at the same time, as stated in the maxim. “*quod approbo non reprobo*” meaning “that which I approve, I cannot disapprove” See the case of Thomas W. & Son (Nig. Limited) vs. P.I. Limited (2019) 12 NWLR (Pt. 1687) 540 and Friday vs. Gov, Ondo State (2022) 16 NWLR (Pt. 1857) 585.

I wish to further reiterate herein that the essence and the purpose of the summary Judgment procedure is to ensure quick dispensation of Justice and to alleviate undue delay and the attendant loss in terms of time and resources. Also, the essence of the procedure is to prevent a Defendant who has no defence to the case formulated against him, particularly in liquidated damages, from dribbling the Claimant with an unassailable case away from the seat of justice or to delay endlessly the completion of an indefensible suit. See the cases of CPL Limited vs Scanbech (Frank-Bech) Denmark (2002) 13 NWLR (Pt. 785) 439 (Pp. 450-451, paras, H-A) and Lewis v. U.B.A Plc (2006) 1 NWLR (Pt. 962) 546.

I find that the Defendant/Respondent has not put up a good defence or disclosed such a good defence that the Court may deem sufficient enough to enable this court to exercise its discretion in its favor to grant leave for the Defendant to defend this suit. The issue now is whether the Claimant is entitled to Summary Judgment as claimed.

As regards the claim on Reliefs 1 (b) of the application, I hold that the Claimant/Applicant is entitled to the reliefs as stated in 1 (b) of the Motion on Notice for Summary Judgment in 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. As regards relief 1 (e), which is for interest on the Judgment sum at the rate of 21% per annum before Judgment

and 15% post Judgment until the Judgment sum is liquidated fully.

I find that the position of the law is that interest may be awarded by a trial Court in a case in two distinct circumstances, namely:

- (a) Where the interest is claimed as of right
- (b) Where there is a power conferred by a statute to do so in exercise of the Court's discretion.

See Nigerian Victory Assurance Company Limited vs Grains Processing Company Limited 1995 3 NWLR (Pt 386) 671 at 683 Paragraph A.

I find that there is nothing to show that parties have agreed to the interest rate of 21% per annum being claimed. I am unable to grant the same under the Summary Judgment procedure. The essence of the procedure under Order 13 of the High Court of Lagos State (Civil Procedure) Rules 2019 as I have stated earlier is for straight forward cases. The Supreme Court in A.G Ferrero & Company Limited vs. Henkel Chemicals (Nig) Limited (2011) LPELR-12 (SC) held that if the parties intended that interest would be paid in the event of a default in making any payment under the contract, the parties would very easily have inserted such a provision in the contract. The Court, therefore, held that in the absence of any specific provision for the payment of interest for late payment or prejudgment interest in the contract agreement, the Court would not award such interest. In the circumstances, I hold that the claim for a 21% interest rate per annum before Judgment fails.

The Claimant has equally, claimed post Judgment sum of 15% interest rate per annum from the date of the Judgment and until the Judgment sum is fully liquidated, in accordance with Order 39(4) of the High Court of Lagos State (Civil Procedure) Rules 2019 By virtue of Order 39 Rule 4 (b) “The Judge may at the time of granting any judgment or order or at any time afterwards, direct the time within which the payment is to be. b. “Reckoned, from the date of the Judgment or Order, or some other date or time, as the Judge deems fit; and may order interest at a rate not less than ten percent per annum to be paid upon Judgment”. In this instance, I hold that the Claimant is entitled statutorily to post Judgment interest which I hereby grant at the rate of 10% per annum from the date of Judgment until final liquidation of the Judgment sum.

The Claimant has asked for cost in the sum of ₦5,000,000. I will hear the Learned Counsel as to cost in order to determine same.

Judgment is hereby entered summarily as follows:

1. 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 Two Kobo) being the Claimant’s entitlement resulting from the insurance contract between the parties.
2. Pre-Judgment interest at the rate of 21% before Judgment fails and it is refused. Post-Judgment interest is granted at the rate of 10% per annum from the date of Judgment until final liquidation of the judgment sum.
3. Cost of ₦250, 000.00 (Two Hundred and Fifty Thousand Naira Only) is granted having heard the Learned Counsel as to cost.

And I so hold.

Hon. Justice Jumoke Olusola Pedro.

49.4 REMARKS.

As above.

49.5. REFERENCES

1. *Matab Oil and Gas Limited. vs F.F.S Limited (2020) 17 NWL 12 (pt1752)1 Pp. 16-17 E-A*
2. *NigeriaVictoryAssurance Company Limited. vs Grains Processing Company Limited19953 NWLR lpt 386) 671 at 683 paragraph A.*

50.1 ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT

DATE: 14th June, 1970

SUIT NO: LD/450/1970

JUDGE: Odesanya, J.

AKIN DENTON
(PLAINTIFF/Respondent)

vs

MUIBATU ABEJE & ANOR
(Defendant/ Appellant)

50.2. REPORTS/FACTS/ISSUES.

TORT AND PERSONAL INJURY – Motor Vehicle accident – Negligence – Where proved – Heads of special damages – Calculation of – Nature of evidence necessary to prove same – Calculation of depreciation of car – Claim for general damages based on Relevant considerations.

INSURANCE AND REINSURANCE – Car collision accident – Where negligence is established against Defendant driver – Payment by insurers of Plaintiff's car – Whether settlement of the claim made on them by Plaintiff's insurers does not diminish the Defendants' liability – Claims for general damages based on evidence of pain and suffering – Failure to call medical evidence – How treated.

INSURANCE AND REINSURANCE – Third Policy Insurance-Joinder of insurance Company to the suit on the application of the Defendant who is a holder of the policy – Propriety of – Whether Defendant, policyholder, is entitled to be indemnified by the insurers against any damages awarded against in the action.

ETHICS – LEGAL PRACTITIONERS: – Duty of diligence owed to the court – Practice by some counsel of leaving to a trial judge the task of conducting unaided the research which the case before him requires – Failure of counsel to cite useful decided cases – Attitude of court thereto.

TRANSPORTATION AND LOGISTICS LAW– Motor Vehicle Accident:- Motor car collision – Defendant's vehicle jumping queue at bridge – Collision with vehicle on opposite side of road – First Defendant joining insurance Company by Third party notice – Plaintiff's insurance Company paying money in lieu of repairs – Particulars of loss of use of car falsifying figure given – Reason for hire of taxi for use and receipts for money paid not tendered by Plaintiff – Percentage of depreciation of car arrived at by court – Medical evidence not called to support claim for pain and suffering.

50.3. DECISION OF COURT.

JUDGMENT

ODESANYA, J.: At all times material to this action:

- (1) The Plaintiff, the Assistant Manager of John Holt Limited at Ondo, was the owner of a Ford Cortina private car registered as No. KC 6927, which he bought at Kano in October 1965 for £747 and had insured comprehensively with the Lion of Africa Insurance Company Limited.
- (2) The first Defendant was the owner of the Bedford passenger lorry registered as No. LO 9148 and insured on a third-party basis with the Mercury Assurance Company Limited.

Originally, Mustapha Yahaya, the servant, agent and driver of the first Defendant, was her co-Defendant in this action, but at the Plaintiff's instance, he was dismissed from the suit and on the third-party application of the first Defendant, his place was taken by Mercury Assurance Co. Ltd. hereinafter called the second Defendant or the Defendant Company. On January 4, 1970, at about 5 pm, the Plaintiff was travelling from Lagos to Ondo in his car. Just after the Majidun Bridge on the way to Ikorodu, the traffic was very heavy, and motor vehicles were being driven slowly on either side of the road. The first Defendant's lorry, driven by Mustapha Yahaya, was in the queue on the other side, travelling from Ikorodu to Lagos and carrying passengers. All of a sudden, the driver jumped his queue, crossed the road and made for the Plaintiff's car on the other side of the road. The Plaintiff, who was driving the car which he was occupying with two friends, pulled up on his side of the road. As the lorry was approaching his car, which was stationary, the Plaintiff blew his horn and hoped that the lorry would stop. The first Defendant's driver drove the lorry so negligently that it ran into the Plaintiff's car at the edge of the road on the left. The car was about 150 feet away from the bridge where it stopped before the lorry was driven into it.

The impact was so great that the Plaintiff's car was forcibly pushed back into the vehicle hit the vehicle at the back thereof. The Plaintiff's shoulder was injured, and he had shock and lacerations. He was taken to the Lagos University Teaching Hospital while his car was abandoned at the scene of the accident. Later on, the disabled car was towed away to the Apapa garage of Messrs. Joe Allen & Company Limited. The cost of the repairs, which the damage done to the vehicle by the lorry necessitated, was estimated. As the cost of the repairs was £701 10s. 4d. The Plaintiff accepted from his insurers, the Lion of Africa Insurance Company Limited, the sum of £500 for which the car was comprehensively insured. He accepted the money in lieu of the repairs, which were not considered economical.

The negligence and vicarious liability of the first Defendant have been established as pleaded by the Plaintiff. Neither the first Defendant nor the second Defendant led any evidence at all and so did not contradict the clear evidence of the Plaintiff.

I shall deal with the special and general damages claimed by the Plaintiff and the particulars thereof before adverting to the propriety of joining the second Defendant to the suit and the liability of the insurance Company if it has been properly joined.

The loss of use of his car, as quantified by the Plaintiff, is £300. The particulars given by the Plaintiff falsify the figure. If it was true that he hired a taxi from January 4, 1970, and paid £5 every day to the owner of the taxi, he should under this head be claiming not £300

for 60 days but £435 for 87 days. The Plaintiff gave in his testimony the name and address of the taxi owner at Ondo, and he also mentioned the registered number of the taxi as WF 2146. His evidence is that the taxi was brought to him every day. He neither called the owner, whose name and address he knew, nor did he produce a receipt for any payment which he made. It is not clear from his evidence whether his business at Ondo required the use of a taxi every day or at all. I hold that this head of special damage remains unestablished and is disallowed. The sum of £24 claimed at the rate of £1 per day was apparently abandoned by the Plaintiff and is therefore and is therefore disallowed. The pre-accident value of the car is specially claimed. I do not know how the Plaintiff arrived at the sum of £500 as the pre-accident value of the car. He testified that he brought the car to Kano in October 1965 for £747. It was new when he bought it.

The accident occurred about four years and three months after the car was purchased. It was insured at the time of the accident for £500. There must have been more depreciation in the value of the car during the years to cast doubt on the insured value as its pre-accident value. It is not known what the speedometer recorded at the time the accident occurred. The pre-accident value could not, therefore, be assessed based on a depreciation related to the number of miles already done at the time the accident occurred. The insurance Company paid to the Plaintiff on April 9, 1970, the sum of £500. Of course, this payment does not affect the liability of the Defendants: *See Simpson vs. Thompson (1877) 3 A.C. 279 H.L.* Whether the Plaintiff's insurers settled the claim made on them or not does not diminish the Defendants' liability.

This payment appears to have been made on a total loss basis according to the endorsement on exhibit "A". In *White Cross Insurance Company Limited and Anor vs. John Mbaeri, Suit No. C/41/1959 heard in the High Court of Calabar*, the trial judge estimated the depreciation in the value of the lorry involved in the accident to be at least 25 per cent a year. On appeal, FSC.106/1960 heard in April 1961, this estimate was not questioned. This is the inference one draws from the reference to the case in *Ubani-Ukoma vs. Nicol [1961] 1 All N.L.R. 105*. I would prefer 15 per cent to 25 per cent for a private car, although the Plaintiff testified that he travelled a lot. On this reckoning, the pre-accident value of the car would be £299 and I award this under this head of claim. The Plaintiff claims general damages. He gave evidence of pain and suffering, but called no medical evidence to assist the court. I would award £20 under the head of general damages.

The second Defendant was joined to the suit on the application of the first Defendant, who, under Section 2 of her third-party Policy exhibit "D", is entitled to be indemnified by the second Defendant against any damages awarded against her in this action. The Company has therefore been properly joined to the suit.

The Plaintiff's alternative claim for £701 10s. 4d. The cost of the unexecuted repairs on the car is, in the circumstances, rejected. It is an alternative to what is claimed and allowed for pre-accident value. The Plaintiff, therefore, succeeds and is awarded special and general damages for £319 with the costs assessed at 80 guineas.

It is necessary to direct attention to the growing practice by some counsel of leaving to a trial judge the task of conducting unaided the research which the case before him requires. No one should now believe in the myth that the law resides in the bosom of the judge. The judge has long ceased to be a slot machine which spits out the law applicable to a case once sufficient facts are fed into the machine. Not a single case was cited by any of the three lawyers who addressed the court after this case, even though the suit touches that part of the law which is saturated with extremely useful decided cases.

50.4. REMARKS

INSURANCE AND REINSURANCE – Car collision accident – Where negligence is established against Defendant driver – Payment by insurers of Plaintiff's car – Whether settlement of the claim made on them by Plaintiff's insurers does not diminish the Defendants' liability – Claims for general damages based on evidence of pain and suffering – Failure to call medical evidence – How treated.

50.5. REFERENCES

1. *Simpson vs. Thompson (1877) 3 A.C. 279 H.L.*
2. *Ubani-Ukoma vs. Nicol [1961] 1 All N.L.R. 105.*
3. *White Cross Insurance Company Limited & Anor vs. John Mbaeri Suit no C/41/1959 – High Court Calabar.*

51.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT, KANO STATE

DATE: 25th July, 1970

SUIT NO: K/93/68

JUDGE: Wheeler, J.

WADA DARMA
(Plaintiff/Respondent)

vs

LION OF AFRICA INSURANCE COMPANY LIMITED.
(Defendant/Appellant)

51.2. REPORTS/FACTS/ISSUES.

COMMERCIAL LAW – Contract: - Enforcement of motor vehicle insurance Policy – Breach that constitutes a condition precedent to any liability on the part of the insurers under the Policy – How proved – Relevant considerations.

TRANSPORTATION AND LOGISTIC LAW– Motor Accident: - Insured vehicle– Need for vehicle owner/operator to observe conditions pursuant to an insurance Policy– Failure as to conditionality regarding proper maintenance of vehicle– Proof of – Evidence of expert motor engineer and assessors – Implications for enforcement of insurance contract.

51.3. DECISION OF COURT.

JUDGEMENT

WHEELER, J. (delivering the judgement of the court):

In this action, the Plaintiff seeks indemnification under a Policy of insurance from the Defendants, the insurers, in respect of a sum of 3,000 arising out of the total loss in an accident of his lorry, registered number KC 9179, on the 1st December, 1967. It is common ground that such an accident with that result took place, but the Defendants repudiate liability on two grounds. First, they say that the lorry in question was not in a roadworthy condition at the time of the accident, as the tyres were in a very poor condition and that this constituted a breach of condition 5 of the Policy, which is a condition precedent to their liability. Secondly, they say that the only sum due under the Policy by virtue of a 10% depreciation clause and an excess clause is £742 and that this sum was paid pursuant to an endorsement on the Policy to the order of BEWAC Ltd., the owners of the lorry at the material time under a hire purchase agreement. A third defence, namely that the Plaintiff was also in breach of a condition requiring notification of an accident to be made immediately to the Defendants, has not been pressed by the Defendants and I need say no more about it. Initially, the Plaintiff's claim, in accordance with condition 8 of the Policy, was referred to Arbitrators, but before any decision was reached, the parties agreed that the matter should be tried by the High Court. Hence these proceedings.

The main defence is that the lorry was not “in efficient condition” at the time of the accident, thus entitling the Defendants to repudiate liability under condition 5 of the Policy, and I deal with this defence first.

The Plaintiff's evidence was that the lorry had a valid roadworthy certificate at the time

of the accident, but that this had been stolen. He said nothing about the tyres during examination in chief, but under cross-examination, he said the tyres were good. An employee of the Plaintiff, Alhaji Baban Gwari, testifies that he went to the scene of the accident at Pandogari and inspected the lorry. Although the tyres were good, he had checked them before the lorry left for Lagos. One front tyre had burst in the accident. The Plaintiff's driver, Hassan, also gave evidence for the Plaintiff. He said that as he neared Pandogari, the front left tyre burst and the lorry overturned. This occurred on a smooth, straight road, and no other vehicle was involved. He had checked the lorry at Tegna, fifteen miles from Pandogari, and found the tyres in good condition. Indeed, the front tyres at the time of the accident were not more than three weeks old, while the rear tyres were about three months old. The Certificate of Road Worthiness in respect of the vehicle has been examined by the Police at Tegna, but was stolen following the accident in which he was knocked unconscious.

The evidence for the Defendants on this point came from Mr. Adewunmi, the senior partner in a Firm of Motor Engineers and Assessors in Lagos. He said he inspected the lorry in question at BEWAC's premises in Kaduna in February 1968. He found all the tyres in extremely poor condition, in particular the front two, which in his opinion, had caused the accident. Four of the six tyres on the lorry could have burst at any time. The deterioration in the tyres, which he observed, could not have been caused by exposure in a stationary condition to the elements over a period of two months, not even over a period of three years. He produced four photographs of the crashed vehicle, which he had taken at the time of his inspection. That summarises the evidence on the condition of the tyres on which I must make my findings. I unhesitatingly accept the evidence of the Defendants' expert witness, a well-qualified and highly experienced motor engineer, that the lorry was not in a roadworthy condition at the time of the accident, having regard to the state of the tyres.

His evidence is graphically confirmed by the photographs, which he took, showing quite clearly that the front tyres were completely threadbare. He was a most impressive witness and was completely unshaken by a vigorous and prolonged cross-examination. I accept his evidence that it would only have been possible to have towed the lorry to Kaduna from the scene of the accident with the front wheels off the ground, and also his evidence that the deterioration in the tyres which he described could not have been caused by exposure to the weather in two months that elapsed from the time of the accident until he inspected the lorry in Kaduna. On the other hand, the Plaintiff's witnesses were far from impressive and I disbelieve their evidence regarding the condition of the tyres. In particular, I disbelieve the evidence of the driver that the front tyres were only three weeks old.

I observe that the Plaintiff himself did not say that, nor did Alhaji Baban Gwari, whose evidence was simply that the tyres were in good condition when the lorry left for Lagos. Moreover, it seems to me that the driver's account as to how the accident took place, namely that the front left tyres burst on a straight, even road, causing the lorry to overturn, is entirely consistent with the expert testimony on the Defendants' behalf that the front tyres were manifestly threadbare. In his final address, Counsel for the Plaintiff for the first time suggested that the tyres of the vehicle could have been changed between the date of the accident and the date of Mr. Adewunmi's inspection, but I observe that this was never put to Mr. Adewunmi in cross-examination or a suggestion in those terms made by any of the witnesses for the Plaintiff. I find that the tyres on the lorry, when so inspected, were the same as the tyres on the lorry at the time of the accident. I also find on the balance of probabilities that by reason of the condition of the tyres, the lorry was not in an efficient condition within the meaning of condition 5 of the Policy at the time of the accident. In

reaching that conclusion, I do not overlook that the burden of proving that a condition has been broken rests upon the insurers: *Barret v. Jermy* (1849) 3 Exch. 535.

It was on this ground that the Defendants repudiated liability in their letter to the Plaintiff of the 10th April, 1963 (Exhibit 16) and having regards to my findings of facts and to the fact that it has not been pleaded, or even suggested, that by not seeking to rely on condition 5 in their much earlier letter to the Plaintiff of the 31st January, 1968 (Exhibit 5) (which complained primarily of the delay in notifying them of the accident) that the Defendants are stopped from relying on condition 5, I hold that they were fully entitled to do so. *Brook v. Tafaigar Insurance Company Limited*. 1947799 LL. Rep. 365 (C.A.) is the authority for the proposition that a plea of waiver must be pleaded. By virtue of the provisions of condition 9 of the Policy, condition 5 constitutes a condition precedent to any liability on the part of the Defendants under the Policy and having found, as I have, that the Plaintiff was in breach of condition 5, it follows that this action must fail.

That disposes of the Plaintiff's claim and it is therefore unnecessary for me to consider the other ground relied upon by the Defendants, namely that assuming the Plaintiff had a valid claim under the Policy, on a true construction of that Policy, all that Defendants were laible to pay in respect of that claim was the sum of £742 which sum was payable to BEWAC Limited. and was paid by the Defendants, without admission of liability, on BEWAC's instructions to Bentworth Finance Limited.

This defence is grounded on the 10% depreciation clause, the excess clause and the hire-purchase agreement clause all endorsed on the Policy, and all I need say about it is that it is difficult to see that there would have been any answer to this defence, except in so far as the Claims Manager of the Defendants conceded under cross-examination that the sum of £742, which he stated was paid in respect of this claim on BE WAC's order to Bentworth Finance, had been miscalculated and should have been worked out, if I understand his evidence correctly, at £847. For these reasons, the Plaintiff's claim is dismissed with costs. Judgment for the Defendants.

51.4. REMARKS

Policy of insurance: - Claim for indemnification under a Policy of insurance in respect of damaged vehicle – Allegation of breach of fundamental clause/condition of the Policy against the insured– on who lies– Defence of waiver of contractual right by conduct – Need for same to be pleaded and proved.

51.5. REFERENCES

1. *Barret vs. Jermy* (1849) 3 Exch. 535.
2. *Brook vs. Tafaigar Insurance Company Limited* 1947799 LL. Rep. 365 (C.A.)

52.1 ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT OF LAGOS

DATE: October, 1999

SUIT NO: 3PLR/1999/77 (HC)

JUDGE: Mahmud Babatunde Belgore, J.

**TRINITY MILLS INSURANCE AND FIDELITY BOND OF NIGERIA
(Plaintiff)**

vs

**UNIC INSURANCE PLC AND 9 OTHERS
(Defendant)**

52.2. REPORTS/FACTS/ISSUES.

CIVIL PROCEDURE:– Whether the Court of Appeal erred in law in giving judgment in favour of the Plaintiff in that the proceedings before him are irregular, null and void.

CIVIL PROCEDURE – Whether the Chief Judge erred in law by hearing the Plaintiffs without properly resolving irreconcilable conflicts in the affidavits before him by hearing oral evidence from the deponents.

52.3. DECISION OF COURT.

JUDGMENT

MAHMUD BABATUNDE BELGORE, J.:

Court gives NNPC's \$25b account to two insurers.

Legal controversy surrounding the 1996 \$25 billion (~~₦~~2.37 trillion), Nigerian National Petroleum Corporation (NNPC) insurance account has been laid to rest by a Federal High Court in Lagos which awarded the commissions to two insurance brokers – Trinity Mills Insurance and Fidelity Bond of Nigeria.

By this judgment the court has also reversed a directive issued in 1996 by the former Petroleum Resources Minister, Chief Dan Etete on placement of the NNPC consolidated insurance account.

The two agents of the NICON Insurance Plc represented by Chief Rotimi Williams (SAN) in a battle that has put the nation's actuary business under global focus.

According to the Chief judge of the court, Justice Mahmud Babatunde Belgore, the two brokers "are entitled to receive all commissions payable to them by NICON Insurance Plc in respect of the afore-mentioned insurance transaction.

His Honour relied on a letter of May 18 1999 by the Permanent Secretary, Ministry of Petroleum Resources Dr. Aboki Zhawa, which confirmed the appointment of the two brokers through NICON Insurance Plc.

The controversy surrounding the account, arose (as reported by The Guardian of July 24, 1996), when an insurance consultant/adviser to NNPC, Prof. Joe Irukwu, had put in place a consortium of four indigenous companies to take over the insurance account.

They are UNIC Insurance Plc, Industrial and General Insurance Company Limited (IGI), Inter-Continental Insurance Company Limited and Kapital Insurance Company Nigeria Limited.

This development led the two insurance brokers to approach a Federal High Court in Lagos, which two days later (July 26, 1996) ordered a stay of action on the issue.

Named as Respondents apart from Irukwu and four consortia are B.C. Madiebo and Co., Koguna Babura and Co., NNPC, NICON Insurance Plc and Minister of Petroleum Resources (Chief Dan Etete).

According to Chief Williams, his clients were invited through a letter dated November 28, 1995 from NNPC to participate in the renewal negotiation for the 1996 insurance year and through another letter of the same date his clients were also invited to attend a meeting in London for the same exercise. He contended further that following series of meetings, an insurance Cover Policy number 0/115/90 with effect from January 1, 1996 to December 31, 1996 through NICON Insurance Plc, was put in place for the assets of NNPC.

They, therefore, asked that since \$32 million had been paid by NNPC to the Alexander Howden Group, the court should among others declare that “it is not competent for the Minister of Petroleum Resources to appoint brokers or coordinating brokers for the NNPC or to remove such brokers who have been duly appointed by NNPC.

The two brokers also sought “a declaration that it is not competent for the Minister of Petroleum to appoint the four indigenous brokers as insurers of the assets of the NNPC...” “an order of injunction restraining NNPC from breaching its contract with the first and second Plaintiffs respectively or from preventing the said Plaintiffs herein from receiving their remuneration as brokers in the afore-mentioned insurance transaction.”

Chief Williams endorsed the claim on September 16, 1996, while the Second Republic Justice Minister Mr. Kehinde Sofola (SAN) represented all the Respondents except NICON Insurance Plc.

The court had begun trial on the matter when leading counsel to NICON Insurance Plc, Chief Richard Akinjide (SAN) brought a motion asking the court to among other things restrain the NNPC and Etete from arranging the Corporation’s insurance cover for 1997 with any other Company pending the determination of the suit over the insurance account. In a landmark judgment on December 30, 1996, Justice Belgore ordered NNPC to insure its assets with NICON in 1997.

The court also prohibited the NNPC and Etete from entering into any insurance or re-insurance contract with or paying any premium for insurance for NNPCs assets for 1997 to any insurance Company other than the NICON.

“It might amount to criminal irresponsibility and insensitivity to national interest to allow the mainstay of the country’s economy to go unprotected and left under risk which will result in calamitous consequences,” he observed. But while this verdict was being challenged at the Court of Appeal, the two brokers continued to press for their commissions of the 1996 insurance covers before the Federal High Court. This current judgment is a major victory for them in their three-year-old legal battle.

Chief Williams on May 28 this year, pursuant to the provisions of Section 9 (2) of the Federal High Court Act (as amended), Order 30 rule 4 of the Federal High Court (Civil Procedure) Rules 1999 and Order 29 rule 6 of the High Court of Lagos State (Civil Procedure) Rules filed a motion on notice for directing “all further proceedings in this suit be stayed and judgment be entered for the Plaintiff in all their claims contained in the Amended Statement of Claim dated September 16, 1996 upon the admissions contained in the letter dated May 18, 1999 addressed to the first Defendant (Prof. Irukwu) and signed by the Permanent Secretary to the Minister of Petroleum Resources.

The motion was supported by a four-paragraph affidavit deposed by Mr. Baptist Babatunde Akinremi Coker, a legal practitioner.

Zhawas letter to Irukwu reads in part: “You are hereby advised that your mandate and that of the consortium of underwriters on the NNPC Insurances took effect on January 1, 1997 up till the December 31, 1998 when the appointment was terminated.

“Be further advised that NNPC for the year 1996 had put in place an insurance Policy for January 1996 to December 1996 through NICON and a set of Brokers and Underwriters appointed by NNPC, to manage her insurance portfolio before your appointment.

“This letter supersedes the letter dated June 26, 1996 which was sent to members of your appointed consortium.”

On June 30, this year, Mrs. Rhona N. Dimude, on behalf of the Permanent Secretary, Petroleum Resources ministry, had to confirm to Irukwu that the May 18, 1999 letter “is genuine and authentic and emanated from the office of the Permanent Secretary. I am therefore to reiterate that the contents of the letter be adhered to.”

Moving the motion for the judgment, Chief Williams relied on these two letters and Justice Belgore in his judgment said: “After hearing Chief F.R.A. Williams (SAN) with him B.B.A. Coker and Olayiwola move in terms of the motion; Chief R.A. Akinjide (SAN) with him, Chinedu of counsel for NICON Insurance Plc not opposing and Mrs. P.N. Dimude counsel for NNPC and Minister of Petroleum Resources not opposing also; Kehinde Sofola (SAN) with him B.A. Oyerinde counsel for other Respondents having applied for an adjournment.”

“And the court having given ruling retiring the application for an adjournment on account that since the Plaintiffs instituted actions on all the Defendants but the Plaintiffs are now applying for a declaration against NNPC and Minister of Petroleum Resources only and the two Defendants are not opposing the application.” Justice Belgore, therefore, made the following declaration:

The letter of November 28, 1995 inviting each of the Plaintiffs to join a consortium of other insurance brokers to seek to put in place an insurance cover for the assets of the NNPC; The letter of May 2, 1996, addressed to the second Plaintiff (Fidelity Bond) by the NNPC whereby the said NNPC appointed or reconfirmed the appointment of Fidelity Bond herein as the

coordinating broker for the insurance of the assets of the said NNPC for 1996; and the letter of Fidelity Bond dated May 6, 1996 addressed to the NNPC accepting the appointment or confirmation of appointment are valid and binding on the NNPC and each of the Plaintiffs to whom the letters were addressed.

His honour, therefore, declared that the insurance of the assets of the NNPC for the period of January 1996 to December 1996 “was in force with effect from January 1, 1996 to December 31, 1996. It was brokered by the Plaintiffs herein and accordingly, the said Plaintiffs are entitled to receive all commissions payable to them by NCON Plc in respect of the afore-mentioned insurance transactions.”

Source: The Guardian (NIG), Monday, 04 October 1999.

Editor’s note: This judgment is now on appeal.

Industrial and General Insurance Company Limited and eight others have filed an appeal against the ruling of a Federal High Court, Lagos which awarded the 1996 \$25 billion insurance account of the Nigerian National Petroleum Corporation (NNPC) to Trinity Mills Insurance Brokers and Fidelity Bond of Nigeria.

Other Appellants of the ruling are insurance consultant to NNPC, Professor J.O. Irukwu; UNIC Insurance Plc; Inter-Continental Insurance Company Limited, Kapital Insurance Company Nigeria Limited; Koguna Babura and Company, NNPC and the Minister of Petroleum Resources.

While delivering his ruling on a motion on notice, Chief Judge of Federal High Court, Lagos Justice Babatunde Belgore declared that the insurance of the assets of the NNPC for the period January 1996 to December 1996 was brokered by Trinity Mills Insurance Brokers and Fidelity Bond of Nigeria.

He therefore held that the two insurance companies “are entitled to receive all commissions payable to them by NICON Plc in respect of the 1996 insurance transactions.” But in their Notice of Appeal filed at the Court of Appeal Lagos, the Appellants formulated seven grounds of appeal and noted that further grounds of appeal will be added upon the receipt of the Record of Proceedings.

They contended in their first ground of appeal that Justice Babatunde Belgore “erred in law in giving judgment in favour of the Plaintiffs in that the proceedings before him are irregular, null and void.”

The Appellants also said that “the Chief Judge erred in law in hearing the Plaintiffs’ motion dated 28th May 1999 and filed on 31st May 1999 without properly resolving irreconcilable conflicts in the affidavits before him by hearing oral evidence from the deponents or such other witnesses as the parties may call and thereby came to a wrong decision which has led to miscarriage of justice.

According to the particulars of error, the Statement of Defence of the Defendants is before the Chief Judge where the NNPC has clearly pleaded that the contract of insurance for 1996 was given to IGI Company Limited, UNIC Insurance Plc and five others.

The Appellants further contended that “the Chief Judge erred in law when on 30th

September 1999, he reversed his ruling on 3rd June 1999 on the hearing of oral evidence to resolve the irreconcilable conflict in the affidavit evidence before him and thereby came to a wrong decision in the case.

The particulars of errors stated that there was no application before him to reverse his earlier decision on the matter and that he has no jurisdiction of competence to sit as a Court of Appeal over his own ruling.

The Chief Judge, according to them, also erred in law “in failing to grant the Appellants fair hearing in the matter and this failure has led to a miscarriage of justice.”

They argued that “issues have been joined on who and who are the parties entitled to receive the commission or remuneration payable for 1996.”

The Appellants are, therefore, praying the Court of Appeal to grant “an order setting aside the decision of the lower court and substituting thereof an order dismissing the Plaintiffs’ motion dated 28th May 1999 in its entirety and that the case be heard and determined before another judge of the Federal High Court, Lagos.

52.4. REMARKS

Whether it is competent for the Minister of Petroleum Resources to appoint brokers or coordinating brokers or to remove such brokers who have been duly appointed.

52.5. REFERENCE

1. *National Insurance Act 1997.*

53.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT OF RIVERS STATE

DATE: 13th May, 1976

SUIT NO: 3PLR/1976/65 (HC)

JUDGE: Manuel, J.

**INTERNATIONAL BANK FOR WEST AFRICA LIMITED
(Plaintiff)**

vs

**CRUSADER INSURANCE COMPANY (NIG.) LIMITED
(Defendant)**

53.2. REPORTS/FACTS/ISSUES.

INSURANCE AND REINSURANCE LAW: – Assurance Policy – Nature of the right to receive any payment under an insurance Policy as a chose-in-action – Assignment of the right to payment to third payment – Conditions that must be satisfied to make same valid – Effect of failure thereto.

INSURANCE AND REINSURANCE LAW: – Insurance Policy – Assignment of – When assignee entitled to sue in own name.

INSURANCE AND REINSURANCE LAW – Insurance Policy – Nature of as a legal choses in action – Assignment of – Conditions precedent – Need to strictly comply herewith – Unstamped deed of assignment of a Policy of life assurance – Validity of.

INSURANCE AND REINSURANCE LAW: – Life Insurance Policy – When deemed to have lapsed – Revival of lapsed Policy – Rule that a Policy which has lapsed may be revived either by agreement between the parties or by some conduct of the insurers as to stop them from denying that the Policy is subsisting – Need to satisfy stipulated conditions precedents – Nature of qualifying conduct that can ground estoppel.

COMMERCIAL LAW: – AGENCY- Rule that in the absence of fraud, an agent, acting in the course of his duty and within the scope of his employment, binds his principal on his transaction over the business of his employers and it is not the duty of the third parties to prove that the agent has no such authority – Oral assurances by an agent – Onus of proof – On whom lies.

53.3. DECISION OF COURT.

JUDGEMENT

MANUEL, J:

In their Amended Statement of Claim, the Plaintiffs are claiming the sum of ~~N~~41,000.00 being amount insured with the Defendant company plus profits. They also claim interest at

the rate of 10% with monthly rents until judgment and thereafter interests at the rate of 5% with monthly rents until the judgment debt and costs are fully satisfied.

Their case is that their customer, one Thomas Passadie Egba, insured his life with the Defendant Company on 15th December 1972 for ₦40,000.00 with participation in profits. The Life Assurance Policy is marked Exhibit "B".

Subsequently, by a document marked Exhibit "C2", the assured assigned the Policy to them. After this assignment, the Plaintiffs wrote Exhibit "C" to the Defendants enclosing Exhibit "C2." Uncompleted Notice Forms marked Exhibits "C1" and "C3" were also enclosed in the letter which was a reply to the Defendants' letter marked Exhibit "E1" calling for the "Policy Assignment Letter." By the Plaintiff's case, the assured called at their bank on the 14th May 1974 to withdraw some money. He was informed that the premium on the life Policy was in arrears of two quarters namely 1st January, 1974 to 30th June, 1974 and that he should obtain a confirmation from the Defendants' Resident Inspector in Port Harcourt that it would be in order if the arrears were paid by the Plaintiff Company. He returned later the same day with the Resident Inspector on whose assurances the late premium of ₦1,189.06 was paid. Exhibit "D" is the receipt for the payment and carries at its back the following conditions: "This receipt is given for a payment made on account of a proposal or application for revival of a Policy being made to the Company and does not place the Company on risk until such proposal or application for revival has been accepted by the Company." The receipt issued at Port Harcourt is dated 14th May 1974.

Another receipt dated 16th May 1974 from the Defendants' headquarters in Lagos marked Exhibit "D1" was later received for the same amount. Exhibit "D2" is another receipt for money paid under similar circumstances on behalf of the same assured but the Resident Inspector was not called to testify in proof of the assurances allegedly made by him in relation to Exhibit "D." the assured died on 15th May 1974 as evidence by the death certificate marked Exhibit "A."

At the close of the Plaintiffs' case, learned Counsel for the Defendants elected not to call any witness but to rest his case on that for the Plaintiff. Opening the addresses learned Counsel for the Plaintiffs submits that the Plaintiffs have sufficiently proved their case and the Defendants not having led any evidence, cannot challenge the existence or validity of an Assignment of the Assurance Policy which they granted. No such challenge was pleaded.

Counsel refers to the cases of: Chief Ategba Atiri vs. Eden Ekpeyong (1963) 7 E.N.L.R. 21; Abimbola George v. Dominion Flour Mills (1963) 1 All N.L.R. 71; North Western Salt Company Limited vs. Eletrolite Alkali Company Limited. (1914) A.C. 461; Adenuga vs. L.T.C. 13 W.A.C.A. 125.

He contends further that the issue of privity of contract should have been raised before pleadings were ordered and that not having done so, the Defendants cannot seek to do so by cross-examination. He cites the case of Nnamani vs. Agbo (1972) 2 E.C.S.L.R. 35. He submits also that there has been an automatic revival of the life Policy by the late payment of the premium due and which payment was made on the assurances of an accredited representative of the Defendant Company and there being no evidence to show that the representative had no powers to do what he has done, it must be accepted that he was acting within the scope of his authority. Counsel contends that the Plaintiff is entitled to succeed if he can show that other considerations have been brought about by the conduct of the parties as to constitute a waiver of the stipulated condition for the revival of a lapsed Policy and by the issue of Exhibit "D I" the Defendants have ratified the conduct of their agent

and are stopped from denying his authority which he exercised at paragraph 3 of his letter marked Exhibit “E”. In this regard, the case of *Murfiu vs. Royal Insurance Company Limited* (1922) 38 L.T.R. 76 is referred to. Counsel submits that because of the ratification there had been no request to the Plaintiffs to comply with the conditions for a revival and that the discretion in paragraph 7(1) of the Statement of Defence has been delegated to the agent while payment of the premium, though late, was within a year from its being due.

Replying, learned Counsel for the Defendants refers to Bullen and Leake on Pleadings page 81 of the 12th Edition and to the case of *Independent Automatic Sales vs. Knowles & Foster* [1962] 3 All E.R. 27 and submits that a point of law though not pleaded, can be raised at the trial. In furtherance of this submission, he contends that the specific Policy – Exhibit “B” – the proposal for which was made on 5th January 1973, has no connection with the averments in paragraphs 1 and 2 of the Statement of Claim. He refers to S.86(1) of the Stamp Duties Act and submits that the assignment, not having been stamped, has no validity and therefore confers no right on the assignee to sue for the Policy money or to give a valid discharge.

Counsel further contends that there has been no waiver of the conditions of the Policy and that waiver being a kind of estoppel must be pleaded, refers to the case of *Charles Rickards Limited. vs. Oppenheim* [1950] 1 K.B. 616. Counsel urges the Court to enter a judgment of dismissal and not of a non-Suit in consideration of the decisions in *Ferdinand George vs. The United Bank for Africa Limited* (1972) 9 S.C. 264.

Considering the arguments which have somehow been extensive, I find that the real issues of law involved are (a) whether the Plaintiffs can sue on the Assignment in their own name (b) the validity of the Life Assurance Policy as at 14th May 1974 and (c) the nature and validity of the assignment made under it.

The Defendants elected to call no evidence to disprove any facts but rested on the case for the Plaintiff. Indeed, the onus of proving any material averments rest on the Plaintiffs and the effect of calling no evidence in rebuttal in trial by pleadings is that the Defendants are bound by the facts the Plaintiff have proved and can only rely on legal or equitable grounds as defenses and the Court can proceed to judgment. Such grounds are not, as a rule, pleaded but can be raised at the close of Plaintiffs’ case. The capacity of the Plaintiffs to sue in their own name is one of those grounds so raised. In order to decide this issue, one has first to consider the nature of the Assignment on which the action is brought. The right to receive payment under an insurance Policy is a chose-in-action and to entitle the transferee to payment, there must be a valid Assignment of the chose-in-action.

The strictness of the common law rule against the Assignment of chose-in-action has been relaxed by various statutes one of which is the Supreme Court of Judicature Act, 1875 which is an Act of general application and therefore applicable to this State by virtue of S.15 of the High Court Law. Under this Act, a legal Assignment, that is, an Assignment enforceable by action at law, must be in writing and signed by the assignee; it must be absolute and not purporting to be by way of charge only and notice thereof must be given to the debtor or person against whom the Assignment is to be enforced in order to obtain the benefit of the Act. By such an Assignment, the assignee can sue in his own name. An equitable Assignment, on the other hand, is one which is effective to pass an equitable though not a legal right to have the chose-in-action; it is founded in contract directing payment to a third person and may be by way of charge only.

Unlike a legal Assignment, no form of words is required for an equitable Assignment

provided the meaning is plain and shows a clear intention that the assignee is to have the benefit of the chose-in-action. Whether an equitable assignee of a chose-in-action can sue in his own name depends on the nature of the chose-in-action. If the chose-in-action is equitable and the Assignment absolute, an equitable Assignment of it passes to the assignee the right to sue for the recovery and he can do so in his own name where, however, the chose-in-action is legal as in a claim on a Policy of insurance, the assignor or, his legal personal representative must be joined to the action either as Plaintiff or Defendant. Under the Act, a claim on a Policy of insurance is regarded as a legal chose-in-action because it is recoverable or enforceable at law- See Article 996-page 479 3rd Edition Volume 4 Halsbury's Laws of England. Exhibit "C2" is the Assignment in question in this action. It is in writing and directs the payment of any claims due under the Policy to the Plaintiff bank. It is therefore, in my view, not within the Act but rather an equitable Assignment of a legal chose-in-action and even though it is stated to be irrevocable, the assignee cannot sue in his own name – See Article 1054-page 511 Volume 4 3rd Edition of Halsbury's Laws of England. It follows therefore that the Plaintiffs suing on the strength of this Assignment cannot do so in their own name.

In this case of *Okwo Nnamani & Ors. vs. Chief Agbo & Ors. (1972) 2 E.C.S.L.R. 35* cited by learned Counsel for the Plaintiffs, the issue was on the time an application by way of motion challenging the authority of the Plaintiffs to sue in a representative capacity could be made. It is unlike the present action where the issue is whether the Plaintiffs, as assignees, can sue the debtors in their own name. The validity of an Assignment whether legal or equitable depends, besides other considerations, on notice to the debtor. Exhibits "C1" and "C3" are the documents tendered in evidence by the Plaintiffs as the notices. They are blank forms on which the date 18th December, 1972 is stamped and were forwarded to the Defendant Company for completion and return under cover of a letter dated 18th December, 1972 and marked Exhibit "C." These Forms remain uncompleted and unsigned and cannot therefore be binding on the Defendants as notice to them of any Assignment. Even though the purport of notice is to confer priority over claims in which notice has been given, it is pertinent to observe that while the purported notices Exhibits "C1" and "C3" bear the date 18th December, 1972, the Policy marked Exhibit "B" was not in force until the 1st January, 1973. This would mean that the notices were sought to be given even before the commencement of the Policy from which the notices can derive their force.

The Assignment itself since it is in writing must contain particulars of the Policy to which it relates. It speaks of the "above mentioned Policy" but leaves blank the column provided for the description of the Policy. *Besides, the assignment must be stamped as a conveyance because by Section.86(1) of the Stamp Duties Act of the Federation of Nigeria, an unstamped assignment confers no right on the assignee or his personal representative to sue for the Policy money.* The section reads as follows: "No assignment of a Policy of Life assurance shall confer on the assignee therein named, his executors, administrators or assigns, any right to sue for the money assured or secured thereby or to give any valid discharge for the same or any part thereof unless the assignment is duly stamped and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped."

Learned Counsel for the Plaintiff endeavoured to counteract this point by contending that the Federal Stamp Suites Act 1958 is not applicable to Eastern Nigeria and refers to the case of *Ofu Itumo vs. Anyim (1960) 4 E.N.L.R. 48* and The Stamp Duties Law of Eastern Nigeria, to buttress his argument.

That was a case where a number of persons jointly and severally claimed special and general

damages for the burning of 78 houses without claiming any joint interest in any of the houses involved. Each Plaintiff had therefore a separate cause of action and the Defendant's pleaded misjoinder of persons and causes of action. Order 4 Rule 2 of the High Court (Civil Procedure) Rules, 1955 did not cover this point and the question was whether the Court could resort to Order 16 Rule 1 of the English Supreme Court Rules 1883, which covered the point as provided under Section 15 of the High Court Law.

It is my view that the jurisdiction vested in Court under S.15 of the High Court Law is exercisable only in matters of practice and procedure and not of substantive law and even then, only when there is default in the local Rules regarding the point in issues. In other words, where the local Rules provide for a particular matter, it becomes unnecessary to resort to English Rules. It is correct that the Stamp Duties Law of Eastern Nigeria makes no provision similar to S.86 (1) of the Stamp Duties Act of the Federation of Nigeria but cannot be a reason to resort to any English Act to upset the Federal Act. It is rather a reason to adopt and apply the mandatory provision of the Federal Act. I therefore hold that the Assignment is ineffective for want of stamping.

Exhibit "B" is the Life Assurance Policy under which the claim for payment is brought. It was proposed on 5th January 1973 and issued on 29th May 1973. The date of its commencement is the 1st January, 1973. Premium of it is to be paid quarterly in the months of January, April, July and October each year. Exhibit "D" is a receipt dated 14th May, 1974 in respect of premium due for the period 1st January, 1974 to 30th June, 1974. This receipt was given by the Defendants' agent in Port Harcourt and it is averred in the Statement of Claim that payment, though late, was made by the Plaintiff bank on the assurance of the agent that the Policy would be revived despite the breach of a stipulated condition in it.

That condition reads as follows: "A lapsed Policy may be revived within one year from the day upon which the unpaid premium becomes due on proof satisfactory to the Directors being given of the continued good health and eligibility for Assurance of the Life Assured and on payment of the arrears of premium with compound interest." At the back of the receipt Exhibit "D" is the following condition: "This receipt is given for a payment made on account of a proposal or application for revival of a Policy being made to the Company and does not place the Company on risk until such proposal or application for revival has been accepted by the Company."

It is without doubt that on the date payment was made on Exhibit "D", the Policy had lapsed by reason of the non-payment of the premium which had become due for the period 1st January to 31st March, 1974. *In Handler vs. Mutual Reserve Fund Life Assurance (1904) 90 L.T. 192*. It was held that "a Policy which has lapsed may be revived either by agreement between the parties or by some conduct of the insurers as to stop them from denying that the Policy is subsisting. The conduct must be such as to lead the assured to believe that the contract is being treated by the insurers as valid notwithstanding the breach as where they accept a renewal premium." The lapsed Policy in the present action can therefore be revived either by compliance with condition No.3 in its schedule or by some conduct on the part of the Defendants as to amount to an estoppel on them. The stipulated condition was not and could not have been complied with because the assured died on the day following the payment of Exhibit "D". Even if he was alive, the question of payment of compound interest, which is not reflected in Exhibit "D", was also a condition precedent to the revival of the Policy under the stipulated condition. There is also nothing to show that the Defendants by issuing Exhibit "DI" had accepted a proposal or application for the revival of the Policy in accordance with the condition at the back of Exhibit "D".

Indeed, by their letter dated 30th October, 1974 and marked Exhibit “E6” they say that the sum paid on Exhibit “D” is being held in a suspense account and this was after they had become aware of the death of the assured. As there has been no revival under the conditions of the Policy one has to determine whether the Defendants have by their conduct led the Plaintiffs to believe that a revival would be effected if the late premium was paid. In this regard I have to state that in the absence of fraud, an agent, acting in the course of his duty and within the scope of his employment, binds his principal on his transaction over the business of his employers and it is not the duty of the third parties to prove that the agent has no such authority.

The agent of the Defendants in the present action did not testify and therefore the oral assurances alleged made by him to the Plaintiffs remain unproved. However, Exhibit “E” is a letter written to the Plaintiffs by the agent. It is dated 14th May 1973 and its paragraphs 3 and 4 are as follows:

“An outstanding amount of ₦1,088.03 as premium due from 1/4/73 to 1/9/73 inclusive should be paid immediately so as to keep the Policy in force for the risk involved. As soon as we receive this amount from you, the Policy becomes in force.”

From the date of this letter which is 14th May, 1973 the premium for 1st January to 31st March, 1974 which now renders the Policy invalid could not have become due and payable. Besides the sum of ₦1,088.03 represented the premium due from 1st April, 1973 to 1st September, 1973 whereas the period paid for on the purported assurances of the agent was 1st April, 1974 to 30th June, 1974 with the sum of ₦1,189.60. It is therefore quite clear that Exhibit “E” is in no way related to the present action and constitutes no estoppel on the Defendants with respect to the revival of the lapsed Policy. It is a misconception for the Plaintiffs to rely on it.

The conclusion is that there are no proved oral assurances by the Defendants to the Plaintiffs to make them believe that the payment Exhibit “D” would revive the lapsed Policy. Neither is it conclusive that the issue of Exhibit “D1” alone amounts to an acceptance of the conditions for revival as stipulated in condition 3 of the schedule to the Policy. The Policy, not therefore having been revived, cannot form the basis of a claim under it and Exhibit “E” on which the Plaintiffs rely, cannot for reasons of irrelevance, afford them any protection.

I therefore hold that the Life Assurance Policy which forms the foundation of this action had lapsed at the date of death of the assured and had not been revived before action. The assignment made to the Plaintiffs under it is itself invalid for want of stamping and therefore no payment can be made to a person claiming under it. The assignment also being an equitable assignment of a legal chose-in-action does not permit the assignees to sue in their name.

The claim therefore fails and is dismissed.

53.4 REMARKS

Equitable assignment of insurance Policy – How effected – Nature of right created – Form of words required to create same – What confers right to sue in assignee’s name – Whether it must be absolute and not purporting to be by way of charge only and notice thereof must be given to the debtor or person against whom the assignment is to be enforced in order to obtain the benefit of the Act.

53.5. REFERENCES

1. *Chief Ategba Atiri vs. Eden Ekpeyong* (1963) 7 E.N.L.R. 21.
2. *Abimbola George vs. Dominion Flour Mills* (1963) 1 All N.L.R. 71.
3. *North Western Salt Company Limited vs. Eletrolite Alkali Company Limited* (1914) A.C. 461.
4. *Adenuga vs. L.T.C.* 13 W.A.C.A. 125.
5. *Nnamani vs. Agbo* (1972) 2 E.C.S.L.R.
6. *Handler vs Mutual Reserve Fund Life Assurance* (1904) 90 L.T. 192.
7. *Okwo Nnamani & Ors. vs. Chief Agbo & Ors.* (1972) 2 E.C.S.L.R. 35.
8. *Ofu Itumo vs. Anyim* (1960) 4 E.N.L.R. 48
9. *Murfiu vs. Royal Insurance Company Limited* (1922) 38 L.T.R. 76.
10. *Automatic Sales vs. Knowles & Foster* [1962] 3 All E.R. 27.
11. *Charles Rickards Limited. vs. Oppenheim* [1950] 1 K.B. 616.
12. *Ferdinand George vs. The United Bank for Africa Limited* (1972) 9 S.C. 264.

54.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT OF LAGOS

DATE: 10th March, 1969

SUIT NO: LD/337/68

JUDGE: Lambo, J.

**LADUN MARTINS
(Plaintiff)**

vs

**NATIONAL EMPLOYERS MUTUAL GENERAL INSURANCE ASSOCIATION
LIMITED
(Defendant)**

54.2. REPORTS/FACTS/ISSUES.

INSURANCE AND REASSURANCE: – Third Party Insurance Policy – Motor Vehicle – Claim for damages for negligent driving of motor vehicle – Statutory requirement that notice be served on insurers – Section 10(2)(a) of the Motor Vehicles (Third Party Insurance) Act Cap.126 – Whether mandatory that the notice be sent by registered post.

INSURANCE AND REASSURANCE: – Statutory requirement that notice of impending action be served on insurers – Form of letter that is deemed sufficient – Whether must be in a particular form – Particulars a letter needs to disclose to constitute a sufficient notice of action.

INSURANCE AND REASSURANCE: – Construction of towards the determination of the liability of the insurer – When insurer's liability has become fixed by the capital fact of a loss within the range of the responsibility assumed in the contract – Attitude of courts to invitation to deprive an insured of the accrued benefit of indemnification arising from insurers' liability based on narrow or technical construction of the conditions and stipulations of the Policy.

INSURANCE AND REISURANCE: – Enforcement of Third-Party Insurance Policy – Application by insured Defendant for the joinder of Insurance Company as a party to suit brought against him for negligent driving – Propriety of – How treated.

TORT AND PERSONAL INJURY: – Motor Vehicle accident – Negligent driving occasioning bodily harm – Where proved against a party who was entitled to indemnification under a Third Party Insurance Policy – Whether insurers can be compelled to indemnify Defendant by paying over award directly to Plaintiff-claimant.

COMMERCIAL TRANSACTIONS – COMMUNICATION: - Delivery or non-delivery of the letters – Proof of – Where shown that letter was delivered at the Defendant's address to authorized agent (clerk or receptionist, etc.) – Failure of agent to deliver letter to principal – Whether delivery at the office of the trustee would be equivalent to a delivery to him in person.

TRANSPORTATION AND LAW – MOTOR VEHICLE: – Motor Vehicle Insurance – Third party Policy – Insured person’s right of indemnity arising therefrom against insurers – Who may invoke same – Whether open to both insured person and third parties entitled to proceed against insured person for liability person for liability covered under the Policy.

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION: - Insurance Policy – Clause stipulating a reference to Arbitration and an award of an Arbitrator – When deemed waived by parties.

54.3. DECISION OF COURT.

JUDGMENT

LAMBO, J.

The Plaintiff was injured on the 11th September, 1965 by a car belonging to one Ezekiel Hart. As a result of the accident her leg was broken into two. Mr. Hart the owner and the driver of the car had been insured against third-party risks with the Defendant Company (hereinafter referred to as “the Insurers”), under the provisions of the Motor Vehicles (Third Party Vehicles) Act Cap.126 of the Laws of Nigeria. At the material time the Policy of insurance under which Mr. Hart was covered was still in force. In an action by the Plaintiff against Mr. Hart, judgment was entered by this Court on the 18th day of August, 1967 in her favour, for a total sum of £3,745.4s.0d. representing damages and costs. The Insurers have refused to indemnify Mr. Hart, and they now dispute Plaintiff’s claim contending that they had no notice of the proceedings as required by Section 10(2) (a) of the Motor Vehicles (Third Party Insurance) Act Cap 126 “before or within seven days after the commencement of the proceedings in which judgment was given” against Mr. Hart. This was the only point on which issue was joined. It is the only ground on which the Insurers seek to disclaim liability under the Policy.

Now Section 10(2)(a) is to the following effect: - “No sum shall be payable by the Insurer under the provisions of sub-section (1): -

- (a) in respect of any judgment unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had given notice of the bringing of the proceedings;”

Section 10(2) of the Act enables an Insurance Company to avoid liability under a Policy in certain circumstances. The insurers did not in this case seek to avoid the Policy; on the contrary they renewed it at the expiration of its life, save that they imposed an additional term in the Policy upon which in the event of an accident the insured (Mr. Hart) would be liable to pay the first £50 of any claim which might be the subject of indemnity under the Policy, *vide* Exhibits ‘A’ and ‘H’.

The facts in this case are fairly simple. The Plaintiff had been injured by the negligence of Mr. Hart whilst driving his Volvo Motor Car on 11th September, 1965. The Court, in a civil action by the Plaintiff, found against Mr. Hart and awarded damages and costs in the amount hereinbefore stated. About five days after the judgment, Mr. Hart wrote to the Defendants, apparently claiming indemnity under the Policy but he received no reply. He, then, had an interview with the General Manager of the insurers who promised to refer the matter to their Solicitors who would get in touch with him.

In May 1966, before the bringing by the Plaintiff of the proceedings which resulted in the judgment aforesaid, Mr. Hart received a letter from Plaintiff's Solicitor making a claim in respect of the accident. About two months later the Solicitors again wrote him a letter to which was attached a copy of an application for a Writ of Summons. He took the letter together with the attachment to the insurers and left it with a young Ibo Clerk whom he had met before in that office. The insurers, claimed Mr. Hart, knew about the claim against him because he had earlier reported the accident to them. He received "no claim bonus" upon the renewal of his Policy following the accident in question and another one within the year. He was finally sued by the Plaintiff; he said he caused the Writ of Summons to be sent to the insurers and received the letter, Exhibit 'B' dated the 7th October, 1966 in reply. The letter reads as follows:-

Dear Sir,
7th October, 1966.

Re: Claim 8296-Accident 11th September, 1965 At Lewis Street, Lagos.

We refer to your letter of the 28th September and our subsequent telephone conversation of the 6th instant.

Indemnity under the Policy we issue is subject to the Policy-holder fulfilling certain obligations thereunder following any accident likely to give rise to a claim against him.

In particular, you should alert us immediately upon the occurrence and supply full details so that we can make all necessary enquiries to protect our own interest. In addition, every letter, claim, writ, summons or process should be immediately passed to us and immediate notice should be given of any impending proceedings.

We note that you have instructed your Solicitors to represent you at these proceedings and we consider that we have been severely prejudiced by your actions. We intend to reserve our rights under the Policy as the question of indemnity is in some doubt and we are taking legal advice upon our position. We have no wish to act hastily and we will let you have our final decision before this action comes up for hearing on the 24th October.

A copy of this letter has been sent to your Solicitors whom we have unsuccessfully tried to contact on the phone.

Yours faithfully,
(Sgd.)
C.R. TERRY
Claims Superintendent.

The Writ of Summons – *vide* attachments to Exhibit 'E' – would appear to have been issued on 6th September, 1966. Shortly afterwards, on the 27th September, 1966, Mr. Akpodiete, a Solicitor of this Court, acting for Mr. Hart, wrote to inform the insurers of the pendency of the action in the High Court against Mr. Hart, The letter, Exhibit 'C,' is as follows:

Dear Sirs,

Ladun Martins..... Plaintiff

and

I..... Ezekiel Hart... Defendant (Motor Policy No. 11289: R.E. (Ezekiel Hart). I am a Legal Practitioner and have been instructed by your customer, Mr. R. Ezekiel Hart, who is a Defendant in the above suit which is coming up for hearing in the Lagos High Court on Monday the 3rd Day of October, 1966, to act for him.

As you are the Insurers of my client, it is normal and proper to notify you of the accident and of the claim suit, and I hereby do so accordingly. I am further instructed that the Plaintiff's Solicitors have been in touch with you in respect of their claim for £6,000.

I have accepted the brief and you may be rest assured that I will do my best for you and my client and my bill will follow in due course. I should mention that normally you should be joined as co-Defendant in the suit.

Mr. Ezekiel Hart further instructs me that the accident of the 11th September, 1965 also involved another victim, Mrs. Rebecca Taiwo, who has not made any claim. I thought I should apprise you of this in your own interest.

Thanking you in expectation of your kind cooperation.

I remain, Yours faithfully (Sgd.) Ekuo Akpodiete.

C.C.

B.C. Madiebo & Co.,

13/15 Balogun Street, Lagos.

The claim for £6,000 referred to in paragraph 2 of the above letter is contained in the letter, Exhibit 'K' of the 19th May, 1966. Then on the following day Mr. Hart wrote to the insurers giving a historical background to the claim about which his Solicitor had already intimated them. When the action came before the Court, Mr. Hart applied for an order to join the insurers and, on the 24th October, 1966, Alexander, J., granted the application. The insurers, however, moved to discharge the order claiming that a reference to Arbitration under a clause of the Policy was a condition precedent to any right of action against them. On the 14th day of November, 1966, the Court granted their application and ordered that proceedings against them be stayed pending a reference to Arbitration and an award of an Arbitrator. It is to be observed that neither the insurers nor their insured took any steps in this direction as per Conditions 7 of the Policy. They appeared to have waived this condition. It is not now the basis on which the insurers are presently seeking to dispute liability under the Policy. Their reason for doing so is founded on the alleged failure of Mr. Hart to give them notice of the proceedings in pursuance of the Act. On the other hand, Mr. Hart claimed to have informed the insurers of the accident on the 15th September 1965 by filling a Form which he posted to them; the latter, however, denied receiving it, but according to Mr. Hart, the denial came after he was sued by the Plaintiff. Mr. Hart would appear to have been twice involved in motor vehicles in 1965 during the currency of his Policy. Barely two months after the accident of the 11th September, 1965, (the subject matter of the present claim) he was involved in another one on the 13th November, 1965, for which repairs' cost of £164.8s.4d. was paid to Messrs R.T. Briscoe by the insurers.

A clerk to the Plaintiff's Solicitors, one Mr. Binuyo, produced a Dispatch Book (Exhibit 'J') which was in use in the Plaintiff's Solicitors' Office from the 28th June, 1963 till the 10th January 1969. Entries in the Book show, inter alia, a letter from Plaintiff's Solicitors, Exhibit 'K', dated the 19th May, 1966. It was addressed to the insurers and entered in the Dispatch Book on the 20th May, 1966; it was duly signed for on the 23rd May, 1966. The original of the letter was addressed to Mr. Hart and was also dispatched through the Dispatch Book and signed for on the 20th May, 1966. Both entries in the Dispatch Book

followed in sequence.

The letter reads:

Mr. E. Hart,
Inspector General of Police,
Police Headquarters, Moloney Street,
Lagos.

Sir,

I am instructed by my client Miss Ladun Martins of 29 Makinde Street, Surulere to demand from you the sum £6,000 being special and general damages resulting from your negligent driving. On or about the 11th day of September, 1965, you drove your Car No. LG. 9273 negligently at Lewis Street, Lagos. As a result of your negligent driving, you collided with my client and caused her grievous bodily injury. Her both legs were injured. My client was immediately rushed to the Orthopedic Hospital at Igbobi where she was operated upon and admitted into the hospital for treatment which lasted for some months. Up till now, my client goes to the Hospital for treatment.

TAKE NOTICE therefore that unless you pay as demanded above or make a satisfactory arrangement with me on or before the 31st day of May, 1966, I shall carry out my further instructions and that without further notice.

Yours faithfully,
(Sgd.)
Abiola A. Oshodi
Solicitor.

Copy to: -
The Manager
National Employers Mutual Insurance Company,
12/14 Broad Street,
Lagos.
Policy No. 113839.

Mr. Binuyo said that he had previously delivered letters to the insurers at the instance of the two Solicitors. The witness also gave evidence of posting a letter, Exhibit 'M', to the insurers on the 18th August, 1966, giving notice of Plaintiff's intention to sue Mr. Hart to enforce payment of the claim for damages, and threatening that if the claim was not met on or before the 27th August, 1966, proceedings would be commenced against Mr. Hart. The insurers denied receiving the two letters, Exhibit 'K' and 'M'. This is hardly surprising since their defence to the claim is based on alleged failure of Mr. Hart to give them notice of the proceedings.

A point was made by the insurers that the letters were not sent by registered post. Whilst it would have been more satisfactory to do so, it was, however, not a term of the Policy that all correspondence based on it must be registered post.

The Defendants did not themselves claim to have sent their letters, Exhibit 'B,' 'P' and 'Q' by registered post or that there was a collateral agreement to that effect, nor, indeed, that under Section 10(2) (a) of the Motor Vehicles (Third Party Insurance) Act the notice of the bringing of the proceedings must be sent to the insurers by registered post.

The insurers, as I said earlier, denied receiving the letter, Exhibit 'M', of the 18th August,

1966, the last paragraph of which reads as follows:-

“TAKE NOTICE therefore that unless Mr. Hart or your Company pays the said sum of £6,000 as demanded by the proposed writ of summons, on or before Monday 27th August, 1966, I shall file the Writ of Summons in Court and that without further notice.”

It was stated that the first intimation the insurers had of this claim was through a letter, Exhibit ‘C’ of 27th September, 1966 from Mr. Akpodiete, Solicitor to Mr. Hart. This was followed by Mr. Hart’s letter on the 29th September, Exhibit ‘D’. Up to that time the insurers denied ever receiving any notification from Mr. Hart about the accident, and further, that no accident report form said to have been sent by Mr. Hart on the 15th September, 1965, four days after the accident, was in fact received. Mr. Terry who is Claim’s Superintendent of the insurers, however, admitted receiving a copy of the letter (Exhibit ‘K’) dated 19th May, 1966, some 8 months after the occurrence of the accident. The terms of the letter have already been set out above. Letters addressed to insurers in 1966 were signed for by the Receptionist. Mr. Terry could not, however, say who was the Receptionist whose signature appears in the Dispatch Book (Exhibit ‘J’) in respect of the letter, Exhibit ‘K’. He said in evidence that:-

“When the Receptionist received mails, she handed them to me for opening.”

The insurers did not call the Receptionist who was on duty on the 23rd May, 1966, to deny the signature against the entry in the Dispatch Book for the 20th May, 1966. I must presume that there is some sort of record in the insurers’ office showing who that Receptionist is, and that in the ordinary course of duty she would have handed the letter, Exhibit ‘K,’ to Mr. Terry. *In Reed v. Harvey L.R. Q.B. 184* where there was a controversy over the delivery or non-delivery of a registered letter posted to a trustee, Lush, J., said at page 187 as follows:-

“We think the evidence ought to have been gone into with regard to the delivery or non-delivery of the letter. If it were shown that the letter was delivered at the Defendants’ address to the person in charge, then we do not think it would be an answer on the part of the trustee to say, that his clerk took it in, and never delivered it to him. We think the delivery at the office of the trustee would be equivalent to a delivery to him in person.”

Accordingly, adopting the views of the learned Judge, I hold that the delivery of Exhibit ‘K’, on the 23rd May, 1966, at the office of the insurers, to a receptionist who signed for it, is equivalent to a delivery to the insurers.

The evidence in this case points clearly, in my view, to the fact that on the 15th September, 1965 Mr. Hart filed in an Accident Report Form and posted it to the insurers; that in May, 1966, when he received Exhibit ‘K’, he telephoned to the Claims Manager and told him of it. Exhibit ‘K’ shows that a copy of the letter was endorsed to the insurers; that the letter Exhibit ‘L’ with a copy of an intended application for a Writ of Summons was taken by him to the insurers at about 2 p.m. on the 19th August, 1966; that the insurers renewed Mr. Hart’s Policy when it expired; that although the insurers succeeded in getting the proceedings against them stayed in Plaintiff’s action against Mr. Hart, the ground for obtaining that order is not an issue in the present action. It does not strike me as probable that Mr. Hart, a Superior Police Officer, would be so naive as to fail to take advantage of his rights under the Policy; the evidence shows that he had done so on other occasions where lesser claims were involved. I have no reason to disbelieve Mr. Binuyo’s evidence that copy of the letter, Exhibit ‘K’, was delivered to the insurers and that the signatory to the Dispatch Book (Exhibit ‘J’) was the Receptionist on duty at the time.

Equally difficult to brush aside is his evidence that he posted the letter Exhibit 'L' to Mr. Hart and Exhibit 'M' to the insurers. On all of these points, I am satisfied with the evidence of Mr. Hart and Mr. Binuyo and believe them to be true. With this view of the evidence which I have taken, it seems that the contention that the insurers had no notice of the bringing of the proceedings in accordance with the provisions of Section 10(2) (a) of the Motor Vehicles (Third Party Insurance) Act is no longer tenable. I find that the letters, Exhibit 'K' and 'M', are sufficiently formal in character warning the insurers of a proposed action against Mr. Hart if the Plaintiff's claim for damages was not met on or before the 31st May, 1966 and the 27th August, 1966 respectively.

Such notice, as we have in Exhibits 'K' and 'M,' has been held to be sufficient in law – *see the Privy Council case of Ceylon Motor Insurance Association Limited. vs. Thambugala (1953) 2 All E.R. 870; at page 873* of the judgment appears in the following:

“The notice which has been sent in this case sets out the name and address of the proposed Plaintiff, the name of the owner and number of the car which caused injuries, the date of the accident, and the sum which was being claimed from the owner as damages. Their Lordships are of the opinion that these elements, taken together, constitute a sufficient notice of action under Section 134(a) and that there are no elements in it which in any way reduce it to something less than a sufficient notice.”

It is argued that notice of the proposed action within Section 10(2)(a) of the Act and Condition 1 (i) of the Policy shall be given either by the Policy-holder or his legal personal representative. Even if the insurers' contention is correct that Mr. Hart did not himself give notice of the proceedings in which judgment was given, there is evidence, which I believe, that adequate notice was given by Plaintiff through her Solicitors. *In Cross v. British Oak Insurance Company Limited. (1938) All E.R. 383* du Parcq, J., observed at page 386 as follows:-

“It is of the great importance to the person who ultimately recovers judgment that he should be able to recover against the insurers and, though he is not obliged to give the notice himself he may give it.”

Accordingly, I hold that a notice given by an agent of the insured is of equal validity as that given by the insured himself. The learned author of MacGillivray on Insurance Law Fifth Edition has this to say at page 1714:

“In determining the liability of the insurer, he is entitled to the benefit of his contract fairly construed and can stand upon all of its stipulations. But when his liability has become fixed by the capital fact of a loss within the range of the responsibility assumed in the contract, courts are reluctant to deprive the assured of the benefit of that liability by any narrow or technical construction of the conditions and stipulations which prescribe the formal requisites by means of which this accrued right is to be made available for his indemnification. But there is no reason why the same rules of construction should not be applied to conditions requiring notice as to other conditions in the policy. They 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. The conditions ought to be construed fairly to give effects to this object, but at the same time so as to protect the assured against being trapped by obscure or ambiguous phraseology.”

This view would appear to be reflected in Section 8 of our Motor Vehicles (Third Party Insurance) Act which provides that:

“Any condition in a Policy or security issued or given for the purposes of this Act providing that no liability shall arise under the Policy or security or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the Policy or security shall be of no effect in connection with such claims as are set out in paragraph (b) of subsection (1) of Section 6.”

This section is substantially similar to Section 38 of the English Road Traffic Act, 1930. In *Revell vs. London General Insurance Company Limited (1934) All E.R. Rep. 744*.

“The Policy contained a condition whereby it was provided that, if a claim under the Policy was made and rejected and an action was not commenced within three months of such rejection, all benefit under the Policy should be forfeited. The insured’s driver knocked down and injured two policemen, who made claims against the insured. The insurers rejected the insured’s claim for indemnity in both cases more than three months before the insured brought this action to enforce it. The insurers relied on this condition, the insured contended that the condition provided that “that ... liability ... shall cease in the event of some specified thing being ..omitted to be done after the happening of the event giving rise to claim.” and was therefore, by virtue of Section 38 of the Road Traffic Act, 1930, “of no effect in connection with such claims as are mentioned in Section 36(1) (b) of the Act.”

Mackinnon, J., held that the insurers were liable to indemnify the insured because (i) the condition was within the above definition contained in Section 38, (ii) the reference in Section 38 to “such claims” was to claims “in respect of any liability which may be incurred by the insured in respect of death or bodily injury to any person caused by or arising out to the use of the vehicle on a road,” and, therefore, covered these claims to indemnity in respect of the injuries to the policemen.

The learned trial Judge at page 749 of his judgment stated that: -

“The result is that, although the facts as specified in No. 6 of these conditions have occurred, namely, the writ was not issued till more than three months after the claim was rejected by the Company, that clause in the Policy is rendered invalid by virtue of Section 38 of the Road Traffic Act of 1930, and therefore, the second defence also fails.”

On the whole I am satisfied that the Plaintiff has established her claim against the insurers and, accordingly, is entitled to a declaration as per her Statement of Claim, to wit: -

- (1) That the judgment in suit No. LD/440/66 was in respect of a liability required to be covered by a Policy of Insurance No. 113839 issued to one R.E. Ezekiel Hart and dated the 2nd day of September, 1964;
 - (2) That pursuant to the said Policy the Defendants are liable to pay the Plaintiff the sum of £3,745.4s.0d. being the said sum under the said judgment with interest at 4%.
- The Plaintiff is awarded the costs of this action which, together with £38.4s.3d. out-of-pocket expenses, I assess and fix at 158 guineas.

Judgment for the Plaintiff: Declaration as per Statement of Claim ordered.

54.4 REMARKS

Action brought against a Defendant entitled to indemnification under a Policy of insurance – Statutory requirement that notice of action be served on insurers – Whether service of notice of action on agent of insurer is valid service on the insurer – Whether notice of the proposed action within Section 10(2) (a) of the Act is only valid if given by the Policy-holder or his legal personal representative – Whether service of notice of action by Plaintiff's solicitor on the insurer's Company is sufficient notice.

54.5. REFERENCES

1. *Ceylon Motor Insurance Association Limited. vs. Thambugala* (1953) 2 All E.R. 870.
2. *Cross vs. British Oak Insurance Company Limited* (1938) All E.R. 383.
3. *Revell vs. London General Insurance Company Limited* (1934) All E.R. Rep. 744.
4. *Reed vs. Harvey* L.R. Q.B. 184.
5. *Privy Council case of Ceylon Motor Insurance Association Limited. vs Thambugala* (1953) 2 All E.R. 870 at page 873.

55.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT OF JUSTICE

DATE: 10th September, 1956

SUIT NO: 1955-1958 WNLR 154

JUDGE: Taylor, J.

**MARK KAYODE.
(Plaintiff)**

vs

**ROYAL EXCHANGE ASSURANCE
(Defendant)**

55.2. REPORTS/FACTS/ISSUES.

INSURANCE AND REINSURANCE: - Motor vehicle insurance Policy – Breach of by insurer – Claims by policy holder to recover thereto – Heads of claim allowed – How construed from Policy – Pre-accident value of vehicle – How determined – Cost of repairs – Party on whom onus of proof lies – Consequential loss awards – “Loss consequent upon the accident and in which the motor vehicle was at the same time damaged” – Meaning of – How determined.

INSURANCE AND REINSURANCE: - Motor vehicle insurance – Recovery for “loss of use” under a Motor vehicle Policy – Period covered – Deductibles – Cost of towage – How determined – When lack of credible expert witness would be fatal – Relevant considerations.

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION: - Agreement containing an arbitration clause – Whether it can be waived – Nature of – Whether it can oust the jurisdiction of the courts or prevent parties from putting in a claim in court despite its existence.

TRANSPORTATION AND LOGISTICS LAW: – Motor vehicle used for transportation – Where insured – Damage thereto – Heads of claim that may be recovered – How determined.

PRACTICE AND PROCEDURE – COURT: - Court discretion– Application for stay of proceedings pursuant to the activation of an arbitration in the agreement founding the suit before the court – How treated.

55.3. DECISION OF COURT.

JUDGEMENT

Taylor, J.:

The Plaintiff claims from the Defendant Company the sum of £4,000, being general and special damages for breach of a contract dated the 12th February, 1955. This sum is made up as follows: - £1,100 is claimed as the pre-accident value of the lorry; £2,100 as loss of

earnings from 16th April to 17th November, 1955, at the rate of £300 a month. £24 is claimed as towage fees and £776 as general damages. The Plaintiff is the owner of a motor vehicle No. 00 7812, which he used for plying for passengers. The Defendant is an insurance Company and the contract entered into was one of Insurance which is defined in Shawcross on Motor Insurance 2nd Edition at page 70 as:- “A contract whereby one person called the insurer undertakes in return for the agreed consideration called the premium, to pay another person called the assured, a sum of money on the happening of a specified event.”

The Plaintiff gave evidence on the 31st July, 1956, and stated inter alia that he bought the lorry No. 00 7812 on the 2nd February, 1955. It was new and not second-hand when he bought it. He had a body built on it and then took it for testing to the Motor Traffic Officer, who passed it and gave him the necessary authority to carry forty-three passengers. After the test, he insured the lorry with the Defendant Company on the 12th February, 1955, for £1,140 and paid a premium of £121,12s 7d. He was given Exhibit “A,” the insurance Policy. A month afterwards, the lorry was damaged on the Ibadan-Shaki Road. He said he was in the lorry when the accident took place and said that the cause of the accident was a tyre burst. He testified to the damage caused to the lorry as a result and said that the Defendant was informed. Five days after informing the Defendant Company, the lorry was removed by Khalil and Dibbo to Messrs S.C.O.A. He paid Khalil and Dibbo by virtue of Exhibit “E” the sum of £24.

The Invoice is dated 16th March, 1955, and payment is stated as being made on 19th March, 1955. The lorry was repaired, but not to the Plaintiff’s satisfaction, for he stated it was not repaired to its pre-accident value. He wrote to the Defendant to refer the matter to arbitration and tendered Exhibits “C” and “D” in respect thereof. Exhibit “C” is a letter dated the 6th July, 1955, written by the Solicitor of the Plaintiff to the Defendant, in effect expressing the Plaintiff’s willingness to submit to arbitration and requesting the Defendant to declare their final stand. The reply to this was dated the 18th July, 1955, and the Defendants stated their preparedness to submit to Arbitration but pointed out the delay that is usually caused by Arbitration and in the alternative suggested that the services of the Chief Engineer of Messrs U.T.C. Motor Limited, Ibadan together with an engineer appointed by the insured be co-opted and a joint inspection be made and a report submitted.

The Defendant, too, was to be represented. As a result of Exhibit “D” the Plaintiff appointed one Karunwi as his mechanic. The Plaintiff said he heard nothing more from the Defendant in this respect, but later, the Defendant’s agent, Messrs S.C.O.A. informed the Plaintiff that they had instructions to repair the lorry, which they did, and invited the Plaintiff to inspect the same. He did so and was still not satisfied with it. Further repairs were refused by the Defendant’s agent. The Plaintiff asked to be allowed to take the lorry, and he was given money for the repairs, which he would see to, and they were done to his satisfaction. This was refused unless he signed for the delivery of the lorry. He was to sign, in effect, what turned out to be a satisfaction note. He refused to do this. However, later, the lorry was taken out to the Motor Testing Officer, who is authorized by the Government to test vehicles and, if roadworthy, to issue a roadworthy certificate in respect thereof. This vehicle failed the test. The lorry is still with the Defendant Company’s agent, Messrs S.C.O.A. The Plaintiff values the lorry at £1,100 before the accident. He further stated that his earnings a day were £4.10 on the lorry, and that out of this sum, he pays £1 for the servicing of the lorry every thirty days, and he pays the driver £4 a month. He claims that at this rate, for seven months instead of eight months for he allows the Defendant’s agent one month within which to effect the repairs. Under cross-examination, he stated further that he paid £120 to have the body built on the lorry and that the price of the lorry was £1,000. He contradicted

himself over the question of the date of the repairs in relation to the consultation with his Counsel, but this was not material. Two further Exhibits, “I” and “11”, were put in under cross-examination. Exhibit “E”, a letter dated 28th of April, 1955, was written by Plaintiff’s solicitor to the Defendant and notified the latter of the damage to the lorry on the 11th March, 1955, and of the expenses of towing incurred by the Plaintiff. In this letter the Plaintiff’s attitude seems to be one of a replacement of the lorry by a new one instead of repairs as he says same was a total loss and he states further in paragraph 6:- “If your firm does not agree with my clients, it is hereby suggested that the matter be submitted to arbitration, for my client is not prepared to accept anything other than a total replacement or payment of the pre-accident value of vehicle.”

Exhibit “F” was dated the 6th May, 1955, and was in reply to Exhibit “E.” It referred the Plaintiff to paragraph 4 of the Policy and further stated that Messrs S.C.O.A. had been further instructed to repair the lorry and paragraph 2 of the letter further stated:-

“We would further suggest that the time for the insured to complain as to the method of dealing with the claim is when the repairs have been completed and for very good reasons, he is unable to accept them as satisfactory. You will, of course, appreciate that if such a complaint is made, it must be substantiated by the opinion of a reputable engineer following inspection by him of the repaired vehicle.”

The next witness was Gabriel Kolade, a Policeman No. 1011 of the Motor Traffic Unit. This witness began his evidence in a most unsatisfactory manner, unsatisfactory not in the sense of tending to disbelief but in a manner unbecoming of a Policeman who is supposed to be an impartial witness. He was at first reluctant to testify. He began his evidence with: “I cannot remember the Number of the vehicle tested on the 12th of December, 1955.”

That was when the number of this lorry was put to him, and he was asked if he remembered the vehicle being tested that day. His answer by itself is at first understandable, but when it is borne in mind that this witness was served with subpoena duces tecum on the 21st of July, 1956, to produce at the hearing the record where he recorded the result of the testing of vehicle No. 00 7812 on 2nd of December, 1955 (which was a mistake for 12th December, 1955) one would have expected him to come to Court prepared to testify on the matter and more so in view of the fact that a subpoena ad testificandum was issued on the Motor Testing Officer to testify as to the result of the testing of the vehicle in question on the 12th December, 1955. After fifteen minutes, this witness refreshed his memory and continued his evidence with the words: -

“I remember something about Lorry No. 00 7812.”

He stated further that the vehicle was tested in his presence and the result was that the vehicle failed the test and was found not to be roadworthy. He stated under cross-examination that he refreshed his memory from what he called the defect sheet, which was then tendered by Counsel for the defence and marked Exhibit “G.”

The driver then gave evidence and corroborated the master – the Plaintiff as to the daily earnings of the lorry and the cause of the accident and stated further that when the tyre burst, the lorry went off the road and hit a tree. He further corroborated the Plaintiff as to the sum of £1 paid every thirty days for servicing of the lorry. He then tendered Exhibits “H” and “H1”, the former Certificate of Roadworthiness of the lorry and stage carriage license of the same.

The Plaintiff's witness was Emmanuel Karunwi, a motor mechanic, who gave evidence as to the state and condition of the lorry on inspection by him. I will not deal with his evidence at any length because he came to testify as an expert and was found to be most inexperienced in respect of such minor parts of the car as the tachometer or revolution counter when questioned by the Court. I reject his evidence. I am, however, perfectly satisfied with the other Plaintiff's witnesses whose evidence I accept subject to the minor discrepancy referred to by me. I did not form the impression that Gabriel Kolade, P.C. 1011, was an untruthful witness by his demeanour, nor did I even form the impression that his memory needed much refreshing.

The Defence then called Sydney Brian Savage, their Claims Manager. He corroborated the Plaintiff that S.C.O.A. was instructed by them to repair the vehicle when the former notified them of the accident. He tendered Exhibit "J", a letter written to them by the S.C.O.A. Motors, Ibadan, and also Exhibit "K", another letter written by the U.T.C. Limited, Motor Department, Ibadan, to the Defendant informing the latter of the repairs done to the lorry and the condition of the lorry. Under cross-examination, he said that he knew that the lorry was for use as a passenger carrying vehicle and admitted the agency of S.C.O.A., Ibadan, for the Defendant. He further corroborated the Plaintiff as to the satisfaction note being required before a vehicle is allowed to leave the repair premises.

Finally, the Defence called Lucien Paul Leterne, the Manager, S.C.O.A., Ibadan, who confirmed that the vehicle was repaired by his firm and is still in the garage. He stated that the vehicle was now in good condition. Counsel then proceeded to address me and draw my attention to the relevant sections of the Policy and the interpretation they wish me to put upon the same. The points for decision are the following;

1. Was the vehicle repaired in accordance with the terms of the Policy?
2. If not then to what is the Plaintiff entitled?

Looking at Exhibit "A", it will be seen that the vehicle was insured for the sum of £1,140. The lorry appearing on the body of the Policy is not the lorry with which we are concerned, but it is not disputed that the Memo attached to this Policy and dated the 14th March, 1955, makes the terms, conditions and expectations of the Policy applicable to the lorry in dispute and which is shown on this Memo as Austin Lorry No. 00 7812. What then are the liabilities of the Defendant in this case?

They are stated in Section 1, sub-sections (i) and (ii). The bone of contention in this case is the construction to be put upon sub-section (ii) of the Policy. I propose to quote these sub-sections. Sub-section (i): The Company will indemnify the insured against loss of or damage to the Motor Vehicle and/or its accessories whilst thereon;

- (a) by accidental collision or overturning or collision or overturning consequent upon a mechanical breakdown or consequent upon wear and tear;
- (b) by fire, external explosion, self-ignition, or lightning, or burglary, house-breaking, or theft;
- (c) by malicious act;
- (d) whilst in transit by road, rail, inland waterway, lift, or elevation.

The Plaintiff is covered by sub-section I (a), for on the evidence which I accept, the damage took place as a result of a tyre burst and accidental collision without a tree. The Defendant's

liability under this head cannot, on the evidence before me, be seriously contested. The only point advanced by the Defendant is that they have repaired the vehicle to its pre-accident value. Can it be contended that a lorry bought on the 2nd February, 1955, in a brand new condition and which had passed the roadworthy test and was damaged on the 11th March, 1955, was returned to its pre-accident value by repairs which when completed and the vehicle tested by the testing authorities did not enable the vehicle to pass the test for roadworthiness? Undoubtedly, the Defendant has not discharged its duty fully and must be held liable under this head. Be it noted that I have come to this my decision in the absence of Exhibit "G" which, though tendered by the defence, I do not allow to have any weight on my mind. The vehicle was insured for £1,140 as from the 12th February, 1955, and the claim is for £1,100 stated as its pre-accident value.

There was no evidence led by the defence in rebuttal of this. The vehicle being insured for £1,140 the Plaintiff is entitled to the sum of £1,140 on the authority of *Inre Wilson and Scottish Insurance Corporation Limited* (1920) 2 Ch.D., page 23 at pages 31-32 per Astbury, J. but since the claim is for £1,100, I cannot award more than is claimed and I therefore award the Plaintiff the sum of £1,100 on this head of liability. Section 1 sub-section (ii) states as follows: -

"The Company shall not be liable to make payment in respect of consequential loss depreciation, wear and tear, mechanical or electrical breakdowns, punctures or breakages, nor for damages caused by overloading or strain or by explosion of the boiler of the motor vehicle nor for damage to tyres unless the motor vehicle is damaged at the same time."

Learned Counsel for the Defendant interprets this sub-section as meaning that the Defendants are in no way liable for consequential loss and further that the Defendants are liable only under sub-section (i) or sub-section (ii) but not both. Looking at the section, it is quite clear that it is governed by the words "unless the motor vehicle is damaged at the same time." The comma should therefore be read after the word "tyres" and before the word "unless." In other words, the Company is not liable for consequential loss and all those heads of liability therein stated unless at the same time the motor vehicle is damaged. As for Counsel's other contention, one would have expected to find the word "or" between sub-section (i) and sub-section (ii) if Counsel's contention were correct. The loss, therefore, comes under this section, being a loss consequent upon the accident and in which the motor vehicle was at the same time damaged. The object of section 1 sub-section (ii) is to exempt the Defendant from consequential loss such as the Plaintiff has suffered by the non-user of the vehicle for those eight months but only under certain conditions or to put it in another way, the object is to make the Company liable for consequential loss only if the vehicle is at the same time damaged. Had the intention been to exempt the Company from consequential loss altogether, one would have expected this sub-section to be worded in a manner similar to that which is found at page 503 of *Shawcross on Motor Insurance* (2nd Edition), which states as follows:

"The Company shall not be liable to pay for

(a) Loss of use depreciation wear and tear mechanical or electrical breakdown failures or breakages."

The learned Author goes on to say on page 504 as follows – "This exception presents many difficulties of construction

"Loss of use." This refers to the loss which the assured sustains of the use of the vehicle during the time that it is out of action as a consequence of some damage covered by the clause. As has been pointed out, such a loss would, without this express exception, not be

covered unless the Policy expressly extended to it. In certain circumstances, it should be noticed that insurers who fail to perform their part of the contract may be liable for the loss of use. The exclusion of loss of use excludes any further loss caused thereby.”

To how much then is the Plaintiff entitled? He claims that for seven months out of the eight months in which the vehicle was with the Defendant’s agent. The vehicle was towed to S.C.O.A. in the month of March 1955, and the vehicle is still there to this day. The claim is made as from 16th April to 17th November, action having been commenced on the 19th November, 1955. The Plaintiff claims at the rate of £300 a month. He stated that he pays £1 for the servicing of the car every thirty days and £4 to his driver every month. The Plaintiff testified that repairs could have been completed in one month, and his mechanic, Mr. Karunwi, supported him in this respect.

The Defendant called no witness to testify on this point. I have already rejected the evidence of the mechanic, and since the Plaintiff is not himself a mechanic, I reject his estimate of one month given his evidence as to the damage done to the lorry, e.g., he told me that the chassis frame was bent in three places and other extensive damage was done. I would estimate a reasonable period at four months, taking into account the fact that the garage would be unable to devote the whole period to it, in view of the fact that they would have other vehicles to repair and service.

The Plaintiff is therefore entitled to consequential loss for four months at the rate of £300 a month which comes to £1,200 less the sum of £4 a month for the salary of the driver for those months which comes to £16 and less £1 a month for four months servicing of the car after the repairs could have been completed, making a total deduction of £20, £1,200 to £1,180.

In respect of the towage fees, this is covered by S.1. Sub-section (iii), which states thus-

“In the event of the motor vehicle being disabled because of loss or damage covered under this Policy, the Company will bear the cost of protection and removal to the nearest repairers, but not exceeding twenty per cent of the agreed cost of repairs.” There is no evidence as to the agreed cost of repairs, nor has the Plaintiff given me any idea as to the cost of repairs with the exception of the evidence of his mechanic, which I have rejected as unreliable. I must therefore refuse this head of liability.

Under the head of general damages, the Plaintiff is suing under the Policy which states and limits his claims. He cannot, in my view, succeed under this head of claim which is not covered by the Policy and is negative by provisions of Section 1 of the Policy.

It should be stated in passing that this agreement contains an arbitration clause under condition 8. This matter is pleaded in paragraph 10 of the Statement of Defence and though Counsel for the defence stated specifically that he was abandoning it, yet it should be mentioned that an arbitration clause in an agreement such as this does not in any way oust the jurisdiction of the courts, nor does it prevent parties from putting in a claim in court despite its existence; it merely enables the other party to apply for a stay of legal proceedings pending such arbitration. Such an application, in my opinion, is made by way of motion on notice, and even then, the grant or refusal of the stay is within the court’s discretion. Authority for this will be found in Shawcross as above at page 615.

The result is that the Plaintiff is entitled to judgment for the sum of £2,280, which I award him with costs.

Judgment for Plaintiff.

55.4 REMARKS

Claim for general damages against insurers for breach of contractual duties – Where Plaintiff is suing under the Policy which states and limits his claims – Whether Plaintiff cannot succeed for being a head of claim which is not covered by the Policy.

55.5. REFERENCES

1. *Shawcross on Motor Insurance – 2nd Edition at page 70.*
2. *Motor Vehicles (Third Party Insurance) Act 1945.*

56.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT

DATE: 18th November, 1970

SUIT NO: LD/463/69

JUDGE: Adefarasin, J.

**OLUSANYA
(Plaintiff)**

vs

**1. ALIMI AKINTOLA
2. THEOPHILUS AJILORE
3. MERCURY INSURANCE COMPANY LIMITED
(Defendants)**

56.2. REPORTS/FACTS/ISSUES.

The Plaintiff brought an action against the 1st, 2nd, and 3rd Defendants jointly and severally for the sum of £5000, being special and general damages suffered by the Plaintiff as a result of the negligence of the 1st Defendant as a servant of the 2nd Defendant "in manipulating and or controlling stage carriage No. LK 2601 owned by the 2nd Defendant."

The evidence was that the 1st Defendant was the servant of the 2nd Defendant and that in the course of his employment, he drove the stage carriage with the Plaintiff and two others in it as fare-paying passengers. The evidence showed that the 1st Defendant drove the said vehicle at an excessive speed and swerved from one side of the road to the other and collided with an oncoming vehicle.

56.3. DECISION OF COURT.

HELD:

- (1) The 1st Defendant was grossly negligent and, as a result, the Plaintiff suffered serious injuries. The 2nd Defendant, as the master of the 1st Defendant, was liable to the Plaintiff for the damages suffered by him.
- (2) In an action for damages for negligence arising out of the use of a motor vehicle in respect of which an Insurance Company has agreed to indemnify the insured, it is wrong to join the Insurance Company since it is not a tortfeasor.

JUDGEMENT

ADFFARASIN, J.:

This is a claim by the Plaintiff against the 2nd and 3rd Defendants, jointly and severally, for the sum of £5,000 being special and general damages suffered by the Plaintiff as a result of the negligence of the 1st Defendant as a servant of the 2nd Defendant "in manipulating and or controlling stage Carriage No. LK2601 owned by the 2nd Defendant along Lagos-Ikorodu Road on the 2nd February, 1968,..." The 1st Defendant, who drove the vehicle No. LK2601, at the time of the incident, complained about, did not appear at the trial. The Writ

of Summons in the case was, in pursuance of the order of this Court, pasted at the door of his residence, No. 91 Docemo Street, Lagos. The 1st Defendant did not appear at the trial or defend the action. He filed no Statement of Defence. The 2nd Defendant did not turn up at the trial, but the representatives of the 3rd Defendant company were present.

The case of the Plaintiff is that the 1st Defendant, while in charge of the vehicle No. LK2601 on the 2nd of February, 1968, drove the vehicle negligently, drove it at an excessive speed, failed to take sufficient regard for traffic that was or might reasonably be expected to be on the road, failed to keep to his side of the road and failed to stop, slow down or swerve in any other way to control the vehicle and avoid its collision with the vehicle No. LN8457, which was travelling in the other direction. As a result of the negligence of the 1st Defendant, the Plaintiff, who was a passenger in the 1st Defendant's vehicle No LK 2601, was injured and had to be admitted to the hospital. The second Defendant is joined in the action as the master of the 1st Defendant, in the course of whose employment the 1st Defendant was driving. The 2nd Defendant denied all the averments in the Plaintiff's Statement of Claim alleging negligence on the part of the 1st Defendant and the fact that the 1st Defendant was, at the material time, the servant of the 2nd Defendant and in the course of his employment.

I will deal first with the issue of the liability of the 1st and 2nd Defendants. As I stated earlier, the 2nd Defendant denied that the 1st Defendant was his servant or that he was driving the commercial vehicle No. LK2601 in the course of his employment as the 2nd Defendant's servant. The 2nd Defendant pleaded in paragraphs 3 and 4 of his Statement of Defence that the 1st Defendant was not his employee and also that the car was driven at the material time by the employee of the hirer of the vehicle. He did not, however, offer any evidence in support of these averments. Evidence of a clear nature was led to show not only that the 2nd Defendant was the owner of the Commercial vehicle No LK 2601, but that at the material time that the vehicle was driven by the 1st Defendant, who was his servant and who drove it at his instance and in the course of his employment.

The Plaintiff said, and I believe him, that both the 1st and 2nd Defendants visited him in hospital and both of them told him that the 2nd Defendant owned the vehicle and that the 1st Defendant was his servant employed to drive the vehicle. I also accept the evidence of Police Corporal Zaccheus Ilori (Plaintiff's 4th witness) who stated that the 2nd Defendant, after being served with the Traffic Police Form MT2 requesting him to produce the driver within 7 days, the 2nd Defendant produced the 1st Defendant before the Ikeja Police Station. The 2nd Defendant did not give any evidence at all; he did not appear at the trial. It is my finding that the 1st Defendant was the servant of the 2nd Defendant and that in the course of his employment as such a servant, he drove the stage carriage, No. LK. 2601 on 2nd February, 1968, with the Plaintiff, Mukadas Finni (Plaintiff's 2nd witness) and Police Constable George Ogunbiyi (Plaintiff's 3rd witness) in it as fare-paying passengers.

Evidence of a compelling nature was led to show that the 1st Defendant drove the vehicle recklessly and negligently. The Plaintiff and his witnesses Finni and Ogunbiyi, said in their evidence which I believe, from the time the vehicle had passed Palm Grove, it started to move at an excessive speed and began to swerve from one side of the road to the other. So frightening was the speed and how he drove that all the passengers began to shout and to appeal to him to drive carefully and at a slower speed. The 1st Defendant paid no heed to their appeal. In the end, he swerved from his lane on the road to the offside of the road when facing Ikorodu. There he collided with the vehicle No. LN. 8457, which had been going in the opposite direction and was virtually off the tarmac to avoid a collision. I do not doubt at all that the 1st Defendant was grossly negligent and that, as a result, the Plaintiff

suffered serious injuries, which I shall discuss later on. I accept the evidence of the Plaintiff and his witnesses, Finni, Ogunbiyi and Police Corporal Ilori and I am satisfied that the negligence of the 1st Defendant has been well established. The 2nd Defendant, as the master of the 1st Defendant, is liable to the Plaintiff for the damages suffered by him. I now turn to discuss the matter of the liability of the 3rd Defendant company, which is the Insurance Company that entered into an insurance agreement with the 2nd Defendant to indemnify him in respect of the vehicle No. LK 2601 with regard to third party risks.

The question that arises for consideration is whether an insurance Company ought to be joined in an action for damages for negligence arising out of the use of a motor vehicle in respect of which the Company has agreed to indemnify the insured. My view is that such an insurance company cannot be joined in such an action for damages for negligence since it is not, by any stretch of the imagination, a tortfeasor.

What I mean is amply illustrated in the case in hand by the particulars of the claim, which claims against all three Defendants:

"...jointly and severally, and in the alternative £5,000 being special and general damages suffered by the Plaintiff as a result of the negligence of the 1st Defendant..."

It is abundantly clear from the foregoing quotation from the particulars of claim that what is claimed against the Defendants (including the 3rd Defendant company) is for damages suffered by the Plaintiff as a result of the negligence of the 1st Defendant. The evidence led by the Plaintiff does not support the claim that the 3rd Defendant had anything to do with the act of the 1st Defendant, of which the Plaintiff complains, or that the doctrine of vicarious liability could apply to him. They could not, therefore, to my mind, be joined to an action where the only allegation is that there was an act of negligence by someone else in respect of a vehicle covered by an insurance Policy of which they are the insurers. It might be different if there were any dispute on the liability of the insurance company as to their liability to indemnify the assured. It seems to me that there is a complete misunderstanding of the decision of the Supreme Court in *Sun Insurance Company vs. Ojemuyiwa*, 1965 NMLR p.451.

In that case, Bairamian, J.S.C. (as he then was) at page 454 of the report stated: -

"The remaining reflection is that, as in Nigeria, civil cases are tried by a judge alone; there is no need to conduct those fatal accident cases in a world of make-believe. 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 insurers who control the defence formally out of the suit; we would ask the Solicitors of the parties to consider whether in these third party insurance cases it would not be better to have the insurers also joined."

In the *Sun Insurance Company* case, the Supreme Court, acting under section 117 (6) of the Constitution of the Federation, granted leave to the insurers as a person having an interest in the matter of a claim for damages for negligence within the meaning of section 117 (6) of the Constitution. Since then, there appears to be a thinking amongst some legal practitioners that the Supreme Court decision was an authority for joining an Insurance Company in every running down case in which the insurance company could be liable for contribution or indemnity. This thinking, to my mind, is a complete misunderstanding of the *obiter dictum* of Bairamian, J.S.C., in the *Sun Insurance Company* case. While it is not doubted that an Insurance Company is entitled to be joined where there is an issue as to whether there is a contract of indemnity between the Defendant and the insurance company,

a joinder of an insurance company to a claim for damages for negligence simplifier is quite wrong. The insurance company is not the wrongdoer. What concerns the Company is purely a contractual contract of insurance.

However, the actual wrongdoer, the Defendant to the claim for damages for negligence, who apprehends a dispute between him and his insurers as to the liability of the latter under the insurance Policy, could apply to join such insurance company. In that case and, not until then, is there also an issue concerning the contract of indemnity. In the instant case, the joinder of the insurance company is wrong since there is no dispute whatsoever touching the company.

In Carpenter vs. Ebbblewhite and others, 1939 1 KBD p. 347 Greer, L.J., discussing whether an insurance company can be joined to an action in circumstances as in the instant case, said:-

"It seems to me that the making of such a claim is contrary to anything that has ever been decided in regard to actions for declarations. It has never been determined that in an action by a Plaintiff against a Defendant, there can be a claim by the Plaintiff for a declaration of liability against a third person for the relief claimed in the action, where no dispute has as yet arisen between the Plaintiff and that person. It would not make any difference if the claim for a declaration against that person were made in a separate action against him, for it would still be vexatious for the Plaintiff to bring such an action against that person before any dispute had arisen between them. It seems to me that no dispute can arise between the Plaintiffs and the insurance company until after the disposal of the action by the Plaintiffs against the Defendant in favour of the Plaintiffs and the establishment of a right of indemnity by Ebbblewhite against the insurance company."

Following the decision in the Ebbblewhite case, I cannot accept the proposition that the *obiter dictum* of the Supreme Court in the Sun Insurance Company case is an authority for an injured person to join his adversary's insurance company to an action for damages sustained by him by the negligence of his adversary in a motor accident. (See also *Post Office vs. Norwich Union Fire Insurance Company 1967 A.E.R. p.577*). I would, therefore, dismiss the Plaintiff's claim against the 3rd Defendant.

I now come to consider the matter of damages claimed by the Plaintiff. He claims special and general damages of £5,000, whereof £2,010 is special damages and £2,990 is general damages. As special damages, he claims £1,920 as loss of income from 2nd February, 1968, at the rate, as he said, of £80 per month. Under the same item of special damage, he claims £69.5s.0d. for medical expenses and £20.15s.0d. as travelling expenses. The oral evidence which the Plaintiff did not support the claim in his Writ and his Statement of Claim. For instance, he said he was claiming £60 on medical expenses as against £69 claimed in his Statement of Claim. He claimed £70 as Travelling expenses, whereas in his Statement of Claim, it was £20.15s.0d. What is worse, the Plaintiff gave no evidence at all as to the basis for his claims. He just said that he earned £80 per month without showing how he arrived at this figure. At another stage in his evidence, he stated that his monthly earnings were £100. Special damages must be proved strictly, and this the Plaintiff has failed to do. He has failed to give any satisfactory proof of his earnings. This he might have done by giving evidence as to his monthly salary or profits. He could do it by showing the accounts of his business or by producing his income tax receipts. He failed to show the cost of medical expenses, which he could have done by producing receipts. He did not establish that he spent £20.15s.0d. on travelling. Granting that it is not convenient for anyone to take receipts from taxi drivers and buses, he could have kept a daily book of accounts showing how much

he spent on transport. One gets the impression that the Plaintiff is out to inflate the damage suffered by him. The items of special damage have not been proved, and I am unable to make any award under this head.

The evidence establishes that the Plaintiff suffered a compound fracture of his humerus, radius and ulna, and had an extensive wound of the upper limb with fractures of three main bones in the upper arm and the forearm around the elbow joint. As a result of the severe injuries which he suffered as a result of the accident, he had a series of operations after which he was discharged on 16th July, 1968, only to be re-admitted and re-operated upon on 1st June, 1970. He was finally discharged on 8th August, 1970. Up till the time of the hearing, his fractures were not united and he still goes about in plaster. His degree of disability for workmen's compensation had been assessed at 65%. I think the degree of disability under the Workmen's Compensation Act is not useful for consideration in assessing the quantum of damage in a case such as this, but it does give an idea of the extent and nature of the injury. There can be no doubt that the Plaintiff has suffered considerable pain and inconvenience and that these have continued from the 2nd February, 1968, till the date of the hearing. He still faces yet another operation soon. Dr. Orhewere testified to the effect that the usefulness of his right hand has been significantly diminished.

I believe this and accept the whole evidence of Dr Orhewere as to the nature of the injuries suffered by the Plaintiff, the treatment which he received, and other prospects he has for the future. I take the whole of the circumstances of the Plaintiff into consideration-the injury which he suffered, the protracted treatment for his injuries which has been spread over a period of very nearly three years, the pain and discomfort he has had to put up with, the handicap brought upon him by reason of the injury and the fact that even now he cannot hope for a full use of the injured arm. I am entitled to take all this-as indeed the expenses which this situation had imposed upon him by way of travelling to and from hospital and his inability to pursue to any measure his employment and his pleasures-into consideration and to fix that sum which, as far as money can do it, will put the Plaintiff in the position he might have been had this tragedy not befallen him, I have come to think that a sum of £1,200 as general damages will be fair and reasonable having regard to the matters to which I have referred.

Accordingly, I enter judgment in favour of the Plaintiff against both 1st and 2nd Defendants, jointly and severally, for £1,200 general damages for the negligence subject matter of this action. I assess costs against both the 1st and 2nd Defendants at £84. As I had said earlier, the 3rd Defendant ought never to have been joined and I would make an order that the Plaintiff's claim against them be dismissed with £18.18s.0d. costs to the 3rd Defendant company.

Judgment for the Plaintiff: Claim against the third Defendant dismissed.

56.4 REMARKS

This is a claim by the Plaintiff against the 2nd and 3rd Defendants, jointly and severally, for the sum of £5,000 being special and general damages suffered by the Plaintiff as a result of the negligence of the 1st Defendant as a servant of the 2nd Defendant "in manipulating and or controlling stage Carriage No. LK2601 owned by the 2nd Defendant along Lagos-Ikorodu Road on the 2nd February, 1968," The 1st Defendant, who drove the vehicle No. LK2601, at the time of the incident, complained about, did not appear at the trial. The Writ of Summons in the case was, in pursuance of the order of this Court, pasted at the door of his residence, No. 91 Docemo Street, Lagos. The 1st Defendant did not appear at the trial or defend the action. He filed no Statement of Defence. The 2nd Defendant did not turn up

at the trial, but the representatives of the 3rd Defendant company were present.

56.5. REFERENCES

1. *Carpenter v Ebbelwhite* [1939] 1 KB at 357-358 [1938]4 ALL ER at 44.
2. *Sun Insurance Co. vs. Ojemuyiwa* 1965 NMLP p.451.
3. *sPost Office v. Norwich Union Fire Insurance Company* 1967 A.E.R. p.577.

57.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT, LAGOS

DATE: 15th December, 1966

SUIT NO: M/232/66

JUDGE: Ikpeazu, J.

MESSRS. CENTURY INSURANCE COMPANY LIMITED
(Applicant)

vs.

OBI ATUANYA
(Respondent)

57.2. REPORTS/FACTS/ISSUES.

INSURANCE AND REINSURANCE: – Whether there was misrepresentation of facts.
INSURANCE AND REINSURANCE: - Motor Vehicle Insurance – Duty of good faith – Proposer’s duty to disclose every material fact – Innocent misstatement – Whether amounts to fraudulent concealment of material information discharging insurer from liability – Meaning of fraudulent representation – Whether extends to honestly held facts or information which had changed where knowledge of such change was unknown to the insured Policy maker/proposer.

INSURANCE AND REINSURANCE: - Validity and enforceability of insurance Policy – Duty of proposer to disclose every material fact to the insurer – Standard – Belief honestly held on reasonable grounds by proposer – How determined – Whether a proposer is bound to disclose what he knows and what he can ascertain by inquiries which he is reasonably expected to make Distinction between standard of disclosure required for maritime insurance and other categories of insurance – Legal effect.

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION: - Whether the arbitration award was based on a wrong principle of the law – Whether the claimant had no knowledge of the cancellation of his Policy and could not be reasonably be expected to disclose what he does not know – Whether award should be set aside – Whether the arbitrator erred – Section 12 (2) of the Arbitration Act Cap. 13 of the laws of Nigeria in considerations.

PRACTICE AND PROCEDURE – APPEAL: - Ground of appeal – Framing of – Attitude of court to grounds framed in such a way as to make their meaning imprecise – How treated.

INTERPRETATION OF STATUTE – Section 12 (2) of the Arbitration Act, Cap. 13 of the laws of Nigeria.

57.3. DECISION OF COURT.

JUDGMENT

IKPEAZU, J.: -

The applicant is an Insurance Company and the Respondent is an insured under a Policy of Insurance which he effected with the company for the sum of £700 (seven hundred pounds) against damage, etc., to his motor car registered as LF 8656. The car was destroyed by an alleged accidental fire on the 15th of January, 1965, and the insured, therefore, made a claim against the Applicant company for the alleged loss and damage. Differences arose between the parties as to the liability of the company under the Policy and clause 8 in the said Policy. The parties agreed on the appointment of an Arbitrator and thereby appointed Mr. Joseph Irukwu as their Arbitrator.

The period of Insurance was from 7-12-64 to 6-12-65, and the accident, which was alleged to have occurred on 18-1-65, did take place whilst the Policy was still in force. The Applicant company had turned down the claim on the grounds, namely, that the claimant had failed to disclose a material fact by “fraudulently concealing” from the company the fact that his Policy with his previous insurers, the Universal Insurance Company Limited, had been cancelled.” The second ground that he did not take reasonable steps to safeguard the insured vehicle was not pursued. It was accepted as proved before the Arbitrator that the Claimant, before he insured with the Applicant, had insured with the Universal Insurance Company at Enugu; that on 20-7-62 the latter addressed a letter to him declaring their intention to cancel the Policy; that this letter did not reach the claimant and was returned to the Universal Insurance Company Ltd as unclaimed; that the claimant did not know the letter at the time he completed the proposal form for the Insurance with the applicant and had answered “No” to the question “Has your Policy been cancelled by any Company”. The Applicant’s witness stated in evidence that the only reason they were resisting the claim was that the insured failed to disclose that his Policy with Universal had been cancelled.

This Defence was considered most carefully and exhaustively by the Arbitrator and he did find that non-disclosure of the fact of cancellation of the Policy with “Universal Insurance Company Limited” was a material fact and he summed up the basis of a successful Defence of non-disclosure as follows:-

“All the authorities seem to establish that a motor Insurer repudiating liability on the ground of non-disclosure has to show:-

- (a) That an alleged circumstance did exist at the time when negotiations between the Insured and the Insurers had not been completed;
- (b) That the Insured KNEW or should have known of the existence of that circumstance;
- (c) That the circumstance in question was material;
- (d) That the circumstance was not disclosed to the insurer.”

He noted that all these requirements existed in this case, save the one as to the knowledge by the insured of the fact that was not disclosed. He held that on the evidence before him, the Claimant had no knowledge of the cancellation of his Policy by the “Universal” and that as no one can reasonably be expected to disclose what he does not know, he held that

the defence of nondisclosure must fail and he awarded to the Claimant the sum of £670 which was the declared pre-accident value of the car.

Following this award, the Applicant has filed this motion to set it aside on the ground: “That the said award on the face of it is bad in law because a principle therein stated by the Arbitrator as a principle of law according to which the said Arbitrator professed to make his award is erroneously stated and applied.”

The Policy of Insurance in question was exhibited and attached to the affidavit in support of the motion and labelled Exhibit “A” while the Arbitrators' Award was annexed and marked Exhibit “B”. There was no other ground filed and I must say, as I said at the hearing of argument on the motion, that I am not enamored of the style in which this ground is framed because one cannot ascertain the real complaint from reading the ground as it was set out on the motion paper and the affidavit in support but can only discover the meaning of the ground after the perusal of the arbitration award. Despite the preliminary objection of Counsel for the Respondent, I allowed the motion to be argued. The application is founded on section 12 (2) of the Arbitration Act Cap. 13 of the laws of Nigeria, which provides that “where an Arbitrator or Umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

Mr. Solanke, for the insured, also filed a motion under Section 13 of the same Arbitration Act, which provides that “an award on a submission may, by leave of court or a judge, be enforced in the same manner as a judgment or order to the same effect.” Mr. Burke’s point is that if an award is based on a wrong principle of the law, it is to be set aside and he attacked the award on the ground that it is a wrong principle of law to say that the defence of nondisclosure of a fact must fail if it is shown that the proposer did not know the fact as no one is reasonably expected to disclose what he does not know. He contends that the Arbitrator ties himself down to a proposition of law which is unsound and that the award based on such proposition must be set aside. He argues that once there is a misrepresentation of fact, this must be ground for avoiding the Policy even if the misstatement is innocent. The statement that there was no cancellation of his Policy by “Universal” was enough to avoid the Policy without regard to the fact that the insured did not know that there was a cancellation in fact.

This law may be right in maritime insurance but in all other classes of insurance, if it is made clear that what the proposer is asked to state, or what he is purporting to state, is no more than what he believes to be the situation, it is the belief honestly held on reasonable grounds that has to be true. The Applicant does not quarrel with the finding that the insured did not know of the cancellation of the Policy. As a matter of fact, strictly speaking, the evidence seemed to have disclosed only an intimation of intention to cancel the Policy. Be that as it may, even going on the basis that there was a cancellation, the finding that the insured did not know of it at the time of the proposal or even thereafter was not challenged. In the case *Heart of Oaks Building Society vs. Law Union and Rock Limited (1936) 2 All England Report p. 619*, a Claimant recovered where he was not aware of a fact which he did not disclose. In that case, Goddard J. stated that “a man can only disclose what he knows.” The view has been held, however, that it is incumbent upon a proposer to make inquiries of matters of which he is ignorant if those matters are material. Accordingly, a proposer is bound to disclose what he knows and what he can ascertain by inquiries which he is reasonably expected to make. I am clearly of the opinion that the principle of law set out by the Arbitrator and on which he based his award is quite sound and the application to set aside the award must be and is hereby dismissed. I therefore allow the motion of the insured and accordingly order that the award be and is hereby made an order of court and

is to be enforced as such.

The insured is to have the costs of both motions assessed at 20 guineas on the whole.
Application set aside.

Award dismissed.

57.4 REMARKS.

Validity and enforceability of the Insurance Policy depend on full disclosure of all material facts concerning the Contract.

The Court also frowns on fraudulent representations.

57.5 REFERENCES.

1. *Heart of Oaks Building Society vs. Law Union and Rock Limited (1936) 2 All England Report p. 619.*
2. *Arbitration Act Cap 13 Laws of Nigeria.*

58.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT, KANO

DATE: 30th August, 1971

SUIT NO: K/107/70

JUDGE: Wheeler, J.

**ALHAJI MALLAM NASIDI.
(Plaintiff)**

vs

**MERCURY ASSURANCE COMPANY LIMITED
(Defendant)**

58.2. REPORTS/FACTS/ISSUES.

INSURANCE AND REINSURANCE LAW: - Motor vehicle insurance – Claim to recover sum due under policy – Lapse and renewal of insurance contract – Where disputed – Determination of – Relevant considerations.

INSURANCE AND REINSURANCE LAW: - Insurance Agent – Express and ostensible authority – Power to bind principals with regard to dealings with third parties without notice to principal – Agent with authority to issue cover notes – Whether principal can deny liability arising therefrom.

INSURANCE AND REINSURANCE LAW: - Motor vehicle insurance – Calculation of value payable on policy – Depreciation – Fair and reasonable estimate – Whether open to court.

COMMERCIAL LAW – CONTRACT: - Contract of insurance – Validity and enforceability of – How determined – Insurance Agent – Extent of power to bind the principal in relation to the execution of a contract of insurance.

COMMERCIAL LAW – CONTRACT: - Evidence of fraud thereto – What does not constitute.

ALTERNATIVE DISPUTE RESOLUTION–ARBITRATION: -Arbitration clause as a condition precedent for bringing an action to enforce an insurance policy – Failure to invoke clause by referring to it in the pleadings or the course of the trial – Legal effect.

PRACTICE AND PROCEDURE – PLEADINGS: – Failure to refer to arbitration as a condition precedent to liability on the part of the insurers in pleadings.

58.3. DECISION OF COURT.

JUDGMENT

WHEELER, J.:-

On 10th January, 1970, the Plaintiff's lorry, KC. 4919 was involved in an accident and was damaged beyond repair. He now claims the sum of £4,000 as the value of the lorry under a Policy of insurance with the Defendants.

The Plaintiff's case, briefly put is that the Policy in question was in force at the date of the accident having been renewed by a cover note dated the 30th December, 1969. The Defendants deny this. In a lengthy Statement of Defence, they plead the Policy had lapsed when the accident occurred as the renewal premium, less a rebate due to the Plaintiff for the period the lorry had been off the road, had not been paid, and that the Plaintiff had been informed of this by registered letter dated the 4th December, 1969 which the Plaintiff with fraudulent intent had returned unclaimed. And that with the same intent, the Plaintiff has paid £300 of the outstanding premium of £469-15s-9d on the day of the accident after the accident had occurred. As to the cover note of the 30th December, 1969, the Defendants plead that, if it was issued at all, it was obtained from the Defendants by fraud or misrepresentation on the Plaintiff's part.

There is a considerable area of common ground in this case. It is agreed that the Plaintiff initially insured the lorry together with another lorry with the Defendants under the Policy of insurance, Exh. 1, which was due to expire on the 14th November, 1969. It is agreed that during the currency of the Policy both lorries were taken off the road for a period and the cover on them reduced to fire and theft only, and that as a result, when full cover was reinstated at the Plaintiff's request with effect from the 25th October, 1969, there was due from the Defendants to the Plaintiff a sum of £105-14s-8d as a rebate of premium. It is also agreed that the thirty-day cover note, Exh. 4, was issued by the Defendants to the Plaintiff on the 25th October, 1969, in respect of the lorry in question. Finally, it is agreed that that lorry had to be written off as a result of an accident on the 10th January, 1970, and that at the time of the accident, no part of the rebate of premium had been repaid by the Defendants to the Plaintiff which still stood to the Plaintiff's credit in the books of the Defendants.

What is at issue in this case is whether, at the time of the accident, there was a valid contract of insurance in existence between the parties covering the lorry. The Plaintiff relies on the cover note, Exh. 5, read with the policy, Exh. 1, as establishing this. Both were produced in evidence by Alhaji Haliru, an employee of the Plaintiff. The cover note is dated the 30th December, 1969 and (inter alia) states that: "The undermentioned having proposed for insurance in respect of the Motor Vehicle described in the Schedule below and having paid the sum indicated the risk is hereby held covered in the terms of the Company's usual form of Policy as described hereunder for thirty days, that is to say from the time and date indicated hereunder to the same time on the thirtieth day after such date unless the cover be terminated by the Company by notice in writing in which case the insurance will thereupon cease and a proportionate part of the annual premium otherwise payable for such insurance will be charged for the time the Company has been on risk".

There is no indication in the Schedule that any sum had been paid by the Plaintiff. Provision is made for entering that sum opposite the words "Premium or Deposit Paid," but the space provided has two lines through it. Neither is there any mention in the cover note of the Policy, Exh. 1, or of any other Policy, but opposite the words "Special Conditions," the word "Renewal" has been entered. Alhaji Haliru's evidence was that in October 1969, he

made it clear to Mr. Sanni, the Manager of the Defendants' branch in Kano that the Plaintiff wished to renew the Policy, Exh. 1 and that he was then given the Cover Note, Exh. 4 which was to expire on the 24th November, 1969 and that at the same time, Mr. Sanni made him to understand that the "laid-up" rebate due to the Plaintiff would be treated as part of the renewal premium.

Although he had written the letter, Exh. 17 on the 4th December, 1969, indicating that the Plaintiff's cover had lapsed because he had failed to pay the balance of the renewal premium, in the course of a subsequent discussion with Alhaji Haliru who had assured him he would pay the balance due, he had agreed to issue the Cover Note, Exh. 5 on the basis and in the circumstances I have mentioned. The Plaintiff, the witness went on, had paid the balance of the renewal premium by two cheques (one post-dated) given to him by Alhaji Haliru on the evening of the 9th January, 1970, that is, the day before the accident to the lorry took place. The Defendant's General Manager and also a clerk in their Kano office at the material time gave evidence for the defence. The clerk, Mr. Shodeinde, denied the Policy. Exh. 1 had been renewed by the Plaintiff and recalled being present when Alhaji Haliru had told Mr. Sanni in the office that the Policy was not being renewed as the desire of Plaintiff to become a member of the Defendants' Board of Directors had not been met. Further, the cover notes, Exh. 5, had been "fraudulently" issued by Mr. Sanni as there was no record of this having been issued in the Return, Exh. 19, submitted to Head Office for the 30th December. The General Manager's evidence was that the cover notes, Exh. 5 should never have been issued by Mr. Sanni in the circumstances in which he did, and it afforded no insurance cover to the Plaintiff as all Managers had written instructions not to issue a cover note unless at least 40% of the premium or renewal premium had been paid and not to re-insure commercial vehicles above a value of £2,000 without reference to Head Office.

Mr. Shodeinde was a witness who gave me the impression that he was anxious to assist his employer's case as much as he possibly could and I disbelieve his evidence that he heard Alhaji Haliru indicate he would not renew the Policy as the Plaintiff had not been given a seat on the Defendants' Board of Directors. I consider it highly improbable that a discussion of that nature would take place in the presence of a mere clerk, and in any event, it is inconsistent with the documentary evidence. On the contrary, I accept the evidence of Alhaji Haliru and Mr. Sanni that the Plaintiff, through Alhaji Haliru, indicated his intention to renew the Policy, Exh. 1, and I find on the evidence that it was renewed for thirty days by the issuance of the Cover Note Exh. 5 on the 30th December, 1970. It seems to me that the renewal date of the Policy being the 15th November 1969, the issuance of the Cover Notes, Exh. 4 by Mr. Shodeinde on the 25th October 1969 affording cover to the Plaintiff beyond the 15th November 1969, was consistent with an intention on the part of both parties to renew the Policy. Even stronger evidence of the intention to renew and of the fact of the renewal is that the Defendants in the endorsement to the Policy, Exh. 18 dated the 6th November, 1969 stated that the laid-up rebate £105-14s-8d due to the insured would be off-set against the premium payable on the renewal date coupled with the evidence that the Plaintiff never demanded payment of that rebate nor was it ever paid to him but was in fact, in accordance with the endorsement, off-set against the renewal premium paid by the Plaintiff and accepted by the Defendants.

I mention here that there is no doubt in my mind on the evidence that the Cover Notes Exh. 5 in speaking of "renewal" refers to, and was understood by the parties to refer to, the renewal of the Policy of insurance, Exh. 1 which is the contract of insurance under which the Plaintiff claims in this action. In *Northern Assurance Company Limited vs. Wuraola, unreported; SC/349/66*; judgment dated 10th January, 1969, the Supreme Court applied the

principle of incorporation by reference in the construction of a contract of insurance and I can see no reason why the same principle should not be applied in this case to link exhibits 1 and 5 as constituents of the contract entered into by the parties, and none has been suggested to me.

It has been suggested that the Cover Note, Exh. 5 was issued by Mr. Sanni after the accident had occurred and not on the 30th December, 1969 on the ground that there is no reference to it in the Return, Exh. 19 made to Head Office by the Defendant's Kano branch in respect of cover notes issued on the 30th and 31st December, 1969.

I do not accept that Mr. Shodeinde's evidence was that the cover notes were only issued by the Kano office in strict numerical sequence from one booklet. The cover note, Exh. 5 is numbered 02622 and although it is not mentioned in the Return, Exh. 19, cover notes 02624 and 02626 are mentioned which in the light of the evidence of Alhaji Haliru and of Mr. Sanni satisfies me on the balance of probabilities that the Cover Notes, Exh. 5 was issued by Mr. Sanni on the 30th December, 1969 and not after the accident as the Defendants' allege. Indeed, the words "fraud" and "collusion" have not infrequently been used in the course of this trial by the Defendants to describe the parts played by Alhaji Haliru and Mr. Sanni in this matter. Although it has not escaped my attention that the Plaintiff and Mr. Sanni are now both on the Board of Directors of a recently established insurance company, it goes without saying that that is not evidence of fraud, and I can find no other evidence substantiating those allegations.

It is apparent, however, from the evidence of the Defendant's General Manager that in issuing the cover note, Exh. 5 on the 30th December, 1969, Mr. Sanni was in breach of Head Office's instructions in two respects. First, he had issued it although 40% of the renewal premium had not been paid. Secondly, he had not obtained prior approval from Head Office, although he was covering a commercial vehicle above £2,000 in value. In this regard, it is important to note that the General Manager's evidence was not that Mr. Sanni had no authority to issue cover notes, but that his authority to do so was limited in the way I have indicated. He also stated during cross-examination that those limitations would not have been apparent to a client doing business with the Defendants through Mr. Sanni.

The law on this point is well settled. It is stated as follows in Halsbury's Law, Third Edition, Vol. 25 at page 531:-

"Where the servant, whilst acting in the ordinary course of his employment on his master's behalf, makes a contract which falls within the apparent scope of his authority the master cannot escape liability on the ground that he did not authorize the making of the contract, not even on the ground that he forbade his servant to make it. All persons dealing with the servant are entitled to assume, unless they have notice to the contrary, that he possesses the authority which it is usual for a servant in his position to possess, and his master, by placing him in that position, impliedly holds him out as having such authority."

It follows that the legal implications of the situation here are clear: as Mr. Sanni was acting within the scope of his apparent authority in issuing the cover note, Exh. 5, he must be deemed to have had authority to issue it and the Defendants, as his employers, cannot be heard to dispute its validity on the ground that it was unauthorized in fact.

The Defendants also dispute the validity of the Cover Note, Exh. 5, on the ground that it was issued without valuable consideration. But I find that there was such consideration in that the rebate of £105-14s-8d was retained by the Defendants and offset against the renewal

premium pursuant to an agreement between Alhaji Haliru and Mr. Sanni. Even if no rebate of premium had been due from the Defendants to the Plaintiff, it would seem that by using the lorry on the road in reliance on the cover note, Exh. 5 issued by the Defendants, an enforceable contract of insurance was created under which the Plaintiff became liable to pay a premium for the period of cover: see the observations of Lord Parker, C.H., in *Taylor v. Allon*, (1965) 1 All E.R. 557 at page 559.

Finally, the Defendants argue that they are not liable under the Policy as the loss occurred “during non-payment of the installments” of premium and therefore falls within the general exceptions clause in the Policy. I am unable to agree. It is enough to dispose of that point to say that Mr. Sanni’s evidence which I accept is that when he issued the cover note, Exh. 5 on the 30th December, 1969 he was prepared to give the Plaintiff three months in all to pay the balance of the renewal premium, and I do not see that it is inconsistent with the evidence on that point that he should have been concerned to see, as the evidence show that he was, that the Plaintiff should pay it as soon as possible within that period. The evidence indeed is that the balance of the renewal premium was wholly paid by the Plaintiff by the end of January 1970.

In the result, I find that the Plaintiff is entitled to be indemnified by the Defendants under the Policy, Exh. I for the loss of his lorry, KC. 4919 in the accident on the 10th January, 1970.

Although Alhaji Haliru’s evidence is that the lorry was worth £4,000 at the time of the accident, that could not be so, for that was the value placed on it when it was first insured as a new lorry in November 1968. The General Manager’s evidence is that after a year’s use, the lorry would have depreciated by 25%. Yet I observe he also gave evidence that at one stage the Defendants had offered to settle the Plaintiff’s claim for £3,300 less the sum of £300 under the excess clause, which both parties agree was enclosed on the Policy. I do not consider that a lorry would deteriorate by as much as 25% in just over a year. I find that the offer of £3,300 made but later withdrawn, by the Defendants less the sum of £3,300 payable under the excess clause, reflected a fair and reasonable estimate of the value of this lorry in January, 1970, and that is the sum I award the Plaintiff. There is a final point. I observe that condition 9 of the Policy requires all claims arising under the Policy to be referred to Arbitration as a condition precedent to liability on the part of the insurers. This clause is not referred to in the pleadings and has not once been mentioned in the course of the trial, and I conclude I must take it therefore that the provisions of that clause have been waived by the Defendants. Judgment is accordingly entered for the plaintiff in the sum of £3,000 with costs.

58.4 REMARKS

Principal/Agency Legal relationship — Can a principal deny giving his Agent authority to issue cover notes on his behalf?

This instant case has provided answers to the questions on the enforceability of a contract entered into by an Agent on behalf of his principal.

58.5. REFERENCES

1. *Northern Assurance Company Limited vs. Wuraola*, unreported; SC/349/66.
2. *Taylor vs. Allon*, (1965) 1 All E.R. 557 at page 559.
3. *Halsbury’s Law*, Third Edition, Vol. 25 at page 531

59.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT, KANO

DATE: 1st November, 1971

SUIT NO: K/74/70

JUDGE: Jones, S.P.J.

**MR & MRS D.J.B. PERERA.
(Plaintiffs)**

vs

**MOTOR & GENERAL INSURANCE COMPANY LIMITED
(Defendant)**

59.2. REPORTS/FACTS/ISSUES.

- (1) When a person acting on a power of attorney files on behalf of the donor, his name should not appear on the Writ, and the suit should be prosecuted as if by the donor.
- (2) The objection to the validity of the Power of Attorney was not an issue in the case because it had not been pleaded.
- (3) The claim was not based on contract but on the Defendant company's statutory liability under s. 10(1) Motor Vehicles (Third Party Insurance) Act.
- (4) The letters were worded to constitute Notice under s. 10(2)(a) Motor Vehicle (Third Party Insurance) Act, even though they also contained an offer to negotiate, because they limited the time for negotiations to fourteen days and stated that, failing such negotiations, Counsel had instructions to file suit. This was more than an intimation that in certain circumstances, suit might be filed; it gave notice of definite instructions to file after fourteen days.
- (5) Defence evidence was not adequate to rebut the presumption of delivery of the letters of statutory notice.

59.3. DECISION OF COURT.

JUDGMENT

JONES, S. P. J.: -

This is an action against an Insurance Company, Motor and General Insurance Company, for payment of the judgment debt and costs awarded to the Plaintiffs in the consolidated case K.5 and 6/1969 in respect of a motor vehicle collision for which one W. Zakia was found liable in damages. Although in the pleadings, the Defendants did not admit being the insurers of W. Zakia against such liability, the Statement of Defence makes it clear (in para. 8) that the basic defence is that the statutory notice of the original actions was not given; and the only defence witness admitted that W. Zakia was insured by this company. The context of that admission necessarily implies that this insurance was in respect of the subject matter of the Plaintiff's claim against W. Zakia.

The judgment which is the basis of this action has been proved by putting in evidence the whole proceedings in the consolidated case mentioned above, which proceedings include the judgment. That judgment was for a total of £5,382-4s-0d plus £300 inclusive costs. And that is the amount of the present claim.

Mr. Thanni, for the defence, has pleaded two issues and has argued three. He was not, of course, entitled to argue an issue not contained in the pleadings; *Chief Subi Jimbo and others v. Aminu Asami (unreported) SC. 373/67*.

I cannot, therefore, consider his third argument in deciding this case. I will, however, mention it because it appears to be based upon a misunderstanding by Counsel on both sides as to the position of Mr. Simhani, who has brought this action on the authority of the Plaintiffs under a Power of Attorney. Mr. Thanni has attacked that authority and has supported his attack by reference to the contents of the two Powers of Attorney produced by Mr. Simhani, "Exhibits. 1 and 2." This objection was not raised in the pleadings for the simple reason that no power of attorney was mentioned in any of the pleadings. Nor should it have been mentioned. The Statement of Claim quite rightly in paragraph 1 refers to husband and wife as Plaintiffs. These are clearly Mr. and Mrs. Perera, who were the successful Plaintiffs in the previous consolidated action and whose names appear in the title of this suit. That was correct; the Plaintiffs in this suit are Mr. and Mrs. Perera. The fact that Mr. Simhani is their Attorney is irrelevant. Plaintiffs' solicitor has mistakenly added in the title after "Mr. and Mrs. D.J.B. Perera", the words "by their Attorney J.C.A. Simhani."

These words should not have been added. Atkin's Court Forms, 2nd Edition Vol. IV page 79 says this:-

"In the simple case where a Power of Attorney is given to someone to bring an action in the name and on behalf of the donor, the proceedings should be in the name of the principal and the title of the proceedings will not indicate that another person has been empowered to act on his behalf; the action proceeds as if the principal had not delegated to an Attorney the taking of the proceedings."

The addition of Mr. Simhani's name to the title of the suit was therefore improper and the production as evidence in the suit of the two Powers of Attorney was irrelevant and they should not have been admitted. Had there been no mention of the Power of Attorney, Mr. Thanni would have had nothing to object to. And this unpleasant issue would never have seen the light of day.

I could order an amendment of the title under Order 33 Supreme Court (Civil Procedure) Rules and strike out the additional words if I thought it necessary, but I cannot see that in the words of Order 33 Supreme Court (Civil Procedure) Rules these additional words "tend to prejudice, embarrass or delay the fair trial of the suit" or that amendment is necessary "to determine ... the real question in controversy between the parties." I take the offending words to be superfluous and irrelevant. In *Alexander Mountain & Co. (suing as a firm) vs. Rumere LD. (1948) 2 KB 436 Cohen LJ*. Stated with approval the following passage from Stephen's Principles of Pleadings, First Ed. (1824) page 320, where the learned author, dealing with the effect of misnomer of a Plaintiff, said:-

"The Defendant by summons supported by affidavit can compel the Plaintiff to amend the action. If he does not do so, and the matter proceeds to trial, it is submitted that the misnomer can then be amended, and that in no circumstances could the misnomer affect the substantive judgment which the court is called upon to pronounce."

This statement of the law was again approved by the Court of Appeal in *Etablissement Baddelot vs. R.S. Graham & Company Limited. (1953) 2 QB 271*. In both English cases, the misnomers of the Plaintiffs were amended. They had to be amended because, as they stood, they connoted a non-existent person and not the real Plaintiffs. That is not the case here. In the present case, the names of the Plaintiffs are correctly stated and are not vitiated by the added words as to Mr. Simhani's Power of Attorney. I hold the view that I can ignore the added words as mere persiflage having no legal significance in that context. No amendment is necessary. This is a case in which truly (to quote learned author Stephen again) "in no circumstances could the misnomer affect the substantive judgment." I need to say no more.

The two issues pleaded are: first, that statutory notice was not given, and secondly, that there is no privity of contract between the Plaintiff and Defendant company. The second defence has no merit. This action is not based on privity of contract; it is based on the statutory liability in section 10 of the Motor Vehicles (Third Party Insurance) Act, which makes the insurers liable to pay persons who obtained judgment against persons insured by them on a claim covered by the Policy.

Section 10 is subject to certain provisos. One of these provisos is that the insurers will not be liable to pay "unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings" (section 10(2)(a)).

This is Mr. Thanni's main defence. For the Plaintiff, two letters have been put in evidence. They are exhibits 6 and 7. Mr. Thomas, the second Plaintiff's witness, has given evidence that he was representing Plaintiffs in December 1968 and in 1969. He represented Plaintiffs in the consolidated suit under reference. He says that two previous actions were prosecuted on the same claim, in which he represented the Plaintiffs and Mr. Thanni represented the Defendants. In those two previous actions Plaintiffs were non-suited. That was in December 1968. He says that Mr. Thanni appeared for the Defendants, having been briefed by the insurance company, the present Defendant company. The defence witness, the Manager at Lagos Head office of the Defendant company, has confirmed this. In that same month, Mr. Thomas wrote a letter to Mr. Thanni saying, "Unless a satisfactory settlement is reached within the next fortnight, my instructions are to file another Writ given the latest development." He sent this letter by registered post. With regard to this letter, the Defendants have pleaded that at the relevant date, Mr. Thanni was not their Solicitor. There is no evidence for the defence in support of this pleading. Mr. Thomas has said in evidence in cross-examination that he does not agree that Mr. Thanni had no instruction to act for Motor and General Insurance Company after 30th December, 1968. He posted Exhibit 6 on the 2nd January, 1969. The known facts are that Mr. Thanni was briefed by the Defendant company to defend a case which concluded in December 1968. He has been briefed in the present suit by the Defendant company. He wrote a letter, Exh. 8, on the 19th of August, 1969, stating that the Defendant company was his client. On this evidence, I cannot say that the Defendant company has held out Mr. Thanni to be their legal representative between December 1968 and August 1969 or that Mr. Thanni has done so either. I therefore find that the letter to Mr. Thanni cannot constitute notice to the Defendant company.

However, that is not the end of the matter. Mr. Thomas says that he sent a copy of Exh. 6 to the General Manager of the Defendant company at Lagos at the same time as he sent the original of Exh. 6 to Mr. Thanni. He sent this copy by ordinary post because he had a previous communication by ordinary post with the Defendant company. He also, at the same time, sent to the General Manager of the Defendant company at Lagos by ordinary

post the letter Exh. 7 informing him of the letter Exh. 6 and saying "I have to advise you that I have today addressed a letter to your solicitor, Mr. F.A. Thanni-(copied you) wherein I intimated that unless a satisfactory settlement was reached within a fortnight ... I have instructions to apply for two Writs of Summon against your insured W. Zakia ..." Mr. Sanyaolu for Plaintiffs has submitted that both these letters Exh. 6 & 7 constitute notice under section 10 Motor Vehicles (Third Party Insurance) Act and he has cited the case- *Ceylon Motor Insurance Association Limited. vs. Thambugala (1953) 2 All E.R. 870*, where almost identical wording was held by the Privy Council to be sufficient notice.

I have had some doubts about whether I should take this point because it is not specifically pleaded in the Statement of Defence. On consideration, I think it can be included in paragraph 8 of the Statement of Defence, which says that the Defendant will "rely on the provisions of the Motor Vehicles (Third Party Insurance) Act which relate to notice." *In Wedrick v. Essex and Suffolk Equitable Insurance Society (1950)*, 83 L.L.R. 91 cited in Bingham's Motor Claims Cases, Sixth Edition page 644, where identical provisions as to notice contained in the English Road Traffic Act, 1934 were considered it was held that formality was necessary for such a notice and a statutory requirement of this kind must be strictly fulfilled. In that case the words, "We understand your Society has repudiated liability and we shall be grateful to have your confirmation thereof in writing, because you will appreciate, we shall have to take proceedings as against Mahomed, ..." were held not to be notice but to be only an intimation that in certain circumstances proceedings might be brought.

It might be said that Mr. Thomas' letters, exhibit. 6 and 7 are both conditional upon failure of negotiations and are therefore not notice that a Writ will be or has been filed, but only intimation that a Writ may be filed if negotiations break down. A contrary view would be that what these letters both say is that the Defendant company has two weeks within which to settle the claim and that if they fail to do so within that time, the Writs will be taken out. This later interpretation commends itself to me. These letters are much more in the form of a notice of intention to file suit than the letter in *Wedrick* (above) and the limitation to two weeks of the period allowed for settlement indicated that Plaintiffs intended to file suit at the end of that period. *Wedrick* is therefore distinguished. The *Ceylon Motor Insurance Association's case* is on a par with the present case, and I find myself in agreement with Mr. Sanyaolu that both these letters, as far as their contents are concerned, are sufficient notice under section 10 of the Act.

But the Defendants have pleaded that they received neither of these letters. This is an issue of fact which I must resolve by carefully weighing the evidence and making a clear finding of fact as to the delivery or non-delivery of the letters. In the above sentence, I have paraphrased Madarikan, J.S.C. in *National Employers Mutual General Insurance Association Limited vs. Ladun Martins* (unreported) SC. 74/1969. In that case, the learned Federal Judge said further:-

"Proof that a letter was properly addressed and posted is prima facie evidence that it was delivered to the addressee in due course. But where the addressee has led evidence that he did not receive the letter, then a straight issue of fact is raised, and before making a finding of fact as to the delivery or non-delivery of the letter, the court ought to examine the evidence carefully."

In the present case, Mr. Thomas has said that he posted a copy of Exhibit 6 and the original of Exhibit 7 to the Defendant company at Lagos. There is no evidence attacking the addresses shown on either letter. By section 148 Evidence Law, it is a rebuttable

presumption that a letter posted by ordinary post will reach its destination within Nigeria, and I would say that I think it is likely that a letter so posted in Kano to an addressee in Lagos will arrive in Lagos within a few days. Therefore, unless there is evidence for the defence on non-delivery of these letters, I must find that the Defendant company received statutory Notice. The addressee of both letters is the General Manager of the Defendant company. The evidence for the defence is that of the Manager at Head office, Lagos, who has said he received neither of these letters. However, this witness admitted that in certain circumstances, letters would go directly to the General Manager without passing through his hands, and might be replied to by the General Manager without them passing through him. Witness was not the addressee, and he cannot speak for the General Manager. His evidence does not therefore cover all possibilities of delivery. It seems to me that to rebut the presumption of delivery the evidence of the General Manager, the addressee was essential. There was no other witness for the defence. There is therefore no adequate evidence to rebut the presumption arising from Mr. Thomas's evidence. This presumption is that both letters were delivered to the Defendants' General Manager. Plaintiffs have therefore proved that the requisite statutory notice was given.

There are no other issues in this case. Plaintiff has proved his claim. There is one small point which I think I should mention. The claim is for a total of the awards given in two cases K.4 and K.5 of 1969. The learned Judge gave separate awards under the claim in each case. Unfortunately, there is a typographical error in the judgment where the two cases are mentioned as K.5 and K.6 of 1969. It is perfectly clear from the judgment which claims are being referred to and that judgment is the judgment in the consolidated case K. 4 and K.5/1969. It is the payment of the awards in the judgment in the consolidated case that Plaintiffs now claim. They have succeeded in this claim and I give judgment for them in the total sum of £5,682-4s-0d.

59.4 REMARKS

There is a rebuttable presumption of delivery of letters sent by ordinary post. If there is a defence/evidence on non-delivery, that is a question of fact to be decided by the court on a careful study of the evidence.

59.5 REFERENCES

1. *Chief Subi Jimbo & others vs. Aminu Asami, (unreported) SC. 373/67.*
2. *Alexander Mountain & Co. (suing as a firm) vs Rumere Limited, (1948) 2 KB 436.*
3. *Etablissement Ramdelot vs. R.S. Graham & Company Limited, (1953) 2 QB 271.*
4. *Ceylon Motor Insurance Association Limited vs Thambugala, (1953) 2 All E.R. 870.*
5. *Wedrick vs. Essex and Suffolk Equitable Insurance Society, (1950) 83 Ll.L.R. 91.*
6. *National Employers Mutual General Insurance Association Limited. vs. Ladun Martins, (Unreported) SC. 74/1969.*

60.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT, KANO

DATE: 15th November, 1971

SUIT NO: K/27/71

JUDGE: Jones, S.P. J.

N.M. JEBARA
(Plaintiff/ Respondent)

vs

MERCURY ASSURANCE COMPANY LIMITED
(Defendant/Applicant)

60.2. REPORTS/FACTS/ISSUES.

- (1) Section 5 of the Arbitration Law empowers a stay pending arbitration, provided application is made before the party applying has taken any step in the suit. Such a step includes filing a statement of defence, as was done here.
- (2) The right to plead a condition precedent in a written contract as a defence does not depend on the Arbitration Law.
- (3) Defendant is not estopped from applying to amend his statement of defence to include breach of an arbitration condition by his having originally filed the statement of defence without including such plea.
- (4) The court has power under Order XXXIII Supreme Court (Civil Procedure) Rules to allow amendment of the statement of defence to include the defence of a condition precedent, including an arbitration condition precedent.
- (5) In the circumstances, the application would be granted.

60.3 DECISION OF COURT.

JUDGMENT

JONES, S.P.J.:-

This is an application made under Order XXXIII Supreme Court (Civil Procedure) Rules to amend the Statement of Defence by including the defence that an arbitration clause in the contract sued on precludes the court from adjudicating the issues to which that clause applies.

Mr. Majiyagbe, for the Plaintiff, submits that the application is too late because the filing of the Statement of Defence operates as a waiver of the Defendant's rights under the arbitration clause. He cites in support *A. Wuraola vs. Northern Assurance Company Limited (1963) N.M.L.R. 31*.

Mr. Nnadi for the Applicant/Defendant, points out that he is not asking for a stay of proceedings which, he agrees he cannot do after taking a step in the proceedings, but he wishes to add this arbitration condition precedent to his defence. He cites *Ewer vs. National Employers Mutual Assurance Company Limited (1937) 2 All E.R. 193* in support.

It is true that after taking a step in the proceedings Defendant cannot ask for a stay pending arbitration. This is the negative effect of s. 5 of the Arbitration Law-and see the leading English case on the same provisions in the Arbitration Act 1889, *Parker, Gaines & Company Limited vs. Turpin (1917) 1 K.B. 358*.

Wuraola's case appears to disagree with *Ewer's* case (above). If it does, then I must respectfully disagree with *Wuraola* on this point. What Fatai Williams J. (as he then was) said was: -

"Once pleadings have been filed, it would appear that Defendants had waived their right to arbitration under condition 8 (the Arbitrations clause)."

He then quotes S. 5 Arbitration Law, but S. 5 deals only with stay of proceedings, and it is the right *to apply for a stay* under s. 5 which is waived by taking a step in the proceedings. The learned Judge's decision on this point was based on the proposition put by Chief Williams that: -

"for this condition (the arbitration condition) to apply, the Defendants should have asked for a stay of the proceedings pending arbitration."

No authority is cited for this proposition, and, with respect, I do not think there can be such authority. It appears that *Ewer* was not brought to the learned Judge's attention. In *Ewer*, Mackinnon J. said:-

"Clause 11 of the conditions (of that insurance contract) ... requires that any pecuniary claim shall be settled by arbitration, and makes the obtaining of such arbitration award a condition precedent to any right of action or claim on the policy. That is a defence which on the *terms of the policy*, is available."

Now, it may well be that on the terms of the policy in *Wuraola* that defence was not available. And it may well be that the same applies to the terms of the Policy in the present case. I do not know. I have not seen the Policy. That will remain to be decided. However, it is, I think clear that s. 5 Arbitration Law does not debar such a defence as a defence. It authorises an application for a stay pending arbitration and gives the right to such a stay. Without this statutory authority, there would be no such right. It authorises it only before any step in the proceedings has been taken by the party wishing a stay. This necessarily implies a bar on such application for stay after such a step has been taken, as in *Parker, Gaines & Co.* (above). It does not bar the use of breach of condition precedent *as a defence*. To use it as a defence does not require the authority of the Arbitration Law. (*Wuraola* was reversed on appeal [S.C. 340/66] but it appears, based on breach of another condition precedent, on condition 1, not condition 8. Both were mentioned, but condition 8 was not discussed.

I therefore find that the Defendant is not barred from using the condition in this Policy as to arbitration as a defence. I cannot agree with Mr. Majiyagbe that the filing of the defence without reference to the arbitration clause estops the Defendant from amending the Statement of Defence to include this defence. In the circumstances, I think the Defendant is entitled to his amendment, and I grant the application. Amendment ordered as prayed.

Application granted.

60.4 REMARKS.

Arbitration Clauses and how they affect pleadings in an Insurance Contract were treated wholesomely in this case.

60.5. REFERENCES

1. *Wurala vs Northern Assurance Company Limited, (1963) N.M.L.R. 31.*
2. *Ewer vs National Employers Mutual Assurance Company Limited, (1937) 2 All E.R. 193.*
3. *Parker, Gaines & Company Limited vs Turpin, (1917) 1 K.B. 358.*

61.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT

DATE: 14th January, 1982

SUIT NO: 166/81

JUDGE: Fakayode, C.J.

BABALOLA.
(Plaintiff/ Respondent)

vs

HARMONY INSURANCE COMPANY LIMITED
(Defendant/ Appellant)

61.2. REPORTS/FACTS/ISSUES.

The Plaintiff insured, following his application to the Defendant insurance company for a comprehensive policy on his car, was on 5th February 1981 issued with a comprehensive cover note which was marked as operative for thirty days together with the Certificate of Insurance. On the 14th day of that same month, the vehicle was involved in a lone accident as a result of which it was irretrievably damaged. Consequently, the insured immediately paid premiums due on the Policy on 25th February 1981 and then put up a claim against the insurer for the insured value of the car. By a letter dated 27th February 1981, the insurer rejected the insured's application for a comprehensive insurance cover and then returned to him premiums which had been paid, thereby denying liability for the loss on the basis that there was no Policy on which the insured could base a claim.

Held, Cover Notes constitute a binding contract of insurance. Therefore, the insured was entitled to indemnity as the loss occurred during the life of the cover note. The purported rejection of the application could not impeach the insured's claim since it was made only after the loss had occurred.

61.3 DECISION OF COURT.

JUDGMENT

FAKAYODE, C.J.: -

The principle of law has long been established by the authorities that where an authorized officer or agent of an insurance company (like D.W.2 in this case) gives a cover note to the assured (as per Exhibit A) for a specified period, the Cover Note creates a binding contract of insurance unless the contract was determined by notice any time within the specified period and before any loss was incurred by the assured — See for example *Mackie v. The European* (1869) 21 L.T. 102.

Where no notice was given to terminate the contract, the cover note may be so worded as to insure beyond the specified period — *Mac Gillivray on Insurance Law, 5th Edition, Article 631 at page 304.*

A cover note properly issued creates at least an interim contract of insurance – *See Murffit v. The Royal [1922] 38 T.L.R. 334; See also Re Coleman’s Depositories [1907] 2 K.B. 798.*

It is the general practice of insurance companies, especially in the case of motor vehicle insurance, to give the proposer protection by the issue of a cover note until a Policy is delivered or until the proposal is rejected or accepted. The duration of a Cover Note is of little importance where the proposal is accepted, but its duration is of significance where the proposal is rejected – *See Ivamy “General Principle of Insurance Law” 3rd Edition pages 90-94.*

A contract of insurance, like any other kind of contract, must be constituted by an offer and acceptance and consideration. The offer is normally contained in a proposal Form duly filled in and signed by the assured or the proposer and the acceptance is signified by a formal acceptance, or by the issue of a Policy, or by the acceptance of the premium paid by the proposer or by conduct on the part of the insurers. I do not doubt at all in this case that before the loss was incurred by the Plaintiff in respect of his car by the accident of 14/2/81, there was a binding contract of comprehensive insurance between the parties because there was a Cover Note – Exhibit A; there was also a proposal as per Exhibit F and the premium was paid.

Once there is a binding contract of insurance, the parties to it will be bound by its terms and conditions whether or not the premium has been paid unless the contract contains a stipulation that there will be no insurance until the premium is paid wholly or by installments: *See Ivamy “General Principles of Insurance Law” third Edition page 168.*

61.4. REMARKS

A Cover note duly issued is a valid document for a binding Contract of Insurance, and the parties are bound by the terms and conditions of the Contract.

61.5. REFERENCES

1. *Mackie vs. The European (1869) 21 L.T. 102.*
2. *Mac Gillivray on Insurance Law 5th Edition Article 631 at page 304.*
3. *Murffit vs The Royal [1922] 38 T.L.R. 334.*
4. *Re Coleman’s Depositories [1907] 2 K.B. 798.*
5. *Ivamy “General Principle of Insurance Law” 3rd Edition pages 90-94..*

62.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: LAGOS STATE HIGH COURT (LAGOS)

DATE: 8th April, 1991

SUIT NO: LD/607/78

JUDGE: Hon. Justice Olusola Thomas

JIMOH ALADE
(Plaintiff/ Respondent)

vs

NIGERIA MOTORS INDUSTRIES
(Defendant/ Appellant)

62.2. REPORTS/FACTS/ISSUES.

The Plaintiff, aged 30 years, was employed by the Defendant in June 1975 as a night guard. As part of the Plaintiff's duties, the Defendant posted him to the Apapa Wharf of the Nigerian Ports Authority to guard the Defendant's roller coaster machine, which had just been discharged from a ship.

On 19/2/76, while on duty alone and unarmed, the Plaintiff accosted an armed robber who was trying to pilfer components from the Defendant's machine.

The robber attacked and stabbed the Plaintiff on his left hand and chest. He received treatment in about three different hospitals, including a surgical operation and forwarded the bill for the expenses incurred there to the Defendant, who declined to pay for the same. The Plaintiff was unable to resume full working life as a result of the injuries, which he sustained; he could not breathe properly, he stooped as he walked, and could not take part in sporting activities anymore, despite being a keen tennis player before he got injured. Consequently, the Plaintiff instituted an action based on negligence against the Defendant, while the employer pleaded *volenti non nocere*.

62.3. DECISION OF COURT.

HELD:

1. An employer owes their employee a duty to provide a safe system of work where the employee carries out a dangerous operation.
2. It is the risk involved in the type of work of the employee that determines the degree of the employer's duty of care. The employer's duty of care is proportional to the degree of magnitude of the mischief that may be suffered by the employee.
3. The Defendant was in breach of its common law duty to provide a safe system of work by its omission to provide the Plaintiff with defensive weapons.
4. The plea of *volenti non fit injuria* would not apply.

However, the Plaintiff was guilty of contributory negligence by accosting an armed robber instead of raising an alarm and knowing fully well the consequences of bodily harm to himself.

5. The Plaintiff's responsibility for damages he suffered was 3/4. Consequently, he will be entitled to 1/4 of the assessed damages of ₦45,985.00 arrived at as follows;

Medical Expenses	₦ 4,385.00
Loss of future earnings	₦21,600.00
Pains sufferings and amenities	₦20,000.00

JUDGMENT

THOMAS, J.

The relief claimed is for ₦100,000.00, being damages for negligence. The Plaintiff filed this suit as far back as 1978. It went through the hands of three other judges, but the trial never commenced, though pleadings were completed. After eight years, the suit came before the Court. A fresh hearing notice had to be issued before the Plaintiff and his counsel showed up in Court. In February 1988, the Plaintiff obtained another order to amend and did amend his Statement of Claim. The trial eventually began in November 1988. In 1989, the Plaintiff obtained another order to further amend and did further amend his Statement of Claim. The parties closed their respective cases on 20th February, 1990. It again took time to get both learned counsel to give their final addresses, particularly the Plaintiff's learned counsel, who could not give her address in reply till 24th January, 1991. Both learned counsel made available their written addresses after delivering oral submissions thereof.

The pleadings relied upon by the parties at the trial were the following:

1. The Plaintiff's further amended Statement of Claim filed pursuant to the order of this court dated 30th February, 1989.
2. The Defendant/Company's Statement of Defence dated 9th April, 1979.
3. The Plaintiff's reply filed pursuant to this Court's order dated 1st February, 1988.

At the trial, the Plaintiff gave evidence in his behalf and two medical practitioners, Batini Durosimi Ayinde (P.W.1) and Oluwatamilore Akinlade Falomo (P.W.2) testified for him.

For the Defendant/Company, their former Administrative Manager, Alhaji Mohammed Baruwa (D.W.1), now a pensioner, testified on their behalf.

I shall summarise the evidence led by the parties below:

The evidence in support of the Plaintiff's case is that the Plaintiff was employed by the Defendant/Co. in June 1975 as a security man with an identity card, Ex. A. The personnel Manager (D.W.1) located him to the premises of the Nigerian Ports Authority. On the 18/2/76, the Plaintiff was posted to Apapa wharf to guard machines discharged from the ship to the berth. While on duty at 6 a.m. on 19/2/78, an armed robber removed the kick starter of a Roller machine and the Plaintiff challenged him. The armed robber stabbed him on his left hand and left side of the chest. The Plaintiff pursued the armed robber. The Security men at the Nigerian Ports Authority sighted the Plaintiff as he pursued the armed robber, they chased the armed robber, arrested him and handed him to the police station at Apapa Wharf. The Plaintiff stated that he had nothing but a stick to protect

himself against the attack by the armed robber. It was, however the term of his agreement with the Defendant/Company. that he should be given protective weapon.

D.W.1 told him he would obtain for him a license for light offensive weapon like cutlass to safeguard himself but never did. There were initially 4 security men including the Plaintiff on duty but the D.W.1 withdrew 3 before the day the Plaintiff was attacked on the excuse that they were too many. In consequence of the robber's attack, the Plaintiff had treatment at Apapa Health Centre and had an operation at the Lagos General Hospital. He was an in-patient from 19/2/76. He got transferred to the Lagos University Teaching Hospital, at Idi Araba where again he was an in-patient from 10/3/76 till he was discharged on 15/4/76. He thereafter reported every month to the hospital for check-up. On the 20/4/76, the Plaintiff suffered pain on his left side chest. His parents took him to the Onikoyi Clinic, Yaba and was treated by Dr. Falomo (P.W.2).

The Plaintiff stated that the Defendant/Company. did not pay his medical bills which he handed to the D.W.2. He then instructed his then lawyers, Chief Gani Fawehimi's Chambers who wrote a letter, EX. B. of 27/10/76 to the Defendant/ Company. The Defendant/ Company. acknowledged the letter from the Plaintiff lawyers by their letter of 4/11/76 (EX. C) and the Defendant/ Company's Insurance Company replied the Plaintiff by their own letter dated 27/1/77 (Ex. D).

The Plaintiff stated he was unable to resume full working life as a result of his injuries. He could not breathe properly and that he bent as he walked. He was once a keen table tennis player but he could not presently take part in any sporting activity.

The Plaintiff gave his age as 30 years at the time of the accident and he would have retired at 60 years. He gave his earnings as ₦60.00 a month.

He was presently not working as the Defendant/ Company. had no light job for him. He gave his medical bill as ₦8,000.00 and his total claim as ₦100,000.00.

In answer under cross-examination, the Plaintiff stated that the Government license was needed for him to carry arrows and cutlasses. He stated that other companies including U.A.C. (Nig.) Limited, C.F.A.O. and G.B.O. supplied their security men with cutlasses, bows and arrows. Before the incident, the Plaintiff stated there had been warnings about thieves in the Wharf, and he had once arrested a thief removing a battery from a tractor. The Plaintiff further stated he knew his job involved coming across thieves but that he chose to stay, as security work was his job. He denied that his job was to raise an alarm whenever he saw a thief, but not to arrest the thief. He stated the Defendant/ Company. stopped his salary on 15/4/76 and informed him there was no light job for him. He stated there was no written agreement between him and the Defendant/ Company.

P.W.1 was a medical Practitioner at the General Hospital, Lagos since March, 1985. He knew the Plaintiff through the hospital records. He produced a medical report dated 20/7/76 (Ex. E) on the Plaintiff prepared by the Principal Medical Officer, Dr. Akingbehin who was no longer in the General Hospital. Ex. E states, amongst others, that the Plaintiff was admitted to the General Hospital on 19/2/76, that examination showed he had a deep wound in the left sixth intercostal space anterior chest wall, that emergency thoracotomy was performed on him and discharged on 10/3/76.

P.W.1 stated emergency thoracotomy was an act of opening of chest and would be done when the life of a patient was in danger.

In answer under cross-examination, P.W.1's professional opinion was that the Plaintiff could work. P.W.2 was the medical practitioner who saw the Plaintiff in April 1976 at the Onikoyi Clinic. He stated the Plaintiff was then breathless, pale and in near near-collapsed stage. He diagnosed severe lobar pneumonia. He treated him, observed him for 48 hours, and discharged him. He issued a certificate (Ex. F) on the Plaintiff and his medical bill for ₦4,385.00 (Ex. G). In answer under cross-examination, the witness stated that the Plaintiff could work again but that depended on the type of job. He stated the Plaintiff could sit and guard a stationary object. The Defendants/ Company's witness, D.W.1, described himself as a former Administrative Manager but presently a pensioner. He worked for the Defendant/ Company from 1964 to 1983. He knew the Plaintiff was employed by the Defendant as a casual worker and security man. By casual, the witness stated he referred to people employed for a purpose and whose contract terminated when the work was finished. The witness stated that the Plaintiff and others were labourers who stood at the premises of the Nigerian Railways at Apapa. The Defendant/ Company picked them when they were needed to keep watch over their equipment on arrival at the Wharf. The Defendant/ Company paid these labourers a daily rate of ₦2.00. With regards to the Plaintiff, the witness stated the Defendant/ Company since 1975 had been using him on and off. The duration of his work depended on the time the equipment was released from the Wharf.

The witness approved the engagement of the labourers for the Defendant/ Company after its supervisor had recruited them. He denied that the Plaintiff was engaged as a permanent staff. He stated that a permanent staff member would be given a letter of appointment for a months' probation. If he were competent, he would then be issued the letter of confirmation. He stated the Plaintiff was never given such a letter. With regard to the identity card (Ex. A) the witness stated that the Defendant/ Company gave such a card to security men to enable the Nigerian Ports Authority to admit them into the Wharf.

The witness tendered in evidence a brochure showing the type of Roller machine the Plaintiff was guarding. He stated the Roller machine was the only one the Defendant/ Company had in the Wharf at the time of the incident. The witness denied that there was any contract with the Plaintiff that two or three persons were to guard the Roller machine. He denied that the Defendant/ Company promised the Plaintiff any arms and stated the Nigerian Ports Authority would not allow anyone with dangerous weapons on its Wharf. He stated the job of the Plaintiff was to keep watch over the machine and raise an alarm if he had a problem. For this purpose, the Plaintiff was provided with a whistle, baton, raincoat and torchlight. He stated if an alarm was raised, the security men of the Nigerian Ports Authority, the Army, and the Police were there to respond.

The witness stated that the kick starter would take roughly 45 minutes to remove from the Roller machine and the fact that the kick starter had been removed showed the Plaintiff was not at the scene when it was being removed.

The witness confirmed that the Plaintiff was bleeding at the police station. The Defendant/ Company collected a letter from the Desk Sergeant by which the Plaintiff was taken to the General Hospital. He said no fees were then being paid at General Hospital. He stated the Plaintiff collected all his drugs after he was discharged from the Hospital. He stated the Plaintiff presented a certificate from the Hospital to the Defendant/ Company which forwarded it to their insurer. He did not agree that the Defendant/ Company was negligent. In answer under cross-examination, this witness stated that N.P.A. instructed the Defendant/ Company to put a guard on their equipment. He confirmed that the Plaintiff sustained injuries in the course of his employment. He stated that the Defendant/ Company

did not receive any medical bill from Onikoyi Clinic. He stated that the Defendant/ Company's workers were paid monthly.

Particulars of Negligence

- (a) The Defendant failed to abide by the agreement that the Plaintiff would only be on duty in the company of at least two other security guards as it was much more difficult for a would-be robber to attempt robbery where two or more people are present.
- (b) The Defendant failed to abide by its promises to provide light defensive arms for the Plaintiff.
- (c) Although the Plaintiff was asked to be on duty that night of the 18th and 19th February, 1976, the Defendant failed to provide him with:
 - (i) Extra security guards in spite of alerted impending danger.
 - (ii) Light defensive arms.
- (d) There was no supervision from the superior officer of the Defendant or any senior security officer as was the usual case and despite the fears of possible interference by marauders to which the Defendant's Management had earlier been alerted.
- (e) There was a negligent abandonment or recklessly not caring for the safety and interest of the Plaintiff in the performance of his duty of the Defendant progress which safety was the responsibility of the Defendant.
- (f) The Plaintiff will further rely upon the doctrine of *res ipsa loquitur*.
- (g) The Plaintiff says further that the Defendant committed a breach of statutory duty." The Defendant/ Company joined issues with the Plaintiff in this manner: In paragraph four of their Statement of Defence, the Defendant/ Company denied among others, paragraphs 4,5,12,13,14,15,16,17 and 21 as well as the alleged particulars of negligence and special and general damages.

In paragraph 5, of their Statement of Defence, the Defendant/ Company denied that they were guilty of any negligence as alleged or at all.

In paragraph 6, of their Statement of Defence, the Defendant/ Company avers that whoever it is that attacked the Plaintiff was not their servant and/ or agent and neither was he acting in their interest.

In paragraph 7, of their Statement of Defence, the Defendant/ Company aver that they will at the trial rely on *volenti non fit injuria*.

In paragraph 8, of their Statement of Defence, the Defendant/ Company avers that the area where in the Plaintiff worked was within the jurisdiction of the Nigerian Ports Authority Officials which officials pursued and arrested the culprit.

In paragraph 9, of their Statement of Defence, the Defendant/ Company avers that they will at the trial contend that the Plaintiff's action is not maintainable against the Defendant other than pursuant to the Workmen's Compensation Act.

In reply to the plea of *volenti non fit injuria* the Plaintiff avers that he did not volunteer to be attacked or killed by an armed robber. In reply to Defendant/ Company's case that there were Security Officials within the N.P.A. area who pursued and arrested the culprit, the Plaintiff described that case as irrelevant.

The end result of the Plaintiff's case of negligence made against the Defendant/ Company and based upon the above nine paragraphs extracted from the further Amended Statement of Claim, is a complaint that the Defendant/ Company did not provide safe systems of work in consequence of which he suffered his injuries. Indeed, at common law, one of the instances of the duty of care an employer owes his employee is to provide a safe system of work where the employee carries out some dangerous operation. If, by the employer's act or omission, he failed to prescribe, provide or to maintain a safe system for the employee and the latter in consequence sustains an accident, the employer will be liable to pay damages to the employee.

However, in each case, it is a question of fact whether or not certain system of work should be prescribed or provided by the employer acting as a reasonable and prudent man, in any given circumstances, and in deciding this, regard ought to be had to the nature of the work involved. Thus, in *Jenner v. Allan West and Co. Limited* (1959) I.L.R. 554 where the deceased fell through the roof he was engaged to carry out repairs and met his death, his employers were held liable not for failure to provide a safe system of work but for failure to advise the use of it notwithstanding that he deceased, had been on the job for many years. It is the risk involved in the type of work of the employee that determines the degree of the employer's duty of care.

The employer's duty of care is proportional to the degree of risk and the magnitude of the mischief that will be suffered by the employee.

In this case in hand, the Plaintiff, as employee, was engaged to keep watch of a stationary machine to prevent thieves from tampering or removing its parts. The duty of care, the Plaintiff alleges, the Defendant/ Company failed to take for his own safety, is such systems of work which would prevent an armed robber from interfering with the stationary machine. The safe systems of work demanded by the Plaintiff and which the Defendant/ Company did not provide were the provision of additional guards and license to carry and carrying protective weapons.

In my consideration view, the system of work that should be prescribed or provided by an employer is a question of fact, the test is subjective. Did guarding a stationary machine in 1976 at night in the Wharf within the premises of the N.P.A. after due warnings of an increased risk, put the Defendant/ Company under a duty of care, as reasonable and prudent employers, to provide additional guards and protective weapons for the Plaintiff? Answering this poser, I cannot do better than apply the formula enunciated by Lord Dunedin in a Scotch case and quoted in the English case of *Paris v. Stepney Borough Council* (1951) A.C. 367 at 382 which states:

"Where the Negligence of the employer consists of what I may call a fault or omission. I think it is absolutely necessary that proof of that fault or omission should be one of two kinds, either to show that a thing which he did not do was a thing which was commonly done by other persons in like circumstances or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

Lord Normand in *Paris v. Stepnry Borough Council* (Supra) added his own commentary in clarification when he said (Ibidem):

“The rule (i.e. Lord Dunedin’s) ... contains an emphatic warning against a fact finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances. But it does not detract it from the test of the conduct and judgement of the reasonable and prudent man. If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will the usual practice in the like circumstances. Failing such proof, the test is whether a precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.”

Before applying this formula to the facts in this case, it must be noted that the Defendant/ Company in their pleadings denied they were guilty of any negligence. In other words, they were saying that they did not owe the Plaintiff any duty of care to provide systems of work the Plaintiff alleged. It must also be noted that this Court would ignore any part of the Plaintiff’s case which relied upon the agreement between him and the Defendant/ Company that he would be provided with arms or that he would not guard the machine alone. The reason is that the Plaintiff is not claiming in breach of contract which though is equally open to him if he so elected. Having sued in tort, it would have been immaterial in this case whether the common law duty arises from contractual duties. A breach of contractual duty must be dealt with according to the law of contract and cannot be regarded as a tort of negligence. The duty of care upon which the Plaintiff relies is that which arises from the general law of tort of negligence. Now, applying the Lord Dunedin’s rule, I find before me evidence by the Plaintiff that other companies in the N.P.A. wharf in the same position as the Defendant/ Company took precaution against the risk the Plaintiff complained of. Indeed, the evidence came in the Plaintiff’s answer to cross-examination by the learned defence counsel.

Answered the Plaintiff:

“Mr. Baruwa and Mr. Parrot promised me that they would take license to provide light defensive weapons for me and others. License was needed not only for guns but for arrows and cutlasses.....

The other securities carried cutlasses, bows and arrows provided for them by their employers. The companies were U.A.C (Nig.) Limited, C.F.A.O., G.B.O. These were all I can remember”.

Mr. Baruwa was the D.W.1. He did not lead evidence to challenge the fact that other companies, carrying out the same activities within the Wharf as they, supplied their employees with arms. True, D.W.1 stated in his evidence-in-chief that the N.P.A. would not allow anyone to enter the wharf with a dangerous weapon but he did not say whether the prohibition would affect someone with a government license to carry arms within the premises. I am therefore satisfied that the first part of Lord Dunedin’s rule had been satisfied having regard to the proof required for precaution with regard to the provision of defensive weapons. The Defendant/ Company, as a reasonable and prudent company, ought to follow the usual practice of other companies in these circumstances. I hold that the Plaintiff has successfully defined a precise relationship which shows that the Defendant/ Company owed him a duty of care to provide him a safe system of work. Having so held, the fact that the Defendant/ Company did not so prescribe or provide such precautionary system of work has not been made an issue by the Defendant/ Company I find as a fact there is a breach of the common law duty of care by the Defendant/ Company to provide safe system of work for the Plaintiff.

The Plaintiff's case is that it was the Defendant/ Company's breach of duty that resulted in his being injured by the armed robber who stabbed him when he accosted him with the stolen kick starter in the course of his duty.

The Defendant/ Company did not deny that the Plaintiff sustained injury in the circumstances described by him and in the course of his duty. D.W.1 had testified in cross-examination thus: - "The N.P.A. (Authorities) instructed that we must put someone there to watch our equipment. I am aware that he sustained injury during the course of his service to my company".

However, in their Statement of Defence, the Defendant/ Company pleaded in paragraph 7 thereof that they would rely on the defence of *volenti nonfit injuria*. In his reply, the Plaintiff avers that he never volunteered to be attacked and/or killed by armed robber.

Volenti nonfit injuria means that a person who makes an agreement with another, either or by implication to run the risk of injury caused by that other cannot recover for damage caused to him by any of the risks he agreed to run. The defence must be specifically pleaded: see *Charlesworth on Negligence supra* at p. 1231 paragraph 1230.

In this same book the learned editor writes in paragraph 1236 thus:

"In master and servant cases based on common law negligence, the defence of *Volenti nonfit injuria* must be applied with extreme caution.

This is because a real and assent to the assumption of the risk without compensation must be shown by the circumstances... if however, a man acts under the compulsion of a duty such consent should rarely, if ever, be inferred, because a man cannot be said to be 'willing' unless he is in a position to choose freely."

I must confess that this is a case that has given me some anxious moments, I have already found that the Defendant/ Company did not provide the Plaintiff with safe system of work. The Plaintiff himself knew what that safe system of work ought to be as he persisted and insisted on being provided with a defensive weapon against the armed robber. He very well foresaw the thief/robber would carry arms to steal from the machine he guarded. He pleaded the Defendant/ Company ordered him to go on duty on pain of dismissal and he reluctantly obeyed. However, the Plaintiff led no evidence to support the above pleaded averments. What he said under cross-examination were:

"I know that my job involves coming across thieves I chose to stay in the job as security work is my job. The Defendant gave me nothing. I only held a stick to defend myself." The armed robber did come as the Plaintiff foresaw. He did not raise any alarm. He testified:

"When I challenged him, the armed robber stabbed me on the left hand and left side chest."

Though this conduct of the Plaintiff would not have absolved the Defendant/ Company of their antecedent negligence for not providing the Plaintiff with a safe system of work, but would a reasonable man have rushed on an armed robber knowing fully well the risk he was taking?

Charlesworth On Negligence (*supra*) at paragraph 1245 had set out 3 cases that may likely have occurred where the defence of *volenti nonfit injuria* is raised having regard to the subsequent conduct of the Plaintiff: They are:

1. Where the Plaintiff did not see a danger created by the negligence of the Defendant, although he ought to have seen it;
2. Where the Plaintiff does see the danger and decides to run the risk of it;
3. Where the Plaintiff sees the danger and agrees to exempt the Defendant from liability;

I will now consider the conduct of this Plaintiff as against these three cases.

The first case does not apply to the Plaintiff as he did not deny seeing the danger created by the Defendant/ Company's negligence. The maxim *volenti non fit injuria* would have had no application herein.

The second case is where the Plaintiff sees the danger created and decides to run the risk of it. The Plaintiff's conduct fits into this case. By accosting the armed robber instead of raising an alarm or taking such steps that would not bring him within the reach of the armed robber, the Plaintiff had not exercised any reasonable care.

In those circumstances, though the maxim, does not apply, the Plaintiff will be guilty of contributory negligence. He would not be entitled to the full damages on this account.

The third case is where the Plaintiff sees the danger created by the Defendant/ Company's negligence and exempts them from liability for damages caused to him through the danger. This is where the doctrine of *volenti non fit injuria* applies. The Plaintiff would have thus consented to run the risk and would recover no damages. The third case involves a consideration whether the act which resulted in the injury suffered by the Plaintiff broke the chain of causation between the antecedent Defendant/Co.'s negligence and the damage caused to the Plaintiff. This Plaintiff may have acted stupidly in accosting the armed robber conscious of the risk he ran but the robber's attack on him can hardly constitute *novus actus interveniens*. The Plaintiff was still acting in the course of his duty for which the Defendant/Co. neglected to provide him with a safe system of work. The chain of causation between the latter negligence and the resulting danger is not broken. The Plaintiff's action does not fall within this third case.

My conclusion is that the Defendant/ Company's defence of *volenti non fit injuria* fails. This issue in this case is to consider the quantum of damages to which the Plaintiff is entitled. Earlier on, I have found that the Plaintiff's conduct fails within the second case considered for the application of the maxim: *volenti non fit injuria*. Though the onus is on the Defendants to establish that Plaintiff's contributory negligence was a "substantial and material co-operating cause" of the damages he suffered, it is not that the evidence must come from the Defendant/ Company. The Court should be able to draw inferences of contributory negligence from the Plaintiff's evidence and other facts found by it on the balance of probabilities. I am satisfied that the Plaintiff's failure to take ordinary care of himself, which a reasonable man could have taken with the knowledge of predisposition of an armed robber caught in the act, was the contributory cause of his injury.

Indeed, the Plaintiff foresaw the risk and insisted on being supplied with defensive weapons. When his request was refused, he reluctantly went on duty. Section 16(1) Law Reform (Torts) Law cap. 67) Laws of Lagos State provides:

- (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not

be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the share of the claimant in responsibility for the damage.

- (2) Where damages are recoverable by any person by virtue of subsection (1) of this section subject to such reduction as therein mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

As I have earlier found from the testimonies of the Plaintiff himself, he saw the armed robber and took no step to enlist any help. It is not his case that he was in such a position that he could not safely look or shout for help. It is not his case that the armed robber found him, turned on him or chased him. He was the one who approached the armed robber knowing fully well the consequences of bodily harm to himself. He got predictably stabbed with an offensive weapon. I put his responsibility for the damages he suffered at $\frac{3}{4}$. This shall be the rate by which I shall calculate the damages for which the Plaintiff would have been entitled if he had not contributed to the damages he suffered.

SPECIAL DAMAGES

1. The Plaintiff claims ~~₦~~8,000.00 being charges for medical operation and drugs. The bill (Ex. 'G') shows the sum of ~~₦~~4,385.00 from Onikoyi Clinic. There is no contrary evidence from the Defendant/ Company the Plaintiff is entitled to only ~~₦~~4,385.00 as medical charges as against his claim for ~~₦~~8,000.00.
2. The Plaintiff claims ~~₦~~36,000.00 for "loss of further earning in the light of permanent incapacity and residual disability". In his evidence, however, the Plaintiff reckoned on his salary of ~~₦~~60.00 per month, that he was 30 years old in 1976 at the time of the accident and he would have worked till he would be 60 years old. The Defendant/ Company led no evidence to contradict the Plaintiff's calculation. I however, have found that by his salary of ~~₦~~60.00 per month for 30 years, the Plaintiff would have earned ~~₦~~22,600.00. This is the sum he is entitled to as against the ~~₦~~36,000.00 in his claim.

GENERAL DAMAGES

The Plaintiff claimed ~~₦~~56,000.00 as general damages for pains, suffering and loss of amenities. The Defendant/co. led no evidence to challenge this sum. However, the evidence from the medical doctors is that the Plaintiff was still able to go to work. P.W.2 modified this by saying that the working capability of the Plaintiff could only be confined to such work where he could sit and guard stationary objects (see the P.W.2's last answer under cross-examination) It would appear that the work for which the Plaintiff was engaged in is similar to the type the doctor stated he could now do, that is "... sit and guard a stationary object." The Plaintiff's incapability to work is not permanent as pleaded by him. Taking all the circumstances in consideration, I will award him ~~₦~~20,000.00 as general damages.

The total sum to which the Plaintiff is found entitled as special and general damages, made up of, ~~₦~~4,385.00, ~~₦~~21,600, and ~~₦~~20,000.00 all comes to ~~₦~~45,985.00.

I have already found that the Plaintiff's responsibility for the damages he suffered is $\frac{3}{4}$. He will therefore be entitled to $\frac{1}{4}$ of the damages found in his favour. By my calculation

the Plaintiff's claim will come to ₦11,496.25. I give judgement in favour of the Plaintiff against the Defendant/ Company in the sum of ₦11,496.25 as special and general damages.

Now, two issues of law were raised by the parties in their pleadings. I have not found them relevant in the determination of this case. I shall touch on them for record purposes. The first was raised by the Plaintiff in his further Amended Statement of Claim wherein he pleaded that he would rely upon the doctrine of *res ipsa loquitur*.

As learned defence counsel properly submitted, the maxim was not available to the Plaintiff since he knew the manner the incident complained of occurred and gave particulars of it. Indeed, this maxim is not a rule of Law but a rule of evidence. Its effect simply is that the burden of proof shifts on the assessment of evidence on negligence. When the Plaintiff proves the happening of an accident and no more which is more consistent with negligence on the part of the Defendant, the burden of proof shifts to the Defendant to offer reasonable explanation how the accident may have occurred without negligence on his part. In this case, the Plaintiff pleaded particulars of negligence he complained of and led evidence thereon. The onus did not shift. The maxim does not apply on the facts of this case.

The second issue was raised by the Defendant/ Company in paragraph 9 of their Statement of Defence that the Plaintiff was estopped from asserting his right other than pursuant to the *Workmen's Compensation Act*. The learned defence counsel did not address on this issue and neither did the learned counsel for the Plaintiff advert thereto.

I believe the Defendant/ Company have abandoned the plea. Indeed, in view of the provisions of Section 27 of the *Workmen's Compensation Act (Cap 222) of the Law of the Federation of Nigeria and Lagos*, this Act is inapplicable hereto.

I have already entered judgement for the Plaintiff against the Defendant/ Company for ₦11,496.25 as damages for negligence. I shall hear learned counsel as to costs.

62.4. REMARKS

This is an Employer's liability case, with contributory negligence as its main thrust. An employer must essentially provide a Safe system and well secured environment for the employee to work. There is need for employer's duty of care, which also determine the extent of 'Safety' measures to be put in place for the workers

62.5. REFERENCES

1. *Jenner vs. Allan West and Co. Limited* (1959) I.L.R. 554.
2. *Paris vs. Stepney Borough Council*.
3. *Caswell vs. Powell Duffryn Associated Collieries Limited* (1940) A.C. 152.
4. *M/S Lewis Peat vs. Akhimien* (1976) S.C. 157.

63.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: KANO STATE HIGH COURT (KANO)

DATE: 9th April, 1991

SUIT NO: K/88/87

JUDGE: Judge of the High Court of Kano State

**FADCO INDUSTRIES (NIG) LIMITED
(Plaintiff)**

vs

**THE UNITED NIGERIA INSURANCE COMPANY LIMITED
(Defendant)**

63.2. REPORTS/FACTS/ISSUES.

Through its banker- The UTB Limited, Plaintiff took out with the Defendant a Goods-in-Transit Insurance Cover in respect of its industrial machinery.

The insured sum was ₦600,000.00. On 19/6/86, the Defendant sent a letter to UTB agreeing to provide cover for the Plaintiff's machinery subject to standard Policy conditions and demanded for the assessed premium of ₦6,000.00 to enable it conclude preparation of other insurance documents in respect thereof. The premium was paid on 20/6/86. After purchase on 25/6/86 and during conveyance for delivery to the Plaintiff's factory. The insured machinery rolled off the carrier and got damaged due to the fact that the driver had to swerve so as to avoid hitting a pedestrian who dashed across the road suddenly.

Plaintiff assessed damage to the machinery as ₦212,500.00 and claimed indemnity in that sum from the Defendant who repudiated liability on the ground that the accident which occurred was not covered under the Policy issued on 27/6/86 – 2 days after the accident. Defendant also contended that by virtue of exception clauses and conditions contained in the Policy, its liability was limited to ₦100,000.00 with respect to the loss. Consequently, the Plaintiff instituted an action in Court claiming indemnity.

63.3. DECISION OF COURT.

HELD:

1. A contract of goods-in-transit insurance was made when the Plaintiff paid the premium on 20/6/86.
2. Where a Cover Note was issued by an insurer subject to the terms contained in the Standard Policy and a loss occurred before the issuance of the Policy, any non-standard condition contained in the Policy will not be binding on the insured. "Since the parties have already arrived in substance at a complete agreement a new term cannot be introduced by the Insurers in issuing a Policy".
3. If in litigations over claims, an Insurer wishes to rely on a Policy exception to

repudiate liability, such as exception must be specifically pleaded. The limitations of liability to ₦100,000.00, having not been pleaded, is unenforceable by the Defendant.

4. Judgement for the Plaintiff in the sum of ₦212,500.00.

JUDGMENT

The Plaintiff in this suit took out a writ against the Defendant in the following terms: The Plaintiff took a *Goods-in-transit Insurance Policy* having paid the sum of ₦6,000.00 as premium for the Insurance of the Plaintiff's goods insured against:

- (a) Loss by fire.
- (b) Loss by accidental collision, impact or overturning of the conveying vehicle.
- (c) Loss by theft, following accidental collision, or impact or overturning of the conveying vehicle plants and machinery.

One of the machines fell off the conveying vehicle which had swerved to avoid hitting a pedestrian who had dashed across the road all of a sudden. The machine got badly damaged and the Defendant refused to pay on demand the sum of ₦212,500.00 the value of the damaged machine.

The Plaintiff's story as revealed in the Statement of Claim reads as follows: -

That the basis of the contract was a letter dated 19th June, 1986 said to have been written by the Defendant to the Universal Trust Bank of Nigeria who are the Plaintiff's Bankers. The Bank persuaded the Plaintiff to take the Insurance Policy.

This the Defendant denies saying that the letter was not an acceptance of insurance proposal and could never be a substitute for a proposal form.

The Plaintiff further states that he has paid the sum of ₦6,000.00 (Six Thousand Naira) as premium and a receipt dated 20/6/86 was issued by the Defendant in acknowledgement thereof.

The Defendant refutes the assertion but explained that it might very well be a consideration for the contract which required the filling of certain documents.

The Plaintiff again avers that after the accident the Insurance Policy dated 27/6/86 was issued by the Defendant in which the goods belonging to the Plaintiff had been insured against: Loss by fire; Loss by accidental collision;

Impact or overturning of the conveying vehicle;
Loss by theft only following accidental collision impact or overturning of the conveying vehicle on plants and machinery.

The Defendant admits that Insurance Documentation could not be completed on the same date of payment of the premium and the Defendant also admits that the duration of the contract was seven days. The Defendant however contends that the contract had certain restrictions defined in the schedule to the Policy as quoted in paragraph 5 of the Statement of Claim. The Plaintiff states that at all materials times, the Plaintiff insured the plants and machinery for ₦600,000.00 (Six Hundred Thousand Naira) being the estimated value of

the goods. The Defendants reply to this is that the Policy was not against all risks but was a restricted one. The Plaintiff avers that on 25/6/86 before the receipt of the Policy, the accident occurred and the line of 7 rollers valued at ₦600,000.00 (Six Hundred Thousand Naira) was damaged when the driver of the conveying vehicle had to swerve into a ditch to avoid hitting a pedestrian.

The Defendant replies that no loss or damage was sustained by the Plaintiff within the meaning of the said Policy and its conditions and no satisfactory proof of such loss/damage was furnished to the Defendant adding that the machine fell off while the conveying vehicle was negotiating a bend not because of any attempt to avoid hitting a pedestrian. Finally, the Plaintiff avers that the Defendant was given due notice of the accident and has filled in the Claims Form in which he claims the sum of Six Hundred Thousand Naira and interest at such rate and for such period as this Hon. Court shall think fit. The Defendant maintain that the Plaintiff is not entitled to the alleged damages or indemnity under the said Policy and denies liability to the Plaintiff in the sum of ₦212,500.00 or any other sum at all. To prove the claim, the Plaintiff called six witnesses and tendered ten documents as exhibits. The Defendant called only one witness and tendered one documents as exhibit in rebuttal. The Plaintiff's first witness was one Mr. A. Tikon of the Universal Trust Bank. He testified that the Plaintiff who had been a customer of the Bank had applied for a loan from the Bank to buy some Plant and Machinery but the Bank insisted that the carriage of the plant and machinery would have to be insured with the Defendant insurance company. All the formalities having been completed, the Defendant sent a demand note to the Bank which was confirmed and paid on behalf of the Plaintiff. The letter of demand was received in evidence as Exhibit 'A'. A receipt was issued to the Plaintiff for the sum of Six Hundred Thousand Naira by the Defendant and this became Exhibit 'B'.

Under cross-examination, Mr. Tikon explained further that the Plant and Machinery were for the manufacture of sweets and that they cost ₦1.5M out of which ₦1.M was loaned by the Bank. He had inspected the plant and machinery before the purchase and after the accident. The Plant and Machinery had been in good working condition before the accident but could not be put to use after the accident. The Insurance Policy according to him was kept by the Bank as part of its Security.

The next to testify for the Plaintiff was one Aliyu Alasan the driver of the vehicle which was conveying the machine on the day of the accident. He testified that he drove the vehicle which conveyed the machinery and plant from Dakata to the Plaintiff's factory at Sharada Industrial Area. On reaching the K/DAN Agundi junction while negotiating a bend, a school boy suddenly dashed across and he had to swerve to avoid hitting him. The machine moved sideways breaking the side board of the vehicle and skipped and fell to the ground. One of the labourers aboard the vehicle was injured in the process. Three parts of the machine were damaged. Aliyu Alasan further states that he immediately went and called the Plaintiff's chairman's son who in turn brought his father and other people whom he did not know, to the scene of the accident. Under cross-examination, Aliyu Alasan explained that the machine had been tied to the body of the vehicle with a wire cable. It was tied very firmly and never shook while on the way. The tyres of the vehicle were good as the vehicle was only 14 months old and that he was driving slowly. He did not report to the Police.

The third to testify for the Plaintiff was Hassan Ali Fadiallah a supervisor in the Plaintiff's company. He explained that the Universal Trust Bank paid for the cost of the plant and machinery as well as the insurance thereof. The premium paid was ₦6,000.00. Payment was made on 20/6/86 while the accident took place on 25/6/86. He testified that the machine was loaded in his presence for delivery to the Plaintiff's factory. A few minutes

afterwards one of the Plaintiff company's staff came and informed him of the accident. It was he who reported both to the chairman and the Defendant. Two of the Defendant company's officials went along with him to the scene of the accident and it was these two who permitted the removal of the plant to the Plaintiff's factory. It was him that took the machine by means of a forklift. He explained that the machine was meant for the manufacture of the chewing gum.

Under cross-examination, the witness stated that the machine has since 1986 been lying in the Plaintiff's factory premises. The 4th Plaintiff's witness was Ali Fadiallah the chairman and Managing Director of the Plaintiff company. He explained that the Plaintiff and the Defendant had never transacted any such business with each other before. It was the Universal Trust Bank that had introduced the Defendant to the Plaintiff. He did not witness the accident but he came to the scene of the accident along with his son PW3 and two officers of the Defendant company. He caused the account of the accident to be reduced to writing and sent to the Defendant. This was Exhibit "C". Other letters sent to the Defendant are Exhibits D1 and D2. A Claims form was filled and sent to the Defendant. This was Exhibit "E". The Plaintiff claims the sum of N212,500.00 (Two Hundred and Twelve Thousand Five Hundred Naira Only).

He explained that after the accident, the period covered by the Insurance was extended and another sum of ₦1,500.00 was paid by the Plaintiff to the Defendant. A receipt was sent under covering letter and endorsement. These are Exhibits F1, F2, and F3. The Policy was received after the accident and this was admitted in evidence as Exh. 'G'. The machine which could not be repaired was insured for the sum of ₦1.5M and was valued ₦212,500.00 in 1986. Under cross-examination this witness stated that the damaged machine was not the only one conveyed by the same transporter. According to him, it was the Universal Trust Bank that chose the Defendant on Plaintiff's behalf and that once the Defendant confirmed in writing that the risk was insured the agreement was complete. The Policy being a document may come later.

Under re-examination the witness stated that 15 pieces of machinery were conveyed on the day of the accident.

The 5th Plaintiff's witness was one Collins Arinze Nwankwo an Estate Surveyor. He holds a B.Sc. degree in Estate Management from the University of Ife plus Associate Diploma. He has a working experience of 13 years. The witness stated that he had evaluated the plants and machinery on 21/5/86 as per Exhibit 'H' and he had re-evaluated the machine after the accident as per Exhibit. 'I'. Under cross-examination the witness stated that he had spent 5 hours inspecting and testing the plant and machinery and that he used the Proforma Invoice as the basis of his evaluation.

The last to testify for the Plaintiff was a Mechanical Engineer of 15 years' experience, one Mohammed Abdul Rauf. He testified that the machines were tested before the sale and that he helped the Plaintiff staff in loading and securing the machinery. He learnt of the accident and was later instructed to inspect and assess the damage. In 1986 it was estimated to cost ₦212,500.00 and about ₦600,000.00 now. Under cross-examination, the witness explained that between ten to twelve people from the Plaintiff's staff sat on either side of the conveying vehicle to assist in keeping the machinery in place.

The only witness called by the Defendant was one Alhaji Salawu, the Manager of the Defendant Company. He too stated that it was the Universal Trust Bank that had introduced the parties one to the other. The Defendant was to insure the Plaintiff's property in which the Bank had an interest.

According to him the agreement between the Plaintiff and the Defendant was documented as per Exh. "G" The Proposal Form which describes the object of insurance was received as Exh. "J". The period covered by the agreement was from 19th July, 1986. The limitation placed on the Policy was that one conveyance would not be more than ₦100,000.00 per trip.

Under cross-examination, the witness confirmed that the Defendant had written to the Plaintiff through the bank as Exh. A which according to him does not contain the stated limitation. He further explained that Exh. A is dated 20/6/86 but the accident occurred on 25/6/86.

Addressing the Court, the counsel for the Plaintiff placed emphasis on the testimonies of PW1 and PW6. He argued that Exh. A dated 19/6/86 formed the basis of the contract between the Plaintiff and the Defendant. Exh. "B" was paid for on 20/6/86 and the accident occurred on 25/6/86. The Policy which is Exh. "B" was dated 27/6/86. He argued that Exh. "A" was not made subject to preparation of other documents. The learned counsel argued that a Cover Note, or a letter as in the present case is an insurance contract distinct from the contract in the Policy. Where a Cover Note is issued, he argued, it is binding on the parties until terminated. It is not material that a Policy has been issued.

In case of an accident during the currency of the Cover Note and before the Policy is issued the terms of the Cover Note will hold good. He cited the following cases:

1. *Re-Coleman Depositories Limited. vs. Life & Health Assurance. A.S.D.C. 1907 2 KB 798.*
2. *SS Ardennes (Cargo Owners) vs SS Ardennes (Owners) 1951 1 KB 55.*
3. *Re-Nell vs S.E. Lancashire Insurance. 1932 S.C. 35.*

The learned counsel for the Plaintiff argued that for any special condition of which the insured has no knowledge he cannot be liable. *Great Nigeria Insurance Company Limited vs Ladgroup Limited. 1986 4 N.W.L.R. (Pt. 33) at 72.*

Turning to Exh. "J" the Proposal Form the learned counsel maintained that it has not been specifically pleaded and the Court should not consider it.

Exhibit "G" the Policy should be discountenanced as it did not form the basis of the contract having been delivered after the accident. The learned counsel then cited the following cases in respect of his submission:

Nicon vs Power & Industrial Engineering. Company Limited 1986 4 N.W.L.R. (Pt. 14)1. Bendel Insurance. vs. Edepehold 1989 N.W.L.R. (Pt. 118) 725.

The learned counsel for the Defendant addressed the Court saying that neither in its pleadings nor in the evidence adduced has the Plaintiff made any claim which can be enforced against the Defendant. The Defendant's case that the sort of accident which occurred is not one which the Defendant had agreed with the Plaintiff to provide cover for. What the cover has been provided for is contained on P.3 of Exh. "G".

The Defendant, learned counsel pointed out, rely on the evidence of PW2, PW4 and DW1 who were either eye witnesses or have been informed of how the accident occurred or visited the scene soon after the accident. The learned counsel cited the case of: *Hapburn vs A. Tomlinson Holiers Lt 1966 A.C. 451 at 452.*

The learned counsel for the Defendant concedes that Exhibits. A, B and J do not contain any condition but Exhibits A and J provide that other documents would contain more details. The cause of the accident the learned counsel for the Defendant maintained was not any of the conditions enumerated but the negligence of the driver who had to swerve to avoid hitting a pedestrian. He then referred to McGilvery & Parkington on Insurance Law Cap 26 paragraph 2209.

The learned counsel put up an alternative argument lest this Court finds the Defendant liable. According to him both Exhibits. G and J clearly show that the whole plant and machinery have been insured for ₦1.5 million and anyone consignment should be limited to ₦100,000.00. Therefore, since the accident was in respect of one consignment, liability of the Defendants would be limited to ₦100,000.00.

Exhibits A and B, he argued, cannot form the basis of a valid contract for they are merely acknowledgement of the receipt of ₦6,000.00. They do not contain the essential elements of a valid contract. In his reply the learned counsel for the Plaintiff pointed out that the issue of limiting liability to ₦100,000.00 has not been pleaded. From the pleadings and the evidence adduced before this Court the following facts have been established. The contract of Insurance was discussed at the first instance by an official of the Universal Trust Bank, one Mr. Tikon, and Mr. Salawu the Manager of the Defendant Insurance company. Evidence revealed that the Bank was to pay the premium for and on behalf of the Plaintiff. The first document to be produced was Exhibit "A" the letter written by the Defendant to the Bankers of the Plaintiff.

Two types of Insurance were agreed upon, one for good goods-in-transit and the other for fire. This suit relates to the goods-in-transit aspect of the insurance. It is on record that in Exhibit "A", the premium for each of the two types of insurance has been stipulated. For the transit risk the sum of One thousand five hundred Naira was quoted and agreed upon while for the other aspect Four thousand five hundred Naira was agreed upon. It is pertinent to quote the last but one paragraph of Exhibit "A". "However, we confirm holding the above named covered and shall be grateful if you will let us have your cheque for ₦6,000.00 in settlement to enable us conclude *preparation of the Insurance Documents*" Exhibit "A" is dated 19th day of June, 1986.

On the following day, the Defendant issued a receipt to the Plaintiff's bank for the sum of Six thousand Naira as the premium for the two types of insurance. This was received in evidence as Exh. "B" dated 20/6/86. It can safely be concluded that Exh. "A" forms the basis of the contract with the payment as evidenced by Exh. "B".

The currency of the contract was seven days and this must be calculated from the date of Exh. "B" which is 20/6/86 the date of the Policy. This is because 20/6/86 is the date the offer of the Defendant was accepted by the Plaintiff.

It is pertinent to consider that the accident occurred on 25/6/86 and that the Policy Exhibit "G" was not prepared until 27/6/86, a day after the report of the accident to the scene of which the officials of the Defendant had been.

When Exhibit "A" is closely examined one would see that it is a Standard Form in which all the conditions and expectations have been printed save where the Policy is described which was type written. It is under this that other conditions have been added! Although Exhibit "A" stipulates that preparation of the insurance documents were to follow, in the circumstances of this contract one would expect the standard conditions to be the contents

of the documents and not those added afterwards. Since the parties have already arrived in substances at a complete agreement a new term cannot be introduced by the Insurers in issuing a Policy: see the case of *Collet v. Morrison* 1851 9 Hare at 817 per Turner V-C and *Griffiths vs Fleming* 1909 IKB 805 at 817 per Farewell LJ. Exhibit “A” has therefore concluded the contract between the Plaintiff and the Defendant with the standard conditions and exceptions contained in Exhibit “G” except those conditions added two days after the accident and after the officials of the Defendant had visited the scene and known the circumstances leading to the accident.

The learned counsel for the Defendant submitted that the crux of this case is that the accident that had occurred was not one in which the Defendant had agreed to provide cover for. Having found the parties had agreed to insure the plant and machinery against risk while in transit subject to the standard conditions contained in Exhibit “G”, the accident having occurred during the currency of the agreement, there being nothing from the exceptions contained in Exh. “G”, I hold that the Defendant is liable to the Plaintiff to indemnify the Plaintiff against the loss of the machine. The learned counsel for the Plaintiff on the other hand, submitted that the limitation of liability had not been specifically pleaded. The limitation clause is not part of the Standard Conditions Exhibit “G” but was added after the date of the accident and not having been specifically pleaded it is unenforceable. In his examination-in-chief, PW5 stated that he had obtained a B.Sc. degree in Estate Management in 1978 besides holding a Diploma in Rating & Valuation from London in 1979 and has a working experience of 13 years. He did evaluate the damaged machine and assessed its cost to be ₦212,500.00.

He has not been discredited under cross-examination and I accordingly hold that the Defendant is liable to and shall pay the Plaintiff the sum of Two hundred and twelve thousand five hundred Naira.

63.4 REMARKS

Goods In transit Insurance Policy. Scope of contract is based on Cover Note issued after the premium has been paid. This portends that the parties have arrived at a complete agreement, it is futile to introduce a new term into the contract.

63.5 REFERENCES

1. *Re-Coleman Depositories Limited vs. Life & Health Assurance. A.S.D.C. 1907 2 KB 798.*
2. *SS Arderennes (Cargo Owners) vs SS Ardennes (Owners) 1951 1 KB 55.*
3. *Re-Nell vs S.E. Lancashire Insurance. 1932 S.C. 35.*
4. *Great Nigeria Insurance Company Limited. vs Ladgroup Limited 1986 4 N.W.L.R. (Pt. 33) at 72.*
5. *Nicon vs Power & Industrial Engineering. Company Limited 1986 4 N.W.L.R. (Pt. 14)1.*
6. *Bendel Insurance. vs Edepehold 1989 N.W.L.R. (Pt. 118) 725.*
7. *Hapburn vs A. Tomlinson Holiers Ltd 1966 A.C. 451 at 452.*
8. *Collet vs Morrison 1851 9 Hare at 817.*
9. *Griffiths vs Fleming 1909 IKB 805.*

64.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: KANO STATE HIGH COURT (KANO)

DATE: 28th July, 1989

SUIT NO: K/77/89

JUDGE: Hon. Justice Ubbaonu

**NIGERIAN VICTORY ASSURANCE COMPANY LIMITED
(Plaintiff)**

vs

**HASSAN DAYAKH
(Defendant)**

64.2 REPORTS/FACTS/ISSUES

Hayder Trading and Manufacturing (Nig.) Limited contracted to supply Grains Processing Company (Nig.) Limited 1,000 metric tonnes of wheat valued at ₦2 Million. Grains Processing Company (Nig.) Limited paid Hayder ₦500,000.00 as an advance. By agreement dated 6/4/88, the Plaintiff executed a Performance Bond in favour of Grains Processing Company (Nig.) Limited, guaranteeing the performance of *Hayder*. In consideration thereof, the Defendant, who was Managing Director of *Hayder*, executed a personal Counter-indemnity dated 6/4/88 in the Plaintiff's favour in the sum of ₦500,000.00 under which the Defendant undertook to indemnify the Plaintiff against all claims and liability under the Bond. Hayder defaulted in supplying the wheat, nor did it reimburse the ₦500,000.00 advance, consequent upon which Grains Processing Company (Nig.) Limited instituted a pending action in Court claiming the sum under the Bond from the Plaintiff.

The Plaintiff demanded indemnity from the Defendant, who declined payment, whereupon the Plaintiff instituted an action claiming the sum of ₦500,000.00 with interest and costs.

64.3 DECISION OF COURT

HELD:

1. A Surety's liability arises when the principal debtor has defaulted. In this case, *Hayder* has defaulted in supplying the wheat to Grains Processing Company (Nig.) Limited.
2. According to the terms of the Counter-indemnity, the Defendant is liable to indemnify the Plaintiff once a claim has been made on it, even though the Plaintiff has yet to pay the claim.
3. The Defendant was liable personally under the Counter-indemnity as he did not agree on behalf of his employer.
4. Judgement for the Plaintiff in the sum of ₦500,000.00 plus interest at 10%.

JUDGEMENT

UBBAONU, J.

The Plaintiff, an insurance company, brought a Writ of Summons against the Defendant, thus:-

- (1) The Plaintiff's claim is for the sum of ₦500,000.00 being money for Counter-Indemnity entered into in favour of the Plaintiff in respect of indebtedness of Messrs Hayder Trading and Manufacturing Company (Nig.) Limited for which the Plaintiff is the guarantor which indebtedness was due and payable as per Counter-Indemnity agreement dated 6th day of April, 1988.

PARTICULARS

- (a) Money due and owing by the Defendant to the Plaintiff as per Counter-Indemnity: - ₦500,000.00.
- (b) Interest at Court rate from the date of judgement until the whole judgement is liquidated.
- (c) The cost of this suit as may be assessed by the Court. Pleadings were ordered, filed and exchanged.

The important paragraphs of the Statement of Claim averred thus: -

- (1) The Plaintiff is a limited liability company performing insurance business in all parts of the Federation, including Kano.
- (2) The Defendant is the Managing Director of a company called Hayder Trading and Manufacturing Company (Nig.) Limited, having its office at No. 75, Sharada Industrial Area Phase 2, Kano.
- (3) That on or about the 6th of April, 1988, the Plaintiff entered into a Performance Bond in favour of Grains Processing Co. (Nig.) Limited for the sum of ₦500,000.00. The sum of ₦500,000.00 was to be collected by Hayder Trading and Manufacturing Company (Nig.) Limited for the purchase of wheat for Grains Processing Company (Nig.) Limited during the 1988 wheat harvesting period.
- (4) In consideration of the Plaintiff entering into Performance Bond in favour of Grains Processing Company (Nig.) Limited for the benefit of Hayder Trading and Manufacturing company (Nig.) Limited. of which the Defendant in turn entered into Counter-Indemnity of Performance Bond in favour of the Plaintiff to the tune of ₦500,000.00 on or about the 6th of April, 1988.
- (5) At the trial of this suit and or any time before the trial, the Plaintiff will rely on the Performance Bond No. VPB/519/KS dated 6th April, 1988. Photocopies of which documents were attached to the application for the writ of summons are hereby specifically pleaded and notice is hereby given to the Defendants to produce the documents.
- (6) That Hayder Trading and Manufacturing Company (Nig.) Limited. Infact, collected a sum of ₦500,000.00 from Grains Processing Company (Nig.) Limited, but did not supply any wheat to Grains Processing Company (Nig.) Limited and the money for

which the Plaintiff entered into Performance Bond was not refunded to the Plaintiff.

- (7) That after several months that Hayder Trading and Manufacturing Company (Nig.) Limited had collected the sum of ₦500,000.00, it did not supply a single grain to the Grains Processing Company (Nig.) Limited; a letter of demand was sent to the Defendant, being the Managing Director and also counter-indemnitor. A photocopy of the letter dated 19th September, 1988, was sent to the Plaintiff.
- (8) That Grains Processing Company (Nig.) Limited has since taken the Plaintiff to Court in suit No. K/51/89 pending before the High Court of Justice, Kano, claiming the sum of ₦500,000.00, being the amount for which the Plaintiff executed a Performance Bond.
- (9) That the Plaintiff claims from the Defendant the said sum of ₦500,000.00 plus interest, cost, and expenses incurred by the Plaintiff on recovery of the said money.

The important paragraphs of the Statement of Defence averred as follows:

- (3) The Defendant emphatically denied the contents of paragraph 4 of the Statement of Claim and put the Plaintiff to the strictest proof thereof, averred facts.
- (4) The Defendant, in reply to paragraph 5 of the Statement of Claim, denies ever indemnifying the Plaintiff for standing surety for Hayder Trading and Manufacturing Company (Nig.) Limited. and avers that the Plaintiff has, in time past and now is, the sole insurer of the said company.
- (5) The Defendant, in reply to paragraphs 6 & 7 of the Statement of Claim, avers that he is an employee of Hayder Trading and Manufacturing Company (Nig.) Limited and admits receiving the letter of 19th September, 1988, for and on behalf of the aforesaid company and in his capacity as the Managing Director.
- (6) The Defendant further avers that the said letter of 19th September, 1988 was written after Hayder Trading and Manufacturing (Nig.) Limited had on the 20th May, 1988 written to Grains Processing Company (Nig.) Limited informing them of the unprecedented heavy down pour of rains which washed away all the farms of wheat already purchased, sources which Hayder Trading and Manufacturing Company Ltd. was to use in supplying the Grains Processing Company (Nig.) Ltd. This letter is hereby pleaded.
- (7) That as a result of the above letter of 20th September, 1988, from Hayder Trading and Manufacturing Company (Nig.) Limited, the two companies entered into another agreement dated 6th of June, 1988, for an increase in the cost per ton of the said wheat. This agreement is hereby pleaded.
- (8) The Defendant later avers that in a letter to his Solicitors Messrs Adamu & Co. the Plaintiff's Solicitors Messrs Olu Awe & Co. on the 27th November, 1988, wrote to say that the counter-indemnity (for which they are purportedly suing the Defendant was executed in favour of the Plaintiff by one Alhaji Abubakar Aliyu Dan Azumi on the 30th of March, 1988. This letter is also pleaded and will be strongly relied upon by the

Defendant at the hearing.

- (9) The Defendant strongly avers that he is not indebted to the Plaintiff in the sum of ₦500,000.00 or any sum, plus interest for that matter, whatsoever. Whereof the Defendant will at the trial urge the Court to dismiss the Plaintiff's claim as being frivolous, vexatious, an act of ill will, and an abuse of the process of this Court.

The Plaintiff called one witness to prove its case. He is Mr. Anthony Olanrewaju Sanni, who gave evidence at D.W.1. He testified that the Plaintiff Company carried on insurance business, and he is the Managing Director of the Plaintiff's Company. He knows the Defendant in this case. The Defendant is the Managing Director of the company called Hayder Trading and Manufacturing Company Limited. The Defendant went to the office of P.W.1 and proposed a performance Bond in respect of wheat to be supplied to a company at Azare in Bauchi State by the Hayder Trading and Manufacturing Company Limited, of which the Defendant is the Managing Director. The company in Azare is called Grain Processing Company Limited. Hayder Trading and Manufacturing Company Limited received from the Azare company the sum of ₦500,000.00 to supply the said company 1,000 tons of wheat within 6 months from 6th April to 5th October, 1988. The Plaintiff company executed a Performance Bond and, in turn, demanded a personal Counter-indemnity from the Defendant.

The counter-indemnity is admitted as Exhibit '1'. The Performance Bond signed by the Plaintiff's company is Exhibit '2'. The P.W.1 went on to say that the Hayder Trading and Manufacturing Company Limited, after receiving the said sum of ₦500,000.00, did not supply a single grain to Grains Processing Company (Nig.) Limited and did not return their ₦500,000.00. On 12/10/88, the Grains Processing Company (Nig.) Limited informed the Plaintiff's company of this situation and demanded their ₦500,000.00 from the Plaintiff's company. The letter Ref. No.9PC/M. 1/11/10/277 dated 12/10/88 is admitted as Exhibit '3'. There was another letter from the Solicitors of Grains Processing Company (Nig.) Limited - Messrs Nwadialo & Co. to the Plaintiff to pay up the sum of ₦500,000.00. This letter is Exhibit '4'. A copy of a letter written by the Plaintiff company to the Managing Director of Hayder Trading and Manufacturing Company Limited is admitted in evidence as Exhibit '5'. This letter was written on 21/9/88. The P.W.1 further testified that the conditions precedent to the enforcing of Exhibit '1' are contained in paragraph 2 of Exhibit '1', i.e, if there is any notice of a claim arising under the counter-indemnity, the indemnitor would be called upon to indemnify the Plaintiff Company, and that was why the Plaintiff sued the Defendant. He also said that the indemnity should take place within 15 days. The witness went on to say that the Plaintiff's company was not aware that there was a new agreement between Hayder Trading and Manufacturing Co. Limited and Grains Processing Co. (Nig.) Limited suspending the Performance Bond. The P.W.1 asked the Court to order the Defendant to pay to the Plaintiff the sum of ₦500,000.00 as contained in the Counter-indemnity... Exhibit 1.

Under cross-examination by Mr. Adamu Abubakar, the Learned Defence Counsel, the P.W.1 said that the Defendant signed Exhibit 1 in his capacity and not on behalf of Hayder Trading and Manufacturing Co. (Nig.) Limited, of which the Defendant is the Managing Director. The P.W.1 showed to the Court the signature of the Defendant in Exhibit '1'. He said that the Defendant signed Exhibit '1' in his private capacity and that was made known to the Defendant. He admitted that the Plaintiff's company has not paid the ₦500,000.00 to Grains Processing Co. (Nig.) Limited, but said that there is a *pendente lite* on the issue.

The Defendant gave evidence as D.W.1 but called no other witness. He testified that he knows the Plaintiff company. He was the Managing Director of Hayder Trading and Manufacturing Company (Nig.) Limited. On 30/8/88, Hayder Trading and Manufacturing Company Limited reached an agreement with Grains Processing Company (Nig.) Limited for Hayder Trading and Manufacturing Co. (Nig.) Limited to supply ₦1,000 metric tonnes of locally produced wheat to the tune of ₦2 million, of which ₦500,000.00 was advanced to Hayder Trading and Manufacturing Co. Limited.

The Plaintiff's company guaranteed the ₦500,000.00 in consideration of ₦10,000.00 premium paid by Hayder Trading and Manufacturing Co. (Nig.) Limited to the Plaintiff's company. The Hayder Trading and Manufacturing Co. Limited embarked upon purchasing the wheat from Kaduna villagers in the Rano L.G.A. of Kano State when heavy downpour flooded the wheat field, and the wheat was under harvesting, which made Hayder incur a heavy loss. The D.W.1 went on to say that his company approached the Plaintiff's company, thinking that the Bond they entered into with the Plaintiff's company covered the Hayder Trading and Manufacturing Co. Limited, but the Plaintiff's company told him that the Bond did not cover the Defendant's company. Hayder Trading and Manufacturing Co. Limited wrote a letter to Grains Processing Company (Nig.) Limited at Azare informing them of their inability to fulfill the agreement to supply them with the grains.

The witness said that they reached another agreement with the Grains Processing Co. (Nig) Limited, dated 6/6/88. He went on to testify that the price of a ton of wheat has gone up from ₦2,000.00 to ₦4,500.00. His company informed Grains Processing Co. Ltd., but the said company ignored their advances. He testified that after the downpour that destroyed their grains, they approached the Plaintiff company, which asked Hayder to discuss the matter with Grains Processing Co. (Nig) Limited. A copy of the letter written by Hayder Trading and Manufacturing Co. to Grain Processing Co. Exhibit '6'. The agreement reached by Hayder and Grains Processing Co. (Nig) Limited is Exhibit '7'. He said that he did not approach the Plaintiff for an extension of the Bond- Exh. '2'. The witness admitted that Exhibit 7 of the new agreement did not extend the time of supplying the grains to the next harvesting season, and so Hayder Trading & Manufacturing Co. did not approach the Plaintiff's company in this case for the extension of the Bond. The Defendant admitted signing the counter-indemnity Exh. 1 but said that he did so in his capacity as the Managing Director of Hayder Trading and Manufacturing Co. (Nig.) Limited. He said that he was aware of a claim of ₦500,000.00 by Grains Processing Co.

The Defendant did not know whether the Plaintiff's company had settled the claim or not. He went on to say that he was surprised that the Plaintiff is claiming for a loss that it has not suffered. He urged the Court to dismiss the claim. Under cross-examination by Mr. Awe, the learned counsel to the Plaintiff, the Defendant admitted that he signed Exhibit '1' but did not state below his signature that he signed on behalf of his company, Hayder Trading Co. Limited. He denied that the Plaintiff is a party to Exh. '7'. He admitted knowing the liability of the Plaintiff in Exh. 2. He said that on the face of Exh. '6', the Plaintiff did not know the Exhibits. '6' and '7'. He denied the Exhibits. '6' and '7' were made when this suit had been instituted. Since the Defendant has admitted signing the counter-indemnity but said that he did so in his capacity as the Managing Director of Hayder Trading and Manufacturing Co. Limited, I shall reproduce Exhibit. '1' in the judgement and examine it critically to find out whether the Defendant is personally liable or not.

“COUNTER INDEMNITY”

VPB/0519/KS

IN CONSIDERATION OF:
NIGERIAN VICTORY
ASSURANCE COMPANY
LIMITED whose registered
Office is at 15B POST OFFICE
ROAD, KANO (hereinafter called
“the SURETY”) executing a Bond
on behalf of: -

- (a) In favour of Hayder Trading and Manufacturing Company Limited, 75 Sharada Industrial Area, Phase 2, Kano.
- (b) In the name amount of ₦500,000.00 (Five Hundred Thousand Naira Only).
- (c) In respect of:-
 - (i) To supply 1,000 metric tons of wheat.
 - (ii) To Grains Processing Company (Nig.) Limited, Azare, Bauchi State.

The party executing this COUNTER INDEMNITY (hereinafter referred to as “the Indemnity”) hereby undertakes as follows:

1. To indemnify the surety against all claims and liabilities under the said Bond, and if the surety is called upon to pay any monies under the said Bond, to pay on demand to the surety the full amount of such monies together with all costs and expenses incurred by the surety in respect thereof. In pursuance of this counter-indemnity, the surety shall be entitled whenever notification of claim or potential claim is received in respect of the said Bond to call up the indemnitor to deposit with the surety the full amount of the said Bond. Such deposit shall be paid by the indemnitor to the surety within 14 days after request in writing and the surety may use such monies to settle such claim or claims together with costs and expenses therewith if there is a surplus in the hands of the surety after settling all such claims, costs and expenses surplus shall be refunded forthwith to the indemnitor but if there is a deficiency, then the amount of such deficiency shall be paid by the Indemnitor to the surety forthwith upon request in writing.
2. The surety shall not be obliged before enforcing the counter-indemnity to take any step to recover from any other person, whether Principal debtor or guarantor any monies due to the surety nor be obliged to enforce any of the surety’s rights in any order of priority and no time given by the surety or any variation or release of any obligation as aforesaid or release of any other security shall in any way reduce or otherwise affect the liability of the Indemnitor here under.
3. If this counter-indemnity is executed by more than one person firm or corporation the word indemnitor shall be read in the plural and the liability of each party executing this counter-indemnity shall be joint and several and the surety shall be entitled to recover from any one or more of the said parties the full amount of the above-mentioned deposits or other monies due from the Indemnitor by virtue of this counter-indemnity.

Signed:
“Hassan Deik”

The counter indemnity, which is Exh. ‘1’ states: “The Party executing this counter-indemnity (hereinafter referred to as “the Indemnitor”) hereby undertakes as: -

- (1) To indemnify the surety against all claims and liability under the Bond:

.....

The question now is who executed the counter-indemnity, which is Exhibit 1? Exhibit 1 was executed by the Defendant Hassan Deik. The P.W.1 identified the Defendant's signature, and the Defendant admitted signing Exhibit '1' but said that he signed it on behalf of Hayder Trading and Manufacturing Co. Limited as its Managing Director. There is no place in Exhibit 1 where the Defendant signed for and on behalf of Hayder Trading and Manufacturing Co. Limited

The Defendant executed Exh. 1 as Hassan Deik simpliciter. I find as a fact that the Defendant signed the counter-indemnity personally and he is personally liable. He is the Indemnitor in Exhibit '1'.

Mr. Adamu Abubakar, the learned defence counsel, submitted that as the Plaintiff company has not paid the ₦500,000.00 to the creditor, Grains Processing Co. (Nig.) Limited, Azare, Bauchi State, the Plaintiff company is not entitled to recover the money at this stage. I do not accede to this argument for paragraph 2 of Exhibit. '1' is clear on this point. The surety liability arises when the principal debtor has made default, but not until then. See Halsbury's Laws of England, 4th Edition Volume 20 paragraph 158 page 86 and the case of *Belford Union Guardians v. Pattison* (1856) 11 Exch 623.

The principal debtor has defaulted in supplying the 1,000 metric tons of locally produced wheat to Grains Processing Co. (Nig.) Limited. The Plaintiff is entitled to its claim. I find and hold that the Plaintiff has established its case on the balance of probabilities. Judgement is therefore entered in favour of the Plaintiff against the Defendant in the sum of ₦500,000.00 (Half a Million Naira) plus 10% interest per annum at Court rate from the date of Judgement until the whole judgement debt is fully satisfied.

64.4 REMARKS

This is a case of liability under counter-indemnity and performance Bond resolved in favour of the Plaintiff in the sum of Five hundred thousand (₦500,000.00) plus interest accruable at 10%.

64.5 REFERENCE

1. *Belford Union Guardians vs Pattison* (1856) 11 Exch.623.

65.1 ARRANGEMENT OF MATTER, COURT, DATES.

COURT: KANO STATE HIGH COURT (KANO)

DATE: 29th September, 1988

SUIT NO: K/298/87

JUDGE: Saka Yusuf

**LION OF AFRICA INSURANCE COMPANY LIMITED
(Plaintiff)**

vs

**STAFF SWEET COMPANY LIMITED
STAR INDUSTRIAL ENT. LIMITED.
STAR FOOD PRODUCT COMPANY LIMITED
(Defendants)**

65.2 REPORTS/FACTS/ISSUES

Through Arewa Brokers, the Plaintiff provided fire, theft, burglary and Marine Insurance covers for the benefit of the Defendants. By letter dated 21/5/85, which stated the Defendants as the proposed insureds, Arewa conveyed to the Plaintiff the offer to provide the insurance cover.

The Plaintiff accepted the offer by a subsequent letter. The Plaintiff supplied Arewa with blank marine insurance certificates, which Arewa issued to the Defendants on behalf of the Plaintiff.

The Defendants duly paid the premium to Arewa, who never paid the same over to the Plaintiff. The Plaintiff demanded the premium from the Defendants, who refused to pay on the ground that they had already made payment to Arewa, who, the Defendants contended, acted as the agent of the Insurer.

65.3 DECISION OF COURT HELD:

1. A disclosed principal can sue and be sued on any contract made on his behalf, and in respect of any money paid or received on his behalf by his agent acting within the scope of his authority. The Brokers (*Arewa Insurance Brokers*) was the agent of the assured Defendants. The Defendants were liable for their acts and omissions.
2. No agent who has accepted employment from one principal can, in law, accept an engagement inconsistent with his duty to the first principal unless he makes the fullest disclosures to each principal of his interest and obtains the consent of each principal to the double employment. As there was no evidence that Arewa Insurance Brokers disclosed its interest to the Plaintiff and that it obtained the consent of both insured and insurer, it could not be inferred that it acted as the agent of the Insurer.
3. As regards the Marine Policy, here, unless otherwise agreed, the broker, but not the assured, is directly responsible to the insurer for the premium. Consequently, the

Plaintiff's claim for payment of the premium in respect of the Marine Insurance Cover should be against Arewa Insurance Brokers and not the assured.

4. The Plaintiff was entitled to claim from the Defendants the sum of ₦12,131.18, being premiums on marine policies. The sum of ₦1,698.21 is claimable from the Broker.

JUDGEMENT

YUSUF, J.

The claim of the Plaintiff, as per its writ, was for ₦13,829.39, being the outstanding premium for the risks undertaken for the benefit of the Defendants. In establishing its claim, the Plaintiff called one witness, P.W.1, who was Mr. Ibrahim Habib, an employee of the Lion of Africa Insurance Company, the Plaintiff company. He told the Court that the Plaintiff did business with the Defendants by insuring them against fire, theft, or burglary and marine insurance. He told the Court also that the business came to the Plaintiff through Arewa Insurance Brokers. He explained that the offer came to them through a letter received by them on 21-5-85. This letter was Exhibit "A". At the time of the contract, the names of the Defendants were made known to the Plaintiff by Arewa Brokers, who were also acting for and on behalf of their clients, the Defendants. He explained further that since Arewa Brokers were acting for and on behalf of the Defendants, they were not at the same time acting for and on behalf of the Plaintiff. He also said that they undertook the risk and issued their Policies. Their acceptance of the offer was contained in Exhibit B".

He said that in addition to the Policies issued, they also supplied Arewa Brokers with their Blank Certificate in respect of Marine Insurance, which was also issued to the Defendants by Arewa Brokers on behalf of the Plaintiff to avoid delay in the Defendants' transacting banking businesses.

He explained further that the method whereby Arewa Brokers was supplied with the Blank Certificates to be issued on behalf of the Plaintiff was the usual practice in all Insurance businesses. He also said that some of the Certificates were copied to the Plaintiff through covering letters, which were exhibits "C" and "C¹". But since both the Policies and Certificates were issued to the Defendants, the Defendants had refused and still refuse to pay for the risks undertaken on their behalf. He therefore urged the Court to recover the sum claimed from the Defendants. Under cross-examination by the counsel to the Defendants, P.W.1 denies the suggestion that Arewa Brokers was acting in a dual capacity by the contents of exhibits "C" and "C¹". P.W.1 explained that they did not write Arewa Brokers, that they were not acting on its behalf, because it is the practice in the insurance business that wherever such certificates are delivered to the insured by the brokers, the brokers are acting on behalf of the insured and not the insurer. He said that the same principles applied when exhibits "C" and "C¹" were completed by the brokers. He explained further that there was no correspondence between the Plaintiff and the Defendants to show the relationship between them and Arewa Brokers. He said that 3% and 30% contained in Exhibit 'A' were the commissions payable to Arewa Brokers for introducing the Defendants and the ready commission for retaining them. P.W.1 confirmed that they did not report Arewa Brokers to the Director of Insurance, whose license was subsequently cancelled by the Director.

He confirmed that the Defendants wrote to them saying that they had paid Arewa Brokers, but when Arewa Brokers' license was cancelled, they were not satisfied with their reply. Hence, Arewa Brokers have now been reported to the Director of Insurance. The

Defendants also gave evidence and called one witness. D.W.1 was Jude Okafor, who was the Accountant of the Defendants. He told the Court that his company had dealings with the Plaintiff between the year 1985 and 1986. He said that they insured with the Plaintiff through Arewa Brokers. He said that they insured against burglary, fire, workmen's compensation, vehicles and marine.

He explained that the payments made to the Plaintiff were made as a result of their debit notes sent through Arewa Brokers. They in turn, made the payments through Arewa Brokers. He said that once the payments were made to Arewa Brokers, they had therefore discharged with them. He identifies exhibits "A", "B" "C" and "C1" as the policies taken; and said that all the premium in respect of all the Policies had been paid. D.W.1 said that it was the Plaintiff themselves who introduced Arewa Brokers to them as their agents. He said that there was a letter from the Plaintiff written to them demanding the premium, to which they had made a reply. Exhibit 'D' was this reply. D.W.1 said that Arewa Brokers was not their agent. He said that they dealt with Arewa Brokers because they were introduced to them by the Plaintiff.

Under cross-examination, D.W.1 still denied the suggestion that Arewa Brokers were their agent. He said that they had no dealings with Arewa Brokers before they were introduced to them. He said that because Arewa Brokers were introduced to them, they then transacted business with them on trust. He said that they paid Arewa Brokers for every transaction they did with them.

D.W.1 argued that they by the contents of exhibit 1, what Arewa Brokers did was done on their behalf, but exhibit 'A' did not represent their instruction. The two counsels also addressed the Court. In his address, the learned counsel to the Defendants submitted that what the Court was being called upon to determine was whose agent Arewa Brokers was. He said from the evidence of P.W.1 and paragraphs 5 and 6 of the claims, it was the contention of the Plaintiff that Arewa Brokers were acting as Brokers for the Defendant, but the Plaintiff had failed to prove this. He said that there was nothing before the Court to show that Arewa Brokers were acting for and on behalf of the Defendants at the time they received the payment of the premium from the Defendants. The learned counsel drew the attention of the court to exhibits "C" and "C1" and submitted that the two exhibits show clearly, without being rebutted, that the brokers were acting on behalf of the Plaintiff. The learned counsel further submitted that since there was no letter to say that Arewa Brokers were acting on behalf of the Defendants, then the doctrine of Estoppel by agency should apply. He drew the attention of the court to *Law and Practice by Orojo*, Vol. 1, pages 144 to 146, under the *Heading of Apparent Authority*.

The Learned Counsel further drew the attention of the court to exhibits C and C1 and said that there was nothing on them to show that the Brokers should not be paid any money or to show that any money paid to the Brokers was paid on behalf of the Defendants. He said that the Plaintiff has put itself in the position of a principal. If any money was therefore paid to the brokers by the Defendants, the Defendants could not be liable. The only remedies for the Plaintiff will be to sue the brokers. He said that since the Plaintiff gave policies to the Arewa Brokers for issuance to the Defendants, they have become the agent of the Plaintiff through implied Authority.

He said that the Plaintiff had failed to prove its case and that it would be wrong both in law and equity to ask the Defendants to pay again. In his submission, the counsel to the Plaintiff submitted that by the admission made by the Defendants both in the pleadings and exhibits tendered, particularly exhibit 'F', it had been shown conclusively that Arewa Brokers were

the agents of the Defendants.

He also referred to the evidence of P.W.1, who told the court about the usual practice in Insurance business and submitted that the evidence of P.W. 1 in that regard was not controverted. He also referred the court to sections 134, 135, and 136 of the *Evidence Act* and submitted that since the Defendant had admitted owing the Plaintiff and had paid this to Arewa Brokers, this alone was enough evidence to show that Arewa Brokers were agents of the Defendants. He referred to the case of *Garthwaiters vs. Rowland* (1948) Vol. 81 Lloyds Law Report pp. 417 to 418. He said that the Plaintiff is entitled to judgement and urged the court to so hold.

It is pertinent to mention straight away that the question as to whether or not there was a valid contract of insurance between the Plaintiff and the Defendant does not arise. Although in exhibit 'F' the Defendants were alleging that they had nothing to do with the Plaintiff and by their paragraph 10, the Plaintiff was by implication put to prove that there was this contract, by exhibits "A", "B", "C" and "C1" and most importantly exhibit "D", I am satisfied that there was a valid contract of Insurance between the Plaintiff and the Defendants even if the contract was brought into existence through the instrumentality of Arewa Brokers who was then acting as the agent. It is the elementary rule of the law of contract that a contract can be formed either by the parties themselves or through one party or agent acting for and on behalf of both parties. Since there are several forms by which a contract could come into existence and since what has been explained are some of the general principles of the law of contract, the mere fact that the agreement between the Plaintiff and the Defendants was brought about by Arewa Brokers could not be regarded as no contract or entitling the Defendants to claim the ignorance of not knowing or hearing of the Plaintiff.

If there is a contract between the Plaintiff and the Defendants, the questions which will arise are (a) who can sue and be sued upon the contract or, to put it more directly, can a third party sue the principal of an agent over a contract which the agent entered into for and on behalf of the principal and (b) whose agent was Arewa Brokers when this contract was formed. To answer the first question, the general principles of law of agency is that a disclosed principal can sue and be sued on any contract made on his behalf, and in respect of any money paid or received on his behalf by his agent acting within the scope of his actual authority. It follows, therefore, that there was nothing wrong in the Plaintiff suing the Defendants over a contract made by Arewa Brokers if Arewa Brokers was the agent of the Defendants. But can this general principle of agency apply in a more specialised contract, such as the contract of Insurance? Paragraph 397 of *Halsburys Laws of England* 4th Edition Vol. 25 provides:

"If a person wishing to obtain insurance of a non-marine character employs an insurance broker as distinct from going direct to the insurers or their agents, the broker is his agent and the ordinary law of agency governs the responsibility of the proposer for the acts and omissions of the Broker". It is clear from the evidence before the Court, particularly the content of exhibit 'A', that it was the Defendants who appointed Arewa Brokers to approach the Plaintiff to insure their properties against both fire and burglary. Exhibit 'A' was a letter of offer by Arewa Brokers for and on behalf of the Defendants, while Exhibit 'B' was the acceptance of the offer. Since it was the Defendants who employed Arewa Brokers to make the contract, therefore, the law of agency must govern both the relationships of the Plaintiff and the Defendants as well as the responsibility of the Defendants for the acts and the omissions of Arewa Brokers. Arewa Brokers has, by the operation of law, become the agent of the Defendants. I must say at this stage that the

existence of the Defendants was not then in doubt. Apart from the facts that their names were disclosed to the Plaintiff through the medium of Exhibit 'A' it is apparent from the contents of Exhibit "A" that the discussion which took place between the Managing Director of Arewa Brokers and the Plaintiff was in respect of the Defendants.

In so far as the existence of the Defendants was made known at the time of the contract, the Plaintiff can therefore proceed against them for any act or omission of Arewa Brokers, who was their agent. There is no doubt that the Defendants had made payments of various sums to Arewa Brokers for onward transmission to the Plaintiff in respect of the premium due from them (see exhibit 'D'); but since they had failed to show conclusively by evidence or otherwise that these various sums were paid to the Plaintiff by Arewa Brokers, it is the Defendants that could be held responsible for this omission.

The Learned Counsel for the Plaintiff, Mr. Kayode, was right when he submitted that the Defendants must show that the various sums reached the Plaintiff and this was what they had failed to do. From the above exposition of the law, therefore, it is clear that a Broker is the agent of the assured and not the agent of the insurer. However, it was the contention of the counsel to the Defendants Alhaji Ali-Balogun that Arewa Brokers was not only acting as agent for the Defendants but also for the Plaintiff since it was Arewa Brokers who on behalf of the Plaintiff delivered the Certificates of Insurance to the Defendants; and by the doctrine of agency, the Plaintiff is estopped from proceeding against the Defendants. Laudable as this submission was, I want to say that this is not the law. With all respect to the Learned Counsel for the Defendants, the law is that no agent who has accepted employment from one Principal can, in law, accept an agreement inconsistent with his duty to the first principal unless he makes the fullest disclosures to each principal of his interest and obtains the consent of each principal to the double employment. (See Bowstead on Agency, 13th Edition, Pg. 144). I must say that there was nothing placed before the court to show that Arewa Brokers disclosed its interest to the Plaintiff either expressly or by implication, and that it obtained the consent of both the Defendants and the Plaintiff. In the absence of such disclosure, therefore, the submission of the learned counsel for the Defendants could not be tenable.

Furthermore, it is observed from the evidence before the court and the various documents placed at the disposal of the court that the risks insured against were not limited to fire and burglary as disclosed in exhibit 'A'. It extends to marine insurance as it was evident on exhibits "C" and "C1". The principles of law that apply in respect of non-marine insurance are not the same principles applicable to marine insurance.

In marine insurance, unless otherwise agreed, the duty of the assured or his agent to pay the premium and the duty of the insurer to issue the Policy to the assured or his agent are concurrent conditions and the insurer is not bound to issue the Policy until payment or tender of the premium. Thus, the Plaintiff was entitled to withhold the issuance of a Certificate of Marine Insurance until payment of the premium unless it was otherwise agreed. It cannot be agreed, therefore, that the issuance of exhibits "C" and "C1" was an acknowledgment of payment. The position is better explained by the Learned Author of *Haslburys Law of England* at paragraph 89, Vol. 25, when he said:

- "1 Unless otherwise agreed, where a marine Policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium and the insurer is directly responsible to the assured for the amount which may be payable in respect of the loss or in respect of the returnable premium.

“2 Where a marine Policy effected on behalf of the assured by a broker acknowledges receipt of the premium, that acknowledgment is in the absence of fraud, conclusive as between the insurer and assured but not as between the insurer and the broker. It follows from the above provisions that as a general rule the assured is liable to the broker for the premium as money paid on his behalf, whether or not they had been paid on his behalf, whether or not they had been paid to the broker to the underwriters”.

It is unequivocally clear from these provisions, therefore, that the assured is not liable directly to the insurer except in cases of occasioned loss and returnable premium. It is also clear that the assured is not again liable to the insurer or the underwriters for payments of premium. But the assured is liable under paragraph 2 above, to the brokers and since there was evidence before the court and as per exhibit ‘D’ to show that the payments have been made to the broker, Arewa Brokers, such evidence is conclusive. The claim for the payment of the premium in respect of the risks covered by exhibits C and C1, therefore, shall be against the broker, Arewa Brokers and not against the assured, the Defendants. This was what Smith L.J. said in the case of *Universo Insurance Company of Milan vs Merchants Marine Insurance Company Limited* (1897) 2 Q.D. Pg. 93 & 96 when he said:

“The question is whether the underwriter in these circumstances can sue the assured for the premium due to him for so underwriting, or must he look to the broker and him alone for the payment. It cannot be denied that for about a century, at any rate, according to the ordinary course of trade between the assured, the broker and the underwriter, the assured do not in the first instance pay the premium to the broker nor does he later pay it to the underwriter. But as between the assured and the underwriter, the premium is considered as paid. The underwriter to whom, in most instances, the assured are known looks to the broker for payment, and he to the assured.

The latter pays the premium to the broker only, and he is a middleman between the assured and the underwriter. But he is not solely an agent, he is a principal to receive the money from the assured and to pay it to the underwriter”.

Thus, in the ordinary course of business of Marine Insurance, a Broker is not regarded solely as an agent. He is, for that purpose, regarded as a principal who receives money from the assured and pays some to the insurer or the underwriter. It is therefore the broker that is liable for the payment of the premium in marine insurance. While applying this exposition of the law to this matter, the Plaintiff, who is the insurer, could not proceed against the assured, who are the Defendants. They can only proceed against the Broker, Arewa Brokers, but only in respect of their claims on marine insurance, i.e, exhibits “C” and “C1”.

It is noted however that apart from paragraphs 4(a) and (b) of the Statement of Claim as to whether the type of Policy and risks covered are mentioned, paragraph 4(c) of claim does not specify which of the Policies mentioned therein are meant for Marine Insurance and which are meant for fire, burglary and other risks. However, by the Marine open Policy Cover Certificates Nos. 005 and 006, which are exhibits “C” and “C1”, it was shown that the risks which the two policies covered are Citric Acid and Liquid Glucose Glob Brand, which risks also appear under the said paragraph 4(c) of the claim. It is clear, therefore, that the only marine insurance undertaken by the assured Defendants was in respect of the two Policies that are exhibits “C” and “C1”. By these two policies, the total premium on them is ₦1,698.21. The sum which is claimable against the assured Defendants, therefore, is ₦13,829.39 less ₦1,698.21, being the amount recoverable only from Arewa Brokers, leaving a balance of ₦12,131.18. Judgement is therefore entered for the Plaintiff in the

sum of ₦12,131.18.

65.4 REMARKS

High Court decision on the legal status of Brokers acting in dual capacity, and on the Broker's failure or default in paying collected premiums to the Insurer. The principal can sue or be sued on any Contract made on his behalf and in respect of any premium paid or received on his behalf by his Agent within the Scope of the Contract.

65.5 REFERENCES

1. *Garthwaiters vs. Rowland* (1948) Vol. 81 Lloyds Law Report pp. 417.
2. *Univervo Insurance Company of Milan vs. Merchants Marine Insurance Company Ltd.* (1897) 2 Q.D. Pg. 93.

66.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT, LAGOS STATE.

DATE: 28th February, 1972

SUIT NO: LD/73/68.

JUDGE: Taylor C. J.

**AJALA
(Plaintiff)**

vs

**AMERICAN LIFE INSURANCE COMPANY, INC
(Defendant)**

66.2. REPORTS/FACTS/ISSUES.

INSURANCE AND RE-INSURANCE LAW – Insurer and Insured – Claim on a life assurance policy – Insured dying before end of agreement – Regular payment of premium made by insured – Policy providing for 31 days’ grace for payment of premium when due – How treated.

INSURANCE AND RE-INSURANCE LAW – Life assurance Policy with named beneficiaries upon the death of the insured person – Sum due – Whether it can be enforced by representatives of the estate of the deceased person.

INSURANCE AND RE-INSURANCE LAW – Construction of a life insurance Policy – “Period of Grace” – meaning of – How calculated -Payment made within period of grace – Effective date ascribed thereto – Mode of payment accepted between parties but not expressed in the insurance Policy – How treated by court.

INSURANCE AND RE-INSURANCE LAW – Duty of insurer to pay sum due to Policy – Attempts to shirk duty – Attitude of court thereto.

INSURANCE AND RE-INSURANCE LAW – Reinstatement of insurance Policy- False statement made by insurer thereto – Where original insurance is shown to still be effective – Whether of no material consequence.

CHILDREN AND WOMEN – *Women and Justice administration* – Deceased woman who dies of ill-health – Effort by estate representatives to recover sums due on a life insurance Policy made by deceased woman and for the benefit of two named daughters – Attempts by insurance company to shirk its duty to pay on technical grounds – Attitude of court thereto.

PRACTICE AND PROCEDURE – PLEADINGS – Bindingness of – Where a party’s pleadings conflict with his evidence – Attitude of court thereto.

66.3 DECISION OF COURT. JUDGMENT TAYLOR C.J.

The Plaintiff in this suit claim the sum of £1,000 upon a Policy of insurance issued by the Defendants upon the life of the deceased Victoria Kehinde Ajala, who died on August 31, 1966. The first Plaintiff died during the action, and the second Plaintiff proceeded with the suit. The parties are in agreement on many points involved and the real issue as to liability is a purely legal one as to whether the Policy had lapsed or not. The admitted facts are as follows: that Kehinde Ajala was insured with the Defendant company on August 13, 1965, for a sum of £1,000 to be paid to her daughters, to wit Morenike and Olubukola Ajala, in equal shares or all to the survivor on her death; that the premium payable was £3 16s. per month; that the deceased paid this sum during her lifetime, though often in arrears from August 12, 1965, as per exhibit “E1” to August 24, 1966, as per exhibit “E.16.” and as I have shown she died within two weeks of the last payment and the death certificate shows that she died of cancer of the breast and tetanus.

In addition to whether the Policy had lapsed or not, Mr. Jaiyesimi raised a point contained in paragraph 4a of the Amended Statement of Defence, which states that:

“Further or in the alternative, the Defendants shall contend at the trial that the benefit provided under the Policy is not for the generality of the estate of the deceased, which the Plaintiffs claim to administer, but for two named beneficiaries who can only claim/and maintain an action under the Policy.”

For this contention, reliance is placed on the fact that –

- (1) the two beneficiaries are specifically stated in the Policy and
- (2) on the following provisions under the heading “Rights in Event of Death of Owner or Beneficiary.

“The rights of an owner other than the insured (whose) death occurs during the continuance of this contract shall pass to the administrators, executors, or assigns of the owner unless otherwise provided herein. The rights of a beneficiary...”

I fail to see how this paragraph or provisions assist the defence, for the Plaintiff who commenced this action is the representative of the deceased insured to carry out the intentions of the deceased by paying the sum due to the beneficiaries. If, for one moment, I thought it necessary that the beneficiaries should be parties to this action, I would, on my motion, join them as parties. Further, if this action should succeed, the order of the court will be for the sum sued upon to be paid into court or invested for the benefit of the beneficiaries. Now to the substance of the case.

The crux of the defence is contained in paragraphs 2-4 of the Statement of Defence. With paragraph 4a, I have already dealt. Paragraph 2 read thus:

“The Defendants admit paragraph 2 of the Statement of Claim to the extent that Victoria Kehinde Ajala died on the 31st of August 1966, but aver that the Policy of the said Victoria Kehinde Ajala had lapsed before her death since the premium for July 1966 was not received until the 26th August, 1966, and placed on deposit.”

This averment is in the receipts tendered in evidence for exhibit “E.15” shows that the premium for June 1966 was paid on August 15, and exhibit “E.16” shows that the premiums for July and August 24, 1966. It has been said on more than one occasion that if pleadings are to be of any value at all, parties must be held bound by them. The plea in

paragraph 2 of the Statement of Defence is that the Policy had lapsed because the premium for July 1966 was not received till August 26, 1966.

The Policy exhibit "A" was executed on September 28, 1965, and it is provided inter alia that:

"Premiums for the basic Policy are payable as of the Policy date and every month thereafter during the lifetime of the insured or until premiums for 25 full years have been paid."

Though executed on September 28, 1965, the Policy date is put at September 13, 1965. I take it, therefore, that the monthly premiums are payable on the 13th of each month, and the premium for July 1966 was due and payable on the 13th of that month.

A period of 31 days' grace is allowed in the general provisions in these words: "All premiums are payable annually, semi-annually, or quarterly in advance upon delivery of a receipt signed by an officer of the company listed in the 'modifications' provisions of this Policy. Except as provided herein, the payment of premiums shall not maintain the contract in force beyond the expiration of a grace period of 31 days following the date when the next premium is payable. If death occurs within the grace period, any premium then due and unpaid will be deducted in settlement of this Policy." I said a little earlier that the premiums were payable monthly, and that, in spite of the fact that these general provisions make no mention of monthly periods. This point was in fact not in dispute at the hearing and in fact all the receipts, except the very last one for £7 12s., exhibit "E.16", show that the premiums were paid monthly.

What then is the effect of this grace period of "31 days following the date when the next premium is payable"? As I read the whole of this clause, the effect put in a positive instead of the negative way contained in the Policy is that, except as provided in the "Modifications" provisions of the Policy, the payment of premiums shall only keep the contract in force up to 31 days after the date when the next premium is payable. In short, then, if as pleaded in paragraph 2 of the Statement of Defence, unamended, the month for which the deceased defaulted was July 1966, the 31 days' grace after the date when the next premium is payable is 31 days from August 13. If, therefore, by paragraph 2 of the Statement of Defence, the premium was paid on August 26, the period of grace had not expired. The documentary evidence exhibits "E.16" shows that the premiums for July and August were paid on August 25 and not 26 as averred.

This is borne out by the Defendants' letter exhibit "F," which was written on August 3, 1966, and reads thus:

Returned Cheque

Life Policy Number 364,448

"We enclose herewith a National Bank cheque for £3 16s. 0d. issued by you in respect of your above numbered Policy, which was subsequently returned by the bank marked "Refer to Drawer." In the circumstances, we require cash to substitute the returned cheque and the July premium is also to be paid in cash to avoid your Policy from lapsing. Please, your immediate attention will be of utmost help.

In the evidence of the Defendants' Claims officer, Mr. M. A. Enigbokan, he said under cross-examination as to the period of grace that:

“There is a period of grace of 31 days. We wrote this letter on August 3, 1966. Tendered and no objection and marked exhibit ‘F’. On August 3, 1966, this Policy was still in operation.”

In spite of this, he went on to say that the Policy lapsed in May after the payment in May. This, of course, is not their case on their pleadings by which they were bound. It seems to me that either this officer is completely ignorant of the full wording and meaning of the 31 days’ grace contained in the Policy, or if he is aware of it, then his company is shamefully endeavouring to shirk its duty to carry out the terms of the contract made with the deceased.

In the case of *Stuart v. Freeman* [1903] 1 K.B. 47, 55 Matthew L.J. said this of “period of grace”: “In my opinion, the correct view as to the days of grace allowed by the terms of this Policy is that if payment is made within the time mentioned it is to be taken to have been made on the day appointed for payment, and is to have the same effect as if it had been made on that day.” Lord Justice Scrutton said much the same thing when he said in *McKenna v. City Life Assurance Co.* [1919] 2 K.B. 491, 497 that: “The condition allowing days of grace means that if the premium is paid during those days it shall be treated as if it had been paid on the due date.

In the particular case before me, a payment of premium due on July 13, 1966, could, by the period of grace allowed, be paid on September 13, 1966, for as I have said, the 31 days is by now the very wording of the Policy “following the date when the next premium is payable.”

I have italicised the material words. It is also of the utmost importance to bear in mind the last sentence in this clause, that:

“If death occurs between the grace period, any premium then due and unpaid will be deducted in settlement of this Policy.”

Death here did occur during the grace period, but of course, the payments of premiums were brought up to date before death.

That is the main defence, but there are other pleas put forward in paragraphs 3 and 4 with which I must, of course, deal. Paragraph 3 reads thus:

“The Defendants also aver that pursuant to the lapsing of the Policy of the said Victoria Kehinde Ajala, the said Victoria Kehinde Ajala applied to the Defendants for her Policy to be reinstated, whereupon she was requested to fill the Defendants’ Form CL-101, that is Health Certificate, requesting the Applicant to state whether she has seen a Doctor since the inception of her Policy to which the said Victoria Kehinde Ajala answered in the negative. There is but one answer to this and that is that since I have found the Policy had not lapsed, a plea based upon something taking place “pursuant to the lapsing of the Policy” must fail. There is a second answer too and that is that the clause dealing with reinstatement says that it must be upon “written application.”

The evidence before me was that there was no written application. The other paragraph of the Statement of Defence, i.e., paragraph 4, is bound up with paragraph 3 and the plea of reinstatement of a lapsed Policy. For the same reason that paragraph 3 must fail, so must this, and the overall effect is that the deceased’s Policy at the time of her death, being good and subsisting, the Defendants are duty-bound to honour their agreement exhibit “A”.

The Plaintiff is therefore entitled to judgement for the full sum insured, i.e., £1,000 against

the Defendant company. This sum is to be paid into court within 14 days from today. Application is to be made by the beneficiaries of the Policy, i.e., Morenike Ajala and Olubukonla Ajala, or if minors, by their legal representatives on their behalf, for the payment out of this sum. The Applicants in their application must attach all means of identification available to their affidavit in support, and if made by representatives, it will be a condition precedent that the beneficiaries be brought before me.

66.4. REMARKS

Beneficiaries are duly entitled to the benefit of the full sum insured in a Life Insurance Contract. All that is required is a means of identification for the beneficiaries.

66.5. REFERENCES

1. *Stuart vs. Freeman (1903) 1 K.B. 47, 55.*
2. *Mckenna vs. City Life Assurance Company (1919) 2 K.B. 491, 497.*

67.1. ARRANGEMENT OF MATTER, COURT, DATES.

COURT: HIGH COURT (LAGOS)

DATE: 18th February, 1972.

SUIT NO: LD/III/71

JUDGE: Odesanya, J.

FADAYOMI
(Plaintiff/Applicant)

vs

MERCURY ASSURANCE COMPANY LIMITED
(Defendant/Respondent)

67.2. REPORTS/FACTS/ISSUES.

INSURANCE AND REINSURANCE LAW: - Insurer and insured, claim for loss incurred as a result of an accident, Oral agreement for premium payable and how treated.

PRACTICE AND PROCEDURE – PLEADINGS: - Application to amend statement of claim after closing statements and adjournment of case for judgement, substitution of a new paragraph for the old and addition of new paragraphs. Objection raised by Defendants on grounds of inconvenience and prejudice. Principles to be followed by the court.

67.3. DECISION OF COURT.

JUDGEMENT

ODESANYA, J.:

The Plaintiff claims against the Defendant the sum of £1,330, being loss suffered on August 25, 1967, in an accident involving Plaintiff's vehicle LN 1372 insured with the Defendant company by virtue of policy No. MB/CV/20229/L dated April 10, 1967. After the close of evidence on both sides and the adjournment of the suit for judgement the Plaintiff brought an application for leave to amend the Statement of Claim:

- (1) by adding to the end of paragraph 7 thereof the words: "on the ground of non-payment of full instalments of the premium;"
- (2) by substituting for paragraph 8 a new paragraph 8 which reads:
"The Plaintiff avers that there was an oral agreement entered into by the Plaintiff and the Defendants through the latter's General Manager Mr. Igandan that the premium was to be spread over the entire year of the Policy of insurance one half of the premium payable before the expiration of six months from December 1966 and the other half of the premium payable before the renewal date of the Policy";
- (3) by adding a new paragraph numbered 9 and which reads:
"The Plaintiff has fully complied with the arrangement referred to in paragraph 8 before the accident referred to in paragraph 4 above";
- (4) by adding a new paragraph numbered 11 and which reads:

“The Plaintiff claims the sum of £1,330, being the sum assured under the policy of insurance.”

All the amendments are set out in an amended statement of claim exhibited to the affidavit filed in support of the Plaintiff’s application.

The counsel for the Defendant company objects to the amendments. He submits:

- (1) that paragraph 11 will necessitate the re-address of the court by parties’ counsel.
- (2) that paragraph 8 is incomplete because the date when the oral agreement was entered into is not disclosed therein, and the amendment would necessitate the filing of an amended Statement of Defence. These counsel submissions would prejudice the Defendant company. There is no doubt that the power to amend with which Order 33 of the Rules of Court invests a trial judge is general and extensive. Leave to amend may be granted at any stage of the proceedings as the Order provides. The suit was adjourned for judgement on January 19, 1971. The Plaintiff delayed bringing the application until February 9, 1972, that is, for three weeks after the adjournment.

Whether this delay should defeat the application or not depends on the nature of the amendments and their effect on the parties’ case.

The amendments, however, are based entirely on the evidence already before the court and on matters which have emerged as part of the issues between the parties. The Plaintiff testified *inter alia* as follows:

“I was asked to pay the premium by instalments, half of the premium within six months and the balance before the end of the year 1967.”

The Defendant company’s General Manager’s testimony in response to the Plaintiff’s evidence set out above is as follows:

“We allowed payment by instalments, five instalments within six months from December 8, 1966. She paid the first £40 and she was asked to pay the balance within six months. She agreed to pay within six months. She did not pay as agreed.”

The parties have joined issue on the collateral agreement relating to the method of paying the premium due on the Policy.

In *Akinkuowo vs. Fafimoju* [1965] N.M.L.R. 349, the Supreme Court held that the trial court in the case was right to allow an amendment which, in effect, raised no new issues but enabled the parties to make use of the evidence already given. The trial Judge in that case gave effect to the English Practice Note in *Loutfi v. C. Czarnikow* [1952] 2 All E.R. 823. In short the Practice Note outlines the prescription for tackling an application for an amendment after the close of a case. It is this: “Unless there is very good and strong justification for so doing, the court should be reluctant to grant amendments of the pleadings after the close of the case but before judgement, even though it has been indicated in the course of the hearing that some amendment might be asked for: Such an amendment may be allowed:

- (i) where the matter involved has been raised in the course of the trial and counsel has addressed the court on it, since it will be merely incorporating in the pleadings that which has emerged in the course of the case as an issue between the parties;
- (ii) where the fact the subject of the amendment has been referred to by counsel in opening and evidence about it has been given since there has been sufficient indication in the course of the trial and in the evidence that it is a matter in

controversy and the amendment will enable the court to arrive at the view, if it thinks fit, that what is pleaded is a correct interpretation of the facts.

By these tests, the amendments in the new paragraph 8 and paragraph 9 must be, and are allowed.

The amendments disclosed in paragraphs 7 and 11 of this amended statement of claim do not prejudice the Defendant and are in keeping with the evidence already led. In other words, they bring the pleadings into line with the evidence.

The application, therefore, succeeds. Leave is granted to amend the Statement of Claim. The amended Statement of Claim will be filed and served on or before Monday, February 21, 1972. The counsel for the Defendant will be allowed to recall the Plaintiff for further cross-examination if he so wishes, and to amend the Statement of Defence. If the statement of defence is amended, it should be filed as amended and should be delivered on or before Friday, February 25, 1972.

The Plaintiff will pay the costs of the proceedings assessed at 15 guineas.

67.4. REMARKS

Amendment to Statements of Claim is allowed, while conversely, the Defendant can also amend the Statements of Defence.

67.5. REFERENCES

1. *Akinkuowo vs Fafimoju* [1965] *N.M.L.R.* 349.
2. *Loutfi vs C. Czarnikow* [1952] 2 *All E.R.* 823.

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