

SUPREME COURT OF NIGERIA
30TH SEPTEMBER 1994. SC. 236/1991
CORAM: M. BELLO CJN, M. L. UWAIS, E. O.
OGWUEGBU, Y. O. ADIO, A. I. IGUH, JJSC

UNION BANK OF NIGERIA LTD.

..... APPELLANT

AND

1. SAX (NIG.) LTD

2. EMMANUELADEBOLA OOLORUNTOBA RESPONDENTS

3. CHIEF JOSEPH OLUWAFEMI TOBA

BANKING - Charge of interest - Whether circumstances exist - That make it unconscionable for bank to charge interest on loans granted by it.

BANKING -Rate of interest - Increased by a bank without prior consent of customer - Whether mortgage clauses that so authorised the bank - Would be nullified

CONTRACTS - Breach of agreement - No provision in the mortgage about grant of additional loan - Bank's refusal to grant more loan - Whether a breach of agreement can be implied.

CONTRACTS - Fundamental terms of a particular contract - Where there is no evidence of agreements on those terms - Whether there can be a valid contract.

CONTRACTS - Inference of an agreement - Protracted negotiation by the parties vide several letters - Firm agreement is held not to be in existence.

CONTRACTS - Mortgage agreements - Parties are bound by their contracts -Need for court not to rewrite the parties ' contract.

DOCUMENTS - Agreement between the parties - Where set out in a written document - Whether it can be varied by extrinsic evidence.

DOCUMENTS - Unambiguous provisions of mortgage agreements - Whether the operative words - Should be given their ordinary grammatical meaning.

EVIDENCE - *Admissibility* - Oral evidence that sought to vary the parties' written agreements - Whether admissible.

EVIDENCE - *Erroneous admission of evidence* - When miscarriage of justice is occasioned thereby.

FACTS

The respondents filed an action against the appellant before the Kwara State High Court Ilorin, claiming certain declarations, injunction and an order. The appellant granted loan to the 1st respondent and the 2nd and 3rd respondents mortgaged their properties to the appellant as security. The mortgage Deeds (Exhibits 25, 26 and 27) contained provisions that empowered the appellant to charge interest at the rate of 11% and to stipulate interest subsequently payable from time to time. The respondents defaulted in payment of the loans as a result of which the appellant threatened to sell their mortgaged properties. Appellant claimed interest at the rate of 21% and 2% penalty vide a letter it wrote to the respondents. The respondents in their action submitted that the appellant could not increase the interest rate at more than 11% without their consent.

The respondents also contended that appellant's refusal to grant additional loan to the 1st respondent as working capital made it impossible for the respondents to be able to pay back the earlier loans. That it would be unconscionable to allow the appellants to recover interest on the said earlier loans. The Appellant filed a counter-claim. The trial court found in favour of the respondents by holding that the agreed rate of interest was 11% and that it could be reviewed only if such review was communicated to and accepted by the respondents. It refused the respondents' contention that it was unconscionable for appellant to charge interest on the loans. The trial court granted a lesser sum in respect of the appellant's counter-claim since it calculated the amount due at an interest rate of 11%. The appellant appealed to the Court of Appeal while the respondents cross-appealed. That court dismissed the appeal and cross-appeal as it upheld the trial court's judgment. Both parties have similarly appealed and cross-appealed to the Supreme Court to determine whether the lower courts were right in their decisions.

HELD (Unanimously allowing the appeal and dismissing the cross-appeal per lead judgment of **ADIO JSC**)

Variation of written agreement by extrinsic evidence

1. It is the general rule that where the parties to an agreement have set out the

terms thereof in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. Therefore, if there is any disagreement between the parties to a written agreement as to what is the term of the agreement on any particular point, the authoritative and legal source of information for the purpose of resolving the disagreement is the written agreement executed by the parties. (P. 104 L36)

Admissibility of Oral Evidence

2. In this case, the documents containing the terms of the agreements relating to the loans are the mortgage deeds, Exhibits “25”, “26” and “27”. The oral evidence led by the respondents that they never agreed on any rate of interest higher than 11% per annum in relation to any of the loans cannot be legally sustained as the oral evidence was inadmissible. The learned trial Judge ought not to have admitted and acted on it. The court below should not have affirmed the admission, by the learned trial Judge, of the oral evidence and ought not to have affirmed or endorsed the use which the learned trial Judge made of it. (P. 105 L6)

Unambiguous provisions of mortgage agreements

3. I am of the clear view that the provision of the relevant clause in each of the mortgage agreements was clear and unambiguous. When a document is clear, the operative words in it should be given their simple and ordinary grammatical meaning. Further, the general rule is that when the words of any instrument are free from ambiguity in themselves and when the circumstances of the case have not created any doubt or difficulty as to the proper application of the words to claimants under the instrument or the subject matter to which the instrument relates, such an instrument is always to be construed according to the strict, plain and common meaning of the words themselves. (P. 106 L2)

Court not to rewrite the parties contract

4. In the circumstance, it was wrong to import into the relevant clause of each of the mortgage agreements extraneous matters such as the requirement that the appellant must obtain the consent of the respondents to the increase in the rate of interest on the loans. The reason is that if the conditions necessary for the formation of a contract are fulfilled by the parties thereto they will be bound by it. It is not the business of a court to make a contract for the parties or to rewrite the one which they have made. (P. 106 L1)

Increase in interest rate without prior consent of customer

5. There was, therefore, no necessity to import new or additional words into the relevant clause in each of the mortgage agreements to require the consent of the respondents to an increase of the rate of interest. Consequently, the failure of the appellant to obtain the consent of the respondents to the increase in the rate of interest mentioned in Exhibit “24” could not, as the court below held, result in the nullification of the provision of clause 3 in Exhibits “25” and “27” and clause 4 in Exhibit “26” and in the fixing of the rate of interest at 11% per annum in the present case. (P. 106 L.24)

Erroneous admission of evidence

6. In the circumstance, it can fairly and reasonably be said that the erroneous admission of the oral evidence would deprive the appellant of 11% interest per annum plus 2% penalty per annum and that it occasioned a miscarriage of justice to the appellant. (P. 107 L.30)

Whether breach of agreement can be implied

7. The legal implication of there being no provision in the mortgage deeds relating to the earlier loans requiring the cross-respondent to grant further or additional loan was that the cross-appellants could not rely on the provisions for the contention that the cross-respondent committed a breach of any agreement by refusing to grant them further additional loan. Such a term could not be implied merely because it would have made things more convenient to the cross-respondents or enhance the operation of their business. (P.109 L.24)

Inference of an agreement

8. I have also read the letters which the parties addressed to each other and I too am of the clear view that there was no stage or time during the protracted negotiation that a firm agreement was reached by the parties on the granting of additional or further loan. Whether in a given case it is reasonable to infer an agreement between the parties who have engaged in negotiation depends on whether there has been an offer which has been accepted in the manner required by law. All the circumstances of the case have to be considered to determine if one of the parties may reasonably be assumed to have made a firm offer and if the other party may likewise be taken to have accepted that offer. (P. 110 L. 11)

Fundamental terms of a particular contract

9. In the present case, despite the protracted correspondence, there was no evidence on what amount was the alleged additional loan which the cross-respondent agreed to grant, the period of repayment, the rate of interest on the loan, and the security to be provided to guarantee the repayment of the loan. The foregoing were fundamental terms which should be provided for in such a transaction. In the absence of agreement on the fundamental terms, there can be no valid contract. (P. 110 L32)

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Whether charge of interest is unconscionable

10. The conclusion of the learned trial Judge, in the circumstances, was that it was not unconscionable for the cross-respondent to charge interest on the earlier loans during the relevant period. The court below, rightly in my view, affirmed the decision. (P. 111 L26)

NOTABLE POINTS OF INTEREST**ADIO.JSC*****1. Documents - When importation of words may be unavoidable***

20 In the construction of documents, the words therein should first be given their simple and ordinary meaning and under no circumstances may new or additional words be imported into the text unless the documents would be by the absence of that which is imported impossible to understand. (P. 106 L19)

25 2. Whether bank can stipulate arbitrary rate of interest

The power given by the relevant clause of each agreement could not properly be used to stipulate arbitrary rate of interest or rates of interest contrary to the guidelines given by the Central Bank of Nigeria. This is because under section 15 of Banking Act, Cap. 28 of the Laws of the Federation of Nigeria, 1990, the rates of interest charged on advances, loans or credit facilities or paid on deposits by any licensed bank is to be linked to the minimum rediscount rate of the Central Bank subject to stated minimum and maximum rates of interest, and the minimum and maximum rates of interest when so approved are to be the same for all licensed banks. (P. 106 L33)

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OGWUEGBUJSC***3. Duty of appellate court to reject improper evidence***

Where a matter has been improperly received in evidence in the court below, even when no objection was raised, it is the duty of a court of appeal to reject

it and to decide the case on legal evidence. (P. 113 L38)

4. Basing a decision on a judgment that was set aside

I agree with the learned appellant's counsel that the strained interpretation put on clause 4 of Exhibits "25" - "27" and clause 3 of Exhibit 26 by the court below was prompted by the decision of the same court in U.B.N. Ltd. v. Ozigi reported in (1991) 2 N.W.L.R. (Pt.176) which decision was set aside by this court. See U.B.N. Ltd. v. Ozigi (1994) 3 N.W.L.R. (Pt.333) 385 and (1994) 5 K.L.R. 1. (P.114 L25)

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REPRESENTATION

S. Bello Esq. for the Appellant

J.O. Baiyeshea Esq. for the Respondents

CASES REFERRED TO

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The Union Bank of Nigeria v. Ozigi (1991) 2 N.W.L.R. (Pt. 176) 677

Oyenuga v. Provisional Council of the University of Ife (1965) N.M.L.R. 9

Solicitor - General, Western Nigeria v. Adebajo. (1971) 1 All N.L.R. 178

Cooperative Bank of Eastern Nigeria v. Maria Eke (1979) F.N.R. 190

Macaulay v. NAL Merchant Bank Ltd. (1990) 4 N.W.L.R. (Part 144) 283. 20

Union Bank of Africa Ltd. v. Tejimola & Sons Ltd. (1988) 2 N.W.L.R. (Pt. 79) 622.

Adebanjo v. Brown (1990) 3 N.W.L.R. (Part 141) 661.

Jacker International Castle Co. Ltd. (1888) 5.T.L.R. 13

Owonyin v. Omotosho (1961) 1 All N.L.R. (Pt.11) 304 at 308. 25

STATUTE REFERRED TO

Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 ss. 131 (1) 132(1)

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LEAD JUDGMENT BY ADIO JSC

In the Ilorin Judicial Division of the Kwara State High Court, the respondents instituted an action against the appellant. The claim, as stated in paragraph 48 of the Amended Statement of Claim, was as follows:-

"(a) a declaration that their total indebtedness to the 1st defendant as at 1st February 1986 is N304,120.00 and that it is unconscionable for the first defendant to charge interests on the debt from the 1st day of February 1986 to the date of filing this suit and until final determination by reason of the fact that the 1st defendant's conduct frustrated the business of

the plaintiffs; and a further declaration that even if the 1st defendant can claim interest on the overdraft, they can only charge interest at the rate of 11% per annum from 1982 until the day of judgment and not at any other higher rate;

(b) *a declaration that the first defendant is not entitled to exercise power of sale in respect of the properties belonging to 2nd and 3rd plaintiffs respectively which are stated in paragraph 43 of this statement of claim;*

(c) *an injunction restraining the 1st and 2nd defendants, their agents and/or servants from selling the properties mentioned in paragraph 2 above either by public auction or by any other means whatsoever;*

(d) *an order of this Honourable court directing the 1st defendant to allow the plaintiffs repay the loan in terms of the proposal annexed to and filed with this writ of summons and mentioned in paragraph 45 of this statement of claim."*

Pleadings were duly filed and exchanged. The evidence led by the respondents was that the 1st respondent was a cosmetics manufacturing firm and the 3rd respondent was the chairman of its board. The appellant granted loans to the 1st respondent and the 2nd and 3rd respondents mortgaged their properties to the appellant as security for the loans. The relevant mortgage deeds were Exhibits 25, 26 and 27. There was a provision in each of the mortgage deeds which empowered the appellant to charge interest on the loans at the rate of 11% and which also empowered the appellant to stipulate the interest subsequently payable from time to time.

There was default in the payment of the loans as a result of which the appellant threatened to sell the properties of the 2nd and 3rd respondents that constituted the security for the loans. In a letter dated 3rd September, 1987, addressed by the appellant to the Managing Director of the 1st respondent it was stated that owing to the circumstances stated in the letter, the interest rate applicable to the payment of the loans was 21% and 2% penalty. The respondents' submission was that the interest rate of the loan was 11% and it was fixed and could not, in any case, be increased without their consent. Meanwhile, the 1st respondent applied to the appellant for a further loan as working capital. There were many letters addressed by the 1st respondent to the appellant and many letters that the appellant addressed to the 1st respondent on the matter. Eventually, the appellant did not grant the additional loan. It was the contention of the respondents that a firm agreement between the parties had been reached on the additional loan and that it was the refusal of the appellant to grant the additional loan that made it impossible for the respondents to be in a position to pay the earlier loans for which security was given.

For that reason, it was further contended that it would be unconscionable to allow the appellant to charge or recover interest on the said earlier loans. The position of the appellant was that it had power to stipulate interest payable on the earlier loans from time to time as it did in the letter dated 3rd September, 1987, Exhibit "24". It was not under any obligation, under the provisions of the mortgage deed relating to the earlier loans, to provide the 1st respondent an additional loan for the 1st respondent's working capital and that, in any case, there was no binding agreement between the appellant and the 1st respondent for an additional loan. What went on, in that connection, was pure and simple negotiation for an additional loan which failed. No firm agreement was reached in relation to that aspect of the matter. 5 10

The appellant, in its Statement of Defence, included a counter-claim in which it claimed from the respondents jointly and severally the sum of N448,150.94 plus interest at 18% per annum on the debt from 18/6/88 until the day of judgment. The appellant also claimed interest at the court rate of 10% per annum on the judgment debt until the debt was fully settled. 15

The learned trial Judge gave consideration to the evidence before him and to the submissions made by the learned counsel for each of the parties. He held that the respondents' total liability as at 1/2/86 was N304,120.00 and that it was not unconscionable for the appellant to charge interest on the loans granted by the appellant to the respondents. He also held that the agreed rate of interest on the loans aforesaid was 11% and that it could be reviewed only if such review was communicated to and accepted by the respondents. The learned trial Judge was of the view that ordinarily the court would not interfere to prevent the exercise of the power of sale of a mortgagee merely because its exercise was contrary to the wishes of a mortgagor but, because of the circumstance of this case, he would grant, and did grant, an injunction restraining the appellant, its servants, agents and privies from disposing of the mortgaged properties before 31st December, 1990, when the total indebtedness would have been liquidated. With reference to the counter-claim, the learned trial Judge entered judgment for the sum of N304,120.00 due as at 1/2/86 with interest at 11% per annum. 20 25 30

Dissatisfied with the judgment, the appellant lodged an appeal against it to the Court of Appeal. The respondents also were dissatisfied with a certain aspect of the judgment and they lodged a cross-appeal against it to the Court of Appeal limited to the question whether the conduct of the appellant in failing to grant to the respondents additional overdraft facility did not frustrate the respondents' business. The Court of Appeal dismissed the appeal and the cross-appeal. Dissatisfied with the judgment, the appellant has lodged 35

a further appeal to this court and the respondents have also lodged a further cross-appeal to this Court.

The parties have duly filed and exchanged briefs. The appellant filed an appellant's brief and the respondents filed a respondents' brief. The respondents filed a cross-appellant's brief and the appellant filed a reply brief in
5 relation to the cross-appeal. The appellant formulated four issues, in its brief, for determination while the respondents, in their brief, formulated two issues for determination. The four issues for determination formulated in the appellant's brief, which fully covered the two issues formulated in the respondents' brief, are sufficient for the determination of this appeal. They are as
10 follows:-

"1. Whether the Court of Appeal, Kaduna was right in affirming the judgment of Kwara State High Court to the effect that the interest rate applicable to the loan advanced to the 1st Respondent was fixed at 11% per annum.

15 *2. Whether the interpretation given by the Court of Appeal to the provisions of clause iv of Exhibit '25' (and clause iii of Exhibits '26' and '27') which in effect nullifies the provisions of these clauses was the proper interpretation.*

20 *3. Whether having regard to the provisions of Exhibits '25' - '27' there was an obligation on the Appellant herein to communicate variation in the interest rate to the Respondents, who shall agree to same and, if so, whether Exhibit '24' was not such communication by the appellant.*

25 *4. Whether having regard to Exhibits '25', '26' and '27', the appellant was not entitled to charge on the loan advanced to the 1st respondent interest at the rate of 21% with 2% penalty from 3/9/87 that of Exhibit '24' until the date of judgment on 28/6/89."*

The learned counsel for the appellant, in the appellant's brief, argued issues 1,2,3 and 4 together. This court too will deal with the aforesaid issues together. The first question for consideration was the rate of interest chargeable on the
30 loans granted by the appellant to the 1st respondent to which the mortgage agreements, Exhibits '25', '26', and '27' related. The appellant, for the purpose of proving the rate of interest on the loans, relied on the provisions of the relevant clause of each of the said mortgage agreements. It was clause 3 in Exhibit "25"; clause 4 in Exhibit "26"; and clause 3 in Exhibit "27".

35 The provisions of clause 3 of Exhibit "25" which are identical with those of clause 4 of Exhibit "26" and also identical with those of clause 3 of Exhibit "27" are as follows:-

"3. All interest payable on the moneys hereby secured shall accrue from day to day at the rate from time to time stipulated by the bank and may

be capitalised at such intervals as the Bank may from time to time prescribe but not more often than monthly and added to the moneys hereby secured and shall thereupon bear interest accordingly at the rate aforesaid."

It was common ground between the appellant on one side and the respondents on the other that the rate of interest at the time the mortgage deeds, Exhibits "25", "26" and "27", were executed was 11% per annum. Where the parties disagreed was that the appellant maintained that the rate of interest could thereafter change from time to time as the appellant was empowered by the aforesaid clause, in each of the mortgage agreements, to stipulate from time to time what should be the rate of interest. In fact, that was the power exercised in stipulating 21% interest and 2% penalty in Exhibit "24" dated 3rd September, 1987, which the appellant sent to the Managing Director of the 1st respondent. The position of the respondents, as stated in their pleading and by the witness who testified for them, was that the rate of interest agreed upon when the mortgage agreements were executed was 11% per annum. It was fixed and that was the rate of interest applicable throughout the relevant period. Even if the rate of interest could fluctuate, it could not be reviewed upwards by the appellant without the previous consent of the respondents. For those reasons, Exhibit "24" was invalid. The respondents, therefore, used 11% rate of interest to calculate their indebtedness to the appellant, subtracted the sum which they had repaid, and determined the balance outstanding which, according to them, was the sum of N304,120.00 as at 1st February, 1986. The learned trial Judge, after consideration of the evidence before him and the submissions of the learned counsel, came to the conclusion that the provisions of clause 3 in Exhibits "25" and "27" set out above, or clause 4 in Exhibit "26" which were similar to the provisions of clause 3 in Exhibit "25" were not capable of sustaining the review of the rate of interest communicated by the appellant to the respondents in Exhibit "24" because what was done was a variation which must not only be communicated to the respondents but must also have been accepted by them. The same issue was raised and argued by the learned counsel on both sides at the Court of appeal. In its own determination of the issue, the court below per Okunola, JCA., stated, inter alia. As follows:-

"On the 2nd primaries (sic) issue relating to the unilateral alteration of interest rates by the Banks, the appellant's counsel relying on Exhibit '24', a letter communicating the new interest rate of 21% and a penalty of 2% to the respondent for this variation, referred to the standard clause in Exhibits '25', '26' and '27', the legal mortgages on the properties used by the Respondents to secure the overdraft under consideration. The clause is the fashionable provision in mortgage agreements to be bound by any future

review of interest by the Central Bank of Nigeria. It will be recalled from the unchallenged evidence of the respondent in the lower court that the agreed rate of interest in this case was 11% per annum."

His Lordship then referred to *The Union Bank of Nigeria v. Ozigi*, (1991) 2 NWLR (Pt. 176) 677 in which the court below had earlier considered
5 and determined the construction of the clause in a mortgage agreement which was similar to clause 3 of Exhibits "25" and "27" and clause 4 of Exhibit "26" in this case. The court also referred to the relevant clauses of the mortgage agreements in this case and stated further as follows:-

*"In spite of Exhibit '24' which is a later development I hold that the
10 failure of the appellant to communicate the periodic increase in interest rates to the respondent who shall agree to same and who has not so agreed to the variation of interest rates nullified the standard clause in Exhibits '25' - '27' and fix the interest rate at 11% in the instant case."*

It was contended for the appellant that the court below erred in
15 affirming the rate of interest determined by the learned trial Judge who relied, for the purpose of making the finding, on the oral evidence led by the respondents that the rate of interest of 11% per annum agreed upon could not be reviewed by the appellant. The agreements had been reduced into writing in Exhibits "25", to "27" and oral evidence was not admissible to vary or contra-
20 dict the provisions of the said mortgage agreements. The respondents contended in their brief that the court below was right In affirming the decision of the learned trial Judge, on the point, because the respondents led evidence that the agreed rate of interest was 11% and that it was fixed in the sense that it could not be reviewed upwards while the appellant did not lead any oral
25 evidence on the question whether the appellant could review the rate of interest upwards.

In the present case, the parties reduced their agreements in respect of the loans granted by the appellant to the respondents into writing in the mortgage agreements, Exhibits "25", "26" and "27." It was common ground
30 that the initial rate of interest was 11 % per annum. If the provisions of the said relevant clauses in the mortgage agreements are properly read and construed it would have been clear that the decision of the learned trial Judge that the rate of interest was fixed and could not be reviewed upwards by the appellant was wrong and the court below should not have affirmed it on the basis of the
35 oral evidence led by the respondents that they never agreed on any rate of interest which was over 11 % per annum. The reason is that it is the general rule that where the parties to an agreement have set out the terms thereof in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. See *Olaloye v.*

Balogun, (1990) 5 NWLR (Pt. 148) 241; Union Bank of Nigeria Ltd., v. Prof. Albert Ojo Ozigi (1994) 4 NWLR (Pt. 333) 385 and section 131 (1) of the Evidence Act. Therefore, if there is any disagreement between the parties to a written agreement as to what is the term of the agreement on any particular point, the authoritative and legal source of information for the purpose of resolving the disagreement is the written agreement executed by the parties. 5 In this case, the documents containing the terms of the agreements relating to the loans are the mortgage deeds, Exhibits "25", "26" and "27". The oral evidence led by the respondents that they never agreed on any rate of interest higher than 11% per annum in relation to any of the loans cannot be legally sustained as the oral evidence was inadmissible. The learned trial Judge ought 10 not to have admitted and acted on it. The court below should not have affirmed the admission, by the learned trial Judge, of the oral evidence and ought not to have affirmed or endorsed the use which the learned trial Judge made of it.

The next question is whether, as held by the learned trial Judge and 15 affirmed by the court below, the appellant, for the purpose of validly exercising the powers conferred upon it by the relevant clause in each of the mortgage agreements, was bound to obtain the consent of the respondents in respect of any review of the rate of interest made by it. The appellant's contention, rightly in my view, was that the provisions relating to the rate of interest 20 payable on the loans granted by the appellant to the respondents were set out in the mortgage deeds, Exhibits "25", "26", "27", and that the aforesaid provisions gave the appellant power to stipulate the rate of interest, as had been done in Exhibit "24", from time to time. The provisions did not specify that the appellant should exercise the power with the consent of the respondents. It 25 was submitted for the respondents that the appellant had no such power. The learned trial Judge rejected the contention of the appellant and ignored the increased rate of interest conveyed to the respondents in the letter, (Exhibit "24"), written by the appellant to the respondents because the appellant did not effect the increase with the consent of the respondents. 30

What was involved was the construction of the relevant clauses of the mortgage agreements, that is, clause 3 of Exhibits "25" and "27" and clause 4 of Exhibit "26" which are all similar. The submission made for the appellant was that the provision of the relevant clause in each of the mortgage 35 agreements was clear and that it was not necessary to import into the agreements the requirement that the appellant should exercise the power conferred on it with the consent of the respondents. *Misir. (Nigeria) Ltd. v. Assad.*, (1971) All NLR 172 was cited. It was submitted for the respondents that the court below was right in upholding the decision of the learned trial Judge that a

Banker could not raise an unusual rate of interest without the consent of the borrower.

I am of the clear view that the provision of the relevant clause in each of the mortgage agreements was clear and unambiguous. When a document is clear, the operative words in it should be given their simple and ordinary
5 grammatical meaning. Further, the general rule is that when the words of any instrument are free from ambiguity in themselves and when the circumstances of the case have not created any doubt or difficulty as to the proper application of the words to claimants under the instrument or the subject matter to which the instrument relates, such an instrument is always to be construed
10 according to the strict, plain and common meaning of the words themselves. In the circumstance, it was wrong to import into the relevant clause of each of the mortgage agreements extraneous matters such as the requirement that the appellant must obtain the consent of the respondents to the increase in the rate of interest on the loans. The reason is that if the conditions necessary for
15 the formation of a contract are fulfilled by the parties thereto they will be bound by it. It is not the business of a court to make a contract for the parties or to rewrite the one which they have made. See *Oyenuga v. Provisional Council of the University of Ife* (1965) NMLR 9. In the construction of documents, the words therein should first be given their simple and ordinary mean-
20 ing and under no circumstances may new or additional words be imported into the text unless the documents would be by the absence of that which is imported impossible to understand. See *Solicitor-General, Western Nigeria v. Adebajo* (1971) 1 All NLR 178 cited with approval in *Union Bank of Nigeria Ltd. v. Ozigi*, supra. There was, therefore, no necessity to import new or addi-
25 tional words into the relevant clause in each of the mortgage agreements to require the consent of the respondents to an increase of the rate of interest. Consequently, the failure of the appellant to obtain the consent of the respondents to the increase in the rate of interest mentioned in Exhibit “24” could not, as the court below held, result in the nullification of the provisions of
30 clause 3 in Exhibits “25” and “27” and clause 4 in Exhibit “26” and in the fixing of the rate of interest at 11% per annum in the present case.

The power given by the relevant clause of each agreement could not properly be used to stipulate arbitrary rate of interest or rates of interest contrary to the guidelines given by the Central Bank of Nigeria. This is be-
35 cause under section 15 of Banking Act, Cap. 28 of the Laws of the Federation of Nigeria, 1990, the rates of interest charged on advances, loans or credit facilities or paid on deposits by any licensed bank is to be linked to the minimum rediscount rate of the Central Bank subject to stated minimum and

maximum rates of interest, and the minimum and maximum rates of interest when so approved are to be the same for all licensed banks. The interest structure of each licensed bank is subject to the approval of the Central Bank.

Having reached the conclusion that the nullification of the rate of interest stipulated in Exhibit “24” and the subsequent application of the rate of interest of 11% per annum to the loans granted by the appellant to the respondents were wrong, the result is that the rate of interest stipulated in Exhibit “24” is applicable from the date of the letter. The question then is whether the application of the rate of interest of 11% to the loans throughout the period of repayment resulted in miscarriage of justice? In other words, did the admission of the oral evidence led by the respondents that the rate of interest on the loans was 11% per annum and that it was the rate applicable throughout the period of repayment, cause or result in a miscarriage of justice? It is necessary to consider the point because it is not enough to complain about wrongful admission of evidence by the lower court. In order to succeed, the party complaining must show that without the admission of the evidence the decision would have been otherwise. See *Idundun v. Okumagba* (1976) 9 - 10 S.C. 227. It is sufficient, for the present purpose, to state that it was because of the erroneous admission of the oral evidence led by the respondents that the rate of interest was 11% per annum and that it was not reviewable that the learned trial Judge held that the total indebtedness of the respondents was N304,120.00 and that the interest chargeable, if at all, from 1982 till the day of judgment was 11% per annum. It was for the same reason that the court below affirmed the aforesaid finding of the learned trial Judge. It was common ground that the initial rate of interest was 11% per annum. In view of Exhibit “24” dated 3rd September 1987 and the view of this court that the appellant had power to stipulate the rate of interest stipulated in it, the rate of interest applicable to the debt could no longer be 11% per annum but 21% per annum plus 2% penalty per annum as from 3rd September, 1987, up to the date of judgment. In the circumstance, it can fairly and reasonably be said that the erroneous admission of the oral evidence would deprive the appellant of 10% interest per annum plus 2% penalty per annum and that it occasioned a miscarriage of justice to the appellant.

However, before coming to a final decision on whether the appellant should be awarded interest at the rate of 21% per annum plus 2% penalty per annum on the sum of N304,120.00 representing the amount due at 1st February, 1986, awarded to it by the learned trial Judge and affirmed by the court below, depends on the conclusion which this court reaches on the contention of the respondents, in the cross-appeal, that it was unconscionable for the appellant to charge interest on the debt from the 1st February, 1986 to the date of filing

this suit and until final determination by reason of the fact that the appellant's conduct frustrated the business of the respondents.

The parties duly filed and exchanged briefs in relation to the cross-appeal. In order to avoid confusion, I will refer to the appellant as cross-respondent and refer to the respondents as cross-appellants. In the brief filed
5 by the cross appellants, they identified two issues for determination while the cross-respondent identified only one issue for determination in its own brief. The first issue in the cross-appellants' brief was similar to the only issue in the cross-respondent's brief. The two issues in the cross-appellants' brief are sufficient for the determination of this cross-appeal and they are as follows:-
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"1. Whether the Court of appeal was right in holding that the cross respondent was not under obligation to provide additional overdraft facility to the cross-appellants.

*2. Whether the failure of the cross-respondent to give additional
15 overdraft facility to the cross-appellants frustrated the cross-appellants' business and if so whether it is unconscionable for the cross-respondent to charge interest on the initial overdraft facility of N250,000 from 1986."*

The cross-appellants dealt with the questions raised under the first and second issues together. I, too, will deal with them together. What really
20 happened was that, at a certain stage, the cross-appellants discovered that in order to enhance the operation of their business and to enable it to break even and move forward, they required additional working capital. An application, for further loan, was made to the cross-respondent. There was correspondence on the matter over a long period of time at the end of which the cross-
25 respondent did not grant the additional loan. The contention of the cross-appellants was that a stage was reached during the exchange of correspondence between the cross-appellants and the cross respondent when there was a firm agreement that the cross-respondent would grant the additional loan to the cross-appellants but the cross-respondent committed a breach of
30 the agreement by refusing to grant the alleged additional loan. That was the basis of their contention mentioned above. The submission made for the cross respondent, which the learned trial Judge accepted and upheld, was that there was no firm agreement on the matter at any stage when the parties engaged in correspondence over a long period. In the view of the learned trial
35 Judge, which was affirmed by the court below, what went on was merely negotiation from which the cross-respondent was entitled to withdraw at any time before a firm agreement was reached. The learned trial Judge, after making reference to the contents of most of the letters which the parties addressed to

each other, came to the following conclusion:-

“There were hard negotiations between the plaintiffs and the bank which negotiations eventually broke down. Although from the evidence, I know that a further loan was needed, it really amuses me how a debtor who is told that a request for an additional facility is “unrealistic and unacceptable” can, seriously, indict his creditor for not giving him more facility or 5 loan and therefore seek to deny the creditor his accrued entitlements in respect of the facility benevolently granted and gainfully utilised. The mortgage deeds do not provide for any additional loan or facility. It is therefore not a right.

Upon a careful perusal of all the exhibits not only is there no firm 10 intention and promise by the defendant Bank to give additional facility, everything still being at the negotiation stage, there is no conclusive binding and enforceable agreement on same. See Cooperative Bank of Eastern Nigeria v. Maria Eke 1979 F.N.R 190.

In the light of the foregoing, it is not unconscionable for the Bank 15 to enforce that which is mutually agreed, in the normal banking practice it is an implied term that an interest will be charged on the overdraft facility.”

The foregoing contained the views expressed and the findings made by the learned trial Judge which the court below, rightly in my view, fully endorsed. The deeds of mortgage, Exhibits “25”, “26” and “27”, relating to the 20 earlier loans did not contain any provision requiring the cross-respondent to grant additional or further loan for working capital or for any purpose connected with the operation of the cross-appellants’ business. The legal implication of there being no provision in the mortgage deeds relating to the earlier 25 loans requiring the cross-respondent to grant further or additional loan was that the cross-appellants could not rely on the provisions for the contention that the cross-respondent committed a breach of any agreement by refusing to grant them further or additional loan. Such a term could not be implied merely because it would have made things more convenient to the cross- 30 respondents-or enhance the operation of their business. If the parties had such an intention they ought to have made provisions, in the three mortgage deeds, for the granting of additional or further loans. In *Macaulay v. NAL Merchant Bank Ltd.* (1990) 4 NWLR (Pt. 144) 283, the appellant was granted a loan by the respondent and, according to the loan agreement, repayment was 35 to be effected in full within four years from either the rental income on the buildings which were to be completed with the loan or from any other sources. There was default in the payment of the loan and respondent sued the appellant for the balance. It was held that the affidavit evidence of the appellant that

there was a mutual agreement between the parties (not recorded in the loan agreement) that time was not of the essence of the contract and that the respondent made him to understand that the loan was to be repaid within four years of completing the buildings and letting them out to tenants, was inadmissible. Certainly, it really would have been more convenient for the appellant in that case to repay the loan from rents collected from tenants occupying the buildings but the parties had reduced their agreement into writing and no such provision was made therein. As pointed out above, when an agreement has been reduced into writing oral evidence will not be admitted to add to, subtract from or contradict the terms of the written agreement.

I have also read the letters which the parties addressed to each other and I too am of the clear view that there was no stage or time during the protracted negotiation that a firm agreement was reached by the parties on the granting of additional or further loan. Whether in a given case it is reasonable to infer an agreement between the parties who have engaged in negotiation depends on whether there has been an offer which has been accepted in the manner required by law. All the circumstances of the case have to be considered to determine if one of the parties may reasonably be assumed to have made a firm offer and if the other party may likewise be taken to have accepted that offer. An offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound provided that certain specific terms are accepted. The offeror must have completed his own share in the formation of a contract by finally declaring his own readiness to undertake an obligation upon certain conditions, leaving to the offeree the option of acceptance or refusal. He must not only have been feeling his way towards an agreement, not merely initiating negotiations from which an agreement might or might not in time result. The task of inferring an agreement and of fixing the precise time at which it might be said that an agreement has emerged is a difficult one, particularly when, as in this case, the negotiations between the parties have covered a long period of time or are contained in protracted correspondence.

In the present case, despite the protracted correspondence, there was no evidence on what amount was the alleged additional loan which the cross-respondent agreed to grant, the period of repayment, the rate of interest on the loan, and the security to be provided to guarantee the repayment of the loan. The foregoing were fundamental terms which should be provided for in such a transaction. In the absence of agreement on the fundamental terms, there can be no valid contract. In the *United Bank of African Ltd v. Tejumola & Sons Ltd.*, (1988) 2 NWLR (Pt. 79) 662, this court held that there was no valid contract or agreement in the absence of an agreement on a fundamental term

in the case of a lease. The price of a parcel of land which was to be sold in negotiations for the sale of land was held by this court to be a fundamental term of the envisaged contract in *Adebanjo v. Brown*. (1990) 3 NWLR (Pt. 141) 661. The foregoing is not all. If in the end, the negotiations become fruitless and end without any contract or agreement ensuing, neither side to the bargain can rely on anything done by him in the course of the negotiations as estopping the other from resiling from the bargain. See *United Bank for Africa Ltd. v. Tejumola & Sons Ltd.* (supra). In the present case, the rate of interest chargeable on the additional loan was unknown.

Having regard to the controversy which arose on the rate of interest on the earlier loans, that is whether 11% per annum as rate of interest was or was not reviewable upwards by the cross-respondent, such a thing could not have been left undetermined.

Further, the cross-respondent had made it clear in one of its letters addressed to the cross-appellants that an additional loan being sought by them was unrealistic and unacceptable. On the question of the commitment which the cross appellants alleged that they made, the commitment was to pay the balance outstanding on the earlier loans which, in any case, they were already under an obligation to pay failing which their properties which were used to secure the loans could be sold. The decision of the learned trial Judge was that the cross-respondent was not under any obligation to provide additional overdraft facility to the cross appellants and that the refusal to grant such facility did not frustrate the cross appellants business. The business of the cross-appellants was frustrated by their failure to make sufficient arrangement for adequate working capital. The cross-respondent was a commercial bank and not a charitable organisation giving loans without adopting measures to ensure that such loans will be paid. The conclusion of the learned trial Judge, in the circumstances, was that it was not unconscionable for the cross-respondent to charge interest on the earlier loans during the relevant period. The court below, rightly in my view affirmed the decision.

On the whole, the cross-appeal fails and it is hereby dismissed. In view of the conclusion earlier reached by me in relation to the appeal, the appeal succeeds and it is hereby allowed. The judgment of the court below which affirmed the judgment of the learned trial Judge in favour of the appellant for the sum of N304,120.00 together with interest at the rate of 11% per annum is hereby set aside. In its place is substituted an order entering judgment for the appellant for the sum of N304.120.00 being the sum due as at 1st February, 1986 together with interest at the rate of 21% per annum and penalty at 2% per annum with effect from 3rd September 1987 (the date of Exhibit "24") up to 2/6/89 (the date of the judgment of the learned trial Judge). The appellant

is awarded N1,500.00 as costs in this court and N500 as costs in the proceedings in the lower courts.

BELLO CJN

I have had the opportunity of reading in advance the lead judgment
 5 of my learned brother Adio, J.S.C. I agree entirely. The cross-appeal fails and
 it is hereby dismissed. The appeal succeeds and it is hereby allowed. The
 judgment of the court below which affirmed the judgment of the learned trial
 Judge in favour of the appellant for the sum of N304,120.00 together with
 interest at the rate of 11% per annum is hereby set aside. In its place is substi-
 10 tuted an order entering judgment for the appellant for the sum of N304, 120.00
 being the sum due as at 1st February, 1986 together with interest at the rate of
 21% per annum and penalty at 2% per annum with effect from 3rd September,
 1987 up to 2/6/89. I endorse the order as to costs made by my learned brother.

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UWAIS JSC

I have had the opportunity of reading in draft the judgment read by
 my learned brother Adio, J.S.C. I entirely agree with the judgment. The provi-
 20 sions of clauses 3, 4 and 3 of Exhibits 25, 26 and 27 respectively are identical
 with the clauses interpreted by this Court in *Union Bank of Nigeria Ltd v.*
Professor Ozigi (1994) 3 NWLR (Pt. 333) 385. It is, therefore, wrong for the
 respondents to canvass and for the Court of Appeal to hold that the interest
 to which the 1st respondent was liable remained static at 11 per centum per
 25 annum.

Secondly, I am satisfied from the terms of Exhibits 25, 26 and 27 and
 the correspondence exchanged by the parties that the Appellant was not
 under any obligation to grant further loan to the 1st respondent.

For these and the reasons contained in the judgment read by my learned
 30 brother Adio, J.S.C. I too will allow the appeal by the appellant and dismiss the
 cross-appeal by the respondents. The judgment of the Court of Appeal is
 hereby set aside. I adopt the order contained in the lead judgment herein.

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OGWUEGBUJSC

I have had the advantage of reading the judgment prepared by my learned brother Adio, J.S.C. and I agree with his reasoning and conclusions.

Exhibits 25, 26 and 27 are deeds of legal mortgage executed by the parties to the case. They contain the terms of the contract between them. The respondents did not contest the bindingness of the exhibits and the appellant relied on clause 3 of Exhibits 25 and 27 and clause 4 of Exhibit 26. The clauses are in pari material and provide as follows:

"All interest payable on the moneys hereby secured shall accrue due from day to day at the rate from time to time stipulated by the Bank and may be capitalised at such intervals as the Bank may from time to time prescribe but not more often than monthly and added to the moneys hereby secured and shall thereupon bear interest accordingly at the rate aforesaid."

The learned trial judge came to the conclusion that the agreed rate of interest was 11% per annum and that where there is such a review in the interest rate, it is a variation creating a new term and unless communicated to and accepted by the borrower, it is unenforceable against him.

On the provisions of clauses 3 and 4 of Exhibits "25"- "27", the court below agreed with the learned trial judge that the appellant could not unilaterally increase the interest rate without an agreement with the borrower and since the respondent did not agree to the variation, clauses 3 and 4 of Exhibits "25" - "27" were null and void.

In coming to the conclusion that the rate of interest was fixed at 11% per annum, both the learned trial Judge and the court below relied on the oral evidence of the 2nd respondent. The court below was in error when it held that where the interest is fixed, the Bankers cannot alter it unilaterally without an agreement with the borrower. The courts below failed to give legal effect to the contract freely entered by the parties and expressed in Exhibits "25" to "27" and particularly clause 4 of Exhibits "25" and "27" and clause 3 of Exhibit "26" set out above. There is a general rule that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. See *Henderson v. Arthur* (1907) 1 K.B. 10.

The courts below relied on the oral evidence of the 2nd respondent that they did not agree on anything higher than 11% and held as follows:

"It will be recalled from the unchallenged evidence of the respondent in the lower court that the agreed rate of interest in the case was 11% per annum. This was not disputed by the appellant herein."

This conclusion was based on the inadmissible evidence of the 2nd respondent which was improperly received. Where a matter has been improperly received in evidence in the court below, even when no objection was raised, it is the duty of a court of appeal to reject it and to decide the case on

legal evidence. See *Jacker v. International Cable Co. Ltd.* (1888) 5 TLR 13 and *Ofowoyin v. Omotosho* (1961) 1 ALL NLR (Pt. 11) 304 at 308. (1961) 2 SCNLR 57

The said oral evidence on the rate of interest offends section 132(1) of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 which
5 provides:

“S. 132(1) When any judgment of any court
or any other judicial or official proceedings or any contract, or any grant or other
disposition of property has been reduced to the form of a document or series of docu-
ments, no evidence may be given of such judgment or proceed-
10 ings, or of the terms of such contract, grant or disposition of property except the
document itself, or secondary evidence of its contents in cases in which secondary
evidence is admissible under the provisions herein before contained; nor may the
contents of any such document be contradicted, altered, added to or varied by oral
evidence.”

The courts below failed to comply with the provision of section
15 132(1) since the provisos to it did not apply to the facts of the case. The Court
of Appeal imported into Exhibits “25” to “27” terms which are extraneous to
them. The exhibits did not fix the rate of interest permanently at 11% per
annum nor was there any provision that the appellant must communicate any
variation of interest to the respondents and for the respondents to agree.
20 Rather by clauses 3 and 4 thereof, the appellant was permitted to stipulate the
rate of interest applicable to the loan from time to time. It is plain and unam-
biguous. It was therefore not the duty of the courts below to rewrite the
agreement for the parties.

I agree with the learned appellant’s counsel that the strained inter-
25 pretation put on clause 4 of Exhibits “25” - “27” and clause 3 of Exhibit 26 by
the court below was prompted by the decision of the same court in *U.B.N. Ltd.
v. Ozigi* reported in (1991) 2 NWLR (Pt.176) 677 which decision was set aside
by this court. See *U.B.N. Ltd v. Ozigi* (1994) 3 NWLR (Pt. 333) 385 and (1994) 5
KLR 1.

30 I will therefore allow the appeal, dismiss the cross appeal of the
respondents and set aside the judgment of the Court of Appeal which affirmed
the judgment of the trial Court. I abide by the consequential orders including
the order as to costs made in the judgment of my learned brother Adio, J.S.C.

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IGUHJSC

I have had the privilege of reading, in draft, the judgment just delivered by my learned brother Adio J.S.C. and I entirely agree with his reasoning and conclusion.

The main issues in controversy in this appeal are virtually on all fours with those in dispute in the recent case of Union Bank of Nigeria Ltd. v. Professor Albert Ojo Ozigi (1994) 3 NWLR (Part 333) 385. In the latter case, this court, in a unanimous decision, held that where, as in the instant appeal, a Bank lends money to its customer on an agreement that the rate of interest thereon shall accrue “at the rate from time to time stipulated by the bank” in response to the Central Bank guidelines, that clearly shows in no mistakable terms that the bank is at liberty to fix its interest rate as it would deem fit in accordance with the varying prevailing rates fixed from time to time by the said Central Bank. Consequently where the bank in accordance with the guidelines of the Central Bank changes its interest rate in respect of a loan, a customer cannot lawfully complain that the bank has arbitrarily or unilaterally varied the original interest rate at will without his prior knowledge or consent as the variation is well within the express terms of the loan.

It therefore seems to me that failure by the appellant to secure the consent of the respondents before increasing the original interest rate of 11% indicated in Exhibit 24 was not any matter of great moment as the exercise of this right by the bank was in accordance with the signed contract between the parties.

It is for the above and the more elaborate reasons set out in the lead judgment of my learned brother, Adio, J.S.C. that I too, would allow this appeal. The cross appeal is without merit and it is hereby dismissed. I endorse all the consequential orders in the lead judgment in their entirety including those as to costs.

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