

SUPREME COURT OF NIGERIA
22ND APRIL, 1994. SC. 327/1990
CORAM:- S. M. A. BELGORE, A. B. WALI,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC.

1. CHIEF R. A. OKOYA
2. MRS. K. OKOYA PLAINTIFFS/APPELLANTS/
3. ALBION CONSTRUCTION CROSSRESPONDENTS
COMPANY LIMITED

AND

1. A. SANTILLI
2. A. DAVANZO ... DEFENDANTS/RESPONDENTS/
3. PRINCE D.A. ADEMILUYI CROSSAPPELLANTS

DOCUMENTS - Signing of a document - By a person of full age and capacity who is not an illiterate - legal implications - whether it is possible to claim lack of understanding.

COMPANY LAW- Allotment of shares - lower courts' decision that there were no more shares for allotment - By a Company as at a particular date - Upheld by the Supreme Court.

COMPANY LAW- Directors - Where defendants became directors by virtue of a partnership agreement- They have no voting rights and cannot own shares.

COMPANY LAW - Shares - Claim by defendants that shares were allotted to them - Tendering forged documents in proof of the claim - Where the defendants' claim has failed - Whether the lower courts were right in assigning shares to the defendants,

COMPANY LAW - Shares - Expatriates - Securing permission to participate in business - And bringing in money from abroad through Central Bank - Whether tantamount to prima facie proof of allotment of shares.

COMPANY LAW - *Illegality - Transaction in shares by 3rd defendant - Tainted ab initio with illegality - Whether the illegality should have been pleaded*

EQUITY LAW - *Resulting trust-Company shares held by 3rd defendant - through a patently illegal transaction - Declared subject to a resulting trust in favour of plaintiff.*

PLEADINGS - *Deviation - Stated objective of the parties in their pleadings - Supported by overwhelming evidence as found by the two lower courts - Deviation of lower Courts in their final findings - Held untenable and complete departure from the pleadings.*

FACTS

The 1st and 2nd plaintiffs/Appellants who are husband and wife were the only subscribers to the share capital of the 3rd plaintiff, Albion Construction Company Ltd. incorporated sometime in 1976, under the Companies Act. In this action filed before the Federal High Court Lagos, the questions that arose for the Court's determination relate to which is the real memorandum and articles of association, what is the share capital and who are the shareholders of the 3rd plaintiff Company. The plaintiffs contend that Exhibit A, bearing only the names of the 1st and 2nd plaintiffs as subscribers is the authentic memorandum and articles of association, with a share capital of 200,000 divided into ordinary shares of N1 .00 each fully paid up by the two plaintiffs. The Defendants contend that Exhibit A1 bearing their names together with that of plaintiffs as subscribers to a total of N500,000.00 ordinary shares in which 40,000 shares each were allotted to the 1st and 2nd Defendants, is the real memorandum and articles of association of the 3rd plaintiff.

The plaintiffs' case is that the said Exhibit A1 and minutes of an alleged meeting of board of Directors held on 5-5-81 tendered by the defendants were false documents. Exhibit SS tendered at the trial is a partnership agreement between the 1st and 2nd plaintiffs of the one part and 1st and 2nd Defendants of the other part whereby the two Defendants were to bring in their expertise knowledge in running the Company on a share of profits in certain proportion stated therein

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without anything being said about shares. Exhibit YY signed by the 2nd and 3rd Defendants show that as at 31-5-81 the N200,000.00 share capital of the Company was fully paid up whereas the 1st and 2nd Defendants brought in money into the Country later part of 1982 with which to buy shares. There was evidence how the 1st plaintiff had earlier asked the company accountant to transfer an amount from his director's account to the company's in assuring full payment of the N200,000.00 share by the 1st and 2nd plaintiffs. The trial court gave judgment partly for the Plaintiff and the Defendants. They all appealed to the Court of Appeal which also gave judgment that favoured both sides partly. Being dissatisfied the Plaintiffs have now appealed to the Supreme Court and the Defendants have crossappealed. The apex court had to determine the major bone of contention between the parties as to who are the shareholders of the 3rd Plaintiff Company, amongst other issues.

HELD (allowing the appeal Wali & Mohammed, JJSC Dissenting)

1. The statement of the 3rd Defendant (a Lawyer) that he not understand Exhibit YY signed by him and 2nd Defendant would not be accepted as true by any Court of Law. This is because any person of full age, capacity and understand who signs a document, not being an illiterate, is deemed or presumed to understand what he appended his signature upon and whatever that document says is binding upon him and the plea of non est factum will not avail him. (P.22 L 27)
2. From the records, the decision of the Court below that as at 31- 5-81 the paid up capital of the 3rd Plaintiff was fully paid for by the Plaintiffs and there could be no more shares to allot is upheld. (P.22 L 38)
3. The 1st and 2nd Defendants were Directors of the 3rd Plaintiff but owned no shares and no voting rights. They were there for expertise and by virtue of the-partnership Agreement, Exhibit SS. (P.24 L 2)
4. In the face of the clear claim by the Plaintiffs and rebutted by the defendants the lower Courts should not have deviated from their stated objective in their pleadings since the court must decide cases on the

front presented by the parties through their pleadings. (P.24L 15)

5 5. The trial judge erred in basing his final findings on Exhibit TT which he termed as admission by the Plaintiffs, after making findings of fact in accordance with the law coupled with the overwhelming evidence before him and with firm conclusion that as at 31-5-81 the N200,000.00 share capital of the 3rd Plaintiff had been fully subscribed. (P. 24 L 28)

10 6. To say that the 1st and 2nd Defendants acquired their shares by allotment is a contradiction of the law, and it is a complete departure from the battle line set up in the pleadings to hold that the Defendants purchased their shares from 1st Plaintiff. This new posture is completely untenable judging by the pleadings; it amounts to a departure resulting in non-issue. (P.27 L 11)

15 7. Since there were no more shares to allot after 31-5-81, there cannot be any allotment in late 1982 when the 1st and 2nd Defendants brought money to Nigeria for shares. The case of these Defendants is not a question of transfer but that of allotment all along. Allotment having been fought and lost by them, the lower Courts erred in trying to save a situation that forged documents - Exhibit A1 and purported minutes of 5-5-81 never achieved (P.29 L 4)

25 8. The Permission of Ministry of Finance and Internal Affairs Ministry to Participate in business and bringing in money from abroad through Central Bank cannot be prima facie evidence of allotment of shares to aliens, for shares can only be allotted if available. (P. 33 L 16)

30 9. There must be certainty in any transfer and the consideration must be shown. The uncertainty about the percentage of shares in the company purportedly given to 3rd defendant can never be removed by subsequent conduct of the 1st plaintiff and the available evidence cannot be relied upon as constituting a contract. (P.34 L 36)

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10. The entire transaction in shares of 3rd Plaintiff by the 3rd Defendant was tainted ab initio with illegality. And trial Judge's holding that illegality ought to have been pleaded is not right for pleadings shall contain only statement of facts upon which a party relies for his case and not the law nor evidence by which those pleaded facts are to be proved. (P.36 L 3) 5

11. The 3rd Defendant's subsequent exit from NEPA will not legalise what was a patently illegal transaction entered into while he was still a public officer. Thus, the 70,000 shares held by 3rd Defendant are subject to a resulting trust in favour of the 1st Plaintiff. (P.36 L25) 10

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Whether documents can be varied by extrinsic evidence

1st Defendant, signed the balance sheets showing all shares as having been fully subscribed by 31 -5-81. These documents could in law not be varied by extrinsic evidence in the absence of ambiguity. (P.23L38) 20

2. Whether "allotment" and "transfer" of shares have same meaning.

The words "allotment" and "transfer" in respect of shares of a Company cannot have any other meaning except the ones ascribed to them in companies practice and legislation; they can never mean the same thing or be used interchangeably. (P.28L17) 25

3. Court cannot grant what was not claimed

Had the 1st and 2nd Defendants claimed they were entitled to transfer perhaps their case might have some weight. There was no alternative plea of transfer by these two defendants and Court of Appeal was totally wrong to have virtually so held. (P.32L6) 30

4. Store decisis - decision of a High court declared wrong

Araka CJ was certainly wrong in Oabuaau vs. Oabuaau (1981)2 NCLR 35

680, 684. In a matter of this nature, where a Court of law, in the course of trial of a matter finds an illegality punishable under the law, even if not triable in that court but in another tribunal, without prejudice to its referring the matter to that Tribunal, it must take cognisance of the illegality, Once a transaction is illegal, it is void and all things emanating from that transaction is a nullity. (P.36L 16)

MOHAMMED JSC (Dissenting)

5. Admitted fact requires no proof

10 It is trite that once a fact is admitted it requires no further proof. It must be taken as established. (P.54 L 19)

6. Whether 1st and 2nd Plaintiffs fully paid for the 200,000 authorised shares

15 It is abundantly clear that the 1st and 2nd Plaintiffs did not fully pay for the 200,000 authorised shares of the 3rd Plaintiff company as alleged in the Plaintiffs statement of claim. By inference the reasonable thing to accept is that by that date the entry in the balance sheet (exhibit H9) which shows that the authorised share capital of N200,000.00 had been fully paid could only be in anticipation of the commitment of the 1st and 20 2nd defendants to pay for their allotted shares through a foreign exchange transfer which had been applied for as far back as 15th November, 1980. (P.56L34)

25 ***7. Code of conduct - when one should not be deprived of his property***

It is quite clear therefore that until the Code of Conduct Tribunal finds a public officer guilty of contravention of the Code of Conduct for public officers no public officer shall be deprived of his rights, property 30 or freedom and the tribunal cannot decide his case without hearing him. (P.64 L 12)

8. Code of conduct-

35 Only Code of Conduct Tribunal can declare an act illegal under the Code

“In the case in hand, although it is safe to allege that an illegality

might have been committed by the 3rd defendant when he accepted 9% shares in the company, in order to take part in the company's management while still serving NEPA, in my opinion, it is only the Code of Conduct Tribunal which would declare the conduct illegal and a contravention of its provisions". (P. 64L25)

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ONU JSC

9. Lack of evidence in proof of transfer of shares

It is worthy of note that throughout the trial in the trial court no evidence was led to show that 1st and 2nd Appellants executed any transfers as a result of any sale of shares to or in favour of 1st and 2nd respondents nor did these gentlemen claim to have acquired shares by transfer from 1st and 2nd Appellants. (P. 81 L19)

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10. Injunction granted by the Court of Appeal - When not to be allowed

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By the court below in considering its grant delving into a consideration of Exhibit A1 which had been ruled as inadmissible by the trial court as being bogus and which it itself accepted as correctly excluded, it was thereby granting an order of injunction couched under a new guise. Such an order cannot be allowed to stand in the face of overwhelming circumstances to the contrary. (P. 82 L4)

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IGUH JSC

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11. Resolution by lower court - Declared to be a serious error in law "I entertain no doubt with all due respect to the court below, that their resolution to the effect that the 1st and 2nd defendants are shareholders in the 3rd Plaintiff company by way of transfer or sale is a gross misconception and a serious error in law. This is so for several reasons". (P. 85 L 25)

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12. When dismissal of a defendant's case should be the court's only option

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"It is my view that in the face of the evidence before the court, both the trial court and the court below should have had no op

tion than to dismiss the 1st and 2nd defendants' claims as misconceived and lacking in merit. This is without prejudice to what ever claims the 1st and 2nd defendants may have against the Plaintiffs in connection with whatever amount they imported into the country in respect of the affairs of the 3rd Plaintiff company".(P. 87L 5)

REPRESENTATION:

Chief F.R.A. Williams SAN, with T.E. Williams, F.R.A Williams Jnr.,
 10 Miss O.R. Johnson and A.O. Olomola for the Appellants.
 Chief B.O. Benson SAN, with B.E. Jagun for the Respondents.

CASES REFERRED TO

- Brown v. La Trinidad 37 Ch D 1 at 17
- 15 Falaju v. Amosu (1983) NSCC 456, 460
- Adebambo v. Olowosogo (1985) 3 NWLR 207
- Ounbogu v. The State (1974) 9 S.C. 11
- Egbase v. Ohiareghan (1985) 2 NWLR 884
- Seismograph Services (Nig) Ltd. v. Eyuafel (1976) NSCC 547, 554
- 20 Oil field supply Centre Ltd v. Joseph Lloyd Johnson (1987) 2 NWLR (Part 58) 625,626
- James Miller & Partner Ltd v. Whitworth Street Estates (Manchester) Ltd (1970) A.C. 572
- English Industrial Estates Corp v. Gorge Winpey Co. Ltd (1973) 1
- 25 Lloyd's report 118
- Trollope & Colls Ltd v. New Metropolitan Hospital Board (1973) 1 WLR 601, 611
- L.G. Schuler A.G. v. Wickman Machine Tool Sales Ltd. (1974) A.C. 235
- Arrale v. Constain Civil Engineering Ltd. (1982) 12 S.C. L 56 - 57
- 30 Steven Omo Ebu Eku v. Sunmola Amola (1988) 1 N.S.C.C. 528
- Overseas construction Ltd. v. Creek Enterprises Ltd (1985) 3 NWLR (Part 13) 407 at 403
- Bakare v. State (1987) 1 NWLR (Part 52) at 594
- Connelius v. Philips (1981) A.C. 185 at 204 - 205
- 35 B and B Viennese fashions v. Losane (1952) 1 A.E.R. 909 at 913
- Anderson Limited v. Daniel (1924) 1 QB. 138
- Nwankwo v. Nwankwo (1992) 4 NWLR (Part 238) 693
- Ogbuagu v. Ogbuagu (1981) 2 N.C.L.R. 680 at 684

Ukpe Ibodo v. Iguase Enarofia (1980) 507 S.C. 42 at 55	
Mogo Chinwendu v. Mbamali (1980) 3 S.C. 31	
Chukwuogor v. Obuora (1987) 3 NWLR 454 at 457	
Ezeudu v. Obiagwu (1987) 2 NWLR 208 at 215	
Atuyeye v. Ashamu (1987) 1 NWLR 267	
Lamai v. Orbih (1980) 5 - 7 S.C. 28	5
Ibodo v. Enarofia 1980 5 S.C. 42	
Woluchem v. Gudi (1981) 5 S.C. 291 at 326	
Kola v. Coker (1982) 12 S.C. 252	
Igwego v. Ezeugo (1992) 6 N.W.R.L (Part 249) 56	
National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd. (1986) 1 N.W.L.R. (Part 14) 1 at 36	10
Eholor v. Osayande (1992) 6 N.W.L.R. (Part 249) 524 at 548	
Emegwora v. Nwaimo 14 W.A.C.A. 347 at 348	
George Ikenye & Another v. Akpala Ofune and others (1985) 2 N.W.L.R. 1	
Emegokwue v. Okadigbo (1973) 3 E.C.S.L.R. 267	15
Ekpenyong and others v. Chief Ayi (1973) 3 E.C.S.L.R. 411	
Kalu Njokwu and others v. Ekwu Ene and Other (1973) 5 S.C. 293	
Commissioner for Works Benue State and Another v. Devcon Development Consultants Ltd and Another (1988) 3 N.W.L.R. (Part 83) 407	
Ophonwa v. Oshirim Unosa (1965) N.M.L.R. 329	20
Nigerian Housing Development Society Ltd. and Another v. Yaya Mumuni (1977) 2 S.C. 57	
Adeniji and others v. Adeniji and others (1972) 1 All N.L.R. (Part 1) 278	
A.C.B, Ltd. v. Attorney-General, Northern Nigeria (1969) N.M.L.R. 231	
Metalimpex v. A. G Leventis and Co. Ltd. (1976) 2 S.C. 91	25
Alhaji Ogunlowo v. Prince Igundare (1993) 7 N.W.L.R. (Part 307) 610 at 624	
Oniah v. Onyia (1989) 1 N.W.L.R. (Part 99) 514	

STATUTES & RULES REFERRED TO

Exchange Control Act, 1962 s, 10	30
Companies Act 1968 ss, 141, 142, 75	
Federal High Court Rules 0.31 r. 5	
Lagos High Court Rules 0.16 r 17	
Federal High Court Act s, 9	35
Code of Conduct Act ss. 2(6), 20(1), 15(1), 23(1)	
Constitution 1979s. 33(1)	

BOOK REFERRED TO:

Cross on Evidence P. 270

Orojo on Nigerian Company Law and Practice P.209.

LEAD JUDGMENT BY BELGORE JSC

5 Despite the rambling seventy-three paragraph statement of defence in answer to the statement of claim, it is clear the issues between the parties at the trial court through Court of Appeal can be summarised as follows:

10 (a) Which is the real memorandum and articles of association between the two competing ones?

 (b) What is the share capital of the company?

 (c) Who are the shareholders (members) of the company, Albion Construction Company Limited?

15 The Federal High Court resolved the questions (a) and (b) in favour of the plaintiffs; but the question (c) was not resolved in their favour. The plaintiffs then appealed to the Court of Appeal just as the defendants also did on questions (a) and (b), The Court of Appeal,
20 upholding the decision of Federal High Court on questions (a) and (b) set aside the decision on question (c) and proceeded to make ancillary orders in respect of its decision on this question.

 To have a through grasp of this matter, it is pertinent to quote portions of the pleadings after summarising what the entire action is all
25 about:

 Albion Construction Limited, the third plaintiff in this case, was incorporated in 1971 under Companies Decree 1968 and Albion was given a certificate of incorporation No. RC 19475. The subscribers to the Memorandum and Articles of Association were the 1st plaintiff and
30 2nd plaintiff who are husband and wife, each taking up a share. This Memorandum and Articles of association of the Third Defendant Company lodged with the Companies Registry could not be found in the file at Abuja and a copy had to be certified as true copy which later
35 became Exhibit A in this case.

 Then the Statement of Claim continued as follows:

 “20.The 1st and 2nd defendants are qualified as “persons

Okoya v. Santilli (1994) 6 KLR Belgore JSC 11
resident outside Nigeria” within the meaning of that expression in Section 10 of the Exchange Control Act, 1962. Accordingly, the permission of the Federal Minister of Finance is required whenever the said defendants, in their capacity as persons so qualified want

(a) *The 3rd plaintiff Company to create any interest in its 5 shares in favour of either of the said defendants or*

(b) *any of the existing shareholders to transfer any of his or her shares to either or both of the said defendants or*

(c) *the 3rd plaintiff Company to issue any of its shares to either 10 or both of the said defendants.*

21. *At no time was any application made to the Federal Minister of Finance by or on behalf of the 1st and 2nd defendants for the necessary permission to enable-*

(a) *the 3rd plaintiff Company to create any interest in its 15 200,000 shares of N1.00 each in favour of either of the said defendants or*

(b) *The 1st plaintiff to transfer any of his shares or the 2nd plaintiff to transfer her share to either or both of the said defendants or*

(c) *the 3rd plaintiff to issue any of its shares to either or both of 20 the said defendants.*

22. *The 1st and 2nd defendants, without the approval of the Federal Minister of Finance as required by Section 10 of the Exchange Control Act, 1962, have falsely and or unlawfully put forward the claim 25 that each of them own N40,000.00 worth of shares in the 3rd plaintiff Company and procured false documents to bolster up their claim.*

Particulars

(i) *The said defendants procured the printing of a false memorandum of association showing that each of them were 30 subscribers to the said document for 40,000 shares each.*

(ii) *The said defendants, aided and abetted by the 3rd defendant, procured the making of a false ‘Extract’ of the Minutes of an alleged meeting of the Board of Directors claimed to have been held at the registered Office of the 3rd plaintiff Com- 35 pany on 5th May 1981 at 20a.m. when in fact no such meeting was held.*

(iii) *The said defendants procured the Secretary of the*

Company to represent to the Federal Minister of Finance that as at 23.3.84 Nigerians held N 720,000.00 worth of shares in the 3rd Plaintiff Company thereby making N80,000.00 worth of shares, available for subscription by non-resident foreign shareholders.

5 **23.** The Plaintiffs will contend at the trial of this action that at all times material to this action the 3rd Plaintiff Company having issued all its shares to the 1st and 2nd Plaintiffs there are no shares available to be issued to the 1st and 2nd Defendants.

24. The Plaintiffs will contend at the trial of this action that the
10 claim of the 1st and 2nd defendants to be owners of 40,000 shares each in the 3rd Plaintiff Company Whether as subscribers to the memorandum and articles of association or pursuant to resolutions allegedly passed at an alleged meeting of the said Company's Board of Directors held on 5.5.81 or otherwise howsoever is unlawful and not true in
15 fact or maintainable in law.

25. The Plaintiffs will at the trial of this action rely on the following documents-

(i) *all relevant documents relating to the 3rd Plaintiff Company registered in the Company's Registry.*
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(ii) *all audited accounts of the 3rd plaintiff as at May 1979 up to date;*

(iii) *all relevant correspondence between the 3rd Plaintiff Company and the Federal Ministry of Finance or the Nigerian Enterprises Promotion Board;*
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(iv) *all relevant minutes of meetings of the Board of directors and of the Annual General Meetings and the Extra Ordinary General Meetings of the 3rd Plaintiff Company;*

30 (V) *Letter doted 24,8,78 addressed by Rasaki Okovo trading & Sons to Messrs Adelusi, Ojo & Co. WHEREUPON the Plaintiffs claim-*

(1) A declaration that the document described as memorandum and Articles of Association of Albion Construction Limited dated 16.09.76
35 to which the 1st and 2nd Plaintiffs were subscribers is the only true memorandum and articles of association of the 3rd Plaintiff Company.

(2) In the alternative to claim (1), a declaration that the

aforesaid document is a true and authentic copy of the only document submitted for registration to the Registrar of Companies by the promoters of the 3rd Plaintiff Company. “and admitted in evidence in this action as Ex. A and

(3) An injunction restraining the 1st, 2nd and 3rd Defendants and/or any other person acting with or on their direction or authority from conducting the affairs of the 3rd Plaintiff and in particular from operating the account of the 3rd Plaintiff in any bank whatsoever on the boss of any Memorandum and Articles of Association other than that mentioned in paragraph (1) of 10 this hereof. 10

(4) In the alternative to (3) an injunction restraining the 1st, 2nd and 3rd defendants and/or any other person acting with or on their direction or authority from conducting the affairs of the 3rd Plaintiff company in any bank whatsoever on the basis of the document purporting to be the Memorandum and Articles of Association of the 3rd plaintiff company and carrying the Signatures of the 1st and 2nd Plaintiffs as well as the three defendants as subscribers. 15

(5) A declaration that the nominal share capital of the 3rd plaintiff company is N200.000.00 divided into 200.000 shares of N1.00 each. 20

(6) A declaration that the 1st and 2nd Defendants are not shareholders of the 3rd plaintiff company.

(7) A declaration that all shares held by the 3rd Defendant in the 3rd plaintiff company are held by him in trust for the 1st plaintiff and on order directing the 3rd defendant to execute an instrument of transfer in respect of the said shares in favour of the 1st plaintiff”. 25

The Defendants on their part first raised objection, albeit lamely, that the first and second plaintiffs had no locus to sue as they were no longer members of the company and at any rate should not have joined the third plaintiff, the Company, as plaintiff. These preliminary skirmishes were quickly dealt with by Odunowo J, the trial judge who overruled the objection. Nothing more is heard of this. But it must be stated that the plaintiffs had earlier leaded Clause of Articles of 3rd Plaintiff that the “subscribers to the Memorandum of Association shall constitute the Original Board of Directors”. At its first Annual General Meeting on 7th February 1980, it was resolved that “1st and 2nd 30 35

plaintiffs as well as 1st and 2nd defendants shall be Directors of the Company, The nominal capital of the third Plaintiff would be N200,000.00 and without the knowledge of 1st and 2nd plaintiffs a purported Extra-Ordinary General Meeting was held on 16th January 1987 at which only the defendants were present whereby a resolution was passed to increase the nominal share capital of the Company to N500,000.00 of N1.00 each. The 1st 2nd Defendants who were not shareholders were invited to the meeting while the 1st and 2nd plaintiffs were not invited or intimated of the meeting, the third defendant, assuming he was lawfully a shareholder could not form a quorum for the meeting. Up to 31st May 1980 when the audited account of the Company was approved only N2.00 worth of shares was fully paid up by 1st and 2nd plaintiffs. However by 31st May 1981 the 200,000 shares had been fully paid up by 1st plaintiff paying N199,998.00 for the remaining shares through Directors' current account to the share capital of the Company. Thus no more shares were available for allotment. The defendants in their statement of defence, particularly in paragraph 19 thereof, inter alia averred"

20*1st and 2nd defendants upon leaving Cappa and D' Alberto Ltd sought to team up with Nigerian partner to go into construction industry whereupon the 1st and 2nd plaintiffs approached them with a proposal to set up business in partnership to be organised through Albion Construction Ltd.*"

25 Albion Construction Ltd was then legally incorporated but was dormant and the 1st and 2nd plaintiffs were the only shareholders and members. It was because of this that a partnership agreement was entered into between 1st and 2nd plaintiffs, of the one part, and 1st and 2nd defendants of the other part. That was on 30th of June 1987. This partnership agreement is Exhibit SS. Exhibit SS is an interesting document. It is no more than what it says: an agreement for partnership for the running of Third Defendant and to share profits in a certain proportion. This has nothing to do with the shares in Albion Construction Ltd., it only relates to its running through the expertise of 1st and 2nd Defendants.

Having explained earlier the claim of the plaintiffs, the defendants stand is on the following pedestal in their Statement of Defence in

paragraph 72 as follows;

“72. The defendants jointly and severally in response to the reliefs sought by the 1st and 2nd Plaintiffs in their Statement of Claim shall seek the Court to find as follows:

- (i) A declaration that the memorandum and Articles of association purportedly certified on the request of their solicitors by the office of the Registrar of Companies on 28th March 1988 was procured irregularly and in breach of laid down procedures without satisfying the Registrar of Companies as to the authenticity of the document.*
- (ii) That the defendants are lawful directors and shareholders of Albion Construction Ltd. and that from 1984 When the 1st and 2nd plaintiffs resigned their membership and directorship of Albion Construction Ltd, they automatically ceased to be members and directors of the Company and accordingly have no say in the affairs of the company.*
- (iii) That the authorised share capital of Albion Construction Ltd. is now N5000,000.00.*
- (iv) that no shares are held in trust for 1st Plaintiff by the 3rd defendant.”*

They then Sought the Court to dismiss the Plaintiffs’ case in its entirety. The trial Court made some remarkable findings, to wit,

1. That the Company at formation had only two members, 1st and 2nd Plaintiffs Who then subscribed to one share each out of the authorised share capital of N200,000.00.
2. That Exhibit AI, a purported Memorandum and Articles of Association of the 3rd Plaintiff (Company) was bogus, meaning it was not genuine and the Court was satisfied that the one tendered by the Plaintiffs, exhibit A, was the genuine and authentic Memorandum and Articles of Association.
3. That the share capital of the Company remained at N200,000.00 and has never been increased to N500,000.00 as claimed by the defendants as of 31.5.81.
4. That the Defendants, despite the fact that no more shares were available for allotment still had shares in the Company even though 1st Plaintiff had made up the 200,000 shares by payment from his current account of N199,998.00

It is not contested that the 1st and 2nd Plaintiffs were the

founding members as well as directors of 3rd Plaintiff Company. They remained so from 1976 and were still so from around February 1980 as it is borne out in paragraph 13 of statement of Claim and paragraph 15 of statement of Defence. The 3rd Defendant claims that he became a director of the company on 16th October 1981 well after 31st May 1981 when 1st Plaintiff acquired more shares to make the N200,000,00 nominal capital. The 1st and 2nd defendants brought in money from foreign country” for the purpose of paying for shares’ allegedly allotted to them well after 31st May, 1981 when all the shares in the 3rd plaintiff Company had been fully allotted. The Federal High Court identified, as I said earlier, Exhibit A as true and authentic Memorandum and Articles of Association of 3rd Plaintiff Company and that Exhibit AI, tendered by the Defendants is bogus and not genuine; the meaning of this is that Exhibit AI was forged. The same Court held that as of 31st May 1981 the share capital of the Company stood at N200.00.00. As for the identity of the shareholders, the trial judge went into arithmetical exercise of apportioning shares despite earlier holding that all the shares had been taken up by 31st May 1981. This led to the appeal by both parties to the Court of Appeal where resolution of who owned what shares was resolved against the plaintiffs’ contention and thus this appeal. The Plaintiffs then formulated the following issues for determination in line with the grounds of appeal:

A. The Shares of 1st and 2nd Plaintiff:

25 Whether the 1st and 2nd defendants ever acquired shares by transfer from the 1st plaintiff.

B. Shares of the 1st and 2nd Defendants:

Whether the court below was correct in failing to consider and uphold the contention of the plaintiffs that by 31.5.81 there were no shares available to be issued to the 1st and 2nd defendants at the time they claimed to have paid for shares allegedly allotted to them.

C. The Shares of 3rd Defendant

Whether the Court below ought to have held that:
 35 (i) the transfer (and accordingly the underlying contract) whereby in exchange for shares transferred to him by the 1st plaintiff the 3rd defendant was obliged and required to participate in the management

and running of Albion Construction Limited, was one which was impliedly prohibited by Section 2(b) of the Code of Conduct for Public Officers under the 1979 Constitution and is therefore illegal and void;

(ii) Whether the shares held by the 3rd defendant were held by him in trust or for his own benefit. 5

D. Court of Appeal's Order on Injunction:

Whether the order of the Court of Appeal setting aside the order for injunction made by the federal High Court was justified."

Going by the issues raised. I ask, what are the shares held by the first and second plaintiffs? These two persons were the only subscribers to the Memorandum and Articles of Association in 1976. each holding a share, and that was about two years before they met the 1st and 2nd defendants. The first plaintiff claimed he paid for additional N199,998.00 worth of shares to make his total shareholding 199,999. This, the 1st and 2nd defendants denied claiming instead that they held each of the share capital of the 3rd Plaintiff Company; with the 3rd defendant claiming 21% for himself and for "Workers Trust". The 1st plaintiff also alleged that out of his shares he transferred 10% to L.S. Balogun and 9% to L.A. Balogun. But first, it must be made clear that the pleadings of the plaintiffs averred in para. 16 that 10 15 20

"up to the time when the audited account of the Company as at 31.5.80 where approved, only N2.00 worth of shares were fully paid for by 1st and 2nd plaintiffs Who then held one share each". 25

This was not disputed by the Defendants especially in their paragraphs 5 and 38 of Statement of Defence. However, the Defendants put a ride into their paragraph 38 (supra) that the two shares were never paid for. This is amazing, when considered in the light of the Simple fact that the three of them had not even come near the Company in 1976 when the 3rd Plaintiff Company was incorporated and was dormant up to when 1st and 2nd Defendants came into its life in 1978 vide a partnership agreement. Exhibit 4 SS. But a look at Exhibit Hand H2 the 3rd plaintiff's balance Sheets for 1978, 1979 and 1980 was each Signed by one or the other of the defendants and reflect that the N2.00 was fully paid. A lot of documents were tendered in this case at trial and 30 35

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it certainly caused some confusion for some witnesses whose memories later got refreshed when in cross-examination they were confronted with relevant documents. An example is Ayinla Okuboye, D.W.6 who testified in evidence in chief inter alia as follows:

“I am the one who keeps the ledger and books of Albion
5 (3rd Plaintiff). All transactions of the Company are recorded in these books. If I see the 1980/1981 (ledger), I can recognise it. This is the ledger being kept by me.”

The ledger was tendered and admitted as Exhibit U. The witness then continued

10 “I also keep the cash books. These are the Cash Books from 1978 to May 1981 (the Cash Books were also admitted as Exhibits UI and V2).....

The Albion Company has external auditors. From time to
15 time I joined in 1988, the external auditors are Adetas; Ojo and Co.”

He testified further that after preparing all his balances he would submit annually his books to the external auditors. These books include ledgers, cash books and all other books kept by him. Also included among the ledger books are Debtors Ledger Book, admitted as
20 Exhibit V. Then he continued

“I have seen Exhibit V. The earnings for completed work in 1980/81 is N 12,815,815.28k. I have seen Exhibit H9, it shows the earnings for the same period as N2,015,824.00. That was not
25 the figure I gave the External Auditors for preparation of Exhibit H9. We have provisions for Directors Account in Exhibit V. It is on page 169 of Exhibit U. As at 31st May 1981 the account standing to the credit of the Directors Current Account is N195]01.73k, the amount stated in Exhibit H9 as Directors ‘Current account is
30 N2,316,659.00 exactly; I don’t know who gave these figures to the auditors. The amount I gave to the auditors was N 195]0 1.73k.”

“I have seen page 168 of Exhibit V, the paid up capital. What I have in my books as at 31st May 1981 as paid up capital is
35 N2.00 The corresponding column in Exhibit HH9 shows N200,000.00 as paid up (capital); I did not give these figures to the auditors. I provided the auditors with N2.00 as paid up. I have seen the column for purchases at p.452 of Exhibit U, it shows N3,656,507.47k as the amount for purchases. I have seen Exhibit

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H9, for that period, the figures put by the auditors for purchases
is N694,645.00 that was not the figure I gave the auditors. I gave
the auditors N3,656,607.47k.”

This witness then became more emphatic when he said:
“Apart from the books of the Company, I cannot say the other
sources the auditors have in preparing their Balance Sheet. I 5
provided information to the auditors since 1978. Apart from N2.00
I did not receive any other money for the payment of share capital.
The money could not have been paid without my knowledge.
I know Chief R.A. Okoya. He is sitting there I can’t say if Okoya 10
loaned any money to the 3rd Plaintiff Company in 1980/81
financial year. During 1980/ 81 financial year, I did not receive
any money as loan from the 1st plaintiff. I received all official
financial transaction (sic) of the third plaintiff.”

In cross-examination however, this witness, on being taken 15
through the very exhibits he tendered for defence and those already
tendered, became wiser. Exhibit W, Ledger for 1981/82 was then
tendered through him after he identified it. Then has was led through
Exhibit Wand stated as follows. “I have seen p.139 (of Exhibit”). It 20
shows the opening entry of N200,000.00 as from June 1st 1981. It
represents paid up capital. The next line is N39,457.44k as at
October 1982. The entry for October 1982 does not fit into the
entry for 1981/82”.

(Against the last sentence above, learned trial judge made the 25
following observation:

“Note: this question was answered after considerable
hesitation and apparent uncertainty.”)

This witness, DW6, Mr. Okuboye then proceeded under cross-Exami- 30
nation as follows:

“It is correct that as a rule the opening figure for all accounting
year (in this case 1st June of a year to 31st May of next year) should
rhyme with the closing figure of the previous year. I am sorry. It is
not correct that the two should agree, I have some explanation for 35
this answer. If the opening figure is N200,000.00 during account-
ing year if there is any transaction the closing figure will be
increased. I got the N200,000.00 from the audited Balance Sheet.
I made the entry of N200, 000.00 in October 1982. The entry for

N39A57.44k was not made the same day. I am not aware that the audit for 7982 was not complete; I made it in October 7982. I made the opening entry of N200,000.00 from the audited account for 1987/1982. Exhibit H4 is where I got the figure from.”

5 This Exhibit H4, the audited account, is a copy and the original was tendered in cross-examination by DW.6 as Exhibit X (i.e the Audited Account for 1981/82). The entry for audited account for subsequent years including 1985 continued to reoccur with the figure of N200,000.00 as paid up capital. This witness finally agreed that the paid
10 up capital by 1980/81 or simply by 31/5/81 was N200,000.00

So the main dispute between the parties has *coalesced* at Trial Federal High Court, it was not that N2.00 was not paid as original nominal capital, but what was the position of N199,998 paid by the Plaintiff, Chief Okoya. Did he pay?

15 As for allotment of shares, the Plaintiffs Brief is succinctly put as follows:

*It will be possible to argue in “the strictest rules” that in the absence of proof of a board Meeting or a resolution of the General
20 Meeting to sanction the allotment of shares to the 1st and 2nd Plaintiffs, it must be concluded that there was no proper allotment of shares to them. One would of course be bound to use the same measure in respect of the shares claimed by the defendants”.*

25 For the above reasoning, Chief Williams, SAN, for the plaintiff, quoted Lindley in Brown vs La Trinidad 37 Ch D 1 at 17 to Wit:

*“I think it is most important that the Court should rota fast to the rule upon which it had always acted, not to interfere for the purpose of forcing companies to conduct their business according
30 to the strictest rules, where the irregularity complained of can be set right at any moment”.*

It must be pointed out that the trial Court outrightly rejected the Defendants’ contention that Exhibit A1, a Memorandum and Articles of Association, was the genuine one, he called it bogus memorandum and
35 Articles of association. I find that he meant by this that Exhibit A1 was a forgery which the Defendants wanted to influence that Court with so as to achieve Victory. The Trial judge *also* rejected the forged document purporting to show that share capital of the Company had

been raised to N500,000.00 as also not correct, it was certainly a forgery of an alleged Board Meeting of 5/5/81.

Learned trial judge finally held that he was convinced by the contention of the Plaintiffs, on the balance

“that the paid up share capital (of the 3rd Plaintiff Company) as at 3 7.5.8 7 stood at N200,000.00 5

These were findings the Court of Appeal never disturbed. Then if as of 31.5.81 the paid up capital share stood at N200,000.00 only the plaintiffs could have paid for the allotment by paying an additional sum of N199,998.00 The reason is not far-fetched because by that day there were no more shares available for allotment and the Defendants 1 and 2 could not have by that date acquired any shares by allotment. They brought in their money over one year later! At that time no shares were available for allotment. So the only person who could have paid for the remaining N199,998.00 for the shares could be no other person than the 1st Plaintiff and this is What *all* the entry of N200,000.00 in Exhibit U is for. The evidence of Okuboye, quoted in extenso herein before, is 10
amply corroborated by that of Michael Ojo 20 Adelusi the principal partner in the Company’s external auditor. He identified Exhibit U, the Ledger Book, and identified the first entry carried forward from may 20
31st 1981 to June 1, 1981 as N200,000.00 as share capital of the 3rd Plaintiff Company making It fully paid. There was no other entry for 1981 on the capital side; except the following year 1982 where there 25
were no more shares to take up by allotment. By June 1st 1982 the entry in Exhibit U stiff remained N200,000.00 as share capital, None of the defendants protested on this entry at the time they were made and they Signed as Directors. DW.9, Chief Adelusi from the external auditors, 30
thus confirmed the plea in paragraph 17 of Statement of Claim that Shares worth N199,996.00 were paid for from the amount standing to the credit of 1st Plaintiff in the Director’s Current Account of 3rd Plaintiff Company. All these evidence from DW.6 and DW.9 could not 35
be assailed as being favourable to the plaintiffs. Such evidence is perfectly admissible and in the absence of any contrary evidence from person of equal status in relation to the affairs of 3rd plaintiff, it must be accepted as the truth. (Falaju vs Amosu) (1983 NSCC 456, 460,461; Adebambo vs Olowosogo (1985) 3 NWLR 207,215). (See also Onubogu

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vs The State (1974) 9 S.C. 1). Odunowo J, trial judge, completely
believed DW. 9 was a witness of truth.

Exhibits H3-H8, Balance Sheets show that the N200,000.00
share capital had been paid up by 31.5.81. There is no support for the
contention of any of the defendants in these Exhibits tendered and
5 admitted without any objection. Viewed in line with S.141 and S. 142 of
Companies Act 1968 (relevant to this case) and Schedule 8 to the same,
it is clear, very clear, that the share capital of Third Plaintiff Company,
standing at N200,000.00 as of 31.5.81 left no more shares for allotment
10 any more. Exhibit H.9 remarkably, was Signed by 2nd and 3rd Defend-
ants and it confirmed the shares were fully taken up by the Plaintiffs as
at 31.5.81. According to DW.9, none of the Defendants challenged
Exhibit H.9. Exhibits H.7 and K are very clear and so is Exhibit YY that
says:

15 “ALBION CONSTRUCTION LIMITED DIRECTORS’ REPORT

*In accordance with Sections 720 and 750 of the Companies
Decree, 1968, we the Directors of the above named Company
hereby certify that the attached Balance Sheet as at 31/5/87 and the
20 Profit and Loss Account for the same year together with Auditor’s
Report to be true copies as laid before the Company in General
Meeting. We further certify that the Directors did not recommend
the payment of any Dividend.*

(Sgd) A. Davanzo
25 (Sgd) D. Ademiluyi) DIRECTORS”

3rd Defendant, as a lawyer, sui juris, made a statement that no
court of law would accept as true when he claimed that he did not .know
what he signed when he and 2nd Defendant signed Exhibit YY. Any
30 person, of full age and capacity and understanding who signs a
document, being not illiterate is deemed or presumed to understand what
he appended his Signature upon. Whatever that document says and
undertakes is binding upon him and plea of non est factum will not avail
him (Egbase vs Ohiareghan (1985) 2 NWLR, 884.899-900).

35 Exhibit HH, minutes of A General Meeting of 15.3.82. where
by implication the paid up share capital was ratified. This is supported
by Exhibit A in Article 14. It is thus patently clear from the records of
the 3rd plaintiff that when Lauro Santilli 1st Defendant, and Albino
Davanzo, 2nd Defendant, brought in money into the country in the latter

part of 1982, they paid into the Company's current account, such money could not be payment for shares as there were no more unallotted shares since 1981, i.e. 31.5.81. I refer in this instance to DW.6 and DW.9 who unambiguously identified documents supporting absence of any more shares for allotment after 31.5.81 especially Exhibits U and W.

I therefore uphold the decision of the Courts below that as of 31 .5.81 the paid up capital of the 3rd Plaintiff was fully paid for by Plaintiffs and there could be no more shares to allot. The only mode of passing shares to the Defendants could only be by way of transfer and no more. This is not the claim of 1st and 2nd Defendants; rather than ask for specific performance if there was agreement to transfer shares to them they resorted to subterfuge of cooking up a memorandum of Association, Exhibit AI, and a purported increase in share capital to N500,000.00 which the Courts below rejected in toto.

The trial Court, despite all the evidence overwhelmingly in support of the case for Plaintiffs, went ahead to allot shares in an arithmetical exercise the parties never claim or asked the Court for, going by their Statement of Defence. The Court held there were no shares to allot after 31.5.81 by virtue of Exhibits U and W. Did the Defendants, Davanzo and Ademiluyi, not Sign Exhibits H3-h9 and Exhibit YY? How does the Court view the evidence of DW.6 and DW.9 that were held to be witnesses of truth and the Court of Appeal never faulted? The burden on the Plaintiffs should not be higher than balance of probability and going by the concurrent findings of the Courts below on the aforementioned Exhibits, one wonders why the same Courts turned round and started allotting shares to the defendants. If assuming the Defendants claimed that they were promised shares, their remedy, with respect, will be for damages for breach of contract. They are not for this; they opted throughout the case for allotment of shares which were no more there. Unfortunately the Defendants resorted to serious misconduct of forging documents - Exhibit AI and alleged minutes of 5.5.81 - to prove their case. This, if nothing else, is serious enough to show they were not honest to the Court.

Santilli, 1st Defendant, Signed the balance sheets showing all shares as having been fully subscribed by Y, 31.5.81. These documents could in law not be varied by extrinsic evidence in the absence of

ambiguity. 1st and 2nd Defendants were Directors of the 3rd Plaintiff, but owned no shares and no voting rights. They were there for their expertise and by virtue of the Partnership Agreement, Exhibit SS. Trial judge made a lot of Exhibit n pleaded by the Defendants to persuade the Court that 1st and 2nd Plaintiffs had severed their connection with the 3rd Plaintiff, not only as Directors but also as shareholders. (Paragraphs 63 and 64 of Statement of Defence refer). Contrary to Order XXX 1 rule 5 Federal High Court Rules and Order 16 rule 17 Lagos High Court Rules (applicable to Federal High Court by virtue of S.9 of Federal High Court Act), the Defendants seemed to shy away from their pleadings. Even in the Court of Appeal they never pretended they relied on Exhibit n as admission by 1st and 2nd Plaintiffs that they held only 51% shares in the 3rd Plaintiff Company. The Court must decide cases on the front presented by the parties, that is to say, through their pleadings. In the face of the clear claim by the Plaintiffs and rebutted by the defendants the Courts should not have deviated from their stated objective in their pleadings. The Defendants posited all along that there were more shares to allot, a situation the two Courts below rejected. In the face of overwhelming evidence that by 31.5.81 no shares were available again for allotment, the 1st and 2nd Defendants bringing in money late in 1982 to pay for “shares allotted was mere day dream. This brings me to the misinterpretation of the very important words “allotment” and “transfer” in the running and administration of companies with regard to shares.

After making findings of fact in accordance with the Law, with the overwhelming evidence before him, and with firm conclusion that as at 31.5.81 the N200,000.00 share capital of the 3rd Plaintiff had been fully subscribed, trial judge erred in basing his final findings on a document which he termed as “admission” by Plaintiffs, that is Exhibit TT. (*Seismo Services (Nig.) Ltd. v. Eyuafe* (1976) NSCC 547, 554. The Court of Appeal was not taken in by this findings on Exhibit n. Trial Court merely split the 51 mentioned in Exhibit n between 1st and 2nd Plaintiffs, giving 50 (i.e. 100,000 shares) to Chief Okoya. The entire evidence indicates Mrs. Okoya had only one share Le 0.005 and this is clear on Exhibits A and W. This led the Court of Appeal into correction exercise.

In the Court of Appeal, Adenekan Ademola JCA accepted the

following is the truth:

“The Defendants cannot, in view of the overwhelming evidence in this case (be heard) to dispute the fact that N200,000.00 were fully paid for as at 31.5.81. The 1st and 2nd Plaintiffs had 100% ownership of the shares of the company, it was clear that they and they only paid for their shares.” 5

He further held

“The contention of the Defendants that the share capital of the Company is otherwise than N200,000.00 and have not been fully paid for, fails” 10

With the foregoing specific findings of fact, corresponding with the stand of the Plaintiffs throughout the case, the Court of Appeal should have no option except to hold that there were no more shares in the Company to allot after 31.5.81, except by transfer from 1st and 2nd Plaintiffs. But this was not the case of the Defendant who stubbornly stood by their claim for allotment. There was no evidence of allotment to the 1st and 2nd Defendants before 31.5.81, all that one can find in favour of these two Italians is that they had a partnership agreement, Exhibit 4SS with 1st Plaintiff, dated 30th June 1978 and this agreement talks only of sharing profits in running the third Plaintiff Company, (I shall allude to this more later in this judgment). 15 20

That cannot in law be allotment; at best it gave them right to sit on the Company’s Board without shares and without voting rights. The concurrent findings of the Federal High Court and Court of Appeal were to the effect that all shares of the Company had been taken up by 32.5.81 with Defendants No. 1 and 2 not having any to take up and their paragraph 23 in the Statement of Defence that they were “allotted” shares could not be correct. Ademola JCA was Clear about this when the inter alia held as follows: 25 30

“Agreeing with Chief Williams’ submission that if by 31.5.81 the 200,000 shares had been fully paid for mostly by 1st plaintiff through Director’s Account of the Company and this is the finding of the learned trial judge in the earlier part of his judgment, it follows, and the argument is very compelling that anybody besides the 1st and 2nd Plaintiffs who wants to acquire shares in the 3rd Plaintiff Company after the 31st May 1987 must do so by transfer 35

from the 1st Plaintiff for his wife if they are prepared to transfer their shares.

Acquisition of shares in this Company cannot therefore be by way of allotment. It follows therefore that acquisition of shares by 1st, 2nd and 3rd Defendants must be by way of transfer or sale."

It seems that the Court of Appeal, after the findings of trial Court on the situation of the share capital and their own confirmation of the same, got carried away by Exhibit KK which led Ademola JCA to hold

"Exhibit KK shows the entry on the date when 1st and 2nd Defendants paid by cheque for the shares ascribed to them. The 3rd Defendant cannot complain that it is false. Both sides in this case have relied on it and it (has) not been disowned. It is therefore a record from which some information about the dealings of the Company could be gathered.

As for the first objection that it was not pleaded as the foundation of the 1st and 2nd Defendants' case, this to my mind is not a serious objection to it being used as it supports the case of 1st and 2nd Defendants being made of since it is a record of 3rd Plaintiff. The Exhibits relating to the application for the 1st and 2nd Defendants to bring in money into the country for the purposes of shares and the approval by the Ministry (of Finance) and Central bank were admitted during trial without objection. They support the evidence of the 1st and 2nd Defendants as to the fulfilment of their obligations under the Partnership Agreement, Exhibit 4 SS with the 1st and 2nd Plaintiff."

The observation above, more than anything else was the *raison d'être* for the Court of appeal to embark on arithmetical exercise of apportioning shares to the Defendants, believing the admission exhibit operated as estoppel against the Plaintiffs. The Defendants sitting as Directors of the Company, Court of Appeal held, was also against the Plaintiffs' stand. But it is clear in evidence that trial Court never so held that the Defendants sitting on the Board of the Company made them shareholders. There is always a world of difference between fact and fiction. It is Exhibit 4 SS, Partnership Agreement, that gave the 1st and 2nd Defendants opportunity to be on the Board of the Company. This

Exhibit concerns sharing of profits by these Defendants only in the running of 3rd Plaintiff and it cannot be elevated to status of a right to shares in the Company.

This was the error of the Court of Appeal. The findings of Court of Appeal is certainly contrary to pleadings and evidence before the trial Court. Far from establishing that they purchased shares in the Company the 1st and 2nd Defendants' case was that they acquired shares by allotment; there were no shares again to allot *after* 31.5.81 and their own key witnesses, DW.6 and DW.9 confirmed this. It is in contradiction of the law to say that the 1st and 2nd Defendants acquired their shares by allotment and it is a complete departure from the battle line set up in the pleadings to allow defendants that they purchased their shares from 1st plaintiff. This new posture is completely untenable judging by the pleadings; it amounts to departure and resulting in non-issue.

Court of Appeal having held that the contention of the Defendants that the share capital of the Company is otherwise than N200,000.00 must fail, it then stands to reason legally that from 31.5.81 there were no more shares to allot to anybody and whoever from that day wants to acquire shares must convince the 1st Plaintiff and 2nd Plaintiff to part with their shares by way of transfer. There is thus no basis for the finding of Court of Appeal that 1st and 2nd Defendants acquired shares by allotment after 25 31.5.81 once their subterfuge of forging Exhibit AI and preparing a bogus resolution increasing share capital to N500,000 failed in the two Courts below.

The case of the 1st and 2nd Defendants cannot be on all fours with that in OILFIELD SUPPLY CENTRE LTD VS JOSEPH LLOYD JOHNSON (1987) 2 NWLR (part 58) 525,626. The decision that this case established, inter alia, that to prove a person is a shareholder in a company, it is not mandatory that documentary evidence such as receipt or share certificate must be tendered, even though desirable, oral evidence which is satisfactory to the Court from the dealings of the parties may be enough. In Oilfield case (supra) there were not only shares to take up on allotment, there was already an increase in share capital and the respondent right from formation of the Company was the motivator and paid for his allotted shares by way of

his salary that he ploughed into the Company. In the case now at hand there were no more shares to allot to the Defendants 1 and 2.

Companies are governed by their own special laws and practice. It is for this reason that in the custom of running companies certain terms have emerged over the centuries that they have acquired certain and definite meanings and thus become words of art or technical words. Companies legislations and practice have grown over the centuries that hardly is any nation an island in their operations any more. Many of the terms being employed have developed specific meanings that when agreements are entered into, the meanings have clear and specific interpretation. When these terms then surface in statutes, they must be assigned the meanings given to them. To do otherwise will create mischief that can throw several Companies into disarray. In such a case uncertainty will create fear in entering into agreements. The words “allotment” and “transfer” in respect of shares of a company cannot have any other meaning except the ones ascribed to them in companies practice and legislation; they can never mean the same thing or be used interchangeably. “Allotment” is done when a new Company is being incorporated and the money paid for the allotment of shares goes to the company only to form part of its share capital. Once the share capital is paid for by allottees that is the end of allotment. Any person desirous of participating in such a company will not therefore ask for allotment but for sale and transfer to him by a shareholder, Companies Decree (Act) 1968 has provisions for allotment in sections 48 to 55. The exception is when share capital is increased.

As for transfer, this is a matter between the shareholder who wants to part with his shares and the purchaser or transferee. The money on transfer goes to the shareholder, not to the Company, the Company will only ratify by adjusting its books to reflect the new shareholding. The transfer of shares is in the provisions of Companies Act (supra) at sections 78-86.

Thus there cannot in law be a recognition of interchangeable use of allotment and transfer in company’s dealings, the words have acquired definite meanings that it is too late to ascribe to them any other

meaning. Apart from allotting shares to participants in formation of a Company, more shares may be available when share capital is increased and allotment may also be made. Apart from this there can be no allotment of shares when all the share capital of a Company has been taken up. Since there were no more to allot after 31.5.81, there cannot be any allotment in late 1982 when the 1st and 2nd Defendants brought money to Nigeria for shares; their case is not a question of transfer, it was all along that of allotment. Allotment having been fought and lost by them, the lower Courts erred in trying to save a situation that forged documents - Exhibit AI and purported minutes of 5.5.81 - never achieved. In paragraph 23 of Statement of Defence the first and second defendants claimed 40,000 shares each. But in the face of concurrent findings of the two lower courts that all shares had been taken up by 1st and 2nd Plaintiffs by 31.5.81 and they were unable to prove acquiring the shares they (the 1st and 2nd defendants) claim before that date, that ought to be the end of their case. Having failed to prove in accordance with their pleading their case ought to end there. But the Court of Appeal, despite its findings, then adverted to Exhibit KK.

Exhibit KK, as far as the Court of Appeal is concerned, manifests circumstantial evidence to show that 1st and 2nd Defendants brought money into the country to pay for shares in the 3rd Plaintiff Company and nothing more. The question always is: who are the members of the 3rd Plaintiff Company? Since Exhibit 2 A is the only authentic Memorandum and Articles of Association of the 3rd Plaintiff, as found and held by the trial Court and affirmed by the Court of Appeal, how do these two Defendants come in? The only answer seems to be the confusion caused by Exhibit SS, the Partnership Agreement whereby the two defendants would use their special knowledge and expertise to run the 3rd Plaintiff Company which had been dormant since its incorporation in consideration for share in its profits. It is remarkable that the partnership agreement was only between the 1st and 2nd Plaintiffs on one side and 1st and 2nd Defendants on the other side. Thus the 3rd Plaintiff incorporated in 1976 had no contact with the two Defendants before 1978, when Exhibit SS was made. Exhibit SS amply provided in its terms in paragraphs 1-13 how they would operate. Salaries, accommodation, share of profits, share of losses, annual preparation of

balance sheets, accounts, operation of bank accounts, transport, each partner to be just and faithful restriction in engaging in a similar business to compete with the object of the partnership, determination of the partnership etc. Part of the clauses will be useful in this case to be set out.

5 CLAUSE 3

“The profits of the Partners shall belong as to 50% to the First Partner (1st and 2nd Plaintiffs), and 40% as to the Second Partner (1st and 2nd Defendants) and 10% as Bonus to the
10 *Technical Staff and they shall bear losses in the same proportion”.*

CLAUSE 7

“That each of the Second partner shall be entitled to a salary of N24,000.00 per annum and which is entitled to draw out
15 *of the Partnership Account at the end of each month commencing from 1st June 1978 - this making the sum of N8,000.00 payable to the Second Partner severally and jointly annually and the Second Partner shall jointly be entitled to a salary of N6,000.00 per annum*
20 *and which is entitled to be drawn out of the Partnership Account at the end of each month commencing from 1st June 1981 etc.”*

To me I cannot find any other agreement that let in the two Defendants into the third Plaintiff Company except Exhibit SS. The Exhibit SS was an “open sesame” for the two to sit on the Board of 3rd
25 *Plaintiff* as Directors but without shares or voting rights. Now Exhibit KK mentions that the two Defendants paid in N40,000.00 each on 5/5/81. This has never been their case. At any rate that date of entry is remarkable, it was the date a resolution was alleged to have been passed to increase the share *capital* of the 3rd Plaintiff to N500,000.00,
30 rejected by the trial Court and by the Court of Appeal. Secondly, Exhibit HH containing the Minutes of the 3rd Plaintiff Board Meeting, never alluded to shareholding of any of these two Defendants. It is instructive to see the Minute Book page by page

35 *“(1) Page 1- meeting of 13th April 1979 where certificate of incorporation was produced. The Defendants never attended, only 1st and 2nd Plaintiffs and Mr. Oriogun of Mabs & Co. Ltd.*

(2) Page 2- Meeting Of 7th February 1980. Present 1st and 2nd Plaintiffs and 1st and 2nd Defendants. Among resolutions was the appointment of 1st and 2nd Defendants as directors along with 1st and 2nd Plaintiffs. There was nothing about shareholding.

(3) Page 3 - Directors' Report with no recommendation for Dividends. 5

(4) Page 4 - as at p. 3.

(5) Page 5 - 75th May 1980. To introduce two prospective Directors - one showed up, the other was absent.

(6) Page 6 - 1st of July 1980. Present were 1st and 2nd Plaintiffs and 1st and 2nd Defendants. Business - Directors' Shareholding produced, opened and made accessible to those attending. All Directors confirmed. 10

(7) Page 7 - Directors' Report on Balance Sheet as of 31/5/79. 15

(8) Page 8 - Attendance as in page 6. Shareholding produced.

(9) Page 9 - As in page 6 for 3 7/5/80.

(10) Page 10 - Attendance as in page 6. Business - Appointment of Bankers. Date 6.5.8 7. Nothing about shareholding.

(11) Page 11 - Date 16th October 1981. 2nd Plaintiff absent but present were 1st Plaintiff, 1st, 2nd and for the first time 3rd Defendant. Appears disagreement on account of the Company and breach in trust between 1st Plaintiff and 1st Defendant. It was suggested that the 3rd Defendant be appointed Director/Deputy Chairman with 1st plaintiff offering 9% of his own shares to 3rd Defendant. Offers accepted. (3rd Defendant still a public Officer)". 20 25

It could be observed that Exhibit KK has not been supported in any material detail by Exhibit HH; secondly the money brought into the country to pay for his alleged shares did not come, according to all evidence, both by the Central Bank and Ministry of finance, before November 1982. Having found clearly that the entire nominal capital share of 3rd plaintiff had been fully subscribed by 31.5.81 and finding that no resolution was passed on 5.5.81 to increase the share capital to N500,000.00 with the attempt to claim Exhibit A1 was the authentic memorandum and Articles of association of 3rd Plaintiff, no Circum 30 35

stantial evidence will support Exhibit KK as reflecting the true state of *affairs* as regards the shareholding. The pleas of the two Defendants concerned was that they brought in money to pay for their allotment late in 1982. They cannot arrogate and subrogate at the same time.

5 Had the 1st and 2nd Defendants claimed they were entitled to transfer perhaps their *casa* might have some weight. There was no alternative plea of transfer by these two defendants and Court of Appeal was totally wrong to have virtually so held. But the only agreement that I find linking them unambiguously with the 3rd Plaintiff Company is the partnership, 10 Exhibit SS. I have taken the trouble to enumerate the events leading the Defendants I and 2 to the 3rd Plaintiff so that clearly one can see that the terms in clauses 3 and 7 concerning payment of salaries and the sharing of profits in Exhibit SS were used as licence to claim ownership 15 of shares. Clause 3 (*supra*) is what now becomes the claim of 1st and 2nd Defendants as right to share by allotment. The entry in KK, even though not adequately considered in the trial Court, it is obvious both trial Court and Court of Appeal made specific findings of fact-

1. That on 31.5.81 all the N200 ,000.00 share being nominal 20 capital of third plaintiff had been taken up and no more shares were available for allotment.

2. That after 31.5.81 whoever wanted to have interest in ac- 25 quiring any shares in 3rd Plaintiff can only do so by way of transfer and not by allotment.

3. That there was no allotment of shares on 5.5.81 as claimed by the Defendants I and 2 as reflected in Exhibit HH, Minutes of the Company and that the claim of 1st and 2nd Defendants was that they brought money from outside the country to pay for their allotment. 30 Nothing was paid for on 5.5.81 and the Exhibit HH does not reflect any shares being allotted before 31.5.81. If 1st and 2nd Defendants brought in money, it was late in 1982 and the Central Bank and Ministry of Finance letters on this were dated in 1984.

35 It is therefore not right, after all the above findings of fact, and the fact that Exhibit A1 relied upon by 1st and 2nd Defendants as Memorandum and Articles of Association of 3rd Plaintiff was rejected by the two Courts as bogus, perhaps euphemism for forgery, to have deftly proceeded to hold again that these two Defendants acquired

shares. Exhibit LL is a fabricated evidence and it is an extract of a minute of the Board of Director's Meeting purportedly held on 5.5.8 J. 3rd Defendant Signed it and purports to show 40,000 shares allotted to 1st and 2nd Defendants. Its falsity was finally admitted in amended statement of defence, paragraph (b) thereof. Exhibit HH, minutes Book 5 never in fact reflect any meeting on that day. There is nothing in the pleadings of the 1st and 2nd Defendants of any "transfer" none was proved either.

No increase in share capital from N200,000.00 to N500,000 and the two courts so held. It must however be recognised that by Nigerian Enterprises Promotion Act and Immigration Act, and also by exchange Control regulation aliens must seek consent of Ministry of Finance and Internal Affairs Ministry to participate in business venture in Nigeria. The permission of Ministries aforementioned and bringing in money 15 from abroad through Central Bank cannot be prima facie evidence of allotment of shares. The aliens can thus only be allotted shares if the shares are available; and if not available by increasing share capital to accommodate them in the new shares. The other option is by transfer 20 of shares by those who want to dispose of them. Of course aliens in such a Situation can go to Court, if they have firm agreement to the effect, for the company to increase share capital to accommodate them or to ask the court to compel some shareholders to transfer shares to them if they over subscribed their initial agreement on allotment. None of the 25 above was the battle field in this case.

I find the two lower courts were in error to have held as they did to 'allot' shares that were legally no more available. I allow this appeal and hold that all the shares of 3rd Plaintiff, as on 31.5.8 belonged to the 1st and 2nd Plaintiffs. I further order that the authentic Memorandum and Articles of Association of 3rd Plaintiff is Exhibit A as held by the two lower Courts. I order injunction against 1st and 2nd Defendants from any interference with the affairs of 3rd Plaintiff and particularly from operating the account of 3rd Plaintiff in any Bank whatsoever on 35 the boss of Exhibit A1 or any other document whatsoever.

I also re-emphasise that the share capital of 3rd Plaintiff

remains at N200,000.00 divided into 200,000 shares of N1,00 each and

that 1st and 2nd Defendants are not shareholders of the 3rd Plaintiff Company.

Third Defendant

The Plaintiffs' case against this defendant Prince Ademiluyi is that 1st Plaintiff transferred to him 70,000 (35 of the Company's) shares to which this Defendant paid on consideration and on this basis 1st Plaintiff contends that "there was a resulting trust in respect of the transfer for 1st Plaintiff". This is reflected in paragraphs 18 and 19 of statement of claim. the Defence reacted by contending that as at the time of the transfer, the 1st plaintiff had no shares in the Company as he had not paid even for his shares. The 3rd Defendant claimed his consideration for transfer to him was in consideration for him to leave the services of the National Electric Power Authority as Chief Legal Officer and this 1st Plaintiff is estopped from denying 3rd Defendant the shares. The interesting portion of statement of defence is paragraph 69 which says

"69 the shares currently held by the 3rd Defendant in Albion Construction Limited are so held on the basis of allotment made to him and paid for after the exit of the 1st and 2nd Plaintiffs from the Company and not as a result of a transfer made by the 1st Plaintiff". Thus the 3rd Defendant denies a transfer and insist he had outright allotment. But learned trial judge had held there was a transfer and may be supported in some way by the evidence of 3rd Defendant, to wit:

25 "In respect of the (transfer) of 9% I have already told the Court how it came about? Then in 1984 when Chief Okoya was leaving the Company he transferred an additional 26% shares but in a letter to me he expressed the view that 14% of the 26% should be held on trust for his son, Ademola Okoya. He told me that the 12% was a gift to me in recognition of my activities in the Company. So by the time he left in 1984 I was holding a total of 35 equity shares of Albion Construction Co. Ltd. -21% for myself and 14% on trust for his son".

35 There must be certainty in any transfer and the consideration must be shown. The uncertainty between 20% and 25% shares in the company purportedly given to 3rd Defendant can never be removed by subsequent conduct of 1st Plaintiff. Such evidence as available at the

trial and argued in the Court of Appeal cannot be relied upon as constituting a contract. Chief Williams relied on sound English cases - James Miller & Partner Ltd vs Whitworth Street Estates (Manchester) Ltd (1970) AC. 572,603, 606,611 and614; English Industrial Estates Corp vs George WinpeyCo. Ltd (1973) I Lloyd's Report 118; Trollope & Coils Ltd vs NW Metropolitan Hospital Board (1973) I WLR601, 611; L. G. Schuler A.G. vs Wickman Machine Tool Sales Ltd (1974) A C. 235, at 252,260 261, 265-270 and 272; Arrale vs Constrain Civil Engineering Ltd (1976) I Lloyd' Report 98. The point was taken in the Court of 10 Appeal though not argued before the trial court but being a point of law it was properly taken. Court of Appeal never made any pronouncement on this point even though Supreme Court in Peenok Investment Ltd vs Hotel Presidential Ltd (1982) 12 S.C. I, 56-57 cited with approval the statement of Denning M. R. in Vandervell's Trusts (1974) Ch.D 269, 322 as follows: 15

"It does appear that Mr. Mills put the case before us differently from the way it was put before the judge: but this did not entail any difference in legal consequences. So it was quite open to him".

The 3rd defendant was on one hand claiming allotment in his pleadings and on the other transfer for consideration for giving up his job with NEPA to devote full time to 3rd Plaintiff's affairs. The evidence of this witness (3rd Defendant) ought not to have been believed. He claimed he had, since 1981, been assisting the 3rd Plaintiff to procure contracts with NNPC, NPF and IGL projects, arid also many other projects. He was also responsible for procuring facilities from banks for the 3rd Plaintiff on the premise that for all his efforts he would always receive as commission 1% of value of any contract procured by him for the Company. As 30 Chief Legal Officer of NEPA, he was a public officer. As such he was not supposed to engage in any other business - See Code of Conduct Act S.2 (b). To so engage in such business is an offence under S.20 (1) (supra) and thus punishable. He participated in running 3rd Plaintiff Company and signed Minutes HH; several annual accounts and balance sheets of the Company. He left NEPA in 1983 but 35 his active participation in 3rd Plaintiff's affairs started in 1981. The reasons for the transfer, if there was any, of shares to him was to actively participate in the management and running of the 3rd plaintiff.

This is clear in Exhibit HH I alluded to earlier.

Thus the entire transaction in shares of 3rd Plaintiff to him was tainted ab initio with illegality. The 3rd Defendant as a lawyer ought to know this. Trial judge held that illegality ought to have been pleaded.

5 With respect, this is not right. Pleadings, I must restate, shall contain and contain only statement of facts upon which a party relies for his case, arid not the law nor the evidence by which those pleaded facts are to be proved. Odunowo J at trial Federal High Court held public servants are constantly appointed into Boards of Banks and Statutory Corporations on behalf of Ministry of Finance Incorporated. This is true because that

10 is permissible in law governing those statutory corporations and government owned Banks. Albion Construction Ltd is a private company and has nothing linking its administration with NEPA that 3rd Defendant

15 served as Chief Law Officer. Araka CJ was certainly wrong in Ogbuagu vs Ogbuagu (1981) 2 NCLR 680, 684 that in a matter of this nature where the jurisdiction to try an illegality is vested in another tribunal. Where a Court of law, in the course of trial of a matter finds an illegality punishable under the law, even if not triable in that Court but

20 in another tribunal, without prejudice to its referring the matter to that Tribunal, must take cognisance of the illegality. Once a transaction is illegal, it is void and all things emanating from that transaction is a nullity. The 3rd Defendant's later leaving N EPA will not legalise what was

25 patently illegal transaction he entered into while he was a public officer. The shares that could be said to be held by the 3rd Defendant will be 70,000 shares subject to a resulting trust in favour of the 1st Plaintiff.

I therefore make the following orders in respect of the main appeal:

- 30 1. 1st Plaintiff owns 199,998 shares in the Company.
2. 1st and 2nd Defendants have no shares whatsoever in the Company, they were only in the Company by virtue of Exhibit SS.
3. The third Defendant owns 35% (70,000) shares subject to a
- 35 resulting trust in favour of the first Plaintiff.
4. The 3rd Defendant should execute an instrument of transfer in favour of 1st Plaintiff, transferring to that Plaintiff the 35% shares held

as mentioned in (3) above in his (3rd Defendant) name.

5. The decision that 3rd Defendant holds shares other than as trustee of 1st Plaintiff is hereby set aside.

6. The decision of Court of Appeal on injunction restraining the defendants from managing or operating the accounts of the Company is set aside and the injunction of the trial Court is restored. 5

I award N 1,000.00 as costs of this appeal in this Court against each defendant.

As for cross-appeal, the reasons advanced in the main appeal are ample enough to cover it. The entire N200,000.00 share capital of 3rd Plaintiff were taken up and owned by 1st and 2nd Plaintiffs as of 31.5.81. The cross appeal is therefore without merit and it is hereby dismissed. No order as to costs will be made for failure of cross appeal. 10

15

WALI JSC (Dissenting)

I am privileged to have read in advance, the judgment of my learned brother, Uthman Mohammed, JSC and I entirely agree with the reasoning and the conclusions contained therein. I adopt the same as mine. I also subscribe to the consequential orders made in the said judgment, that of costs inclusive. 20

25

MOHAMMED JSC (Dissenting)

I have the opportunity of reading through the majority judgment just read by my learned brother, Belgore JSC and with greatest respect I have come at a different conclusion in this appeal. 30

The two parties in this appeal and the cross-appeal are in dispute over the affairs, including ownership of shares, in a limited liability Company, incorporated under the name of Albion Construction Limited. The matters in dispute relate to the promotion and incorporation of the Company, its share capital, who the shareholders are and the number of shares each shareholder owns. The case is complex and, with 35

ninety two exhibits, its decision has been based almost entirely on

documentary evidence, I will therefore follow the method adopted by the Court of Appeal and refer to the parties as Plaintiffs and defendants for ease of reference, in this judgment.

5 The 1st and 2nd plaintiffs filed their action for themselves, and for other shareholders, Messrs L.A. Balogun and L.S. Balogun and claimed against the three defendants 100% total ownership of the shares of the 3rd plaintiff company, It is a well contested case with counsel on both sides throwing in one document after another in an endeavour to prove their clients' respective claims

10 At the conclusion of the trial and, after Odunowo, J, of the Federal High Court had delivered a well considered judgment, both parties appealed to the Court of Appeal. At the Court of Appeal, Chief B, O, Benson. SAN., took over the case of the defendants from Mr, Ugerah Abolu, Both senior counsel wrote detailed briefs and made
15 illuminating oral submissions in support of them There again, both parties were dissatisfied with the unanimous decision of the Court of Appeal, Hence the registration of this appeal and the cross-appeal. This is not the first time the dispute between the parties over the matters of the 3rd
20 plaintiff had reached this Court, An application for stay of execution of the judgment of Odunowo, J, pending the determination of the appeal filed by the defendants in the Court of Appeal ended up in this Court, In that decision this Court set aside the order of the Court of Appeal in which- it granted a stay of execution of the judgment of Odunowo, J, and
25 restored the order of the learned trial judge directing the 3rd defendant to execute an instrument of transfer in respect of 51% or 102,000 shares which, according to the declaratory judgment, the 3rd defendant holds in trust for the 1st plaintiff, The decision was made without prejudice to
30 any of the declaratory judgments granted by Odunowo, J, in his judgment.

The plaintiffs claim against the 1st, 2nd and 3rd defendants is as follows:-

35 "1. A declaration that the document described as memorandum and articles of association of Albion Construction United dated 16th September, 1976 and admitted as Exhibit A and to which the 1st and 2nd plaintiffs were subscribers are the only true memo

randum and articles of association of the 3rd plaintiff company.

2. *In the alternative to claim (1), a declaration that the aforementioned document is a true and authentic copy of the only document submitted for registration to the Registrar of Companies by the promoters of the 3rd plaintiff company.*

3. *An injunction restraining the 1st, 2nd and 3rd defendants and/or any other persons acting with or on their direction or authority from conducting the affairs of the 3rd plaintiff and in particular from operating the account of the 3rd plaintiff in any bank whatsoever on the basis of any Memorandum and Articles of Association other than that mentioned in Claim (1).*

4. *In the alternative to (3) an injunction restraining the 1st, 2nd and 3rd defendants and/or any other persons acting with or on their direction or authority from conducting the affairs of the 3rd plaintiff company in any bank whatsoever on the basis of the document purporting to be the memorandum and articles of association of the 3rd plaintiff company and carrying the Signature of the 1st and 2nd plaintiffs as well as the three defendants as subscribers.*

5. *A declaration that the nominal share capital of the 3rd plaintiff company is N200,000.00 divided into shares of N1.00 each.*

6. *A declaration that the 1st and 2nd defendants are not shareholders of the 3rd plaintiff company.*

7. *A declaration that all shares held by the 3rd defendant in the 3rd plaintiff company are held by him in trust for the 1st plaintiff and an order directing the 3rd defendant to execute an instrument of transfer in favour of the 1st plaintiff."*

The defendants jointly and severally opposed the claim and urged the trial Federal High Court to find and declare in their favour what they canvassed in paragraph 72 of the amended statement of defence, to wit;

"1. *A declaration that the memorandum and articles of association purportedly certified on the request of or on behalf of 1st and 2nd plaintiffs through their solicitors by the office of the Registrar of Companies on the 28th March 1988 was procured*

irregularly and in breach of laid down procedure without satisfying the Registrar of Companies as to the authenticity of the document.

2. *That the defendants are lawful directors and shareholders of Albion Construction Limited and that from 1984 when the*
 5 *1st and 2nd plaintiffs resigned their membership and directorship of Albion Construction Limited they automatically ceased to be members and directors of the company and accordingly have no say in the affairs of the company.*

10 3. *That the authorised share capital of Albion Construction Limited is now N500,000.00*

4. *That no shares are held in trust for the 1st plaintiff by the 3rd defendant.*

15 5. *That the names of the defendants are in the Register of shareholders and Register of Directors of Albion Construction Limited.*

20 6. *That the names of 1st and 2nd plaintiffs cannot and should not be in the Register of members or Register of Directors of Albion Construction Limited.”*

The facts of this case, in a nutshell, are in the following narrative: Albion Construction Limited, the 3rd plaintiff company, was incorporated in October, 1976. The 1st and 2nd plaintiffs were subscribers to the memorandum and articles of association of the company and
 25 in that capacity each of them subscribed for one share in the 3rd plaintiff. On the 30th of June, 1978, the 1st and 2nd plaintiffs entered into a partnership agreement with the 1st and 2nd defendants by which they agreed to engage in the business of construction and development under the name of Albion Construction Limited. The partners agreed to share
 30 the profits on for the 1st and 2nd plaintiffs, 40% for the 1st and 2nd defendants and 10 for the technical staff.

On the 15th of November, 1980, the Administrative Manager of the 3rd plaintiff wrote the following letter to the Permanent Secretary,
 35 Ministry of Finance, Lagos:

*“The Permanent Secretary,
 Federal Ministry of finance,
 Lagos.
 Dear Sir,*

APPLICATION FOR APPROVED STATUS FOR MESSRS SANTILLI AND DAVANZO ALBINO

We wish to inform you that the above named gentlemen were given business permit by the Ministry of Internal Affairs as foreign participants on the above named establishment.

In order to enable them bring the necessary foreign money from their country to pay their 40% contribution we should be grateful if you would kindly grant the transfer of N100,000.00 being 40% of the N200,000.00 shares of the Company.

We shall be grateful for an early reply.

Yours faithfully,

Administrative Manager (Sgd.) “

The approval to transfer the money was granted and the 1st and 2nd defendants brought in, through the Central bank, foreign exchange equivalent to N78,601.70. This has been confirmed in a letter dated 14th February, 1984 from the Secretary of the 3rd plaintiff to the Permanent Secretary, Ministry of Finance, Exchange Control Department. It has also been confirmed in exhibit T and Z. In his evidence, as PW.5, Michael Ojo Agelusi, a chartered accountant, told the trial court that he was involved in the incorporation of the 3rd plaintiff. He said that when Mr. Babatola prepared the Memorandum and Articles of Association of the Company he was the one who registered it. At that time only Chief Okoya and his wife were the subscribers. Mr. Adelusi audits the account of the company and prepares its balance Sheets. He said that in 1981, he was directed by Chief Okoya to transfer N199,998.00 from his Current Account to 3rd plaintiff's paid up Capital Account. This the witness said was a recognised method of payment for shares. Mr. Adelusi however neither gave the exact date of the transfer nor did he show in the Balance Sheet where such transfer was made. However, at the Annual General Meeting of the Company held on 15th March, 1982, where the 3rd defendant presided as Chairman, and all the remaining parties were present, the audited accounts of the company for the year ending 31st of May, 1981 together with the Directors Report were received and unanimously adopted. In the Balance Sheet, Exhibit H.9, it has been recorded that 200,000 ordinary shares of the company

had been fully paid. In another document, Exhibit KK, which is the share register of the company, it has been recorded that both the 1st and 2nd defendants have, on the 5th of May, 1981, each paid by cheque for 40,000 shares. It has not been made clear whether the shares were paid for through a transfer or allotment.

5 The 3rd defendant was invited by the 1st plaintiff, who was his friend, to join the company. He said in evidence that he was promised between 20% to 25% of the shares of the company in consideration of what he would lose if he left the position of Chief Legal Officer of
10 NEPA. In fulfilment of that, oral agreement at a meeting of the Board of Directors of the company, held on 16th October, 1981, the 1st plaintiff who was the chairman, suggested that the 3rd defendant be appointed a Director and Deputy Chairman of the Company. The 1st plaintiff, in addition offered 9% of his shareholding to the 3rd defendant. The 3rd
15 defendant accepted both offers. He was thereafter formerly introduced to all the Board members.

In 1984 relationship between the 1st plaintiff and the 1st and 2nd defendants turned sour. On 13th July, 1984, the 1st and 2nd plaintiffs
20 wrote a letter which a legal Officer, Ogunsanya & Ogunsanya, passed on to the Secretary of the Company disclosing that they have resigned from both directorship and membership of the company. The letter is important to this decision and I reproduce it below:

“1. Alhaji Rasaki Okoya
25 2. Mrs. Kuburat Okoya
3/5 Ikoyi Crescent,
Ikoyi, Lagos
13th July 1984
30 The Company Secretary,
Albion Construction Limited,
Iganmu, Lagos

Dear Sir,
RESIGNATION OF MEMBERSHIP OF THE
35 BOARD OF DIRECTORS AND THE COMPANY

We have within the last few weeks drawn the attention of the management of Albion Construction Limited to a number of irregularities in the manner in which they have been running the

affairs of the Company. The information was conveyed to them during verbal discussions and in letters written by our Solicitors on the subject. It is clear that the Management had given no response to the warnings.

It is not our wish to do anything which might in any way prejudice the existence or the future operations of the Company which we have done so much to build. 5

We therefore have no alternative than to sever our connections with the Company by resigning our directorship of the Company and our membership thereof. Our resignations take effect from today. Please convey to us your acceptance thereof. 10

We propose to transfer our shares to our nominees whose names will be given to you in due course, please delete our names from the register of members of the Company forthwith. We wish the Company every success in its business. Thank you for the co-operation which you gave us throughout the period of our association with the Company. 15

YOURS FAITHFULLY,

1. 20

ALHAJI RASAKI OKOYA (SGD.)

2.....

MRS. KUBURAT OKOYA (SGD.)

The defendants however gave a different version of the account of the event leading to the resignation of Chief Okoya and his wife from the company. The defendants said that the 1st plaintiff and his wife resigned from the company because he feared that the Military Regime which toppled the civilian government of Alhaji Shehu Shagari would investigate the affairs of Albion Construction Limited. 25

There are various documents tendered before the learned trial judge showing the stand of the parties in respect of share holding in the company. I shall analyse some relevant documents later in this judgment. The case of the plaintiffs is anchored on the assertion that the 1st and 2nd defendants owned no shares in the company and that all the shares being held by the 3rd defendant were held in trust for the 1st plaintiff. 30 35

The learned trial judge Odunowo, J. must have burnt the mid

night oil to produce what, in my view, is a very well considered judgment. At the end of his judgment he made the following declarations:

“(1) That the document described as memorandum and Articles of Association of Albion Construction Company Limited dated 76/9/76 and admitted in evidence in this action as ..Exhibit A and to
5 which the first and second Plaintiffs were subscribers is the only true Memorandum and Articles of Association of the third Plaintiff Company.

(2) That the nominal share capital of the third Plaintiff Company is N200,000.00 divided into 200,000 shares of N1.00 each, and not 500,000 as alleged by the Defendants.

(3) That all the parties to this action are shareholders of the third plaintiff Company namely (1) Chief R.A. Okoya-50%..... or 100,000 shares (2) Mrs. K. Okoya-1% or 2,000 shares, (3) Mr. S.
15 Sontilli-20% or 40,000 shares. (4) Mr. A. Davanzo 20% or 40,000 shares, and (5) Prince D.A. Ademiluyi -9% or 78,000 shares.

(4) That the third Defendant is hereby directed to execute an instrument of transfer in respect of 51% or 102,000 shares, which
20 he holds on trust in favour of the first Plaintiff.

(5) That the first, second and third Defendants and or any other person or persons acting with or on their direction or authority are hereby restrained from conducting the affairs .. of
25 the third Plaintiff Company and in particular from operating the account of the said Company in any bank whatsoever on “the basis of any Memorandum and Articles of Association other than that mentioned in paragraph (1) above.

(6) That each side shall bear its own cost.

(7) That an extra-ordinary general meeting of the third plaintiff Company shall be held on Wednesday the 21st day of December, 1988 at 4 p.m. at Albion premises 52/..... 53 Onitiri Close, Surulere.”

35 Dissatisfied with the above decision both parties appealed to the Court of Appeal. As I mentioned earlier, Chief B.O. Benson, SAN. took over the case of the defendants from Mr. Abalu and the battle scene moved to the Court of Appeal with motions and counter motions over the decision of the trial Federal High Court. At the Court of Appeal,

the reliefs sought by the defendants in their appeal are to set aside the orders of the Federal High Court relating to the shareholding of the 1st and 2nd plaintiffs and the 3rd defendant in the company and substitute it with the following:

- (a) A declaration that the 1st and 2nd Plaintiffs are not members of the 3rd Plaintiff and do not hold 51% of the shares of the ... 3rd Plaintiff. 5
- (b) A declaration that the 3rd Defendant is entitled to hold 21% of the authorised share capital of the 3rd Plaintiff.
- (c) A declaration that as at 31/5/81 the paid up share capital of the 3rd Plaintiff was N2.00 10
- (d) A declaration that the Workers of the 3rd Plaintiff are entitled to and hold 10% of the authorised share capital of . the 3rd Plaintiff.
- (e) To adjudge that the disputed Minutes contained in the Minutes Book of the 3rd Plaintiff are irregular and were . never held.” 15

The plaintiffs were similarly dissatisfied with the decision of the Federal High Court and the relief sought at the Court of Appeal, they urged for their appeal to be allowed and the decision of Odunowo, J. be substituted with the following decision or orders: 20

- “(i) a decision that in this case it is unnecessary to plead the illegalities on which the plaintiffs rely;
- (ii) a decision that by reason of the provisions of the enactments on which the plaintiffs rely neither the 1st nor the second defendants own any shares in the Company and the shares held by the 3rd defendant are held by him in trust for the 1st Plaintiff; 25
- (iii) a decision that the 1st and 2nd defendants do not own any shares in the Company. 30

The Court of Appeal with quorum: Ademola, Akpata and Babalakin JJ.C.A (as they then were) considered the illuminating briefs filed by the learned Senior Counsel on both sides and the oral argument in support of those briefs. In its judgment, delivered on 5th April, 1990, the Court of Appeal held as follows: 35

“It is hereby declared that shareholding of the respective members of the company are as follows:-

-1st plaintiff 19,9995% or N39,999.00

-2nd plaintiff	.0005% or N1.00
-1st defendant	20% or N40,000.00
-2nd defendant	20% or N40,000.00
-3rd defendant	21% or N42,000.00
-L.S. Balogun	10% or N20,000.00
5 -L.S. Balogun	9% or <u>N19,000.00</u>
	N200,000.00

2. The shareholding 19,9995% in favour of the 1st plaintiff is inclusive of the 14% held in trust for him by the 3rd defendant.

3. It is hereby ordered that the 3rd defendant should execute an instrument of transfer of the 14% shares accordingly.

4. The order restraining the defendants from conducting the affairs of the 3rd plaintiff Company and operating the account of the said company in any bank whatsoever is hereby set aside. They are however not to conduct the affairs of the company or operate its account on the basis of the memorandum and articles of the association exhibit AIraising the share capital to N500,000.00

5. It is hereby declared that the nominal share capital of the 3rd plaintiff company as at the time this action was instituted remained at N200,000.00 divided into 200,000.00 shares of N1.00 each and not N500,000.00 as alleged by the defendants.

Both parties, being, dissatisfied with the decision of the Court of Appeal came to the Supreme Court. The plaintiffs enumerated I parts of the decision of the Court of Appeal which they appealed against in the following order:

“(i) The decision concerning the amount or proportion of shares held in the 3rd plaintiff Company by the 1st and 2nd plaintiffs and the 1st, 2nd and 3rd defendants.

(ii) the decision relating to the legality of the shareholding of the 1st, 2nd 3rd defendants.

(iii) The decision setting aside the order for injunction made by the High Court.

(iv) The decision that the 1st and 2nd defendants are shareholders in the 3rd plaintiff Company and that the 3rd defendant

Chief Williams, SAN., in the plaintiff’s brief, which he prepared. submitted that the disputes between the parties to the action boil down to a number of questions concerning the affairs of the third plaintiff company - the Albion Construction Limited. The particular matters to which the questions relate are:

- (a) the identity of the memorandum and articles of association;
- (b) the share capital of the company; and
- (c) who are the shareholders of the company and how many shares does each of them own.

Considering the grounds of appeal filed in support of the plaintiffs’ appeal and the issues formulated by Chief Williams, SAN., for the determination of the appeal, it is only the question on injunction granted by the High Court, but set aside by the Court of Appeal, which does not fall within the question raised in (c) above. I have gone through the issues each learned counsel formulated for the determination of this appeal and, apart from the semantic content of the formulation, the issues raised therein are the same. I shall adopt the formulation of Chief Williams, SAN., in dealing with the relevant issues for the determination of this appeal. Therefore the issues for the determination of this appeal are as follows:

A. *The Shares of 1st and 2nd Plaintiff:*

Whether the 1st and 2nd defendants ever acquired shares by transfer from the 1st plaintiff.

B. *Shares of the 1st and 2nd Defendants:*

Whether the court below was correct in failing to consider and uphold the contention of the plaintiffs that the third plaintiff company had issued all its shares to the 1st and 2nd plaintiffs by 31.5.81 and there were no shares available to be issued to the 1st and 2nd defendants at the time they claimed to have paid for shares allegedly allotted to them.

C. *The Shares of 3rd Defendant:*

Whether the Court below ought to have held that:

(i) The transfer (and accordingly the underlying contract) whereby in exchange for shares transferred to him by the 1st plaintiff, the 3rd defendant was obliged and required to participate in the management and running of Albion Construction lim-

ited, was one which was impliedly prohibited by Section 2 (b) of the Code of Conduct for ...Public Officers under the 1979 Constitution and istherefore illegal and void;

(ii) Whether the shares held by the 3rd defendant were held by him in trust or for his own benefit.

5 *D. Court of Appeal's Order on injunction:*

Whether the order of the Court of appeal setting aside the order for injunction made by the Federal High Court was justified."

10 Chief Williams, SAN., opened up his submission with the issue raised on the shares of the 1st and 2nd plaintiff. It is the case of the plaintiffs that all the 200,000 shares of the 3rd plaintiff company, had been fully paid up by the 1st and 2nd plaintiffs. It is not in dispute that the 1st and 2nd plaintiffs were the subscribers to the memorandum and
15 articles of association and in that capacity each of them subscribed for one share in the 3rd plaintiff company. At the High Court what was in dispute over the Single shares for each of the 1st and 2nd plaintiffs is the claim of the defendants that the plaintiffs had not paid for those shares.
20 Chief Williams, SAN., submitted that, in the face of overwhelming evidence at the trial, the High Court had no difficulty in arriving at any other conclusion than that the N2.00 shares were paid for. There is really no need to further plug the issue of payment for the two shares which were subscribed by the 1st and 2nd plaintiffs when they
25 subscribed to the memorandum and articles of association of the 3rd plaintiff company. It is clear that the defendants have abandoned their argument that the two shares were never paid for by the 1st and 2nd plaintiffs. This can be seen in one of the reliefs the defendants requested
30 from the Court of Appeal when they filed their grounds of appeal. They asked the Court of Appeal to set aside the judgment and orders of the Federal High Court relating to the shareholding of the 1st and 2nd plaintiffs and the 3rd defendants in the 3rd plaintiff company and substitute it with the following:

35 *(C) A declaration that as at 31/5/81 the paid up share capital of the 3rd plaintiff was N2.00"*

The main issue which is highly contested is whether the 1st

appellant had validly acquired and paid for 199,998 shares in addition to the one share which he subscribed when the company was floated. In paragraph 17 of the statement of claim it is averred that:

“As at 31.5.81 the 1st plaintiff had paid for N 199,998.00 worth of additional shares”

If it is established that by 31/5/81 the 1st plaintiff and his wife had fully paid for the 200,000 shares in the 3rd plaintiff company, the learned trial judge would be correct to say that whoever wants to acquire any share thereafter could only do so by transfer from the 1st plaintiff or his wife. But the big question is, was there any proof that the 1st plaintiff had fully paid for 199,998 remaining shares of the Company? The only evidence was from the testimony of PW.5 where he said that on the direction of the 1st plaintiff he transferred N199,998.00 from Director’s Current Account to the 3rd Plaintiff’s share Capital Account. The witness referred to exhibits H3. and H9. which were the audited balance Sheets prepared by PW.5.

It is instructive to observe that there is no entry in the Balance Sheet (Exhibits H3. and H9.) showing how and when the amount 20 N 199,998.00 was transferred from the Director’s Current Account to the share Capital Account. It only shows that by 31/5/81 the 200,000 shares of the company were fully paid up. The missing gap in the evidence was provided by the oral testimony of Chief Adelusi (PW.5). There is no document however to support the evidence of PW.5 that 199,998 shares had been allotted informally to the 1st plaintiff and it had not been mentioned in any report of the Board of Directors meeting.

Chief Williams, SAN., submitted that it might well be possible to argue on the basis of the strictest rules that in the absence of proof of a Board meeting or a resolution at the General Meeting sanctioning the allotment of shares to the 1st and 2nd plaintiffs, it must be concluded that there was no proper allotment of shares to them. The learned Senior Counsel added that one could use the same measure in respect of the shares claimed by the defendants. He then referred to the dictum of Lindley L.J. in *Browne v. La Trinidad* 37 Ch. D 1 at 17 where he said: *“I think it is most important that the court should hold fast to the rule upon which it had always acted, not to interfere for the purpose of forcing companies to conduct their business according to the*

50 Okoya v. Santilli (1994) 6 KLR Mohammed JSC
strictest rules, where the irregularity complained of can be set right
at any moment.”

It is crystal clear that Chief Williams cannot use the same measure in respect of the payment of shares of the 1st and 2nd defendants. In the case of the 1st plaintiff there is no document to
5 support the evidence of PW.5 that he transferred 199,998 from Directors Account to the Share Capital Account. Whereas in the case of 1st and 2nd defendants many documents have been admitted in evidence showing that they have transferred foreign exchange to the share capital of the company.

10 Chief Williams submitted however that the learned trial judge found in his judgment that on balance, the contention of the plaintiffs were right in the sense that the paid up share capital as at 31.5.81 stood at N200,000.00. On this argument Chief Benson, SAN., pointed out that
15 although the learned trial judge found on the basis of exhibits H3. and H9. that the paid-up capital of the 3rd plaintiff was N200,000.00 the learned trial judge never found that all the shares were paid for by the 1st plaintiff and his wife.

Looking at the other documents admitted in this case, over the
20 shareholding of the “parties in the 3rd plaintiff company. Chief Williams has uphill task to convince anyone that the 1st plaintiff and his wife had paid in full all the 200,000 shares in the 3rd plaintiff company. In exhibit KK., the shareholders Register of the Company, 1st plaintiff and his
25 wife were shown to have only 120,000.00 by 5/5/81. Since it is the case of the plaintiffs that the 1st and 2nd defendants owned no shares in the company and that the plaintiffs did not transfer any shares to the Italians. it would mean that the 100% shares of the 3rd plaintiff company were all allotted and fully paid for by the 1st appellant and his wife.

30 If that is so what of the 40,000 shares which 1st and 2nd defendants each paid in by cheques as is recorded in the Register of Shareholders of the company. Exhibit KK. Those payments have been recorded to have been made on 5/5/81. It is quite correct as Chief
35 Williams submitted that Santilli and Davanzo made payments to the Company in or around the latter part of 1982. Now for the sake of argument if both the learned trial judge and the Court of Appeal had found that by 31/5/81 all the 200,000 shares had been paid up which money had been used by the 1st and 2nd defendants to pay for their

shares? There is no doubt that missing links on both sides and seeming admissions makes this appeal complex and difficult. It is plain that some documents may not be true.

What is obvious however, is the overwhelming evidence that the 1st and 2nd defendants were allotted 40,000 shares each and that they had paid for those shares through the foreign exchange transfer which had been established to have been paid into the account of the 3rd plaintiff company (see Exhibit S). It has been decided by this Court in the case of Oilfield Supply Centre Ltd v. Johnson (1987) 2 NWLR (Part 58) that the question whether or not a person is a shareholder of a company is in the main a question of fact. If the 1st plaintiff and his wife have paid in full the 200,000 shares of the 3rd plaintiff company he could not have spoken in the following documents showing that 1st and 2nd defendants are shareholders in the company or that he only controls majority shareholding.

In exhibit CC., Chief Okoya wrote to Messrs Adelusi Ojo & Co. as follows:

“Dear Mr. Adelusi,

By the date I resigned my appointment with Albion Construction Company, there was credit standing in my favour and my wife respectively. Can you please give me the details of all the credit. By the time of Santilli and Davonson, I had (sic) been given 40% (forty percent) share, can we have the value of the Company's asset as at that time and equipment etc.. In one word, what is the true value of the Company's asset. Certainly there is credit in our favour, including the amount owed by the .. Ministry of Works to which we are entitled.

Thank you very much,

Yours sincerely,

CHIEF R.A. OKOYA A. (SGD.)”

In exhibit JJ1, 1st and 2nd plaintiffs wrote to the Company Secretary notifying that they have both resigned from directorship and membership of the company and in addition said that they propose to transfer their shares to their nominees. This is indicative of the fact that there were other shareholders left in the company. Exhibit GG is a letter written on 20/11/81 and in it the 1st plaintiff complained to the Secretary

of the company about the failure of the Board of Directors to meet in the following words “*Reference to your letter dated 19th November, 1981 kindly realise that Mr. Davanzo’ s absence should not prevent this meeting being held. For your enlightenment, he has 20 shares (yet to be settled)*”

5 In Exhibit GG6. Mr. Adeyiga O Ajayi, solicitors for the 1st and 2nd plaintiffs wrote to the Company’s secretary requesting among other things the following:

10 “*Our clients are also anxious to know the position-of the shares in the company, particularly those shareholders who have fully paid for their shares and how these shares were paid for.*”
Underlining is mine)

This letter clearly shows that there are minority shareholders in the company and that one can safely assume that the 1st plaintiff was
15 the majority shareholder which he referred to in his letter. In Exhibit TT the 1st plaintiff and his wife entered into an agreement with the 3rd plaintiff company and referred to himself and his wife being holders of 51 of the equity shares of the company. It is pertinent to ask, who are the shareholders of the remaining 49%. It is in evidence that the 1st
20 plaintiff had transferred 9 of his shareholding to the 3rd defendant when he invited the 3rd defendant to join the company. It is evidently clear that all these facts are admissions against interest. The case of the plaintiffs is that the 1st and 2nd defendants owned no shares in the Company. But
25 the documents, some of which were written by the 1st plaintiff himself show to the contrary of that assertion.

The only evidence upon which the 1st plaintiff hinged his claim on is that he and his wife had paid in full 100% shares of the 3rd plaintiff
30 is through the Balance Sheet Exhibit H9 and Director Report Exhibit YY both of which had been signed by 2nd and 3rd defendants. In Exhibit YY the 2nd and 3rd defendants certified that the Balance Sheet as at 31/5/81 and the Profit and Loss Account for the same year, together with Auditors Report were true copies as laid before the Company at the
35 General Meeting.

In their evidence the 1st & 2nd defendants told the trial High Court that when they challenged the entry showing that 200.000 shares had been paid up they were told that the entry was made for tax purposes only. Chief Williams, SAN,. referred to the evidence of the 3rd

defendant where Prince Ademiluyi said that he Signed the balance sheets before the auditors explained it to him and that he did not know how to read a balance sheet. The learned Senior Counsel referred to the case of Egbase v. Ohiareghen (1985) 2 NSCC. 1219 at 1231 in which Eso, JSC, quoted Lord Denning MR where he declared that:

“Whenever a man of full age and understanding who can read and write signs a legal document which is put before him for signature by which I mean a document which, it is apparent on the face of it, is intended to have legal consequences - then, if he does not take the trouble to read it, but signs it as it is, relying on the word of another as to its character or contents or effect, he cannot be heard to say that it is not his document. By his conduct in signing it he has represented to all those whose hands it may come, that it is his document: he cannot go back on it, and say it was a nullity from the beginning.”

Be that as it may, the 1st plaintiff must still prove that he was the one who paid 199,998 shares to complete the 200.000 shares alleged to have been fully paid up. It was only the evidence of Chief Adelusi (PW.5) which supported that assertion. Curiously enough such a transaction could not be traced in any of company’s books and it is mandatory to report such a principal activity in the Directors Report and attach it to the Balance Sheet. It seems very clear that the evidence available from other documents tilt more against such assertion than in favour of it.

I agree with Mr. Benson. SAN., that it stand to reason that had it been the plaintiffs that paid for the whole shares of the company in 1981, the money subsequently brought in by the 1st and 2nd defendants would have been paid to the 1st plaintiff and not to the company. In exhibit P (application for approval status) the company, as far back as 15th November, 1980, applied to the Permanent Secretary. Ministry of Finance for permission to be granted the 1st and 2nd defendants to transfer foreign money in order that they might pay their 40% contribution of the 200.000 shores granted to them. In exhibit Son 23/3/84, the Company Secretary wrote to the Permanent Secretary, Federal Ministry of Finance, Exchange Control Department showing non-resident investment in the 3rd Plaintiff Company explaining the following position in the Company:

“The present position of the capital of the Company. Albion Construction Limited is

<i>Paid-up Capital</i>	<i>N200,000.00</i>
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Nigerians *N120,000.00*

Foreigners

⁵ *Mr. Santilli (20%)* *N39.14426*

<i>Mr. Davanzo (20%)</i>	<i>N39,467.00</i>
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The small differences rose as a result of small fluctuations in foreign exchange rates “

10 With such overwhelming evidence could anyone deny that the
1st and 2nd defendants have each 20 shareholding in the 3rd plaintiff
company? It is abundantly clear that in many documents tendered in this
appeal which includes exhibits CC, GG, P, S, KK, TT both the 1st and
3rd plaintiffs recognised the 1st and 2nd defendants as shareholders in
15 the company. In all those documents the plaintiffs have made admis-
sions against their interests.

It is trite that once a fact is admitted it requires no further proof.

It must be taken as established. See Steven Omo Ebueku v. Sunmola
20 Amola (19P-8) 1 N.S.C.C.582.

Chief Benson. SAN., concluded his submission on this issue that the concurrent findings of both the Federal High Court and the Court of Appeal are that the 1st and 2nd defendants are shareholders and each owned 20% of the 200,000 shares of the company. To confirm the
25 submission of Chief Benson. I will reproduce excerpts from the findings of the two lower courts. Odunowo, J., the trial Federal High Court judge in his evidence at page 554 of the record found as follows:

30 *“The conclusion I have reached on preponderance of evidence placed before me is that the 1st plaintiff and his wife both have shares of the company’s equity. Which is perhaps another way of saying that all the shares in the company were not fully allotted to the first plaintiff as alleged, my finding is that each of the two gentlemen has 20% of the company’s equity. This result is*
35 *justified in view of the evidence of DW2. DW3. DW5. DW7 and the evidence of the defendants coupled with Exh. P and P1...”*

At the Court of Appeal, Adernolo, JCA., who wrote the lead judgment

referred to the exhibits relating to the application for the 1st and 2nd defendants to bring in money into the country for the purposes of the shares and the approval of the Ministry and Central Bank and said that trial exhibits were admitted during trial without objection and that:

“They support the evidence of the 1st and 2nd defendants as to the fulfilment of their obligations under the partnership agreement, exhibit SS with the 1st and 2nd plaintiffs. The fact of their bringing in money into the country was established beyond doubt. The payment of such monies to the company for the acquisition of shares was also established and I think all these pieces of evidence which were believed by the learned judge led to one conclusion that they are shareholders in the company to the extent for the shares ascribed to them in the books of the company. It is important to bear in mind that there is no opposing evidence to theirs.....In my view, it does not lie in the mouth of the 3rd plaintiff to describe them as employees now because the money brought in to buy shares are in the company’s hands, and the books of the company, exhibits KK (Register of members) show them as shareholders. The 1st plaintiff cannot, having sat with them as a director of the company now say they are not shareholders. For at various meetings of the Board of Directors, the register of shareholders and various other books of the company which must....placed before them in compliance with the provisions of the 25 Company Act.”

Akpato, JCA. (as he then was) in his contribution on this issue also found as follows:

“Contrary to the stance of the plaintiffs on this issue. there is the partnership agreement exhibit ‘SS’ dated 11/6/78 which vested 50% of the business in the 1st and 2nd plaintiffs, 40 in the 1st and 2nd defendants.....There is also the letter dated 20th November 1987, exhibit “GG” He cannot be seen to approbate and reprobate. Incidentally the 1st plaintiff conveniently avoided the witness box.There is also exhibit ‘TT’ an agreement between the 1st and 2nd plaintiffs on the one hand and the 3rd plaintiff company on the other hand dated 25/7/88 wherein both of them claimed to hold 57% of the equity shares of the company. This agreement to my mind further falsifies the case of the plaintiffs

that the 1st and 2nd plaintiffs owned the entire 200,000 shares. That is not all. As for back as 15th November 1980, the company of which the 1st plaintiff was the chairman wrote the letter exhibit disclosing:- (1) That the 1st and 2nd defendant had been given business permit.... (2) Applying for approved status for the 1st and 5 2nd defendants; and (3) requesting that permission be granted to enable the said defendants transfer foreign money ... There is also the letter, exhibit's' dated 23/3/84 written by the Secretary of the company to the Permanent Secretary Ministry of Finance showing 10 in unmistakable terms that (1) the amounts in question for 20 shares held by each of the 1st and 2nd defendants had been paid to the (Company)."

Chief S.O. Benson, SAN., referred to the recent decision of this Court in Oilfield Supply Centre Ltd. v. Johnson (supra) where it was 15 held that to establish that a person is a shareholder of a company oral evidence which is satisfactory to the court may be sufficient to establish the right of a person as a shareholder of a company. In my judgment here I will agree that if the trial court believed that the evidence of PW5 was 20 sufficient to establish that the 1st and 2nd plaintiffs had fully paid for the shares of the 3rd plaintiff that would be a finding of fact. But the trial court did not believe him and the Court of Appeal concurred in disbelieving that the 1st and 2nd plaintiffs were the only shareholders of the 3rd plaintiff.

25 Learned Senior counsel for the defendants cited the cases of Overseas Construction Ltd. v. Creek Enterprises Ltd. (1985) 3 NWLR (Part 13)407 at 403 and Bakare. v. State (1987) 1 NWLR(Part 52) at 594. In both cases this Court held that as a general rule this Court will 30 not normally disturb or upset concurrent findings of fact in the two lower courts unless there is some miscarriage of justice or violation of some principle of law or procedure.

With the above findings it is abundantly clear that the 1st and 2nd plaintiffs did not fully pay for the 200,000 authorised shares of the 35 3rd plaintiff company as alleged in the plaintiffs statement of claim. By inference the reasonable thing to accept is that by that date the entry in the balance sheet (exhibit H9) which shows that the authorised share capital of 200,000 had been fully paid could only be in anticipation of the

commitment of the 1st and 2nd defendants to pay for their allotted shares through a foreign exchange transfer which had been applied for as far back as 15th November, 1980. Before I go away from the issue of paid up share capital, I think it is pertinent at this stage to consider the issue appealed against by the defendants against the judgment of Ademola, JCA., in the cross-appeal. In this judgment Ademola. JCA., said:

“Agreeing with Chief Williams’ submission that if by 31/5/81 the 200,000 shares had been fully paid for mostly by the 1st plaintiff through the director of credit account of the company and this is the finding of the learned trial judge in the earlier part of the judgment, it follows and the argument is very compelling that anybody besides the 1st and 2nd plaintiffs who wants to acquire shares in the 3rd plaintiff company offer 31st May, 1981 must do so by transfer from the 1st plaintiff or his wife if they are prepared to transfer their shares. Acquisition of shares in this company cannot therefore be by way of allotment of shares by 1st, 2nd and 3rd defendant must be by way of transfer or sale.”

I have decided above, in this judgment that the overwhelming evidence is that the 1st and 2nd plaintiffs did not fully pay the 200,000 authorised shares of the 3rd plaintiff company. With such a finding it goes without saying so that the learned Justice of the Court of Appeal was in error to say that he agreed with Chief Williams that by 31/5/81 anybody, besides the 1st and 2nd plaintiffs, who wants to acquire shares in the 3rd plaintiff company must do so by transfer from the 1st plaintiff or his wife if they are prepared to transfer their shares. There is no evidence from either oral testimony or the 92 documentary exhibits that the 1st and 2nd plaintiff had transferred any shares to the 1st or the 2nd defendants. In fact it is not the plaintiffs’ case that the 80,000 shares allotted to the 1st and 2nd defendants had been acquired through a transfer from the 1st and 2nd plaintiffs. Chief Williams. SAN., did not even support such a finding of the Court of Appeal that the 1st and 2nd defendants acquired their shares through transfer. He said so in the following submission in the plaintiffs’ brief:

“So, it cannot be right for the Court of Appeal to conclude that they (The said defendants) obtained any shares by way of transfer from

the 1st plaintiff. The Supreme Court is respectfully invited to hold that the two defendants acquired their shares by transfer from the 1st plaintiff is (with profound respect) untenable.”

I therefore agree that the cross-appeal has merit and it succeeds. It is accordingly allowed.

5 The Third Defendant’s Shares

The plaintiffs’ case is that the 1st plaintiff transferred 70,000, 35% of his shares to the 3rd defendant. The questions which arise for determination on the pleadings at the trial of the action which Chief
10 Williams formulated in respect of ‘the shares of the 3rd defendant were as follows:

“(i) *Whether the shares which were registered in the name of the 3rd Defendant in the Plaintiff Company were transferred to him by the 1st Plaintiff (as the Plaintiffs contend) or were*
15 *allotted to him (as the defendants contend in the alternative).*

(ii) *If the answer to question (1) reveals that the shares were transferred to the 3rd Defendant by the 1st Plaintiff, whether there was any consideration for the transfer (as the Defendants*
20 *have alleged) or it was a voluntary transfer made without any consideration (as the 1st Plaintiff has alleged).*

(iii) *Was there a resulting trust in favour of the 1st plaintiff in respect of any of the shares held in the name of the 3rd defendant”.*

25 It has been resolved by the trial High Court that the shares were transferred end-not allotted to the 3rd defendant. There are a number of documents which are exhibits in this case dealing with the transfer of the 1st plaintiff’s shares to a number of beneficiaries including the 3rd
30 defendant. I dealt with the transfer of 9% of the 1st plaintiff’s shares earlier in this judgment. The learned trial judge rejected the contention of the defence that the shares are allotted to the 3rd defendant and on the transfer of the 1st plaintiff’s shareholding to the 3rd defendant he said:

35 *“the uncontradicted evidence of all the three Defendants that the first Plaintiff voluntarily transferred 9% of his share holding to the third Defendant. Secondly, the fact that this was done is clearly borne out by the minute of the first board meeting attended by the*

third Defendant (see p.11 of Exhibit HH) at which “the Chairman also offered 9% of his share holding to Prince Ademola Ademiluyi.
“

Thus by this decision the court is of the opinion that the 3rd defendant was a beneficial owner of that percentage. The Court of Appeal upheld the decision of the learned trial judge and added that the 3rd defendant was in fact entitled to hold beneficially 21% and not 9% of the equity shareholding of the company. I have gone through all the documents upon which the two lower courts based their decisions and it is quite clear that the intention of the 1st plaintiff to transfer his shares to the 3rd defendant are explicit in those documentary exhibits. I will reproduce some of them for the clarity of what I say. In exhibit RR7, dated 5/10/84, the 1st plaintiff wrote to the Secretary of the company announcing a grant of 12% of his shares to the 3rd defendant in the following words:

“5th October, 1984

The Secretary,

Mabs & Company Limited,

286, Murtala Mohammed Way,

Yaba.

Dear Sir,

We have concluded with Prince Ademola Ademiluyi and we hereby confirm a share of 12% to them respectively leaving us a balance of 20% in which we will soon confirm to you the beneficiaries.

Please kindly send us the necessary forms from the Ministry for our Signature.

Please inform the Managing Director and other Directors accordingly.

Thanks for your usual cooperation.

Yours faithfully,

Chief R.A. Okoya CC: Chairman,

Albion Construction Ltd.

CC: Managing Director

Albion Construction Ltd.”

In exhibit RR 11 the Secretary of the 3rd plaintiff company wrote, on 19th October 1984, to the 1st plaintiff acknowledging receipt of exhibit

RR 7. The Secretary in that letter said:

“With reference to your letters dated 4th and 5th October 1984, we forward herewith Transfer forms for Prince D.A.Ademiluyi and Alhaji L.S.Balogun. As indicated on the forms, we are transferring additional 24,000 shares representing 12% to Prince Ademiluyi. This brings the total holding by him to 20%.”
See also exhibits RR 8, RR 9 and ZZ.

In the absence of any instruction in the articles of association of a company or by agreement with the company outside the articles a shareholder can transfer his shares to any beneficiary legally competent to take the shares. A share in a company is a chose in action. It consists of the interest in the second, and also made up of various rights conferred by the contract contained in the articles of association.

The 1st plaintiff, from the documents reproduced above, in the absence of any evidence to the contrary, voluntarily transferred his shares to a number of his nominees and beneficiaries, including the 3rd defendant. Cozens - Hardy MR, in the case of *Re Sede Shipping Company Limited* (1917) 1 Ch. 123 held: “.....What is the position of a shareholder in a company such as this? He has a property in his shares, a property which he is at liberty to dispose of, subject only to any express restriction which may be found in the articles of association of the company,subject to that right, the shareholder is at liberty to transfer a share as much as he is at liberty to sell a chair or table or any other property.”

In the case in hand, there is no evidence showing that the 1st plaintiff was induced through fraud or deception to transfer his shares to the 3rd defendant. Chief Okoya did not disclose any reason or condition for the transfer of 21 of his shares to the 3rd defendant and it is not the business of the court to start fishing for reason for such a voluntary transfer of shares.

In his evidence before the trial court, 3rd defendant testified thus:

“I am a shareholder of the company. In respect of the 9% I have already told the court how it came about. Then in 1984, when Chief Okoya was leaving the company, he transferred an additional 26% shares but in a letter to me he expressed the view that 14% of the

26% should be held by me on trust for his son Ademola Okoya. He told me that the 12% was a gift to me in recognition of my activities in the company. So by the time he left in 1984, I was holding a total of 35% equity shares of 5 Albion Construction limited, 21% for myself and 1% (sic) on trust for his son.”

The only person who would deny what is testified above is the 1st plaintiff, but he avoided the witness box. Therefore there is no evidence from the plaintiffs contradicting the above testimony of 3rd defendant. There were documents as I reproduced above and exhibit ZZ in which the 1st plaintiff demanded the return only of 14% which the 3rd defendant held in trust for his son. The trial court believed that 9% of the 1st plaintiff’s shares had been voluntarily transferred to the 3rd defendant. On appeal the 15% Court of Appeal affirmed the decision of the High Court in respect of 9, and added that 12% also had been transferred voluntarily by the 1st plaintiff to the 3rd defendant, thus making his total shareholding 21%.

In his judgment, Ademola, JCA observed that the way and manner the 3rd defendant acquired 9% of the shares of the Company was, in his opinion, a clear breach of the provisions of section 2(b) of the Code of Conduct for Public Officers. The learned justice however, quite rightly, saw nothing wrong in the acquisition of the 3rd defendant of 12% shares which were given to him by the 1st appellant after he had left NEPA. What looked like a U-turn, the learned Justice said on true construction of S.20(1) of the Code of Conduct Bureau, the Organ to make a finding that one is in breach of Its provisions and impose punishment is the Code of Conduct Tribunal established under the Constitution and not the regular courts. He referred to the case of Ogbuagu v. Ogbuagu (1981) 2 N.C.L.R. page 680 at 684. Section 20(1) of the Code of Conduct Bureau provides:

“Where the Code of Conduct Tribunal finds a public officer guilty of contravention of any of the provisions of this Code, it shall impose upon that officer any of the punishments specified under sub-paragraph (2) of this paragraph and such other punishment as may be prescribed by the National Assembly.”

Chief Williams submitted that since, in exchange of shares transferred or to be transferred by the 1st plaintiff, the 3rd defendant was obliged

to and did participate in the management and running of the 3rd plaintiff company which impliedly was prohibited by the Code of Conduct, the contract to transfer the shares was void. He referred to a number of English authorities to buttress his submission - See Connelius v. Philips (1918) A.C. 185 at 204-205, Band B Viennese Fashions v. Losane (1952) 1 AE.R. 909 at 913. In Anderson Limited v. Daniel (1924) 1 QB. 138 Atkin L.J. held:

“The question of illegality in a contract generally arises in connection with its formation, but it may also arise, as it does here, in connection with its performance, In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party. And I think that it is equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violating of some statute, even though the contract as agreed upon between the parties wascapable of being performed in a perfectly legal manner”.

In reply, Chief B.O. Benson, SAN., referred to the decision of the Court of Appeal and submitted that only the Code of Conduct Tribunal has the jurisdiction to try a contravention of the Code of Conduct for Public Officers. He agreed that one of the functions of the Bureau under S.15 (1) (b) is:

“it receive complaints about non-compliance with or breach of this Code and where it considers it necessary to do so, to refer such complaints, of such breach or non-compliance of the Code of Conduct Tribunal”,

The penalty provision is in S.23 (1) OF THE Code of Conduct Bureau and Tribunal Act. Cap 56. It has been provided therein that a public officer if found guilty by the Tribunal contravening any of the provisions of the Code, it shall impose upon that officer any of the punishments specified under Sub-Section 2. The subsection reads:

(2) The punishment which the tribunal may impose shall include any of the following:-

- (a) vacation of office or any elective or nominated office, as the case may be;
- (b) disqualification from holding any public office (whether elective or

not) for a period not exceeding ten years; and
 (c) seizure and forfeiture to the State of any property acquired on abuse of corruption of office.

Learned Senior Counsel for the defendants submitted that the proper thing for any person who felt that the 3rd defendant had breached the Code of Conduct Bureau which bureau may, if it considers it necessary to do so, refer his case to the Code of Conduct Tribunal. This is more so in view of the fact that what the 3rd defendant is alleged to have done against the Code of Conduct might be morally wrong but not illegal. The learned Senior Advocate referred to the cases of Ogbuagu v. Ogbuagu (supra) and Nwankwo v. Nwankwo (1992) 4 NWLR (part 238) 693 and argued that any complaint not having been lodged against 3rd defendant with the Code of Conduct Bureau, the 3rd defendant cannot be said to be in breach of the code

Before I consider whether or not the transfer of 9% shares is in breach of the Code of Conduct and therefore illegal I would like to say that I see nothing wrong in the 3rd defendant receiving a transfer of 12% of the shares which the 1st plaintiff voluntarily made to him after he had left NEPA.

I have been referred to the decision of Aroko, CJ. in the case of Ogbuagu v. Ogbuagu (supra) in which the learned Chief Judge held (1) that the court is not a proper forum under the Constitution for a complaint that a person has breached a Code of Conduct under the Constitution. (2) Under the Constitution any allegation that a public officer has committed a breach or has not complied with the provisions of the Code of Conduct should be made to the Code of Conduct Bureau established by the Constitution. (3) Judges are sworn to uphold the Constitution of the Federal Republic of Nigeria but the Constitution cannot be upheld by the Judges usurping the powers and functions of Constitutional body set up by the very Constitution.

I entirely endorse this decision of Aroko, CJ, and will apply it fully in this judgment. It is a fundamental right under the Constitution that: “33 (1) in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within

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a reasonable time by a Court or other tribunal established by law
and constituted in such manner as to secure its independence and
impartiality. “

The issue involved here is said to amount to a breach of the
Code of Conduct under the Constitution. It is pertinent to ask, who
5 determines whether a breach has occurred or not? Under S. 12 of the
Code of Conduct for public Officers it is provided that any allegation that
a public officer has committed a breach of or has not complied with the
provisions of the Code shall be made to the Code of Conduct Bureau.
10 The Bureau would impose a punishment if finds a public officer guilty
of contravention of any of the provisions of the Code. It is quite clear
therefore that until the Code of Conduct Tribunal finds a public officer
guilty of contravention of the Code of Conduct for public officers no
public officer shall be deprived of his rights, property or freedom and the
15 tribunal cannot decide his case without hearing him.

It should be borne in mind that taking unilateral decisions,
without following the proper procedure laid down by the Constitution
would result in depriving a citizen of his status or property. It is not for
20 any person other than the Code to declare that a particular act amounts
to an infringement of the Code of Conduct. Such declaration could only
be made by the Body empowered to do so by the Constitution.

In the case in hand, although it is safe to allege that an illegality
25 might have been committed by the 3rd defendant when he accepted 9%
shares in the company, in order to take part in the company’s manage-
ment, while still serving NEPA, in my opinion, it is only the Code of
Conduct Tribunal which would declare the ‘conduct illegal and a
contravention of its provisions”. The learned Justice of the Court of
30 Appeal, Ademola JCA, is therefore right to hold that only the Code of
Conduct Tribunal and not the regular courts could declare the action of
the 3rd defendant a breach of the provisions of the Code of Conduct for
Public Officers. Thus making the agreement to transfer 9% shares to
35 Prince Ademiluyi illegal and void. Having reached the above conclusion,
it is my opinion that the issue of resulting trust in favour of the 1st plaintiff
or his nominees in respect of 21% of the shares which the 1st plaintiff
voluntarily transferred to the 3rd defendant, does not arise.

The issue of injunction is a Simple one. The alternative claim which the plaintiffs sought for a declaration at the High Court is - “an injunction restraining the 1st, 2nd and 3rd defendants and/or any other persons acting with or on their direction or authority from conducting the affairs of the 3rd plaintiff company in any bank whatsoever on the basis of the document purporting to be the memorandum and articles of association of the 3rd plaintiff company and carrying the Signature of the 1st and 2nd plaintiffs as well as the three defendants as subscribers”. It is an error, in my view, for learned Justice of the Court of Appeal to refer to exhibit “AI”, the memorandum and articles of association which the learned trial judge, quite correctly, declared bogus. SThe learned justice of the Court of Appeal shared the views of the learned trial judge in respect of exhibit “AI”.

I do not agree with Chief B.O. Benson, SAN., that there is little difference between the order of injunction made by the trial High Court and the one made by the Court of Appeal. There is indeed a world of difference between the two. I therefore agree with Chief Williams, SAN., that the appeal in respect of the order of injunction should be allowed and it is allowed. I restore the order of injunction made by the Federal High Court. For clarity I reproduce that order hereunder:

“The first, second and third defendants and/or other person or persons acting with or on their direction or authority are hereby restrained from conducting the affairs of the third plaintiff company and in particular from operating the account of the said company in any bank whatsoever on the basis of any memorandum and Articles of Association other than that mentioned in paragraph (1) above.”

What was mentioned in paragraph (1) above is memorandum and Articles of Association of Albion Construction Company Limited dated 16/9/76, and admitted in evidence during the trial as Exhibit A. It is the memorandum and Articles of Association which the 1st and 2nd plaintiffs were subscribers when the company was incorporated.

In consequence of all what I considered above, this appeal fails in respect of the issues concerning the shareholdings of the 1st, 2nd and 3rd defendants. The cross-appeal in respect of the issue that the 80,000 shares of the 1st and 2nd defendants were acquired through transfer

succeeds. The appeal of the plaintiffs against the order of injunction made by the Court of appeal also succeeds. I accordingly dismiss the appeal concerning the shareholdings of 1st, 2nd and 3rd defendants in the 3rd plaintiff company and I allow both the cross-appeal and the
5 appeal of the plaintiffs against the order of injunction made by Ademola, JCA.

In summary, the share standing of the equity shareholding of respective members of the 3rd plaintiff company are as follows:

(1)	1st Plaintiff	19.9995%	equivalent of	N39,999.00
10 (2)	2nd Plaintiff	.0005%	equivalent of	N 1.00
(3)	1st Defendant	20%	“	“ N40,000.00
(4)	2nd Defendant	20%	“	“ N40,000.00
(5)	3rd Defendant	21%	“	“ N42,000.00
15 (6)	L.S. Balogun	10%	“	“ N20,000.00
(7)	L.A. Balogun	9%	“	“ <u>N19,000.00</u>
				<u>N200,000.00</u>

In view of the fact that the success and failure in this appeal are
20 shared between the parties each should bear own cost.

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25 When this appeal came up for hearing on 24th January, 1994, it underwent the following preliminaries. Firstly, upon Chief Williams, learned Senior Advocate for the Plaintiffs/Appellants/Respondents leading his team of learned counsel getting up to submit that they filed a brief dated 8th may, 1992 and that they wished to adopt same, learned
30 Senior Advocate, Chief Benson for the Defendants/Respondents/ Cross-Appellants, quickly got up to observe that after receiving the Appellants’ brief, they for their part, filed a Respondents’ brief dated 20th August, 1992. That thereafter, they applied to cross-appeal and that
35 that application having been granted, they proceeded to file a brief in cross-appeal dated 26th August, 1992. Learned counsel then pointed out how that morning he drew Chief Williams’ attention to the fact that he had up till then not received from him (Chief Williams) a Respondents’ brief in response to his (Chief Benson’s) cross-appellants’ brief. The

reply he received from Chief Williams was succinctly that he did not deem a Respondents' brief to his (Chief Benson's) cross-appeal necessary.

We heard it all from the horse's mouth when Chief Williams rose to say that they felt no need to file a Respondents' brief in response to the cross-appeal, adding that their original brief on the main appeal (Le. that filed on 8th May, 1992 covered everything he needed to say.

Having previewed the preliminaries, I must pause here to set out in brief the facts of the case from inception as Suit No. FHC/39/88 in the Federal High Court sitting in Lagos (per Odunowo, J) to Suit No. CA/L/44/89 in the Court of Appeal holden in Lagos, which has culminated in the decision of the court below dated 5th April, 1990 now on appeal to this Court.

The 1st and 2nd Plaintiffs suing for themselves and in a representative capacity for the other alleged shareholders, Messrs L.A. Balogun and L.S. Balogun, claimed against the three Defendants total ownership (of the shares) of the 3rd plaintiff company. Pleadings were ordered, filed and exchanged.

The 1st and 2nd Plaintiffs sought in the Amended Statement of Claim and in the Oral Further Amended Statement of Claim thus:-

1. A declaration that the document described as Memorandum and Articles of Association of Albion Construction Limited dated 16th September, 1976 and admitted as Exhibit A the 1st and 2nd plaintiffs were subscribers is the only true Memorandum and Articles of Association of the 3rd Plaintiff.

2. In the alternative to claim (1), a declaration that the aforementioned document is a true and authentic copy of the only document submitted for registration to the Registrar of Companies by the promoters of the 3rd Plaintiff Company.

3. An injunction restraining the 1st, 2nd and 3rd Defendants and/or any other persons acting with or on their direction or authority from conducting the affairs of the 3rd Plaintiff and in particular from operating the account of the 3rd Plaintiff in any bank whatsoever on the basis of any Memorandum and Articles of Association other than that mentioned in claim (1)

4. In the alternative to (3) an injunction restraining the 1st, 2nd and 3rd defendants and/or any other person acting with or on their

direction or authority from conducting the affairs of the 3rd Plaintiff Company in any Bank whatsoever on the basis of the document purporting to be the Memorandum and Articles of Association of the 3rd Plaintiff Company and carrying the signature of the 1st and 2nd Plaintiffs as well as the three defendants as subscribers.

5 5. A declaration that the nominal share capital of the 3rd Plaintiff company is N200,000.00 divided into 200,000 shares of N1.00 each.

10 6. A declaration that the 1st and 2nd defendants are not shareholders of the 3rd Plaintiff Company.

7. A declaration that all shares held by him in trust for the 1st Plaintiff and an order directing the 3rd defendant to execute an instrument of transfer in favour of the 1st Plaintiff.

15 The Defendants jointly and severally denied the Plaintiffs' claims and pleaded in their paragraph 72 of the Amended Statement of Defence thus:

20 1. A declaration that the Memorandum and Articles of association purportedly certified on the request or on behalf of 1st and 2nd Plaintiffs through their Solicitors by the Office of the Registrar of Companies on the 28th March, 1988 was irregular and in breach of the laid down procedure without satisfying the Registrar of Companies as to the authenticity of the document.

25 2. That the defendants are lawful directors and shareholders of Albion Construction Limited and that from 1984 when the 1st and 2nd Plaintiffs resigned their membership and directorship of Albion Construction Limited they automatically ceased to be members and directors of the Company and accordingly have no say in the affairs of the Company.

30 3. That the authorised share capital of Albion Construction Limited is now N500,000.00

4. That no shares are held in trust for the 1st plaintiff by the 3rd Defendant.

35 5. That the names of the defendants are in the Register of Shareholders and registrar (sic) of Directors of Albion Construction Limited

6. That the names of the 1st and 2nd Plaintiffs cannot and should not be in the Register of members or Register of Directors of Albion

After evidence was adduced on all sides and counsel had addressed the trial court, the latter in a reserved judgment (See pages 499-559 of volume 11 of the Record) while rejecting the 100 ownership of the 3rd Plaintiff's shares as claimed by the 1st and 2nd Plaintiffs, held inter alia-

1. That the memorandum and articles of association put forward by the 1st and 2nd plaintiffs - exhibit A is the only true memorandum and articles of the 3rd plaintiff company.

2. That the nominal share capital of the 3rd plaintiff company is N200,00.00 and not N500,000.00

3. That all the parties to the Suit are Shareholders of the 3rd plaintiff Company in the following proportions:-

1st Plaintiff	-	50%	
2nd Plaintiff	-	1%	15
1st Defendant	-	20%	
2nd Defendant	-	20%	
3rd Defendant	-	9%	

4. That the 3rd Defendant should execute an instrument of transfer in respect of 51% or 102,000 shares held by him on trust in favour of 1st plaintiff

5. That the Defendants are restrained from conducting the affairs of the 3rd Plaintiff company and in particular from operating the account of the said company in any bank whatsoever on the basis of any memorandum and articles of association other than that mentioned in paragraph (a) above. Being dissatisfied with this decision the Plaintiffs/Appellants/Respondents (hereinafter referred to simply as Appellants) appealed to the Court of Appeal, Lagos, which in a considered judgment, set aside the decision of the trial Court (much to Appellants' disapproval) as being contrary to their contentions when it held inter alia thus:

"It is hereby declared that the share holding of the respective members of the Company are as follows-

1st plaintiff	19.9995%	or N39,999.00	35
2nd plaintiff	... 0005%	or N 1.00	
1st defendant	20%	or N40,000.00	
2nd defendant	20%	or N40,000.00	
3rd defendant	21%	or N42,000.00	

L.S. BALOGUN	10%	or	N20,000.00
L.A. BALOGUN	9%	or	N19,000.00
			<u>N200,000.00</u>

2. *The share holding of 79.9995 in favour of the 1st Plaintiff*
5 *is inclusive of the 14% held in trust for him by the 3rd defendant.*

3. *It is hereby ordered that the 3rd defendant should*
execute an instrument of transfer of the 14% shares accordingly.

10 4. *The order restraining the defendants from conducting*
the affairs of the 3rd plaintiff company and, operating the account
of the said company in any bank whatsoever is hereby set aside.
They are however, not to conduct the affairs of the company or
15 *operate its account on the basis of the memorandum and articles of*
association exhibit AI raising the share capital to N500,000.00

5. *It is hereby declared that the nominal share capital of the*
3rd plaintiff company as at the time of this action was instituted
20 *remained at N200,000.00 divided into 200,000 shares of N1.00*
each and not N500,000 as alleged by the defendants. “

It is against this judgment that the Appellants have further
appealed to this Court. The Defendants/Respondents (hereinafter
referred to as Respondents) later cross-appealed as hereinbefore
25 mentioned. Both parties filed briefs. of arguments by their Senior
counsel in accordance with the rules of this Court as elucidated earlier
on in this judgment.

The questions submitted on behalf of the Appellants for deter-
mination as far as the shares of the 3rd Appellant are concerned are:-

30 A. The shares of 1st and 2nd Appellants:

Whether the 1st and 2nd defendants ever acquired shares by transfer
from the 1st plaintiff.

B. Shares of the 1st and 2nd Respondents:

35 Whether the court below was correct in failing to consider and uphold
the contention of the plaintiffs that the third plain liff company had issued
all its shares to the 1st and 2nd plaintiffs by 31.5.81 and there were no
shares available to be issued to the 1st and 2nd defendants at the time

they claimed to have paid for shares allegedly allotted to them.

C. The shares of 3rd Respondent:

Whether the court below ought to have held that:

- (i) The transfer (and accordingly the underlying contract) whereby in exchange for shares transferred to him by the 1st plaintiff, the 3rd defendant was obliged and required to participate in the management and running of Albion Construction Limited, was one which was impliedly prohibited by section 2(b) of the Code of Conduct for Public Officers under The 1979 Constitution and is therefore illegal and void; 5
- (ii) Whether the shares held by the 3rd defendant were held by him in trust or for his own benefit. 10

D. Court of Appeal's Order on Injunction:

Whether the order of the Court of Appeal setting aside the order for injunction made by the Federal High Court was justified.

The Respondents for their part also formulated four issues for our determination, to wit: 15

(a) Are the 1st and 2nd defendants shareholders of the 3rd plaintiff company, and if so, how did they acquire their 20% shares and or have they any interest in 40% of the shareholding of the 3rd plaintiff 20

(b) Whether the 3rd defendant is a shareholder of the 3rd plaintiff company and if so how many of the shares held by him are for his own benefit and how many are held by 25% him in trust for the 1st plaintiff 25

(c) Whether the order of the Court of appeal setting aside the order for injunction made by the Federal High Court was justified.

(d) How many of the shares held by the 3rd defendant beneficially (if some are so found) were acquired in contravention of section 2(b) of the Code of Conduct for Public Officers under the 1979 Constitution. 30

At the hearing of this appeal on 24th January, 1994 learned Senior Counsel on either side adopted their briefs and elaborated thereon in extenso. Chief Williams in expatiation of his brief submitted that in relation to their appeal they had set out three questions at page 1 of their brief i.e. (A) the identity of the Memorandum and Articles of Association; (B) the share capital and (C) the share holding. While 35

question (A) was decided in their favour. he pointed out, question (B) was decided substantially in their favour too, adding that the only question he wished to highlight was question (C). As a foundation for the judgment of the Court of Appeal in respect of shareholding, learned counsel referred us to page 673, last sentence to page 674, lines 1 to 3 in Volume IV of the Records. The Respondents' contention at page 676 lines 8 to 10 of the Record that the share capital of 3rd Appellant was otherwise than N200,000.00 and had not been fully paid for would fail, argued learned counsel. This point, he said, would seem to have been accepted by Ademola, J.C.A. in his judgment at page 684, last paragraph to page 685, lines 1 and 2. Since it was therefore not 1st and 2nd Respondent's case that they acquired membership of 3rd Appellant by transfer of shares, he argued, one could not possibly reach that conclusion on how the 1st and 2nd Respondents came to acquired their shares. Learned Senior Advocate adverted our attention to page 25, paragraph 5.3 and page 26 of his brief. After referring to the counter-claim at pages 345 in paragraph 72 of the 1st to 3rd Appellants' Amended Statement of Defence, particularly paragraph 6 thereof, learned counsel submitted that 1st and 2nd Respondents did not claim before the trial court acquisition of their shares by transfer - there being a world of difference between buying shares by way of transfer in which case the buyer pays money to the one from whom he buys and buying of shares by paying to the company directly. In relation to 3rd Respondents shares learned counsel referred us to pages 28 and 30 of his brief and submitted that he adopted all arguments he proffered therein. Learned Senior Advocate in this regard further referred us to page 35 at paragraph 6.6. on the effect of Code of Conduct, adding that Ademola, J.C.A. agreed that there was indeed a breach of the Code of Conduct vide section 2(b) of the Code of Conduct for Public Officers by 3rd Appellant as illustrated at pages 42-44 of Appellants' brief. Learned counsel however urged us to seize this opportunity to overrule the case of Ogbuagu v. Ogbuagu (1981)2 N.C.L.R. 680 at 684 which, he argued, was wrongly decided.

On the order of injunction learned Senior Advocate referred us to page 48 of the Appellants' brief and maintained that there were two

Articles and Memoranda of Association (Exhibits A and AI) which were before the trial court, the latter (Exhibit AI) which it ruled as a bogus document. In view of that conclusion which was perfect decision, argued learned counsel, there was no need for the court below labouring under a misapprehension, to have attempted to interfere with the order for injunction the trial court made. 5

Making further expatiation on the question of Code of Conduct, learned counsel said that he wanted to correct his learned friend's impression that unless corruption was proved there could be no finding against a person. He adverted our attention to pages 35 and 36 of his brief read together with page 423 (Volume 11 of the Records). 10

On partnership agreement (Exhibits SS) we were referred to page 654 in Volume 11 of the Records depicting that Exhibit SS was signed on 6/7/78 wherein parties were not talking of the ownership of any company but rather a business for the sharing of profits. 15

We were thereafter referred to page 499 (the judgment of the trial court) which learned counsel submitted, had nothing to do with Exhibit SS - document neither pleaded nor in the evidence adduced and in the briefs, adding that nobody is talking about breach of the document but rather on profit-sharing which was never an issue before the trial court. What was in issue, learned counsel asserted, was that of share-holding, adding that if any money was paid by 1 stand 2nd Respondents, this was done after 3rd Appellant had issued all its share, as fully paid. Learned senior counsel further contended that the question of application to Ministry of Finance, etc. for 1st and 2nd Respondents to participate in 3rd Appellant Company would not (sic) since there should have been a permit for them (1st and 2nd Respondents) to bring into Nigeria the money to buy the shares in 3rd Appellant Company. And if the 1st and 2nd Appellant disappointed them, they could have sued for specific performance. Our attention was finally drawn to paragraph 50 of the Respondent's Amended Statement of Defence at page 341 (Volume 1) of the Records where after 1st and 2nd respondents had averred that they both held 40% of the combined share holding of 3rd Appellant pleaded that they had "lawfully 40 of the authorised share capital of Albion Construction Limited which is now N500,000.00 The 20 25 30 35

learned Senior Advocate in conclusion referred us to the Counter-claim by the Respondents at pages 501 at the bottom of page 502.

Chief Benson, learned S.A.N” on behalf of the Respondents after adopting his brief dated 20th August, 1992, submitted firstly in
5 respect of the order of injunction that his contention relating thereto is to be found at paragraphs 3.1 and 3.2 on pages 25 and 26 of their brief.

Secondly, and in relation to the two Memoranda, learned counsel submitted that while one was held to be bogus, the other (the first
10 one) was held to be genuine. That while the trial Federal High Court made an order respecting Exhibit AI rejecting it in evidence, the court below also made its own specific order thereto, adding that the specific order made by the court below was correct. We were referred to pages 16, 17 and 18, particularly paragraphs 2, 7. 2 at page 18 of the
15 Respondents’ brief in relation to the transfer of shares in 3rd Appellant Company and from 1st Appellant to 3rd Respondent, adding that nobody would be allowed to benefit from illegality.

20 Thirdly, and in regard to Code of Conduct, learned Senior Advocate adverted our attention to page 19 of his brief for the view that whoever felt the 3rd Respondent had breached the Code of Conduct ought to report him to the Code of Conduct Bureau which ultimately makes a finding of fact that he among other things corruptly acquired shares.
25 However, since there was no evidence apart from that emanating from the 3rd Respondent himself this court should not disturb the decision of the court below. Learned Senior Advocate while conceding that being a director while still a public servant is an illegality, he would not admit that to acquire shares only from a company is an illegality. Hence, the
30 9 acquisition of the share capital of 3rd Appellant company by 3rd Respondent while in office would not result in an illegality.

Fourthly, regarding shareholding of the 1st and 2nd Appellants
35 in the 3rd Appellant (Albion Construction Company) the Company itself, learned Senior Advocate asserted, took off in 1976 with a share each of N 1.00 that in 1978 1st and 2nd Appellants invited the 1st and 2nd Respondents who are aliens. Being aliens, both 1st and 2nd Respondent,

it stated, could not directly partake in the shareholding of 3rd Appellant Company. Hence, they entered into a partnership agreement (Exhibit SS), the latter in which the mode of shareholding was depicted as 50% to 1st and 2nd Appellants, 40% to 1st and 2nd Respondents and the remaining 10% to members of staff.

The 1st and 2nd Respondent being aliens, they applied to Government to enable them participate in 3rd Appellant Company. Steps were therefore taken to get them the permission vide pages 6, 7 and 8 of the Respondents' brief. It was then shown that they (1st and 2nd Respondents) paid in foreign exchange and the money went into 3rd Appellant's account Learned S.A.N. then explained that the problem that arose was that as at 31/5/81 when the 1st and 2nd Respondents signed a balance sheet of 3rd Appellant Company showing a transfer of a sum of N199,998.00 from director's account to make up for the N200,000.00 shareholding the shares were fully paid. The Appellants' assertion that they owned the 200.000 shares as found by trial court and the court below especially with regard to the latter, maintained counsel can be seen at page 9, paragraph 20 1.3.1. to page 10 of the Respondents' brief. These findings, he submitted, are concurrent findings of facts. Ademola, J.C.A., learned counsel then pointed out, did find that because of the finding in Exhibit HH, the 1st and 2nd Respondents had lost their rights under the partnership agreement (Exhibit SS). He therefore submitted that as at 1978, the 1st and 2nd Respondents had an equitable right to enforce their rights under Exhibit SS adding that 1st and 2nd Respondents being part and parcel of that agreement, had no right to resile from the partnership agreement. Pages 4, 5 & 6 of the cross-appellant's brief. Our attention was thereon drawn to Ademola JCA's finding, a view with which Akpata, JCA (as he then was) did not share vide page 5 of the cross-appellants' brief dated 26/8/92. Where there is an equitable right that could be confirmed, argued learned Senior Advocate it would not be overthrown. He relied for support on the contents of pages 12, 13 and 14 respectively of the cross appellants' brief and finally urged us to dismiss the main appeal and uphold the cross-appeal.

I will now consider the issues as formulated by the Appellants (Respondents' issues being similar in their order of sequence as follows:

As pointed out elsewhere in this judgment, the court below by its decision set out above had 'set aside the decision of the trial Federal High Court on question C and proceeded to resolve same in a manner contrary to the contentions of the Appellants. As can be seen, the court
5 below in effect, made orders purely ancillary to their decision on question C; hence the appeal and cross-appeal herein. In so far therefore as questions A and B are taken as having been substantially disposed of, I shall where applicable for the purposes of this appeal regard them as concurrent findings of fact of both the Federal High
10 Court and the Court of Appeal, with which this Court will be loath to interfere in as much as there are no special circumstances to warrant us to do so; the decisions not having been shown to be either erroneous or perverse. This Court has by a long line of decided cases established
15 this principle to need any further re-echoing. Such decisions to mention but a few are:-

1. Ukpe Ibodo v. Iguase Enarofia (1980)5-7 S.C.42 at 55
2. Lokoyi & anor. v. Olojo (1983)8 S.C.1
3. Uredi v. Dada (1988)1 NWLR.237 at 254
- 20 4. Mogo Chinwendu v. Nwanegbo Mbamali (1980)3 S.C.31
5. Etowa Enang v. Ikor Adu & ors. (1981)11-12 S.C.25 at 30-40
6. Chukwogor v. Obuora (1987)3 NWLR..454 at 457
7. Ezeudu v. Obiagwu (1986)2 NWLR.208 at 215 and
- 25 8. Atuyeye v. Ashamu (1987)1 NWLR.267

I think it pertinent to refer to a few examples if only to elucidate the point. At page 673, line 7 onto ppge674 lines 1-3 in Volume 30 IV of the Records, the Court of Appeal (per Ademolo. JCA) had this to say:-

30 *"The plaintiffs submitted that Exhibits 11 and 72, the Company's balance sheet for 7978/79 and 7980 which was signed by one or other of the Defendants belied the contention of the Defendants that the N2.00 shares were not paid for. Also Exhibit
35 'U' supports the payment of N2.00. The plaintiffs contend that the only issue is whether the shares of 799, 998 in addition to the one share each were paid for.*

The plaintiffs relied on the evidence of Chief Adelusi who

confirmed paragraph, of the Statement of Claim that the additional 799,998 worth of shares were paid for by transferring the sum from the amount standing to the credit of the 1st plaintiff as a Director to the 3rd plaintiff share capital account as reflected in the audited account. Chief Adelusi was a witness for the plaintiffs as well as for the defence. Plaintiffs can use his evidence to support their case. 5 See the case of Falolu v. Amosu 7983 NSCC page 454 at page 467,' Adebambo v. Olowosago (7985)3 NWLR page 207 at 275. Chief Adelusi being a defence witness, the defence must take the consequences of his evidence.

The Plaintiffs submitted that the balance sheet particularly Exhibit H9 which was signed by the 2nd and 3rd Defendant is conclusive on the issue as to the full payment of the shares of the Company, and the Director's Report, Exhibit YY given in 15 accordance with Sections 720 and 750 of the Companies Act puts the matter beyond dispute. The Defendants cannot in my view of the overwhelming evidence in this case be heard to dispute the fact that N200,000.00 were fully paid for as at 3 7/5/87. 1st and 2nd plaintiffs had a 100% ownership of the shares of the Company both of them, were at that time the only members of the Company, it was 20 clear that they and they only paid for their shares."

Thus, even though Ademola, J.C.A. who wrote the lead judgement later stated, erroneously though in my view, that the words transfer and allotment were interchangeable - these being words of art 25 that have received judicial interpretation and recognition for all times and can in no way be used interchangeably - had dealt a mortal blow to the Respondents' case when the learned justice further held at page 676, lines 8-11 of the 30 Record thus:

"The contention of the Defendants that the share capital of the Company is otherwise than N200,000.00 and have not been fully paid for, fails" 30

Hence, in my view, no one can at that point in time (31/5/81) acquire shares in 3rd Appellant Company. This is because, since 1st and 2nd Respondents' case is that they acquired membership of 3rd Appellant by transfer of shares one cannot possibly reach that conclusion as to how they came to acquire their shares. Transfer of shares if 35

any. could only have emanated from 1st or 2nd Appellant. And if it was acquisition of shares by way of allotment, such acquisition of shares by 1st, 2nd and 3rd Respondents must perforce be from 3rd Appellant. See section 75 of the Companies Act. 1968. Be that as it may. PW5. Adelusi had testified both as plaintiff's witness and as a defence witness uncontroverted to the effect that the N200.000.00 capital shareholding of 3rd appellant had been fully subscribed by 31/5/81 and this amounted to the Respondents' own funeral since they cannot be heard to argue otherwise than their own witness has bluntly and factually put it. In law a party guarantees the reliability of the witness procured by him. See Onubogu v. The State (1974)9 S.C. 1 at page 20. See also Cross on Evidence at page 270.

In saying, all have said above, I am not unmindful of Exhibit GG dated 11th November, 1981 in which it is claimed that the 1st Appellant acknowledged that the 2nd Respondent (Davanzo) held 20 shares (yet to be settled) and upheld by the two courts below. However, there is a discordant note emanating from Exhibit RR8 in which 3rd Respondent was writing to P.W.5 on 6th October. 1984 in his own handwriting - over three years after the share capital of 3rd Appellant had been fully paid up at 200.000 shares when he said inter alia therein that-

"You will find enclosed a letter from Chief Okoya instructing that an additional 12% shares be transferred to me. My total shareholding will now be 21%.

25 Kindly prepare the necessary Transfer forms/papers before our arrival

(Underlining above is mine.

While Exhibit RR8 (supra) talks of 21% as 3rd Respondent's shareholding., Exhibit P is a letter from the Administrative Manager of 3rd Appellant company to the Permanent Secretary. Federal Ministry of Finance asking for approval status for both 1st and 2nd Respondents and the necessary foreign money from their country (Italy) "to pay for their 40% contribution" i.e. "the transfer of N100,000.00 being 40% of the N200.000.00 of the Company."

Apart from the contradiction on these documents there is no evidence that after 31/5/81 when the 200,000 shares of the 3rd

Appellant were said to have been fully paid up as endorsed by the two courts be 100% there is no assertion or suggestion that any other person or persons apart from 1st and 2nd appellants contributed cash or services to the share capital of 3rd Appellant. Moreover, there is no book of 3rd Appellant bearing any transfer or allotment of 3rd appellant's shares to any member (s) placed before us. Be it noted too that with the rejection of Exhibit A1 any purported expansion in the capital shareholding of 3rd appellant as would suit the Respondents other than that contained in Exh. "A" had been effectively blocked. A fortiori, Exhibit 'A' being the uncontroverted memorandum and Articles of Association of 3rd Appellant Company to which 1st and 2nd appellants subscribed, is the only true memorandum and Articles of Association of the 3rd appellant. This is irrespective of the fact that 1st appellant by his own self admission resigned as a member of the Company only later to return thereto. That the 1st appellant did not testify at the trial or that he resigned from the 3rd appellant for sometime, in my view, would not detract from my conviction that the Respondents did not and could not establish their case by incontrovertible evidence at the trial. In the first place, none of the Respondents could be heard to say that all the shares were not allotted as at 31/5/81. If any of them had said so, he would be contradicting what he had declared and signed in Exhibits H3 and H9 each in which the share capital of 3rd Appellant company is depicted as 200.000 Ordinary shares of N1.00. Furthermore, it must be borne in mind that Exhibit H9 was signed by 2nd and 3rd Respondents who equally signed Exhibit VY. 1st Respondent also signed some of the Balance sheets (Exhibits H1 and H5) showing that all the shares had been fully subscribed. Hence, any oral evidence to the contrary by any of the Respondents is simply unworthy of credit vide Onubogu v. The State (1974) 9 S.C.I. Nor is the fact that they acted as directors of 3rd appellant (a thing the Companies Act allows) makes them members of the 3rd Plaintiff as shareholders.

In the light of the above, the imperative question to ask is did 3 the 1st and 2nd Respondents actually acquire the shares of 3rd Appellant? In other words, can 1st and 2nd Respondents be said to be members of the 3rd Appellant? If so, how did they acquire their shares

- by transfer or allotment? My answer to the first question in the light of all I have said hereinbefore, is in the negative by reason of the fact that by 31 /5/81 the share capital of the 3rd Appellant was 200,000 shares at N1.00 by way of a 100 share holding vested in the 1st and 2nd Appellants. In answer to the second question it is pertinent first to dispel the notion created by the court below that the words ALLOTMENT and TRANSFER could be used interchangeably. I must say categorically that they cannot since they are both technical terms or words of art. Allotment means that shares had been given, sold or apportioned directly by and from the company (on the resolution of a Board of Directors) to the allottees for whatever consideration agreed upon. For instance, where the consideration is cash, the amount is paid to the company and subsequently forms part of the company's share capital. It could be by way of services rendered in the form of expertise whereby the salary earned by the person who rendered the services are converted into shares as in Oil Field Supply Centre Limited v. Johnson (1987)2 NWLR (Part 58)265; (1987)5 S.C. 310. In the instant case, one cannot talk of allotment of shares in as much as the two courts below found the paid up share capital of the 3rd Appellant Company was and remained at 200,000 shares of N1.00 from 31/5/81. There is no evidence that despite the Central Bank authorisation for 1st and 2nd Respondents to bring money into the country, such sums are accounted for in any of the books of the Company e.g. in the minutes of the Company's General Meeting as exemplified in Exhibit HH. Indeed, where the consideration for the allotment is other than cash e.g. by way of services (supra) the law is clear that this be indicated separately in the Return of Allotment together with an agreement to that effect and stating the consideration therefor between the Company and the allottee. Such a situation arises where there are "unallotted shares" yet to be apportioned or where the share capital of a company is to be simultaneously increased to meet the fresh allotment. In the instant case, the nearest event to the latter situation was where the Respondents attempted to increase through manipulation the paid up share capital of the 3rd appellant but the Appellants resisted and the trial court and the court below ruled in their favour. The same antics on the part of the Respondents in relation to their attempt to tender Exhibit AI was stoutly and successfully resisted. In none of the

documents tendered is it depicted where the money brought in by the Respondents from Italy went. Hence if they are not members of 3rd Appellant Company they cannot be its directors.

If such money as was brought into Nigeria constituted transfers, the law is that shares in a company are in the nature of personal estate and are transferable in the manner provided by the articles. See section 75 of the Companies Act, 1968 and Orojo on Nigerian Company Law and Practice, page 209. With a TRANSFER, the only way in which the company is concerned is to give effect to a private arrangement between the transferor (existing member) and the transferee (who may be an existing member or a new member altogether). Usually the transaction is concluded between the parties before it is brought to the knowledge of the company and for whatever the consideration that may have passed, does not concern the company. The transferee's name eventually replaces that of the transferor on the records.

It is worthy of note that throughout the trial in the trial court no evidence was led to show that 1st and 2nd Appellants executed 20 any transfers as a result of any sale of shares to or in favour of 1st and 2nd Respondents nor did these gentle men claim to have acquired shares by transfer from 1st and 2nd Appellants. The contention of 1st and 2nd Respondents had been that they acquired 40 or more shares by allotment for which they brought in money into Nigeria. However, by the time their money arrived in the country in June, 1982 or thereabout the stage for allotment of the share capital of 3rd Appellant had passed. Of course, in relation to 3rd Respondent, he was doing what he did with 3rd Appellant company in contravention of section 2(b) the Code of Conduct for Public Officers and his actions were null and void. His conduct is however punishable at the instance of the Code of Conduct Tribunal vide Ogbuagu v. Ogbuagu (1981) 2 NCLR.680 at 684 and Nwankwo v. Nwankwo (1992) 4 NWLR (Part.238)693. With regards to Chief Williams' invitation to us to overrule Ogbuagu's case I need only say here that attractive though the invitation, I think that it is not opportune nor is it the appropriate forum to do so. A full panel of this court may have to consider this matter when in future it is canvassed before it. In respect of the injunction granted by the court below, I do not share Chief Benson.

learned Senior Advocate for the Respondents’ view that there is no difference between that granted by the trial court and that which the court below ordered, By the court below in considering its grant delving into a consideration of Exhibit AI which had been ruled as inadmissible
 5 by the trial court as being bogus and which it itself accepted as correctly excluded, it was thereby granting an order of injunction couched under a new guise. Such an order cannot be allowed to stand in the face of overwhelming circumstances to the contrary.

In the result, the entire appeal succeeds and it is allowed by me.
 10 The cross-appeal fails and it is accordingly dismissed. I will make the same consequential orders viz. Orders 1-6 contained in the judgment of my learned brother Belgore, JSC, accompanying which is the draft of his judgment which I have been privileged to read before now and with
 15 which I am in complete agreement. I equally make the same Order as to costs.

IGUH JSC

20 I have had the privilege of reading in draft the lead judgment of my learned brother, Belgore, J.S.C., just delivered.

I entirely agree with the reasoning and conclusion therein. I wish however to add a few words of my own on the all important issue
 25 of the share capital of the 3rd plaintiff company together with whether or not the 1st and 2nd defendants are share holders in the company.

In this connection, the trial court after an exhaustive consideration of the evidence found that-

“the paid up share capital of the company still stands as at today
 30 at N200,000.00”

Earlier on in his judgment’ the learned trial Judge, Odunowo, J. had held as follows:-

“I am convinced that on balance, the contention of the
 35 plaintiffs are right in the sense that the paid up share capital as at 31/5/81 stood at N200,000.00” (underlining supplied for emphasis)

The above findings were not disturbed by the Court of Appeal in the face of abundant evidence in support thereof. Indeed, the Court

of Appeal, in accepting those finding of Odunowo, J. per the lead judgment of Ademola, J.C.A. observed as follows:-

“The contention of the defendants that the share capital of the company is otherwise than N200,000.00 and have not been fully paid for, fails.”

A little later in the said judgment, the Court of Appeal continued as follows:-

“The defendants cannot, in view of the overwhelming evidence in this case (be heard) to dispute the fact that N200,000.00 were fully paid for as at 31/5/87. The 1st and 2nd plaintiffs had a 100% ownership of the shares of the company.

As both of them were at that time the only members of the company, it was clear that they and they only paid for the shares” (Underlining supplied for emphasis)

It is therefore crystal clear, and this is of vital importance in the determination of this appeal, that there are concurrent findings of facts by both the trial court and the Court of Appeal to the effect that as at the 31st May, 1981 the entire 200,000 shares of 20 the 3rd plaintiff company had been fully allotted and paid for. Indeed the Court of Appeal further found, and quite rightly in my view, that the said shares were fully paid for by the 1st and 2nd plaintiffs and that there could not have been any acquisition of shares in the 3rd plaintiff company by the defendants by way of allotment after the said 31st May, 1981. In this regard, the court below commented thus –

“Agreeing with Chief Williams’ submission that if by 31/5/87 the 200,000 shares had been fully paid for mostly by the 1st Plaintiff through the Director’s (of) credit account of the company, and this is the finding of the learned trial Judge in the earlier part of the judgment, it follows, and the argument is very compelling, that anybody besides the 1st and 2nd plaintiffs who wants to acquire shares in the 3rd plaintiff company after the 31st May, 1987 must do so by transfer from the 1st plaintiff or his wife if they are prepared to transfer their share, Acquisition of shares in this company cannot therefore be by way of allotment.”

I have laboured to no small extent to ascertain whether then

aforesaid concurrent findings ought to be disturbed by this court. However, in the face of overwhelming evidence in support thereof; in the absence of any apparent and substantial error on the face of the record of proceedings upon which they were based; the said findings not being perverse and there being no miscarriage of justice or special
5 circumstances to justify their reversal; this court has no option but to uphold them as fully established. See Chikwendu v. Mbamali (1980) 3 - 4 S.C. 31 at 75, Lamai v. Orbih (1980) 5-7 S.C. 28, Ibodov. Enarofia (1980) 5 S.C. 10 42 Woluchemv. Gudi 1981) 5S.C. 291 at 326, Kolav.
10 Coker(1982) 12S.C. 252, Lokoyi v. Oloio (1983) 2 S.C.N.L.R. 127 at 131, Igwego v. Ezeugo (1992) 6 N.W.L.R. (Part 249) 56, National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd. (1986) 1 N.W.L.R. (Part 14) 1 at 36, Eholorv. Osayande(1992)
15 15 6 N.W.L.R. (Part 249) 524 at 548 etc..

15 It is not disputed that the 1st and 2nd defendants were directors of the 3rd plaintiff company from around February 1980. It is also not open to question that the sum of money imported into the country by the 1st and 2nd defendants as their alleged subscription to the capital of the
20 company was only transferred sometime between June and the end of 1982. The said money was therefore transferred well over one year after the 31st May, 1981 on which date all the shares in the company had been fully taken up and paid for by the 1st and 2nd plaintiffs. It seems to me plain in the circumstances that the above concurrent findings of
25 facts, which, as I have observed. I have no reason whatsoever to interfere with, completely ruled out the 1st and 2nd defendant claims to any shares in the company by way of allotment. This is because the 1st and 2nd defendants' alleged subscription to tile capital of the company
30 was only imported into the country after the 31st May, 1981 as aforesaid. And as at the said 31st May, 1981 up to the present moment, it is clear from the established facts of this case that not one single share of the company remained available for allotment to any one. In my view, the aforesaid concurrent findings are more than sufficient for any court
35 to arrive at the inevitable and inescapable conclusion that the 1st and 2nd defendants on the balance of probability acquired no shares by way of allotment from the 3rd plaintiff company. Equally, they are more than

enough to sustain a dismissal of the claims of the 1st and 2nd defendants in respect of their alleged ownership of shares in the 3rd plaintiff company by way of allotment.

With great respect to the learned Justices of the Court of Appeal, I find it extremely difficult to appreciate how in the face of the foregoing findings, they were able to plunge into the arena of speculation and proceeded to hold that the 1st and 2nd defendants must have acquired the shares they claimed by way of transfer or sale. The said court, per Ademola, J.C.A., concluded as follows;-

“Acquisition of shares in this company cannot therefore be by way of allotment. It follows therefore that acquisition of shares by the 1st, 2nd and 3rd defendants must be by way of transfer or sale.....”

(Underlining supplied for emphasis).

With profound respect, it must be pointed out that this resolution of the issue under consideration by the court below is totally unsupported by the evidence before the court and contrary to the contentions of the parties both in their pleadings and in their vivo voce evidence before the trial court. The 1st and 2nd 20 defendants neither pleaded nor based their claim on transfer or sale of the shares they claimed. On the contrary, they specifically pleaded in their statement of defence and based their entire claim to shares in the 3rd plaintiff company by way of allotment. I entertain no doubt, with all due respect to the court below, that their resolution to the effect that the 1st and 2nd defendants are shareholders in the 3rd plaintiff company by way of transfer or sale is a gross misconception and a serious error in law. This is so for several reasons.

In the first place, it is not the duty of a court to endeavour by examination of the evidence to deduce what ought to be or might be the true nature of a claim by a party to a dispute and then proceed to make a declaration or finding which such a party has not specifically sought and may not infact desire. It would be certainly improper for the court so to do unless, of course, it were prepared to order an amendment of the pleadings in which case it would be necessary to give the other party an opportunity of what would be an entirely different case. See Emegwora v. Nwaimo 14 W.A.C.A. 347 at 348. Put differently, it is not

and has never been the function of a court of law by its own ingenuity

or exercise to imagine, speculate on or to supply evidence or work out the mathematics of arriving at an answer in a case which only evidence tested under cross-examination could supply. See George Ikenye & Another v. Akpala Ofune and others (1985) 2 N.W.L.R.1.

5 In the second place, it is a basic principle of law that parties are bound by their pleadings and that evidence which is at variance with the averments in the pleadings goes to no issue and should be discountenanced or disregarded by the court. See Emegokwuev. Okadigbo (1973)3 E.C.S.L.R. 267, Ekpenyongand others v. Chief Ayi (1973) 3
 10 E.C.S.L.R. 411, Kalu Njokwu and others Ekwu Ene and others (1973) 5 S.C. 293 etc.

Thirdly, it is a fundamental principle in the determination of disputes between parties that judgment must be confined to the issues raised by the parties in their pleadings and not otherwise. It is therefore
 15 not competent for the court suo motu to make or formulate a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before it. See Commissioner for Works Benue State and Another v. Devcon Devel-
 20 opment Consultants Ltd. and Another (1988) 3 N.M.L.R. (Pan 83) 407, Ochonwa v. Oshirim Unosa (1985) N.M.L.R. 329, Nigerian Housing Development Society Ltd. and another v. Yaya Mumuni (1977) 2 S.C. 57, Adeniji and others v. Adeniji and others (1972.) 1 All N.L.R. (Part 1) 278 and AC.B. Ltd. v. Attorney-General, Northern Nigeria (1969)
 25 N.M.L.R. 231. To act otherwise might well result in the denial to one or the other of the parties of his right to fair hearing. See Metalimpex v. A G. Leventis and Co. Ltd. (1976) 2 S.C. 91, Alhaji Ogunlowo v. Prince Ogundare (1993) 7 N.W.L.R. (Part 307) 610 at 624 and Oniah v. Onyia
 30 (1989) 1 N.W.L.R. (Part 99) 514.

As I have already stressed, the 1st and 2nd defendants at no time pleaded or relied on their acquisition of shares in the 3rd plaintiff company by way of transfer or sale. There was infact no iota of evidence from the 1st and 2nd defendants on the issue of their alleged
 35 acquisition of shares in the 3rd plaintiff company by way of transfer or sale. In the circumstance, it seems to me clear that the court below by wading obviously slipped and consequently fell into a serious error of law which resulted in its erroneous allocation of non existent shares to the

1st and 2nd defendants. It appears to me that the 1st and 2nd defendants having failed to prove the case of allotment which they pleaded, that should have been the end of their claim in respect of title to any shares in the company. It is my view that in the face of the evidence before the court, both the trial court and the court below should have had no option 5 than to dismiss the 1st and 2nd defendants' claims as misconceived and lacking in merit. This is without prejudice to whatever claims the 1st and 2nd defendants may have against the plaintiffs in connection with whatever amount they imported into the country in respect of the affairs 10 of the 3rd plaintiff company.

It is for the above and the more elaborate reasons set out in the lead judgment of my learned brother, Belgore, 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 15 their entirety including those as to costs.

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