

SUPREME COURT OF NIGERIA
28TH APRIL, 1995. SC. 270/1988
CORAM:- M. BELLO CJN, S.M.A. BELGORE,
E.O. OGWUEGBU, U. MOHAMMED, Y.O. ADIO, JJSC.

1. JALLCO LIMITED
2. JOHN HOLT LIMITED APPELLANTS

AND

OWONI BOYS TECHNICAL
SERVICES LIMITED RESPONDENT

AGENCY - Holding out as principal - Though not clearly pleaded - Whether proved from the facts in evidence.

AGENCY - Apparent or ostensible authority doctrine - Whether applicable in holding both appellants liable - As concurrently found by the two lower courts.

APPEALS - Issue - That does not flow from any of the grounds of appeal - Whether to be struck out.

CONTRACTS - Interest - On the amount due under the parties' contract - Whether to antedate the date of judgment - When there was no agreement between the parties on payment of interest.

EVIDENCE - Proof - Where respondent proved his assertion - That several amounts due to him were not paid - The onus is on the appellants to prove the contrary.

EVIDENCE - Key witnesses - Failure of the defence to call them - Whether fatal to their case.

EVIDENCE - Unfavourable evidence - Defendants' failure to produce key witnesses - Whether court is entitled to presume - That such evidence would be unfavourable to them.

EVIDENCE- *Proof - Whether an item in plaintiffs claim was proved - When it failed to tender the relevant document.*

JUDGMENTS - *Interest on judgment debt - Under the relevant Kwara State rules of court - Whether properly determined.*

LIMITATION OF ACTIONS - *Statute bar - wrong entries in account - Whether time began to run when the entries were made - Or when the respondent became aware of the error.*

PLEADINGS - *Rule of pleadings - Duty of court is to determine real issues in controversy - Strict application of rule of pleadings - May lead to miscarriage of justice.*

FACTS

The plaintiff/respondent had a dealership agreement with the 1st appellant/defendant on sale of vehicles. In course of the relationship, 2nd appellant was held out as the parent company and the dealership relationship went on between the respondent and the appellants. Certain sums of money due to the respondent were not credited to its account and some of the said due credits were erroneously debited against respondent's account. These facts were not known to the respondent until after several years. It demanded for all the amount due to it to be credited which the appellants declined. The respondent filed an action before the Kwara State High Court Ilorin claiming the total sum of N411,109.81.

The trial court found for the respondent and awarded the sum of N400,108.41 plus interest at the rate 10% per annum antedating the judgment date. And 10% interest on the judgment debt until it is liquidated. Appellants' appeal to the Court of Appeal was partly upheld as that court disallowed one of the items awarded to the respondent as not having been proved. It disallowed the interest antedating the judgment date. Being dissatisfied the appellants appealed against the entire judgment of the lower court while the respondent cross-appealed against the unfavourable aspect of that judgment. The Supreme Court now has to determine inter alia, whether the onus was on the appellants to prove that they had paid the respondent all its entitlement.

HELD Unanimously dismissing the appeal and the cross-appeal per lead judgment of **MOHAMMED JSC**)

Agency - Holding out as principal

1. I agree that there is no ground of appeal challenging the lower courts' decision that the 1st appellant was agent of the 2nd appellant. However, the essence of pleading is that each party must know the case he has to meet and must not be taken by surprise at the trial. Although agency was not clearly pleaded, in this case, the averments of the two parties in their respective pleadings and the evidence adduced before the trial High Court imply that the 2nd appellant which was the holding company of the 1st appellant held itself out to the respondent as the principal of the 1st appellant in this dealership agreement. In proof of this contention some salient facts which were part of the evidence before the trial court have been identified by the learned counsel for the respondent as the factors which convinced the trial court that both appellants were liable to the claim of the respondent. (p. 969 D)

Agency - Apparent and ostensible authority doctrine

2. Evidence had been adduced before the trial High Court showing that each of the appellants and its officers dealt with the respondent during the course of the dealership agreement. Under the doctrine of apparent or ostensible authority where a person by words or conduct represents to a third party that another has authority to act on his behalf, he may be bound by the acts of that other as if he had in fact authorized them. The two lower courts, in the case in hand, had made concurrent findings on the facts disclosed above and, in my view, those facts pointed clearly that both appellants were liable to the claim of the respondent. (p. 970 C)

Proof - Where respondent proved his assertion

3. It is trite that he who asserts must prove it. The respondent in this action asserted that he was a stockist and dealer appointed by the 1st appellant. He proved through documentary evidence that in the course of the dealership agreement several amounts due to him which were to be credited to his account with the appellants were not paid. In some cases, instead of crediting his accounts the appellants debited them. Some erroneous entries were also discovered in his discount account. The respondent in this suit alleged that he had not been paid his entitlements which were due through the dealership agreement. I do not see where the Court of Appeal had erred if the learned justice says that the onus is on the appellants to prove that they had paid the respondent all his entitlements. The burden of proving a particular fact is on the party who seeks to rely on it and who will fail where

such evidence is not adduced Such a party must discharge the onus by proving through evidence which will convince the court or tribunal of the probability of his case on the point in issue. (p. 970 F)

B *Key witnesses - Failure of the defence to call them*

4. The matter dealt with in issues 3 and 4 in this appeal concerned the failure of the defence at the trial court to call some key witnesses who were allegedly connected with the transaction between the appellants and the respondent. PW1 who is the Managing Director of the plaintiff company mentioned the names of those witnesses when he gave evidence before the trial court. Learned counsel for the appellants queried why the Court of Appeal said in its judgment that failure to call those witnesses was fatal to the case of the appellants. Here again the lower court was justified to make such a finding. (p. 971 B)

D

Unfavourable evidence - Presumption

5. Learned counsel for the respondent submitted, on this issue, that where the conduct and the affairs of a particular Manager and accountant in respect of a specific transaction is in dispute it is that manager, accountant or officer who would explain documents made by them in support of company's position in the dispute that would testify on behalf of the company and not officers who never had anything to do with the transaction. I agree with this submission because what the Court of Appeal did was mere presumption of law which it is justified to do by drawing certain inferences from the facts of the case. Under S. 148(d) of the Evidence Act, the court is entitled to presume that any evidence which could be and is not produced, would if produced, be unfavourable to the person who withholds it. (p. 971 G)

G *Statute bar - Wrong entries in account*

6. In considering whether an action is statute barred, it is relevant to ask. "When does time begin to run"? It is crystal clear from the facts of this case that the respondent had not become aware of the wrong entries in his accounts until in 1980/81. That being the case, the right of action accrued when the respondent's demand to have his account credited was denied and refused, and this happened in 1980/81. The claim of the respondent is not therefore statute barred. (p. 972 G)

Issue - That does not flow from any of the grounds of appeal

7. I have looked at the averment of the learned counsel for the appellants in issue 6 and I agree that it does not flow from any of the grounds of appeal filed. This Court had made several pronouncements that only issues formulated within the parameters and context of the grounds of appeal can be determined in an appeal. Issue 6 is therefore struck out. (p. B 973 B)

Whether an item in plaintiff's claim was proved

8. The learned justice thereafter opined, quiet rightly, in my view, that without job cards the claim in item II has not been proved. I entirely agree C with the learned justice because the issue of job cards was introduced by the Managing Director of the cross-appellant. When he gave evidence the Managing Director failed to produce, as an exhibit, any of the job cards which he said was the basis of his claim for first free service. (p. 975 B)

D

Rules of pleading - Duty of court

9. The duty of courts is to determine the real issues in controversy as they appear in the evidence. Strict application of the rule of pleadings is capable sometimes of leading to miscarriage of justice, hence the Courts have been vested with wide powers of amendment of pleadings. The Court E of Appeal under S. 16 of Court of Appeal Act and the Supreme Court under section 22 of Supreme Court Act can always resort to the general powers vested in them and make a necessary order for determining the real question in controversy between the parties in the appeal. From the foregoing it is quite clear that the issue in controversy between the parties in respect of the claim for N50,051.20 cannot be resolved without the production of job cards. Failure to tender them as exhibits is fatal to the claim of the cross-appellant. The Court of Appeal is therefore correct to set aside that award. (p. 975 E)

G

Interest on the amount due under the parties' contract

10. It is pertinent to pause here and ask, "where was it contemplated by the dealership agreement between the parties in this suit to pay interest on all amounts due to the cross-appellant? There was no mercantile custom either for payments of interests in their dealership agreements. The issue of fiduciary relationship does not arise, since it is not the cross-appellants' case before the trial court. To crown it all the Managing director of the cross-appellant told the trial court during his testimony that there was no agreement on payment of interest between the parties. (p. 976 C)

H

Interest on judgment debt

11. The law in respect of payment of interest relevant to Kwara State is Order 27 Rule 8 of High Court (Civil Procedure) Rules 1975 and it provides for payment of interest at the rate of 10% per annum in respect of judgment debt only. The award of interest in Nigeria is still governed by the Common Law principle and practice as stated by this Court in the case of Reuben N.A. Ekwunife v. Wayne (West Africa) Limited (supra). The Court of Appeal is therefore right in ordering interest to be paid by cross-appellants only on the judgment debt from the date of judgment until final liquidation. (p. 976 D)

REPRESENTATION

M. A. O. Okulaja for the appellants and cross-respondents
Akin Olujimi, for the respondent and cross-appellant

D

CASES REFERRED TO

Solomon v. Solomon (1897) A.C. 22

African Continental Seaways v. N.D.R.G.W. Ltd. (1977) 5 SC. 235/250

Lukan v. Ogunsusi (1972) 5 SC. 40

E Odiete v. Okotie (1972) 6 SC 83

Fadare v. Attorney-General of Oyo state (1982) N.S.C.C. 52 at 60

Board of Trade v. Cayner Irvine and Co. Ltd (1927 A.C. 610

J.I.G. v. Oniah (1989)1 NWLR (Pt 99) 514

Ekwunife v. Wayne (West Africa) Limited (1989) 5 NWLR (Part 22) 422 at

F 448

STATUTES & RULES REFERRED TO

Limitation Decree s. 57(1)

Court of Appeal Act s. 16

G Supreme Court Act s. 22

Kwara State High Court (Civil Procedure) Rules 1975 0.27 r. 8

LEAD JUDGMENT BYMUHAMMED JSC

The respondent was appointed stockist and reseller for J. Allen and Company Limited for Kwara State. In the dealership agreement the respondent was selling heavy commercial vehicles, passenger cars, tractors, spare parts and Yamaha motor-cycles. The pattern of trading activities between the parties were occasional cash purchases, deposit of funds by cheques and drafts. Three distinct accounts were therefore opened and

maintained by the 1st appellant on respondent's behalf into which all agreed discounts due to the respondent were to be paid.

In 1985 the respondent filed a writ of summons in Ilorin High Court, Kwara State, claiming, initially against the 1st appellant, various sums of money totaling N411,109.81k, the break down of which is as follows:

"(i) 21/2% discount of 285 commercial vehicles on retained account which B amounts to N84,803.47 and 5% retained discount for 234 passenger vehicles which amount to N32,192.95K

(ii) N50,051.20 being amount due to the plaintiff to be credited as allowance for first free service of 336 vehicles carried out at Ilorin.

(iii) N30,046.871/4 of 10% of monthly purchases wrongly debited instead C of credit as shown in statement of accounts in breach of agreement.

(iv) N50,270.30 being amount due to the plaintiff for wrong accounting debit entries made in vehicle account for which the plaintiff is entitled to be credited having been satisfied from deposits made into vehicle Account.

(v) N131,673.72 being money meant as deposit into the vehicle account D paid to the 1st defendant by the plaintiff Banker at Ilorin but for which the plaintiff account was not credited.

(vi) N32,071.30 being amount wrongfully double debited as duplication of items supplied to the plaintiff in vehicle/motor cycle account."

Later, during the course of the proceedings the plaintiff applied and E was granted leave to join John Holt as 2nd defendant to the suit. Again, when P.W.1 was testifying before the trial High Court it was revealed that J. Allen had ceased to exist. The Company changed its name to Jallco Limited. The plaintiff applied to the court to change the name of the 1st defendant. The application was granted. There was a counter claim filed by the F 1st defendant against the plaintiff claiming the sum of N55,170.68 being money owed the 1st defendant by the plaintiff as per some listed invoices.

At the end of the trial learned trial Judge, after considering the evidence adduced through mainly various documentary exhibits, awarded to the plaintiff a total sum of N400,108.41. In addition the court ordered G the 1st defendant to pay the plaintiff 10% per annum interest from 1981 to the date of judgment on the total judgment sum of N400,108.41 and thereafter 10% per annum interest on the total judgment debt until the final liquidation of the judgment debt. On the counterclaim the learned trial Judge found that, in its defence to the counter-claim, the plaintiff pleaded H res judicata because the amount claimed by the 1st defendant constituted the action in suit No. 1/308/81 between the plaintiff and the 1st defendant which was fully heard and determined by a High Court in Ibadan in favour of the plaintiff. The 1st defendant also failed to adduce any evidence in

support of the counter-claim and that, according to the learned trial Judge, amounted to abandonment of the counter claim. In consequence, the court dismissed the claim.

Dissatisfied with the decision of the High Court, the defendants appealed to the Court of Appeal, Kaduna Division. The Court of Appeal, in a considered judgment, per Akpabio, J.C.A. (with which Aikawa and Achike JJ.C.A. concurred) affirmed five of the six awards made by the High Court in favour of the plaintiff. Item 11 which the Court of Appeal found not proved is in respect of a claim for N50,051.20 being amount said to be due to the plaintiff to be credited as allowance for "first free service" of 336 vehicles carried out at Ilorin. The Court of Appeal held that the only satisfactory way to prove that first free service has been carried out on any particular vehicle was to tender the job card. The Court of Appeal went further, in its judgment, on this issue and said:

"It is our view that 1st defendant was right in insisting on seeing the job cards before making any payment; and we will also insist on doing so. The learned trial Judge had dismissed this defence of 1st defendant as an "after-thought". But we find that the defence about the necessity to produce coupons was pleaded by the 1st defendant at paragraphs 15 and 16 of his further amended statement of defence and also raised at the trial; plaintiff/respondent had adequate notice about that line of defence, and so should have been prepared to produce and tender the job cards at the trial. It must be admitted that paragraphs 15 and 16 of statement of defence of 1st defendant spoke only of coupon and did not mention job card. But this court holds that without the job cards, the claim in item (ii) has not been proved. Plaintiff/Respondent claimed that he had the job cards in the same way he had tendered a file containing sales invoices in Exhibit 8, 9 and 10? We have no alternative but to invoke the presumption contained in S.148(d) of Evidence Act, against the plaintiff, i.e. either that the job cards did not exist, or that if they existed and were tendered, they would have been unfavourable to plaintiff who withheld them. In view of these facts, we hold that item No. (ii) about first free service was not proved with the certainty it deserved, and should have been disallowed by the learned trial Judge.

The appeal in respect of this item will therefore succeed."

The Court of Appeal, in addition, directed that interests on the judgment debt and costs shall be payable with effect from the date of judgment of the lower court and not from 1981.

Both parties were not satisfied with the judgment of the Court of

Appeal. The appellants filed an appeal against the whole decision and, in a cross-appeal, the respondent challenged the propriety of the Court of Appeal setting aside the grant of N50,051.20 and the award of 10% interest on the debt due from 1981 to the date of judgment. Learned counsel for the appellant filed four grounds in support of the appeal and raised the following six issues from those grounds:

"1. Whether on the totality of the evidence adduced before the trial Court, the Court of Appeal was right to have held that the trial court correctly found that the second appellant was in any way indebted to the respondent:

2. WHETHER the learned Justices of the Court of Appeal were right when they held that the onus was on the appellants to prove that they had paid the respondent all his entitlements:

3. WHETHER the failure of the appellants to call as witnesses the Dealership Manager of 2nd appellant for West, Kwara State and the General Sales Manager was fatal to the case of the appellants:

4. WHETHER the fact that none of the three witnesses called by the appellants was a Dealership Manager made them not to be credible witnesses:

5. WHETHER the learned Justice of Appeal was right when he held that the date of accrual of most of the claims must be taken to be 1980 or 1981 and that therefore they were not caught by the Limitation Act 1966:

6. WHETHER the failure of the appellant to cite the Limitation Act 1966 and to give particulars of that Statute including section and sub-section relied upon was sufficient to defeat a defence based upon the Act, if otherwise applicable; and whether in any event it was not the duty of the respondent to have pleaded concealed fraud as provided for under the Act bearing in mind the other averments in the respondents pleading."

I have observed that the issues formulated by the learned counsel for the respondent for the determination of the main appeal now more appropriately from the grounds filed for this appeal. The issues have been couched thus:

"(i) Whether the lower court ought not to have allowed the appeal of the 2nd appellant having found that the summing up of the evidence by the trial court was somehow defective as regards the 2nd defendant appellant.

(ii) Whether the lower court properly considered the question of the onus of proof in this case.

(iii) What on the evidence on the record should be the date for reckoning the accrual of the plaintiffs cause of action in this case.

(iv) Whether the evidence produced by the appellants in defence of this

case was sufficient to dislodge the evidence called by the plaintiff in support of its case."

The main argument of the learned counsel for the appellants, on issue 1, is that the claim of the respondents at the trial court was in contract. Going by the pleadings and the evidence it was plain that the contractual relationship which was the basis of the action in the High Court was between respondent and 1st appellant. Since it was the dealership agreement that resulted in the claims of the respondent, it would be wrong in law to make anybody who was not a party to that dealership agreement liable under it. Counsel further stressed that there was no way one would stretch the said agreement and say that the 2nd appellant was a party to it. In attacking the decision of the Court of Appeal on this issue, learned counsel referred to a portion of that court's judgment, which I reproduce as follows;

"It is our considered view that all the above statements and declarations in documents published by the defendants/respondents themselves to the whole world have sufficient evidence from which the learned trial Judge could rightly come to one and only conclusion that 1st defendant/respondent was a subsidiary of 2nd defendant/respondent being run and owned by the same group of people. The relationship between 1st defendant/respondent and 2nd defendant/respondent was at best that of parent and child or at worst that of a successor in title and not that of sister companies as the 2nd defendant/respondent would want the court to believe. He was therefore right in holding that the two defendants were jointly liable in this suit."

Counsel thereafter questioned whether a holding company is liable for the misdeeds or debts of its subsidiary when both of them are separate and distinct legal entities in law. Could a father ipso facto be liable for the misdeeds or debt of his son. He then referred to the cases of *Salomon v. Salomon* (1879) A.C. 22 and *African Continental Seaways v. N.D.R.G. W. Ltd.* (1977) 5 SC. 235/250 in which this court held that:

"A holding company is no more than a controlling shareholder of its subsidiary that fact does not make it the principal of its subsidiary."

In conclusion, learned counsel brought in the issue of agency. He referred to an English case of *Ebbw Vale UDC. v. South Wales Traffic Licensing Authority* (1951) 1 All E.R. 806 at 808 in which Lord Justice Cohen held that under the ordinary rules of law a parent company and a subsidiary company, even a hundred percent subsidiary company, are distinct legal entities and in the absence of a contract of agency between the

two companies one cannot be said to be the agent of the other.

In response to the issue of agency now raised, learned counsel for the respondent drew this court's attention to the grounds of appeal filed by the appellants and submitted that there was no ground of appeal specifically challenging the holding of the lower court that the 1st defendant was agent of the 2nd defendant. Even if there was such a ground of appeal, B counsel argued that there was enough evidence before the trial High Court pointing to the fact that the 1st appellant was agent of the 2nd appellant. What is necessary for a party alleging agency in a case to do is to produce evidence in support of it. He submitted that the decision of this Court in African Continental Seaways v. N.D.R.G. W. Ltd. (supra) is in fact in sup- C port of this view. I have looked at that authority and what this Court decided, in that case, was that the trial court was in error to have decided that case on the issue of the agent of a disclosed principal, an issue not raised or relied upon by either party in the pleadings.

I agree that there is no ground of appeal challenging the lower D court's decision that the 1st appellant was agent of the 2nd appellant. However, the essence of pleading is that each party must know the case he has to meet and must not be taken by surprise at the trial. Although agency was not clearly pleaded, in this case, the averments of the two parties in their respective pleadings and the evidence adduced before the trial High E Court imply that the 2nd appellant which was the holding company of the 1st appellant held itself out to the respondent as the principal of the 1st appellant in this dealership agreement. In proof of this contention some salient facts which were part of the evidence before the trial court have been identified by the learned counsel for the respondent as the factors F which convinced the trial court that both appellants were liable to the claim of the respondent. Some of those facts are:

(i) The defence of the 1st defendant at the trial was that it was no longer a trading company and that its business had been taken over by the 2nd defendant.

(ii) The 2nd defendant was consequently joined as a defendant and it never objected but filed a defence to join issues with the plaintiff on pleading.

(iii) The admission of the 2nd defendant that it bought the net assets of the 1st defendant in 1981 and that it had been carrying on the business of the 1st defendant.

(iv) The 2nd defendant also admitted that some of its staff knew of the transaction between the plaintiff and the 1st defendant.

(v) It was not in dispute that the 2nd defendant issued cheques in 1980 and 1983 to the plaintiff to settle debt of the 1st defendant.

(vi) *That almost all the sales invoices tendered at the trial had the name of the 2nd defendant on them.*

(vii) *The two appellants/defendants were sued jointly and severally.*

(viii) *All the receipts and letter headings issued by the 1st defendant as well as invoices bear the name of the 2nd defendant - See in particular Exhibits*

B 1,2,3,4,8,9, 10, 56 and 61 to 71.

(ix) *The uncontroverted evidence of P.W. 1 is that Allanson, Pretty James Cavelo and Seward, all top functionaries of the 2nd defendant played prominent roles in the business relations between the plaintiff and the 1st defendant."*

C It is undutiful that the above undisputed facts created a legal relationship between the appellants jointly and severally and the respondent. Evidence had been adduced before the trial High Court showing that each of the appellants and its officers dealt with the respondent during the course of the dealership agreement. Under the doctrine of apparent or ostensible D authority where a person by words or conduct represents to a third party that another has authority to act on his behalf, he may be bound by the acts of that other as if he had in fact authorised him. See *Lukan v. Ogunsusi* (1972) 5 SC. 40 or (1975) 1 All NLR (Pt. 2) 41. The two lower courts, in the case in hand, had made concurrent findings on the facts disclosed above E and, in my view, those facts pointed clearly that both appellants were liable to the claim of the respondent.

In issue 2 the appellants complained against the statement in the judgment of the Court below where the learned Justice of the Court of Appeal, Akpabio, J.C.A., held that the onus was on the appellants to F prove that they had paid the respondent all his entitlements. It seems to me that the learned counsel for the appellants had taken irrelevant considerations in making this issue a serious ground of appeal. It is trite that he who asserts must prove it. The respondent in this action asserted that he was a stockist and dealer appointed by the 1st appellant. He proved through G documentary evidence that in the course of the dealership agreement several amounts due to him which were to be credited to his account with the appellants were not paid. In some cases, instead of crediting his accounts the appellants debited them. Some erroneous entries were also discovered in his discount account. The respondent in this suit alleged that he had not H been paid his entitlements which were due through the dealership agreement. I do not see where the Court of Appeal had erred if the learned Justice says that the onus is on the appellants to prove that they had paid the respondent all his entitlements. The burden of proving a particular fact is on the party who seeks to rely on it and who will fail where such evidence

is not adduced. Such a party must discharge the onus by proving through evidence which will convince the court or tribunal of the probability of his case on the point in issue. See *Odiete v. Okotie* (1972) 6 SC 83. The case of *Akinfosile v. Ijose* (1960) SC NLR 447 (1960) 5 FSC 192 which learned counsel for the appellants cited in the appellants' brief is also relevant to this issue.

The matter dealt with in issues 3 and 4 in this appeal concerned the failure of the defence at the trial court to call some key witnesses who were allegedly connected with the transaction between the appellants and the respondent. P.W.1 who is the Managing Director of the plaintiff company mentioned the names of those witnesses when he gave evidence before the trial court. Learned counsel for the appellants queried why the Court of Appeal said in its judgment that failure to call those witnesses was fatal to the case of the appellants. Here again the lower court was justified to make such a finding. P.W.1 gave the following evidence before the trial court in his testimony:

"I was appointed stockist and retailer by J. Allen. The appointment was made orally and then confirmed in writing. Mr. Cavalo and Mr. Banjo of the John Holt came to collect the original of the agreement from me saying that they had some corrections to make. I have the photocopy. Mr. Cavalo was the General Sales Manager while Banjo was dealership Manager for West and Kwara. I have written several letters of demand to Cavalo and Banjo for the amended original but nothing is produced. I have caused to be served on the defence a notice to produce but nothing is produced."

Instead of calling Mr. Cavalo and Mr. Banjo to repudiate, deny or correct the statement made by P.W.1 the defence called one Benerd Adeniyi Upade as D.W.2 and Paul Iwezuke as D.W.3 both of whom feigned ignorance of the transaction between the appellants and the respondent. D.W.2 said in evidence:

"I was never involved in the business transaction between the plaintiff and the 1st defendant. I know all that I knew from the records."

Paul Iwezuke also told the trial court that he had never seen the comprehensive statement of account of the plaintiff company from 1969 to 1983. Learned counsel for the respondent submitted, on this issue, that where the conduct and the affairs of a particular Manager and accountant in respect of a specific transaction is in dispute it is that Manager, accountant or officer who would explain documents made by them in support of company's position in the dispute that would testify on behalf of the company and not officers who never had anything to do with the transaction. I agree with this submission because what the Court of Appeal did was mere presumption of law which it is justified to do by drawing certain inferences from the facts of the case. Under S.148(d) of the Evidence Act, the court is

972 Jallco Ltd v Owoniboy's Tech. Serv. Ltd (1995) 4 KLR Mohammed JSC entitled to presume that any evidence which could be and is not produced, would if produced, be unfavourable to the person who withholds it.

I now move to issue 5. The question here is whether the learned Justice of the Court of Appeal was right when he held that the date of accrual of most of the claims must be taken to be 1980 or 1981 and that therefore they were not caught by the Limitation Act. The appellants referred to some communications between the appellants and respondents over the award of N116,996.42, which the trial court made in favour of the respondent. Learned counsel for the appellants submitted that the respondent was aware of this claim since 1974 and since it failed to claim it until 1984, the action is statute barred. Counsel referred to a letter which P.W.1 wrote to the 1st appellant in 1974 in which he admitted that Exhibits 24, 7A, 7B and 7C were sent to him when he requested for statement of account in respect of vehicles, spare parts and discount Account. Learned counsel referred to other pieces of evidence which stand as proof of the fact that the respondent was, in 1974, supplied with all facts upon which it could have founded this claim.

Respondent's counsel on the other hand, submitted that the case of the respondent as decided by the trial court and affirmed by the Court of Appeal was that the servants of the appellants gave the impression that the plaintiffs accounts were credited. But the truth was revealed when in 1980/81 the 1st appellant sued the respondent for a debt allegedly not paid for in Ibadan High Court. The respondent's Managing Director in his evidence in the case in hand before the trial court explained that it was during the trial in Ibadan High Court that he discovered that the appellants fraudulently concealed the truth from him. Under S. 57 (1) of Limitation Decree the right of action will be available once there is fraudulent concealment of facts to a party.

Appellant's counsel now argued that fraud was not pleaded by the respondent. Because of this submission, during the hearing of this appeal, we asked counsel to show us where respondent pleaded fraud. He referred us to the Reply to the Statement of Defence where it was quite clear that fraud was pleaded. In considering whether an action is statute barred, it is relevant to ask. "*When does time begin to run?*" This Court, in the case of *Fadare & Ors. v. Attorney-General of Oyo State* (1982) NSCC 52 at 60 referred to the case of *Board of Trade v. Cayzer*.

Irvine and Co. Ltd. (1927) A.C 610 where it was held.

"Time, therefore, begins to run when there is in existence a person who can sue and another who can be sued, and all facts have happened which are material to be proved to entitle the plaintiff to succeed."

It is crystal clear from the facts of this case that the respondent had not

become aware of the wrong entries in his accounts until in 1980/81. That being the case, the right of action accrued when the respondent's demand to have his account credited was denied and refused, and this happened in 1980/81. The claim of the respondent is not therefore statute barred.

I have looked at the averment of the learned counsel for the appellants in issue 6 and I agree that it does not now form any of the grounds of appeal filed. This Court had made several pronouncements that only issues formulated within the parameters and context of the grounds of appeal can be determined in an appeal. See Chief Obi J.I.G. Onyia v. Louis Oniah (1989) 1 NWLR (Pt. 99) 514. Issue 6 is therefore struck out. C

In conclusion this appeal fails and it is dismissed. The judgment of the Court of Appeal is hereby affirmed.

I will now consider the cross appeal. The cross-appellant who is respondent in the main appeal filed 4 grounds of appeal and formulated the following issues from those grounds. D

"1. Whether the Justices of the Court of Appeal properly exercised their judicial powers in setting aside the award of the sum of N50,051.20K on grounds of none production of job cards and by reason of presumption under section 148(d) of the Evidence Act.

2. Whether the award of the sum of N50,051.20K made by the Trial High Court was validly set aside by the Court of Appeal on grounds of Limitation Law.

3. Under what circumstances in Law and Equity is a claimant entitled to award of interest on money wrongly withheld and if the circumstances favour the award made by the Trial High Court and whether failure of the court of appeal to sustain the award and follow its earlier decision in appeal No. CA/L/8/85 Wema Bank Limited & Another v. Anthos Philalithis delivered earlier on 9th February, 1987, did not occasion miscarriage of justice and uncertainties in the Law." F

The cross respondent adopted issues 1 and 2 above and modified G issue three thus:

"Issue No.3

Whether the court below was right in disallowing the order of the High Court ordering a payment of interest on an unpaid debt in contradistinction to a judgment debt from the date of accrual of the debt." H

An issue totally unrelated to the grounds of appeal filed by the cross-appellant was introduced by the cross respondent, as issue 4. It is a clever way of introducing irrelevant argument and I waste no time in striking it out.

The setting aside of the N50,051.21 award which was granted by

the trial High Court is the basis upon which issue 1 was formulated. I have reproduced, in the main appeal, part of the decision of the Court of Appeal and reasons for the said decision in which it set aside the award of N50,051.21. Learned counsel for the cross appellant argued in support of this issue that the foundation of its claim was in paragraphs 18-22 of the amended statement of claim. The basis of the claim was that allowance at agreed rates would be paid for *"after sales of all vehicles resold at Ilorin but were not returned to Ibadan for first free service"*. The defendants in the statement of defence paragraph 15 averred that the agreement was that the plaintiff would supply the 1st defendant with coupons on the vehicles so serviced. The coupons were to be forwarded to the manufacturers of the vehicle by the 1st defendant and the manufacturers were to pay the plaintiff based on the coupons through the defendant. In paragraph 16 the 1st defendant averred that at no time did the plaintiff supply coupons amounting to N51,844.00 or any sum at all.

Learned counsel for the cross-appellant argued that job cards were not pleaded and the Court of Appeal was in error to set aside the award of N50,051.21 made by the trial High Court because job cards were not supplied. It is interesting to observe that P.W.1 who was the Managing Director of the cross-appellant was the first to introduce the issue of job cards when he testified before the court. In his evidence P.W.1 said:

I have job cards for all the vehicles sold and serviced". Further down in his testimony he said, "I am claiming in respect of what is on the job card for first service and for all vehicles sold by me for J. Allen. He denied knowledge of anything about coupon or making returns for service. It was in answer to the evidence of P.W.1 on job cards that D.W.2 testified and explained how a claim could be made for first free service. Part of his evidence on that issue is as follows:-

"As a sub-dealer if vehicles were sold to him for sale to other customers -and on which he has to carry the 1st free service for every vehicle there must be what we call first free service voucher. When services are carried out, there must be job card, raised by the sub dealer which will indicate the particulars of the vehicle, the name of the owner and the mileage. The customer has to sign the job card and the voucher without which the manufacturing company would not honour the voucher. The job card and the vouchers would then be sent to us being the main distributing company."

The learned trial Judge in considering the claim for N50,050.20 in respect of first free service considered the relevance of job cards and found that the cross appellant tendered Exhibit 16 which indicated the date of

engine, number, model/type of vehicle and amount due as was compiled from all the ledgers and job cards connected with the servicing of vehicles from 1975 to 1982. The cross-appellant was successful in this head of claim due to this finding. On appeal to the Court of Appeal the cross-appellant re-introduced the issue of job cards in its brief. The learned justice of the Court of Appeal observed that paragraphs 15 and 16 of the Statement of Defence spoke only of coupon and did not mention job card. The learned justice thereafter opined, quite rightly, in my view, that without job card the claim in item II has not been proved. I entirely agree with the learned Justice because the issue of job cards was introduced by the Managing Director of the cross-appellant. When he gave evidence the Managing Director failed to produce, as an exhibit, any of the job cards which he said was the basis of his claim for first free service.

The matter in dispute between the parties in respect of this issue cannot be resolved without considering the relevance of job cards to the claim for first free service. Both parties adduced evidence on the relevance of the job cards and there is agreement between the parties that a claim for first free service is made in respect of what is on the job card. The cross appellant having won at the High Court in this claim was silent over the failure of the parties to plead job cards. Now that it has lost that award in the Court of Appeal, it became awakened to the rules of pleading - I think it has already checkmated itself. The duty of courts is to determine the real issues in controversy as they appear in the evidence and not to punish them for the mistakes which they make in the conduct of their cases. Strict application of the rule of pleadings is capable sometimes of leading to miscarriage of justice. Hence the Courts have been vested with wide powers of amendment of pleadings. The Court of Appeal under S. 16 of Court of Appeal Act and the Supreme Court under section 22 of Supreme Court Act can always resort to the general powers vested in them and make a necessary order for determining the real question in controversy between the parties in the appeal.

From the foregoing, it is quite clear that the issue in controversy between the parties in respect of the claim for N50,051.20 cannot be resolved without the production of job cards. Failure to tender them as Exhibits is fatal to the claim of the cross-appellant. The Court of Appeal is therefore correct to set aside that award. I will not consider the second issue which was formulated on the Limitation Law since I have dismissed the appeal in respect of the award of N50,05.20.

The third issue, in this cross-appeal arose from the decision of the trial High Court wherein it ordered the 1st cross-respondent to pay the cross-appellant 10% interest per annum from 1981 to the date of judgment

which was 30/10/86, on the adjudged total sum of N400,108.41. The Court of Appeal set aside this award and made the cross-respondent to pay 10% interest per annum on the judgment debt from date of judgment until final liquidation. The learned counsel for the cross appellant argued that the Court of Appeal was wrong and referred to an unreported Court of Appeal decision in the case of Wema Bank Limited v. Anthros. Philathis Appeal No. CA/L/8/85 delivered on 9/2/87. Counsel also referred to this Court's decision in Reuben N.A. Ekwunife v. Wayne (West Africa) Limited (1989) 5 NWLR.(Pt. 122) 422 at 448, in which it was held, inter alia, that interest may be claimed as a right where it is contemplated by the agreement between the parties or under a mercantile custom or under a principle of equity, such as breach of fiduciary relationship.

It is pertinent to pause here and ask, "where was it contemplated by the dealership agreement between the parties in this suit to pay interest on all amounts due to the cross-appellant? There was no mercantile custom either for payments of interest in their dealership agreements. The issue of fiduciary relationship does not arise, since it is not the cross-appellants' case before the trial court. To crown it all the Managing director of the cross-appellant told the trial court during his testimony that there was no agreement on payment of interest between the parties. The law in respect of payment of interest relevant to Kwara State is Order 27 Rule 8 of High Court (Civil Procedure) Rules 1975 and it provides for payment of interest at the rate of 10% per annum in respect of judgment debt only. The award of interest in Nigeria is still governed by the Common Law principle and practice as stated by this Court in the case of Reuben N.A. Ekwunife v. Wayne (West Africa) Limited (supra). The Court of Appeal is therefore right in ordering interest to be paid by cross-appellant only on the judgment debt from the date of judgment until final liquidation.

The cross-appeal has therefore failed and it is dismissed. The appellants in the main appeal and the cross-appellants, having both failed in their respective appeals, I make no order as to costs.

BELLO CJN

I had the privilege of reading in advance the judgment delivered by my learned brother, Mohammed, J.S.C. and for the reasons stated therein I agree that the appeal and cross-appeal should be dismissed and I dismiss both. I adopt the order as to costs.

BELGORE JSC

I read in advance the judgment of my learned brother, Uthman Mohammed J.S.C. and I agree that both the appeal and cross-appeal lack merit. For the reasons advanced in the said judgment, which I adopt as mine, I also dismiss the appeal and the cross-appeal. I make no order as to costs.

OGWUEGBU JSC

I have had a preview of the judgment read by my learned brother Mohammed, J.S.C. I entirely agree with it. Accordingly, the appeal and cross-appeal are dismissed. I make no order as to costs.

ADIO JSC

I have had the opportunity of reading in draft, the judgment just read by my learned brother, Mohammed, J.S.C. and I agree with him that the appeal and the cross appeal fail. Accordingly, I dismiss the appeal and the cross-appeal. I abide by the order for costs. Appeal dismissed.

E

F

G

H