

SUPREME COURT OF NIGERIA
18TH JUNE, 1993. SC 24/1989
CORAM: M.L. UWAI, S.M.A. BELGORE, A.B. WALI,
O. OLATAWURA, M.E. OGUNDARE, JJSC

MAZIN ENGINEERING LIMITED PLAINTIFF/APPELLANT
AND
TOWER ALUMINIUM (NIG.) LTD. ... DEFENDANT/RESPONDENT

CONTRACTS - Partly written and partly oral contract - how deduced.

CONTRACTS - Sale of goods - time for delivery - whether expressly stipulated - are legal conditions under which time is taken to be of the essence of a contract present.

CONTRACTS - Frustration - when further performance will be excused - whether from the circumstances the contract was frustrated.

CONTRACTS - Breach of contract - can breach arise where there is frustration - whether plaintiff is entitled to damages for breach.

PLEADINGS - Alleged insufficient denial of certain averments in the statement of claim - whether significant - when plaintiff has treated the contract as determined by intervening events - and where court has found the contract was frustrated.

FACTS

The Defendant/Respondent contracted to supply some locally produced aluminum roofing sheets to the Plaintiff/Appellant within 14 days. Appellant subsequently changed the order to a different type of aluminum product which it clearly knew would have to be imported. It was stated in Respondent's quotation that delivery would be effected in 4 (four) months. When the Respondent encountered difficulty in securing FORM "M" and Import Licence from government, it informed the Appellant in writing that it was not possible to deliver within the earlier scheduled 4 months.

Appellant simply regretted Respondent's inability to deliver in 4 months and asked for a refund of the N15,000.00 deposit it paid, which was promptly paid back by the Respondent.

Before the Lagos High Court, Appellant claimed against the Respondent the sum of N33,886.56 being general and special damages for breach of contract of sale, or alternatively for negligent misrepresentation of the date of delivery. The trial Judge found that the contract was frustrated, held that time was not of the essence of the contract and dismissed the claim. Appellant's appeal to the Court of Appeal was also dismissed. The Appellant has further appealed to the Supreme Court and the main issue for determination was whether the contract was frustrated by Respondent's inability to secure Import Licence from government.

HELD (unanimously dismissing the appeal)

1. From the documents exhibited in this case, it is deducible that the contract was partly in writing and partly oral. (P. 84 L 36)
2. There is no express stipulation that the aluminum sheets must be delivered on any particular date. Relevant portion of one of the exhibited documents confirm that the fixed period of delivery being tentative was at best a promise by the Respondent to deliver within that time. (P. 85 L 18)
3. None of the legal conditions under which time is taken to be of the essence of the contract is present in this case.
4. Where a contract is frustrated, further performance is only excused if the frustration, occurs before breach of the contract, it is without the fault of either party, and it is due to a fundamental change of the circumstances beyond the control and original contemplation of the parties. (P. 86 L 6)
5. From the circumstances in this case, it can be implied that the Respondent's delivery of the iron sheets within the estimated time would be subject to approval of Form "M" to enable it import the required components in time which was a condition precedent Respondent must meet if it was not to break the Regulations. (P. 88 L9)

. By reason of the events in this case there was such a change of circumstances that the contract looked at as a whole must be considered as frustrated. (P. 88 L 18)

7. It cannot be said that the Respondent was negligent or made any misrepresentation to the Appellant at time of entering into the contract, as the evidence did not show that. (P. 88 L 32)

8. Where there is frustration the question of breach will not arise since none of the parties can be held responsible for what happens. Therefore, the Appellant will not be entitled to any damages for breach save the amount of money it paid to the Respondent which it had already collected when it treated the contract as abrogated by the intervening event. (P. 88 L 35).

9. Whether or not two paragraphs of the Appellants statement of claim were sufficiently denied by the Respondent, the Appellant having treated the contract as determined by the intervening circumstances, and the court having found the contract was frustrated by such events, the Appellant would not be entitled to any damages. (P. 89 L 3)

REPRESENTATION:

Parties absent and unrepresented.

CASES REFERRED TO

1. Hedley Byrne Co. Ltd. v. Heller & Paterns Ltd. (1993) 2 All ER 575
2. Esso Petroleum Co. Ltd. v. Mardon (1976) 2 WLR 583
3. Cricklewood Property & Investment Trust Ltd. v. Leightons Investment Trust Ltd. (1945) 1 All ER 252
4. Amadi v. Thomas Aplin & Co. Ltd. (1972) 1 All NLR 413
5. Hartley v. Hymans (1920) 3 KB 475
6. Re Anglo - Russian Merchant Traders Ltd. (1917) 2 KB 678
7. Tsakirog Lou & Co. Ltd. v. Noble & Thorl G.m.b.h (1961) 2 ALL ER 179
8. Morgan v. Master (1947) 2 All ER 666
9. Unger v. Preston Corporation (1942) 1 All ER 200
10. Denny Mott & Dickenson v. James B. Fraser & Co. Ltd. (1944) AC 265

11. The Queen v. The Governor in Council, Wester Region, ex parte Kasalu Adenaiya (1962) All NLR 300
12. Lawal v. Ijale (1967) 5 NSCC 94.

STATUTES & RULES

1. Supreme Court Rules 1985 0.6 rr. 2 & 5 (1) (a)
2. Sale of Goods Law 1959 s. 10(1)

BOOK REFERRED TO

Cheshire & Fifoot on the Law of Contract (9th Ed.) p. 531

LEAD JUDGMENT BY WALI JSC

By a Writ of Summons taken out in the Lagos State High Court, Ikeja Judicial Division, the plaintiff claimed against the defendant as follows:-

“The sum of #33,886.56 (Thirty three thousand, eight hundred and eighty six naira, fifty six kobo) being general and special damages for breach of contract of sale.

Particulars

(i) Contract price for Honeywell Enterprises (Nig.) Ltd.	#135,000.00
(ii) Quotation/acknowledgement of Order from Defendant	#102,375.55
(iii) General damages and loss of profits	#32,624.45
(iv) Special damages wasted expenses	<u>1.262.11</u>
	<u>#33,556.56</u>

Alternatively, the plaintiff claims the aforesaid sum of money as damages against the defendants for negligent misrepresentation of the date of delivery,”

The plaintiff’s claims were denied by the defendant. Pleadings were ordered amended, exchanged and filed and issues joined.

At the end of the trial, the learned trial judge I. O. Agoro, J, found that the contract was frustrated by the subsequent and intervening

events and so dismissed the plaintiffs claims.

The plaintiff appealed to the Court of Appeal, Lagos Division against the trial court's decision. The Court of Appeal also, after hearing arguments for and against the appeal, dismissed it and affirmed the judgment of the trial court.

The plaintiff has now further appealed to this Court.

In compliance with Order 6 rule 5(1)(a) of the Supreme Court Rules, 1985 (as amended), the plaintiff filed a brief of arguments, and up to the date the appeal was heard, the defendant as respondent did not, in compliance with Order 6 rule 2 of the said Rules, file any brief of arguments. As a result the appeal was heard on the plaintiff's brief only.

Henceforth the plaintiff and the defendant will be referred to in this judgment as the appellant and the respondent respectively. It is to be noted that on the date the appeal came up for hearing, none of the parties or their representatives appeared in Court.

Based on the five grounds of appeal filed by the appellant in this appeal, the following 5 issues were formulated in the appellant's brief for determination by this Court:-

(1) *Whether the Appellant unilaterally terminated the contract (exhibit 1) by itself in writing their letter exhibit 9 or whether the respondent anticipatorily breached the contract exhibit 1 by their letter exhibit 6 and whether such anticipatory breach is nonetheless a breach of contract in law as pleaded by Appellant in their paragraphs 8 and 9 of Amended Statement of Claim.*

(2) *Whether the rule of law enunciated in Hedley Byrne Co. Ltd. v. Heller & Partners Ltd. (1963) 2 All E.R. 575 and applied in Eso Petroleum Co. Ltd. v. Mardon (1976) 2 WLR 583 at 593-595. MI-602 and 605-607 regarding negligent misrepresentation is applicable to the forecast of the date of delivery as contained in the contract document exhibit 1 prepared by the Respondent in this case.*

(3) *Whether the doctrine of frustration applies to the case in this appeal thereby discharging the parties from their contractual obligations in the circumstances of this case.*

(4) *Whether the contents of the contract document (exhibit 1) may be contradicted, altered, added to or varied by oral evidence.*

(5) *Whether or not the Appellants are entitled to damages in the circumstances of this case and the quantum of damages applicable in such eventuality.*”

But before going into the arguments and submissions, I think it is pertinent to state the facts of the case, and in doing so I shall adopt the facts as produced in the judgment of the Court of Appeal which are as follows:-

“The respondent is a manufacturer and importer of aluminum raw materials for the Stucco Mitt Finish type of Towerspan Corrugated Roofing Sheets. The appellant who in March 1983 (see EXH. 7) had won a contract for the construction of a Warehouse/Factory for one Honeywell Enterprises (Nigeria) Limited at Ibadan, Oyo State of Nigeria, approached the respondent with the drawings of the warehouse/factory for a quotation for aluminum roofing only. The respondent then made and submitted to the appellant quotation No. 8228/83/TBP dated 29/4/83 based on its locally manufactured products. It was stated therein that delivery would be effected within 14 days (see EXH. 11 dated 29th April, 1983). As a result of further discussions between the parties, the appellant by letter dated 17th June, 1983 (EXH. 13) requested the respondent to provide a fresh quotation using the same data as the one used in the preparation of the first quotation (i.e. EXH. 11, but with 0.55 mm. beige aluminium sheets only). On 22nd June, 1983 the respondent furnished the plaintiff with a new quotation as requested (see exh. 1 Quotation No. 8228/83/TBP (REVISED) dated 22-6-83). It was stated therein that delivery would be effected in four (4) months. Evidently exhibit 1 was accepted by the appellant as it made immediate advance payment of the sum of N15,000.00 (Fifteen thousand Naira) to the respondent vide Receipt EXH. 2 dated 22-6-83. It was apparently made clear to the appellant during negotiations that Beige Finish Aluminum Corrugated Roofing Sheets would have to be imported after it had rejected the first quotation (Exh. 11) based on local materials. Respondent immediately thereafter sent telex messages to its overseas suppliers in Belgium (see EXH. 17) and proceeded to process Form “M” for the necessary foreign exchange and also applied for import licence to cover the importation as required by law. When it appeared to the defendant that because of the delay in obtaining government approval for Form M and import licence, it would not be possible to deliver the beife aluminum sheets within the 4 months stipulated in

EXH. 1 it caused a letter EXH. 6 dated 11th October 1983 to be written to the appellant explaining the situation. In it, it offered apologies for the delay and stated that it was then expecting delivery in February 1984. The respondent however made it clear in EXH. 6 that they were in a position to supply Alcolux green or Stucco Mitt finish immediately as an alternative if acceptable to the appellant. It should be noted that EXH. 6 was written before even the 4 months period stipulated in EXH. 1 expired. From 22/6/83 to 11/10/83 is clearly less than 4 months.

The appellant on receipt of EXH. 6 simply regretted the inability of the respondent to deliver in 4 months and demanded the refund of N15,000.00 advance or deposit by a certified Bank draft (see the letter EXH. 9 dated 20th October 1983). The money was paid back on 24/10/83.”

I think the main decisive issue in this appeal is Issue No. 3 dealing with frustration of the contract the subject of litigation in the case. In the English case of CRICKLEWOOD PROPERTY & INVESTMENT TRUST LTD. v. LEIGHTONS INVESTMENT TRUST LTD. (1945) 1 ALL E.R. 252. Viscount Seman, L.J., defined frustration as follows at page 255 of the Report:-

“Frustration may be defined as the premature determination of an agreement between parties lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If therefore the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising, frustration does not occur. Neither of course, does it arise where one of the parties has deliberately brought about the supervening event by his own choice... But where it does, frustration operates to bring the agreement to an end as regards both parties forthwith and quite apart from their violation.”

It is common ground that the parties entered into the contract for the supply of “Towerspan Aluminium Corrugated Roofing Sheets” (Beige finish) and accessories. It is deducible from the documents exhibited particularly Exhibits 4 and 5, the contract was partly in writing and partly oral, as both Exhibits 4 and 5 spoke of further discussions. Exhibit

1 is the revised quotation of the respondent to the appellant based on Exh. 13 Except in Exh. 1, the revised quotation, none of the exhibits tendered in this case fixed the delivery time of 4 months. Even in Exh. 1 the time of delivery was not specifically made of the essence of the contract and this is borne out by Exh. 3 in which the appellant wrote to its client Honeywell Enterprises Limited on 24-8-83 intimating them of the position of the supply of the roofing sheets of the type mentioned in Exh. 13. Part of Exh. 3 reads thus -

“As I indicated to you in the beginning, there is a time lag of four (4) months from the time of a firm order for the beige coloured roofing sheet and cladding. 10

Though the order was placed for the above in mid June 1983, the manufacturers hope to supply the sheets around mid September, 1983, which would enable us to complete the roofing and cladding at the end of September, 1983.”

The portion of Exh. 3 (supra) shows that the appellants were hoping to receive the supply of the sheets around mid September 1983; and this goes to confirm that the period fixed in Exh. 1 was only tentative. See Section 10 (1) of the Sale of Goods Law 1959. There is no express stipulation that the iron sheets must be delivered on any particular date. The best construction that one can put on the 4 months time for delivery contained in Exh. 1 is that the respondent promised to deliver the goods within that time. See AMADI v. THOMAS APLIN & CO. LTD. (1972) 1 ALL N.L.R. 413. 15 20

In my view the learned trial judge’s findings on the issue on the evidence before him that:- 25

“ While it is conceded on the authorities that in ordinary commercial contracts for the sale of goods the rule is that time is prima facie of the essence with respect to delivery; Hartley v. Hyman (1920) 3 KB. 475 at page 484; but in the case in hand it must be realised that the raw materials for the manufacture of the Beige Aluminum Roofing Sheets were to be imported from overseas under licence. I am satisfied from the evidence of Mr. Agobe and Exhibits Nos. 15, 16, 17, 18 and 19 and hold as a fact that the Defendant company used its best endeavours without success to obtain approval of Form M for the said raw materials from the Central Bank of Nigeria which is an agent of the Federal Government of Nigeria. In the circumstance, I have come to the conclusion that failure by the Defendant company to obtain approval of Form M for painted Aluminium Coil was an event which frustrated the Agreement between the Plaintiff and the Defendant; 30 35

Re Anglo-Russian Merchant Traders. Ltd.(1917) 2 K.B. 678”

cannot be faulted. The Court of Appeal was equally right on the same issue, when it opined that -

5 *“I have carefully read through Exh. I and there is nothing in it which shows that time is of the essence of the contract.”*

Time is only taken to be of the essence of the contract under the following conditions -

1. Where the parties expressly stipulate it to be so in the contract;
- 10 2. Where one of the parties to the contract has been guilty of undue delay in performing his own part and is notified by the other that unless performance is completed within a reasonable time, the contract will be regarded as breached; and
- 15 3. Where by the nature of the surrounding circumstances or the subject matter it is imperative that the agreed date should be strictly adhered to.

See CHESHIRE & FIFOOT ON THE LAW OF CONTRACT 19th Edition, page 531.

None of these conditions is present in this case.

20 On the issue of frustration, there is evidence examined and accepted by the learned trial judge that the components of the materials required to manufacture the type of sheets required by the appellant was to be imported from overseas and to import them the respondent had to open a letter of credit and to apply for Form “M” from the Central Bank
25 of Nigeria. See the evidence of D.W.I where he said:-

“The coloured roofing sheets were imported from abroad. We gave the plaintiff delivery period of about 4 months.

*Prior to preparing Exhibit No, 1 we had earlier placed orders
30 for coloured roofing sheets with suppliers abroad. These are the relevant papers from our overseas partners, now admitted as Exhibits Nos. 15 and 16*

*The plaintiff company paid the defendant the sum of N15,000 as
35 deposit. The defendant then sent a telex message to the overseas supplier for coloured roofing sheets. This is a copy of the telex message on 22/6/83, now admitted as Exhibit No. 17. The defendant company also started processing Form M through U.BA. Ltd. Ikeja Branch. We have not yet obtained approval for the Form M which was submitted sometime in*

June 1983. The situation in the country regarding restriction of importation of aluminum coils was responsible for the non-approval of Form M.

The defendant was not in a position to supply the beige roofing sheets because Form M was not approved by the Central Bank of Nigeria”;

and D.W.2 where he said –

I was responsible for processing Form M on behalf of the defendant. On 7/6/83. I lodged an application with U.B.A. Ltd., Ikeja Branch. This is an acknowledgement copy of the forwarding letter, now admitted as Exhibit No. 18. The Central Bank did not approve our Form M in this particular transaction” and also that of D.W.3 where he also said:-

I am the officer-in-charge Bill Department at U.B.A. Limited, Ikeja Branch. I process applications for Form M.

The defendant company is one of our customers. The defendant had previously processed many Form M applications which had been approved.

Sometime on 7/6/83 the Defendant company submitted an application on Form M which was duly processed by the Bank. There was no approval of the said Form M from our records.

The paper now shown to me is the covering schedule forwarded to the Central Bank of Nigeria.

The document has been admitted as Exhibit No. 19.” T o show how anxious the respondent was to enable it meet the request of the appellant within the time estimated, it even sent Exh. 17 to its foreign suppliers to supply the item. This was in anticipation that the application of Form “M” would be approved in time. When that did not happen and in reply to the appellant’s two letters, Exhibits 4 and 5, the respondent wrote Exhibit 3 to the appellant explaining the cause of the delay. Parts of Exhibit 3 read thus:-

“The delay caused was primarily due to the non-availability of the multi beams purling which we now substitute with angle iron on the monitor roof. As I indicated to you in the beginning, there is a time lag of four (4) months from the time of a firm order for the beige coloured roofing sheets and cladding. Though the order was placed for the above in mid June, 1983, the manufacturers hope to supply the sheets around mid September, 1983 which would enable us to complete the roofing and cladding at the end of September, 1983.”

Frustration depends, in most cases, on the true construction of the terms of the contract read in the light of the relevant circumstance when the contract was entered. It must be emphasized that where the contract is frustrated, further performance is excused only if:-

- 5 (i) it occurs before breach of the contract,
- (ii) it is without the fault of either party, and
- (iii) it is due to a fundamental change of the circumstances beyond the control and original contemplation of the parties.

From the facts and circumstances prevalent in this case, it can
10 be implied that the delivery of the iron sheets within the time estimated would be subject to the approval of Form “M” by the Central Bank of Nigeria to enable the respondent import the required components in time, which were then under the list of classified items for importation purpose. This was a condition precedent which the respondent must meet if it was not
15 to break the Regulations. See TSAKIROG LOU & CO LTD. v. NOBLEE & THORL G.m.b.H (1961) 2 ALL E.R. 179; MORGAN v. MASTER 2 ALL E.R. 666 and UNGER v. PRESTON CORPORATION (1942) 1 ALL E.R. 200. There was such a change of circumstances in this case and the contract looked at as a whole, must be considered as frustrated by reasons of the events.

20 The learned trial judge was in my view right when he found on the evidence before him that:-

*I am satisfied from the evidence of Mr. Agobe and Exhibits Nos. 15, 16, 17, 18 and 19 and hold as a fact that the Defendant company used its best endeavours without success to obtain approval of Form ‘M’
25 for the said raw materials from the Central Bank of Nigeria which is an agent of the Federal Government of Nigeria. In the circumstance, I have come to the conclusion that failure by the Defendant company to obtain approval of Form ‘M’ for painted Aluminium Coil was an event which
30 frustrated the Agreement between the Plaintiff and the Defendant: Re Anelo- Russian Merchant Traders. Ltd.. (1971)2 KB, 679.”*

It cannot be said that the respondent was negligent or made any misrepresentation to the appellant when the contract was entered into, as the evidence did not show that.

35 On the issue of breach, as I have said earlier in this judgment that, where there is frustration the question of breach will not arise, as none of the parties can be held responsible for what happens. The appellant in this case will not be entitled to any damages save the amount of

money it paid to the respondent and which it had already collected when it treated the contract as abrogated by the intervening event.

On issue (e) in the appellant's brief, I will only say this - whether or not paragraphs 3 and 4 of the appellant's (plaintiffs) amended Statement of Claim were sufficiently denied, the appellant by its own action, 5 had treated the contract as determined by the circumstances and the intervening event, and since it was found to have been frustrated by such circumstances and intervening events, the appellant would not be entitled to any damages.

On the whole, I find no substance in this appeal and it is accordingly dismissed. 10

The judgments of both the trial court and the Court of Appeal are hereby affirmed.

There will be no order as to costs since the respondent neither 15 filed a brief nor appeared on the date the appeal was heard, nor did it even excuse itself for the non-appearance.

UWAIS JSC

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I have had the privilege of reading in draft the judgment read by my learned brother Wali, J.S.C. I agree that the appeal has no merit and that it should be dismissed.

Accordingly, the appeal is hereby dismissed and the decision of 25 the Court of Appeal is affirmed with no order as to costs.

BELGORE JSC

Unless time is indicated in a contract, it is presumed the performance will only be within reasonable-time, all parties having fulfilled their respective obligations under it e.g. payment of money etc. But where the parties expressly stipulate time of performance, or if time is not indicated in the contract but after some delay the other party notifies that he would like full performance within a specified time and it is clear by the circumstances surrounding the contract, due to its very nature, that it is essential and imperative that an agreed date is strictly adhered to, then in such cases, time will be of the essence. 30 35

As for non-performance, of the contract, this was due to failure to have Central Bank of Nigeria approve the request on Form M despite efforts of the Respondents.

I agree therefore with the reasoning and conclusion in the judgment of Wali J.S.C., and I adopt them as mine in dismissing this appeal
5 with no order as to costs to the respondent who never appeared in this Court.

OLATAWURA JSC

10 My learned brother Wali, J.S.C. has succinctly stated the facts and the issues raised in this appeal in the lead judgment. I agree with his conclusions. I will elaborate only in respect of the only material issue, i.e. frustration of the contract between the parties.

15 In the consideration of the evidence before the learned trial judge Agoro, J. the learned judge made some crucial findings. These are:

(1) *That during the negotiation of the contract and at the time Exhibit 1 - Quotation for beige roofing sheets was prepared, Aluminum sheets had been placed under General Open Licence by the Federal Government of Nigeria.*

(2) *That the defendant/company had used its best endeavours without success to obtain approval of Form M for the said raw materials from the Central Bank of Nigeria which is an agent of the Federal Government of Nigeria.*

25 (3) *That failure by the Defendant/Company to obtain approval of Form M for painted Aluminium Coil was an event which frustrated the Agreement between the Plaintiff and the Defendant: Re Anglo-Russian Merchant Traders Ltd. (1917) 2 K.B. 679.*

30 I believe it is on account of these findings that Mr. Oshilaja in the Appellant's brief raised the doctrine of frustration and whether it applies thereby discharging the parties from their contractual obligations.

Mr. Oshilaja has submitted in the Appellant's brief that "*frustration occurs under conditions that are totally out of the control of both parties. It is for the Court and not for the parties to determine whether an event constitutes a frustrating event: PENNY MOTT & DICKENSON v. JAMES B. FRASER & CO. LTD. (1944) A.C. 265/272, 274-276.*" I entirely agree with this submission. If one takes into account the evidence of D.W.I, this evidence was not successfully discredited. It was

accepted by the trial judge. I quote excerpts from his evidence in-chief and under cross-examination:

"... The coloured roofing sheets were imported from abroad. We gave the plaintiff delivery period of about 4 months The defendant was not in a position to supply the beige roofing sheets because Form M was not approved by the Central Bank of Nigeria"

Under cross-examination the witness said:

"The restriction referred to in my letter, Exhibit No. 6 was approval of Form M. We explained to the representative of the plaintiff that the coloured roofing sheets would be imported from abroad; but painted roofing sheets could be obtained locally. The plaintiff did not want roofing sheets painted locally in Nigeria. The delivery date of 4 months of Exhibit No. 1 was purely speculative as it depended on the availability of coloured sheets from abroad"

The evidence of D.W.2, Mr. Samuel Iwolu and D.W. 3, Mr. Abiodun Adoshum amply supported the evidence of D.W. 1, Mr. Japheth Agobe. There can be no doubt that Mr. Oshilaja is quite aware and is well familiar with the law governing this doctrine of frustration, I think, with profound respect to the learned Counsel, that his misapplication led to a misunderstanding of the issue. It is therefore a misconception of the facts and law that led to the submission of the learned counsel for the appellant to the effect that *"neither the importation of the contracted goods nor the raw materials for its manufacturer nor the duty of obtaining import licence and approval for Form 'M' and foreign exchange for the contracted goods was a condition precedent forming the foundation upon which the contract was based."* These submissions over-looked the Amended Statement of Defence where the respondent averred thus:

"6. During the month of May and the first half of June 1983 the Plaintiff's representatives Mr. J. Vyravipillai and one other person visited the premises of the Defendant to discuss further on this matter. Enquiries were made about Beige Finish Towerspan Aluminum Corrugated Roofing Sheets.

7. At the meeting referred to above the defendant's representative Mr. J.O.J. Agobe, the Technical Sales Engineer explained to the Plaintiff's representatives the problems his Company was having about importing the Beige Finish Towerspan Aluminum Corrugated Roofing Sheets and Accessories as well as some of her other products which the

Defendant had already ordered from their Oversea Suppliers in Belgium due to strict Federal Government Regulations relating to approval for Form M, Import Licence and opening of Letters of Credit.

8. Notwithstanding the explanation given by the Defendant in
5 paragraph 7 above the Plaintiff by her Letter Ref. JVIVNS/0683/61 dated 17th June 1983 requested the Defendant to furnish her with a new Quotation for the Beige Finish Aluminum Sheets. The Defendant shall rely on this Letter at the trial.

10 9. On the strength of the letter referred to above and the several discussions held earlier with the plaintiffs representatives, the defendant prepared a new Quotation No. 8228/83/TBP (Revised) dated 22nd June 1983 the delivery date of which was speculative put at 4 (four) months to
15 the full understanding of the plaintiff.

11. On getting a deposit confirming the plaintiff's interest the defendant on the same date the plaintiff paid quickly dispatched a message by Telex to her Oversea Supplier requesting for the Order already
20 placed to be enlarged to accommodate the plaintiffs Order. The defendant shall rely on her copy of the Telex Message Ref. 136/TAL/BNO/21/6/83 dispatched on 22/6/83.

12. "The defendant says that the plaintiff was fully aware that
25 the defendant does not manufacture any coloured Aluminum Coil (Raw Material) which is required for the manufacture of all Colour Finished Towerspan Aluminum Corrugated Roofing Sheets locally and that the availability of these special products was dependent on governmental approval for importation and remittance of money to defendant's Over-
30 seas Suppliers.....,"

16. That Import Restrictions by the Federal Government that is problems of Form 'M' opening of Letters of Credit, obtaining Import
35 Licence were fully brought to the knowledge of the plaintiff as 'Conditions Precedent' to the performance of the said contract by the Defendant during their several discussions preceding the contract. These factors were repeated in the Defendant's letter of sympathy and apology to the Plaintiff dated 21st October. 1983..... .

I agree with the Court of Appeal (per Kutigi, J.C.A.) when the Court said:

“The judge was also right when he held that while the duty of obtaining import licence approval for Form M and Foreign Exchange for the goods was on the respondent, the agreement between the parties must as a whole be treated as made upon the assumption that the law and regulation applicable to importation of goods from abroad would be observed by the parties.” 5

It is therefore well established therefore that on the contract between the parties and defence of frustration is a good defence. I will also dismiss the appeal. 10

I now come to the question of costs. The general practice is that costs will follow the event and a successful party is entitled to costs: THE QUEEN v. THE GOVERNOR IN COUNCIL. WESTERN REGION, ex parte Kasalu Adenaiya (1962) 1 all N.L.R. 300: Lawal v. Ijale (1967) 5 N.S.C.C. 94. The award of costs is within the discretion of the court. It must be exercised judiciously. When this appeal was listed on 7th October, 1992 for hearing, it was a result of the motion filed by the appellant for the accelerated hearing of the appeal. As at the time the appeal was heard, both parties were absent and not represented. Notwithstanding the fact that the appellant’s brief was filed on 2nd March 1989, the respondent did not file any brief. It appears to me that Order 6 rules 6 and 7 are being abused as a result of deliberate absence from court on a date an appeal is fixed for hearing. Notwithstanding the filing of briefs the Court is still at liberty to ask questions in respect of submissions or arguments contained in the said briefs. This is to assist the Court in arriving at a just decision. These rules under Order 6 of the Supreme Court Rules 1985 (as amended) reads: 15 20 25

“(6) When an appeal is called and. no party or any legal practitioner appearing for him appears to present oral argument, but Briefs have been filed by all the parties concerned in the Appeal, the appeal will be treated as having been argued and will be considered as such.” 30

(7) When an appeal is called, and it is discovered that a Brief has been sued for only one of the parties and neither of the parties concerned nor their legal practitioners appear to present oral argument, the appeal shall be regarded as having been argued on that Brief.” 35

I agree with Wali, J.S.C. that the respondent is not entitled to costs. I will therefore make no order as to costs.

OGUNDARE JSC

I have had the privilege of a preview of the judgment just read by
my brother Wali JSC and I am in total agreement with his reasonings and
5 conclusion. I have nothing more to add. I also dismiss the appeal.

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