

SUPREME COURT OF NIGERIA
21ST APRIL, 1995, SC. 217/1991
CORAM:- S.M.A. BELGORE, E.O. OGWUEGBU,
U. MOHAMMED, S.U. ONU, A.L. IGUH, JJSC.

1. UNION BANK OF NIGERIA LTD
2. E. B. ADEBISIAPPELLANTS
AND
BENJAMIN NWAOKOLO RESPONDENT

APPEALS - Grounds of appeal - Failure to consider some of them by the Court of Appeal - Whether a denial of fair hearing.

BANKING - Guaranteeing bank loan - Where guarantor did not terminate e guarantee properly - Mere payment of a higher amount into that account - Cannot discharge the guarantor.

COSTS - Purpose - Not meant to be a bonus to the successful party - Whether cost should be awarded based on sentiments.

DOCUMENTS - Clear and unambiguous agreement - Between the parties - Whether wrongfully interpreted by the two lower courts.

DOCUMENTS - Determination clause - Enshrined within a document - Where clear and unambiguous - Whether recourse can be had to extraneous matters.

GUARANTEE - Alteration - Document that is merely an invitation to treat - Whether tantamount to an alteration of the guarantee agreement.

GUARANTEE - Continuous guarantee - For a bank loan - As specified within the parties' agreement - Can only be determined as provided within that agreement.

FACTS

The plaintiff respondent guaranteed the account of the principal debtor (3rd defendant, who is not taking part in this appeal). Respondent claimed that he paid the amount he guaranteed before the end of the three months stipulated in the guarantee agreement (Exhibit 3) but that the ap-

pellants wrongfully impounded his savings pass book towards realization of the amount owed by the principal debtor. Respondent sought to establish that he was not responsible for the indebtedness of the principal debtor and claimed N5,000.00 as damages suffered as a result of appellants' refusal to allow him operate his savings account. The trial court found for the respondent and awarded N2,000.00 to him as general damages.

Appellants' appeal to the Court of Appeal was not successful as that court merely reduced the general damages to N500.00 but awarded costs in the sum of N 1,500.00 against the appellants, and upheld the trial court's judgment. The appellants have further appealed to the Supreme Court. They contended that the respondent's guarantee was a continuous one and that it can only be terminated as provided within the parties' clear and unambiguous agreement without referring to extraneous matters. The apex Court had to determine inter alia, whether the two lower courts were right in having recourse to extraneous documents not made by the same parties in interpreting the respondent's guarantee.

HELD (Unanimously allowing the appeal per lead judgment of **ONU JSC**)

Clear and unambiguous agreement

1. While it is conceded that in Exhibit 2 a brief reference is made to 1st Appellant, it cannot be said to bind 1st appellant and the respondent. Equally, 1st appellant can be said without equivocation, to be a complete stranger to the friendly exchange or private correspondence in Exhibit 1 between an employee of 1st appellant and the respondent. I cannot see how the trial court and the court below can fall on the purports of Exhibits 1 and 2 to interpret the plain words of Exhibit 3 which was an independent, complete, unambiguous and clear agreement between the respondent and the 1st appellant. The two courts below were, in my view, therefore wrong in so doing. (p. 931 D)

Continuous guarantee - For a bank loan

2. Clause 2 I have set out above being unambiguous, ought to and should be construed literally. Thus, when an agreement or document such as Exhibit 3 in Clause 2 speaks patently of one thing, no gloss should be put on it vide section 132 of the Evidence Act. If therefore, it is given its literal interpretation, Exhibit 3 in Clause 2 created a continuous guarantee which can only be determined as provided elsewhere in the same document. To hold otherwise would, in my view, amount to the court re-writing the agreement - a task the court, with due respect, is not competent to do. (p. 932 C)

Documents - Determination clause

3. Where in a written agreement or instrument such as Exhibit 3, there is a clause for determination or the manner for bringing the same to an end, parties are bound by such a clause and recourse cannot be had to extraneous matters for the purpose. Since the words of the above clause are clear, lucid and unambiguous, it is in my view, unnecessary to call in aid any canon of interpretation to give efficacy of meaning thereto. In its common, literal meaning, the guarantee cannot be determined during the three months period between 4th August, 1983 and 30th November, 1983 unless the respondent gave the requisite 3 months notice. (p. 932 F)

Guaranteeing bank loan

4. In the light of the above, the fact that on 29/9/83, namely, over a month before the 3 months period of guarantee had expired the Principal debtor paid a total of N 10,792 00 into the account, did not exonerate the respondent from the guarantee. This is because, the mere payment of a lump sum before the due date would not discharge the respondent from liability unless he acted in the spirit and in accordance with the letters of Clause 3 of Exhibit 3. This, he did not do by giving the requisite notice or waiting for the expiration of the three months life of Exh.3 upon which he relied. Thus, the purported notice of determination prior to the expiration of the three clear months of the life of the agreement will be ineffectual and any interim payment during the period even in excess of the loan sum, could not discharge the respondent. (p. 933 B)

Guarantee - Alteration

5. From the contents of Exhibits 4 and 5, it cannot be said as did the two courts below that the Respondent was automatically discharged from Exhibit 3 and that both documents constituted a variation or alteration to the contents of Exhibit 3. Exhibit 4 was therefore no more than an invitation to treat -an inquiry as to whether the Respondent was willing and ready to guarantee a higher sum than before. Exhibit 4 cannot therefore, in my view, be said to be an alteration or variation of Exhibit 3. (p. 933 H)

Grounds of appeal - Failure to consider some of them

6. Having considered the grounds (4, 5 and 6) which the court below failed to consider or pronounce upon, the next logical question to ask is, what are the consequences of such a failure? Failure to consider grounds of appeal, it is now established by decisions of this court, amount to lack of fair

hearing and a miscarriage of justice. Fair hearing within the meaning of section 33(1) of the 1979 Constitution means a trial conducted according to all legal rules formulated to ensure that justice is done to the parties vide Ntukidem v. Oko (1986) 5 NWLR (Part 45) 909. Grounds of appeal, it should be borne in mind, are akin to pleadings and the trial court has a duty to consider the case of the parties as pleaded; where there is a failure to do so, then there is a failure of justice. Thus, in an appeal, the Court of Appeal has a legal duty to consider all the grounds properly filed by way of the argument of issues distilled therefrom. (p. 936 D)

C *Costs - Purpose - Not meant to be a bonus*

7. Costs follow the event; it is not designed or meant to be a bonus to the successful party. As the holding of the court below that the Appellants oppressed the Respondent was not borne out either in his pleadings or in evidence, the sentiments brought into the award of damages and costs, D had neither relevance nor were they part of the Respondent's case. Finally, while it is true that a successful party should not be denied costs unless for good reasons, a defeated party ought not to be damnified in costs for no cause or on flimsy, capricious and unfounded grounds. The Court below did not therefore exercise its discretion judiciously, and judicially in the award of costs of N1,500.00 to the Respondent. (p. 939 B)

NOTABLE POINTS OF INTEREST

ONUJSC

F 1. *Construing a document*

Furthermore, it is settled that in construing a document, reference cannot be made to previous negotiation, nor can the words of the written agreement be affected by the conduct of the parties before or after execution of the agreement. Indeed, it is an established canon of interpretation that the instrument must be construed as at the time of its execution and nothing more. (p.928 B)

2. *Whether court can set up a case outside the pleadings*

The learned trial Judge's holding as complained about in Ground 4 as set out above, was in effect making a different case for the Respondent outside the parties pleadings and thus at variance thereto. In Ground 5, the complaint was against the trial Judge's holding that it was the Respondent that "meticulously and painstakingly ensured" that the Principal Debtor paid the debt by depositing over N 10,000.00 into the account. This, also with

due respect, was not Respondent's case as disclosed on the pleadings. The trial court there again was thereby setting up a new case for the Respondent. (p. 935 F)

3. Construction of documents - Cardinal principle

This trite that in the construction of documents, the cardinal principle is that the parties are presumed to intend what they have in fact said or written down. Accordingly the words employed by them will be so construed and should be given their ordinary and plain meaning unless, of course, circumstances, such as trade usage or the like, dictate that a particular construction ought to be applied in order to give effect to the particular intention envisaged by the parties. As a general rule therefore, words should be given their ordinary and plain meaning and additional words or clauses ought not to be imported into a written agreement or document unless it is impossible to understand the agreement or document in the absence of such additional words or clauses. (p. 942 C) D

4. Court not to make or rewrite contract for the parties

The point must also be made that it is not the function of a court to make or rewrite a contract for the parties. And so, where parties have embodied the terms of their contract in a written document, extrinsic evidence, whether oral or contained in other writings, is not admissible, save in a few accepted exceptions, to add to, vary, contradict or subtract from the terms of such document. (p. 942 F)

REPRESENTATION

Yusuf O. Alii, Esq. with W. Egbewole and K.K Eleja Esq. for the Appellants
Respondent Absent. Not represented F

CASES REFERRED TO

Tucker v. Bennet (1987) 38 Ch.D 1 at 15
Symons & Co. v Buckleton (1913) A C 30 at 47
Union Bank of Nigeria Ltd v. Professor Ozigi (1994) 3 NWLR (Part 333) 385
Union Bank of Nig. Ltd. v Sax (Nig.) Ltd (1994) 8 NWLR (Part 361) 150 H (1994) S.C.N.J. 1.
Oyenuga v Provisional Council of the University of Ife (1965) NMLR 9 G

- Solicitor-General, Western Nigeria v. Adebajo (1971) 1 All N.L.R. 178
 Ogbuanyinya v. Okudo (1979) 6-9 S.C. 32;
 Chief Awolowo v. Shagari (19/9) 6-9 S.C. 52
 Magor Rural District Council v. New Port Corporation (1952) A.C. 189
 Animashaun v. Osuma (1972) All NLR 363
 B British Movietonews Ltd. v. London and District Cinema Ltd (1952) AC 165; (1951) 2 All E.R. 617
 Hawey v. Facey (1893) A.C. 552
 Fisher v. Bell (1960) 3 All E.R. 731
 Pharmaceutical Society of Great Britain v. Boots Cash Chemists Southern
 C Ltd (1952) 2 All E.R. 459;
 Ward v. National Bank of New Zealand Ltd
 Emegokwe v. Okadigbo (1973) 4 S.C. 113 at 117; (1973) NMLR. 192 at 195
 Atano v. A.G. Bendel (1988) 2 NWLR (Part 75) 201
 D Ntukidem v. Oko (1986) 5 NWLR (Part 45) 909
 UB.A. v. Achonu (1990) SCNJ. 17 at 24
 Ochonma v. Unosi (1965) NMLR. 321
 Adenaiya v. Governor in council Western Region (1962) All NLR. 300
 Nneji v. Chukwu (1988) 3 NWLR (Part 81) 184
 E Aouad v. Kessrawani (1956) 1 F.S.C. 35,
 A. G. Kaduna State v. Atta (1986) 4 N. W.L.R. (Part 38) 785
 Olatoye v. Balpgun (1990) 5 N. W.L.R. (Part 148) 24

STATUTE REFERRED TO

- F Evidence Act (Cap 112 L.F.N. 1990) s. 132

BOOKS REFERRED TO

- Halsbury's Laws of England 3rd Ed. Vol. 11 pp. 396 - 398 para 646, pp. 399 - 400 para 648 & 649; Vol. 9 p. 303 para. 731
 G Nigerian Law of Contract - Achike pp. 23-24
 Law of Contract - Cheshire & Fifoot 9th Ed. by Furmston pp. 27-28

LEAD JUDGMENT BY ONU JSC

- The respondent herein as plaintiff, by his writ of summons dated
 H 29th November, 1984 and taken out in the High Court of Kwara State
 holden in Ilorin, claimed against three defendants jointly and severally (the
 1st and 2nd out of whom are now the present appellants) the following
 reliefs:-

"1. A declaration that the plaintiff has ceased to guarantee any subsequent

loan granted by the 1st defendant to the 3rd defendant since after the repayment of the initial N6,000.00 loan.

2. A declaration that the 3rd defendant is primarily and solely liable for any loan negotiated by him outside the original N6,000.00 as such negotiation was made without information to, or knowledge and consent of the plaintiff.

3. a declaration that the withdrawal of the plaintiff's saving pass book by the 2nd defendant acting for the 1st defendant is wrongful.

4. An injunction restraining the defendants jointly and severally from further holding the plaintiff responsible for the indebtedness of the 1st defendant.

5. The sum of N5,000.00 against the defendants jointly and/or severally being damages suffered by the plaintiff as a result of the 1st and 2nd defendants' refusal to allow the plaintiff to operate his savings account."

Pleadings having been ordered, duly filed and exchanged by the parties, the case went to trial before the trial court which found for the respondent, stating that it agreed with him that he had repaid the loan and for that reason was discharged from the guarantee. In addition, it awarded the respondent N2,000 general damages for alleged wrongful seizure of his pass book (Exhibit 7) jointly and severally against all three defendants.

The appellants being aggrieved by this decision, appealed to the Court of Appeal sitting in Kaduna (hereinafter simply referred to as the court below). The Court below, by a majority of two to one, upheld the trial court's decision but reduced the general damages to N500 with N1,500 as costs. The appellants (the 3rd defendant, Tunde Olu-Samuel, Trading in the name and Style of Babat Associates, having decided to take no further part in the proceedings both in the court below and in this court, no more will be said of him unless where necessary or appropriate) have both further appealed to this Court on three grounds contained in their Notice of Appeal dated 6th May, 1988.

While the appellants subsequently filed their brief of argument and served same on the respondent in accordance with the rules of court, the latter did not respond by filing a respondent's brief. Three issues, in order of sequence overlapping the three grounds of appeal, were submitted at the appellant's instance for our determination, to wit:

1. Whether the majority in the Court of Appeal was right, in accepting the trial Judge's method of interpreting the guarantee, by having recourse to extraneous documents not made by the same parties, when the words of the guarantee agreement, Exhibit 3, are clear, unambiguous and devoid of any unclarity.

2. Whether the majority of the Court of Appeal was right when they failed to consider and pronounce upon grounds of appeal validly filed by the appellants, upon which issues were formulated in the appellants' brief and thereby occasioned a grave miscarriage of justice to the appellants.

3. Whether the majority of the Court of Appeal having found that B the trial Judge was wrong to have awarded general damages of N2,000.00 could make a volteface to award punitive cost of N1,500 against the appellants in the circumstances?

For a better appreciation of the issue I have set out above, which I propose to consider serially hereafter, it is pertinent at this juncture for me C to review, albeit briefly, the facts that gave rise to this case as follows:

The claim of the plaintiff/respondent (hereinafter in the rest of this judgment called the respondent) was that he guaranteed the account of Tunde Olu-Samuel trading as Babat Associates and who was 3rd defendant as hereinbefore stated, is neither taking part in the appeal herein nor D did he do so in the court below. For the purposes of this appeal, he is simply referred to as the Principal Debtor. The respondent claimed that he paid the money he guaranteed before the end of the three months stipulated in the guarantee agreement (Exhibit 3) but that the appellant wrongfully impounded his savings pass book (Exhibit 7) in purported realisation of the E debt owed by the Principal Debtor.

The appellants for their part, contended that the money guaranteed had not been paid and that the guarantee agreement (Exhibit 3) was a continuous or continuing guarantee, adding that the failure of the Principal Debtor to liquidate the debt entitled them to take possession of the F respondent's pass book (Exhibit 7) which was the document used to support the guarantee. The appellants further maintained that the trial court's employment or use of extraneous documents, to wit: Exhibit 1 (a private correspondence between non-parties to Exhibit 3, which itself is a document that is simple, unambiguous and straightforward) and Exhibit 2 (an G agreement to which 1st appellant was not a party) and further, that Exhibits 1 and 2, not having been incorporated by reference into Exhibit 3, ought not to have been relied upon to discharge the respondent from the debt obligation.

ISSUE 1:

H When this appeal came up for hearing on January 30, 1995, learned counsel for the appellants in briefly expatiating on Issue 1, which is very crucial to the success or failure of this case, first adverted bur attention to the reliance the trial court placed on extraneous documents, namely, Exhibit 1 and 2 to interpret the Deed of guarantee (Exhibit 3). Exhibit 1,

which he asserted, is copied into the Record, is a personal letter between respondent and one Mr. Ipidunmi while Exhibit 2, also copied in the Record, is an agreement between the Principal Debtor and respondent. The Deed of guarantee (Exhibit 3), which learned counsel also pointed out is copied in the Record, was a document made between respondent and the 1st appellant. Exhibits 4 and 5 learned counsel further explained, were letters exchanged between the parties after Exhibit 3 had been executed. After pointing out how the court below on appeal had confirmed the trial court's view on the matter, learned counsel drew our attention to the additional authorities he had submitted to buttress his argument. Now, Section 132(1) of the Evidence Act, Cap. 112 Laws of Federation provides, inter alia that -

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

The above rule of evidence which has been given expression by way of interpretations by this Court in several cases, to which I shall come shortly, has some recognised and accepted or laid down exceptions. The recognised and accepted exceptions are as set out in the proviso to subsection (1) and in subsections (2) and (3) of Section 132 both of which stipulate that -

"(2) Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, grant or disposition of property. (3) Oral evidence of the existence of a legal relationship is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on."

A party wishing to call in aid the exceptions referred to above must bring his case by credible evidence within the purview of the recognised exceptions. Thus, in Halsbury's Laws of England Third Edition, Volume 11 pages 296-398, paragraph 646, the learned authors stated the position thus:

"Where the intention of the parties has been reduced to writing, it is, in general, not permissible to adduce extrinsic evidence, whether oral or contained in Writings such as instruction, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary

or add to the terms of the document. This principle applies to words, arbitrators' awards, bills of exchange and promissory notes, bills of lading and charter parties, descriptions of boundaries, guarantees, lease, contracts of sale of goods and wills. Extrinsic, evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the instrument." (Italics is mine).

Furthermore, it is settled that in construing a document, reference cannot be made to previous negotiation, nor can the words of the written agreement be affected by the conduct of the parties before or after execution of the agreement. Indeed, it is an established canon of interpretation that the instrument must be construed as at the time of its execution and nothing more vide Halsbury's Laws of England (supra) paragraphs 648 and 649, page 399-400; Chitty on Contracts, General Principles: 24th Edition, paragraph 735 page 734. At page 751 of Chitty (supra) the learned authors D stated as follows:-

"But a heavy burden of proof rests upon the party who alleges that a seemingly complete instrument is incomplete and it would seem that the extrinsic evidence must not be inconsistent with the terms of the instrument."

E See Tucker v. Bennet (1987) 38 Ch.D 1 at 15; Heilbut, Symons & Co. v. Buckleton (1913) A.C. 30 at 47. See also Union Bank of Nigeria Ltd. v. Professor Albert Ozigi (1994) 3 NWLR (Pt. 333) 385. 'and Union Bank of Nig. Ltd. v. Sax (Nig.) Ltd. & ors. (1994) 8 NWLR (Pt. 361) 150; (1994) SCNJ. 1.

F In the U.B.N. v. Ozigi Case (supra), a banker/customer relationship case involving inter alia whether written documentary evidence/agreement or instrument may be varied by parol or extrinsic evidence, etc the two issues which arose for determination were:

G 1. *Whether the plaintiff in the court below discharged his burden to prove his case by credible evidence to justify the affirmation by the Court of Appeal of the first, second, third and fourth reliefs granted to the plaintiff/respondent by the trial court; and*

H 2. *Whether, on a proper construction of clause 3 of Exhibits 5 and 6 (Deeds of legal mortgage) the mortgagee (the appellant therein) of the change in interest rates from time to time, and whether the failure of the appellant to give such notice justified the nullification by the Court of Appeal of the variation of the interest rate in Clause 3.*

This Court in allowing the appellant's appeal held among others at pages

400, 404 and 405 of the Report (per Adio, J.S.C.) as follows:-

"The general rule is that where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. See Section 132 (1) of the Evidence Act; and Olaloye v. Balogun (1990) 5 NWLR (Pt. 148) 24. In the circumstances, it was, therefore, wrong to import into the provision of Clause 3 of the mortgage deeds (Exhibit "5" and "6") extraneous matters such as the requirement that the appellant must obtain the prior consent of or given prior notice of increase in the rate of interest on the loan to the respondent. This is because, generally, if the conditions necessary for the formation of a contract are fulfilled by the parties thereto, they will be bound by it. It is not the function of a court to make a contract for the parties or to rewrite the one which they have made. See Oyenuga v. Provisional Council of the University of Ife (1965) NMLR 9.

9.....The provisions of clause 3 of the mortgage agreements is clear and unambiguous. It is possible to understand and apply it as it stands. There was, therefore, no necessity to import new or additional words into it to require prior consultation with or the giving of prior notice of increase in rates of interest on the loan in question to the respondent.. "

In U.B.N. v. Sax (Nig.) Ltd. (supra) another banker/customer relationship case wherein, two questions submitted at the appellant's instance as arising for determination, were as follows:-

(1) Whether the Court of Appeal was right in holding that the Bank was not under obligation to provide additional obligation to provide additional over-draft facility to the respondents; and

(2) Whether the failure of the Bank to give additional overdraft facility to the 1st respondent frustrated its business and if so whether it is unconscionable for the Bank to charge interest on the initial overdraft facility of N250,000 from 1986.

This Court in allowing the appeal, dismissing the cross-appeal and citing with approval its earlier decision in U.B.N. v. Ozigi (supra), had occasion to reiterate and re-state the law once more (per Adio, J.S.C.) at pages 13-14 of SCNJ (ibid) inter alia thus:-

"I am of the clear view that the provision of the relevant clause in each of the mortgage agreements was clear and unambiguous. When a document is clear, the operative words in it should be given their simple and ordinary grammatical meaning. Further, the general rule is that when the words of any instrument are free from ambiguity in themselves and when the circumstances of the case have not created any doubt or difficulty as to the

proper application of the words to claimants under the instrument or the subject matter to which the instrument relates, such an instrument is always to be construed according to the strict, plain and common meaning of the words themselves. In the circumstance, it was wrong to import into the relevant clause of each of the mortgage agreements extraneous matters
 B *such as the requirement that the appellant must obtain the consent of the respondents to the increase in the rate of interest on the loans. The reason is that if the conditions necessary for the formation of a contract are fulfilled by the parties thereto they will be bound by it. It is not the business of a court to make a contract for the parties or re-write the one which they*
 C *have made. See Oyenuga v. Provisional Council of the University of Ife (1965) NMLR 9. In the construction of documents, the word therein should first be given their simple and ordinary meaning and under no circumstances may new or additional words be imported into the text unless the documents would be by the absence of that which is imported impossible*
 D *to understand. See Solicitor-General, Western Nigeria v. Adebajo (1971) 1 All NLR 178 cited with approval in Union Bank of Nigeria Ltd. v. Ozigi (supra)."*

In the instant case, it is common ground that Exhibit 3 is the cornerstone of the agreement between the respondent and the 1st appellant. Exhibit 1 was a private letter written on 25/7/83 between the respondent and 1st appellant's sub manager, Mr Ipindumi, in his private capacity. It reads as follows:-

"Dear Mr. Ipindumi,
The bearer is the Director of Babat Associates Incorp. He is well known to
 F *me. He needs a short term Loan to enable him carry out a contract he just won. Could you please grant him the loan he is requesting for. I believe he will refund same with accruing interest as soon as he is paid."*

The reply of the said Exhibit 1 which was endorsed at the bottom thereof, and dated 1/9/83, then reads:

G *"Dear Ben,*
Hello, I called at your house yesterday, but met only a yellow chick at home. Hope you enjoy the weekend. Can you guarantee this man's loan because he has no security. If you can please let me know so that you can complete our forms"

H Exhibit 2 which was executed between the Principal Debtor as borrower and the respondent as guarantor and which was in existence about the same time as Exhibit 1, spelt out what the loan the Principal Debtor was receiving, its purpose and mode of repayment was Its (Exhibit 2) main portion dated 2nd August, 1983, reads:

“AGREEMENT BETWEEN BABAT ASSOCIATES INC. (TUNDE OLU SAMUEL) AND MR. BEN NWAOKOLO -MY GUARANTOR

The said loan is to be used for the execution of a Rug-Carpeting contract awarded to Babat Associates Inc. by the Code of Conduct Bureau, Ilorin Branch totalling N 10,792.00. We sincerely pledge to pay the said amount to the Bank as soon as we are being paid in the presence of B our Guarantor. We hope to get the cheque from the Code of Conduct Bureau September.”

Attached to Exhibit 2 was a letter conveying approval from the Code of Conduct Bureau dated 27/7/83 to the effect that “

CARPETING OF OFFICES

C

I am directed to convey approval for the rug-carpeting of the offices specified in my earlier letter No. CCB/KWS/OH/1/11/216 of 23rd June, 1983 by your Company at the contract sum of N10,792 only.2. It will be appreciated if the job could be commenced with immediate effect.”

While it is conceded that in Exhibit 2 a brief reference is made to D 1st appellant, it cannot be said to bind 1st appellant and the respondent. Equally, 1st appellant can be said without equivocation, to be a complete stranger to the friendly exchange of private correspondence in Exhibit 1 between an employee of 1st appellant and the respondent. I cannot see how the trial court and the court below can fall on the purports of Exhibits E 1 and 2 to interpret the plain words of Exhibit 3 which was an independent, complete, unambiguous and clear agreement between the respondent and the 1st appellant. The two courts below were, in my view, therefore wrong in so doing.

The question that therefore arises after arriving at the above con- F clusion is, was the guarantee a continuous one having regard to its tenor?

The most germane clause in Exhibit 3 that calls for interpretation in rendering an answer to the above question is, in my view, Clause 2 thereof. Clause 2 states:-

“2. This guarantee is to be a continuing security for the whole amount now G due or owing to you or which may hereafter at any time become due or owing to you as aforesaid by the principal (including any further advances made by you to the principal during the three calendar months period next hereafter referred to and all interest and bank charges on and in connection with such further advances). Provided always that the total amount recoverable hereon shall not exceed the sum of N6,000.00 (Six thousand Naira H only) in addition to

(i) such further sum for interest on that amount or on such less sum as may be due owing, and other banking charges in respect thereof

shall accrue due to you within six months before and at any time after either the date of demand by you upon the undersigned for payment of the date of the determination of this guarantee pursuant to any notice of determination by the undersigned hereinafter provided and,

(ii) *Costs and expenses recoverable from the Principal and costs, all expenses (on a full indemnity basis) arising out of or in connection with the recovery by you of the moneys due to you under this Guarantee which the undersigned agree to pay. Such interest (in the absence of any agreement to the contrary) shall be calculated with the usual rests and at the ruling rate from time to time for bank advances in the territory in which the liability of the Principal is incurred.*"

Clause 2, I have set out above being unambiguous, ought to and should be construed literally. Thus, when an agreement or document such as Exhibit 3 in Clause 2 speaks patently of one thing, no gloss should be put on it vide section 132 of the Evidence Act (ibid). See also Ogbunyiya v. Okudo (1979) 6-9 S.C. 32; Chief Awolowo v. Shagari (1979) 6-9 S.C. 52; Magor Rural District Council v. New Port Corporation (1952) A.C. 189 and Animashaun v. Osuma (1972) All NLR 363. If therefore, it is given its literal interpretation, Exhibit 3 in Clause 2 created a continuous guarantee which can only be determined as provided elsewhere in the same document. To hold otherwise would, in my view, amount to the court rewriting the agreement - a task the court, with due respect, is not competent to do. See U.B.N. v. Ozigi (supra) and U.B.N. v. Sax & ors. (supra).

See also the House of Lords decision in British Movietonews Ltd. v. London and District Cinema Ltd. (1952) AC 166; (1951) 2 ALL E.R. 617. Furthermore, one may ask, how was the Guarantee to be determined?

Where in a written agreement or instrument such as Exhibit 3, there is a clause for determination or the manner for bringing the same to an end, parties are bound by such a clause and recourse cannot be had to extraneous matters for the purpose. In the instant case, the clause that has provided for the determination of the guarantee is Clause 3 of Exhibit 3. It stipulates:

"3. This guarantee may and shall be determined (save as below provided) and the liability hereunder crystalised (except as regards the additional sums for interest costs and expenses which under the provision of clause 2 the undersigned have agreed to pay) at the expiration of three calendar months after the receipt by you from the undersigned notice in writing to determine it (but notwithstanding the determination as to one or more of the undersigned, the guarantee is to remain a continuing security as to the other or others)."

Since the words of the above clause are clear, lucid and unambiguous, it is in my view, unnecessary to call in aid any canon of interpretation to give efficacy of meaning thereto. In its common literal meaning, the guarantee cannot be determined during the three months period between 4th August, 1983 and 30th November, 1983 unless the respondent gave the requisite 3 months notice. B

In the light of the above, the fact that on 29/9/83, namely, Over a month before the 3 months period of guarantee had expired the Principal debtor paid a total of N 10,792.00 into the account, did not exonerate the respondent from the guarantee. This is because, the mere payment of a lump sum before the due date would not discharge the respondent from C liability unless he acted in the spirit and in accordance with the letters of Clause 3 of Exhibit 3. This, he did not do by giving the requisite notice or waiting for the expiration of the three months life of Exh. 3 upon which he relied. Thus, the purported notice of determination prior to the expiration of the three clear months of the life of the agreement will be ineffectual and D any interim payment during the period even in excess of the loan sum, could not discharge the respondent. The basis for my coming to this view is that it is in accord with normal banking transactions. To hold otherwise, will produce the incongruous situation whereby a debtor for a specific time to the bank can be blackmailed within the currency of the agreement, by E the bank unilaterally sitting on his money on the lame excuse that he paid in money into his account in excess of the loan, and therefore he must repay the loan even though the time to repay has not matured.

Having said this much, the next consideration is whether as the learned trial Judge had found, from the contents of Exhibits 4 and 5, the F appellant had varied or altered Exhibit 3 in that further loans were advanced to the Principal Debtor without the consent of the respondent and that the respondent was therefore discharged under the guarantee agreement. The Court below agreed with this opinion of the trial court. Exhibit 4 G is a letter from the 1st appellant to the respondent asking to know if as at the date of writing it (29/12/83) when they received some forms signed by the respondent, they should still release money on his account to make a total of N9,000.00. Exhibit 5 is a reply by the respondent dated 27/1/84 informing 1st appellant that he was no longer standing for the Principal Debtor's Company (Sabat Associates) urging that the forms already signed H by him be cancelled while asking for the stoppage of further facilities other than the first forms he signed for the first advance given on 4/8/83 for N6,000.00 only.

From the contents of Exhibits 4 and 5, it cannot be said as did the

two courts below that the respondent was automatically discharged from Exhibit 3 and that both documents constituted a variation or alteration to the contents of Exhibit 3. Said he (Respondent) on oath in the trial court:

"On exhibits 8 and 9 no further advances other than the N6,000 guaranteed was granted to the 3rd defendant."

B The 2nd appellant as D.W.1 confirmed this when he testified that as at 29/9/83 when N10,000 was paid into the Principal Debtor's account and there was left a credit balance of N1,000, the Principal Debtor was still enjoying the facility of N6,000, which stood to expire on 30/11/83. Exhibits 8 and 9 referred to by the respondent were incidentally the ledger cards of C the Principal Debtor. Exhibit 4 was therefore no more than an invitation to treat, an inquiry as to whether the respondent was willing and ready to guarantee a higher sum than before. Exhibit 4 cannot therefore, in my view, be said to be an alteration or variation of Exhibit 3. See *Havey v. Facey* (1893) AC 552. Had the respondent accepted the offer in Exhibit 4, D such an acceptance would have meant that the 1st appellant would have disbursed the amount of N6,000 stated on it to the Principal Debtor. See *Fisher v. Bell* (1960) 3 All E.R. 731; *Pharmaceutical Society of Great Britain v. Boots Cash Chemists Southern Ltd.* (1952) 2 All E.R. 456; *Achike: Nigerian Law of Contract* pages 23-24 and *Cheshire and Fifoot, Law of Contract*, 9th Edition by Furmston pages 27-28.

If also Exhibit 4 did not amount to an alteration of Exhibit 3, Exhibit 5 would similarly not alter or vary Exhibit 3. See *National Bank of Nigeria v. Awolesi* (1964) 1 WNLR 1311; *Ward v. National Bank of New Zealand Ltd.* (1883) 8 A. 755 at 764; *Home v. Brunskill* (1878) 30 BD 495; *In Re: F Sherry London and Country Banking Co. v. Terry* (1884) 25 Ch. D.692 AC. Issue 1 is accordingly answered in the negative.

ISSUE 2:

It is common ground that the appellants appealed from the decision of the trial court on either grounds to the Court of Appeal. It is contended that in respect of these grounds, the Court below neither made any pronouncements nor adverted to grounds 4,5 and 6 respectively. The grounds, without their particulars, are set down below as follows:-

GROUND 4:

The learned trial Judge erred in law when he held as follows:

H *"This position is further strengthened by the fact that no further notice of any withdrawal of money outside the original guaranteed N6,000.00 was communicated to the plaintiff as at the expiration of 3 months short time loan, if at all there was a standing facility."*

GROUND 5:

The learned trial Judge erred in law when he held as follows:-

Having guaranteed 3rd defendant, the repayment of which he meticulously and painstakingly ensured by a payment of N10,000.00 in the principal debtor's account, the plaintiff was right to think that he had performed all his obligations under the guarantee contract Exhibit 3."

GROUND 6:

B

The learned trial Judge erred in law when he held that the withdrawal of the plaintiff's passbook Exhibit 7 by the 2nd defendant is wrongful. "

The appellants, as clearly depicted on the Record and in the brief of argument they filed, had identified three issues for the consideration of the court below. It is also on record that appellants argued fully all three issues and by implication, the eight grounds, to which they related. At the hearing of the appeal by the court below. It is common ground that appellants adopted their brief of argument. However, without justification the majority judgment of that court now assailed before this Court, failed to pronounce on grounds 4, 5 and 6 covered by appellants' issues 2 and 3 thereat, both of which have prompted ground 2 in the appeal to this court which incidentally, is covered by issue 2 now under consideration.

The judgment of the majority in the court below neither adverted to nor pronounced on these grounds (4,5 and 6 respectively). The respondent's statement of claim in the trial court nowhere alleged that any further sums in the form of overdraft was extended to the Principal Debtor. It was not also his (Respondent's) case that he was entitled to any notice for normal withdrawals from the account of the Principal Debtor to which he was neither a signatory nor operator.

The learned trial Judge's holding as complained about in Ground 4 as set out above, was in effect making a different case for the respondent outside the parties pleadings and thus at variance thereto. See *Emegokwue v. Okadigbo* (1973) 4 SC 113 at 117; (1973) NMLR 192 at 195; *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1 and *Awoyegbe & Anor v. Ogbeide* (1988) 3 SCNJ. 99; (1988) 1 NWLR (Pt. 73) 695.

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In Ground 5, the complaint was against the trial Judge's holding that it was the respondent that "*meticulously and painstakingly ensured that the Principal Debtor paid the debt by depositing over N10,000.00 into the account. This, also with due respect, was not respondent's case as disclosed on the pleadings. The trial court there again was thereby setting up a new case for the respondent. This greatly affected the learned trial Judge's mind by his conclusion that the respondent 'had performed all his obligations under the guarantee contract exhibit 3. The court below in my opinion, was therefore in grave error by its failure to pronounce on the*

ground. Had it done so, there is no doubt that it would have arrived at the irresistible conclusion that the trial court was in error in deciding the case on facts not pleaded. Further, since Grounds 4 and 5 attacked the jurisdiction of the trial court had the court below considered them, it would have allowed the appeal. Failure on the part of the court below to do so amounted B to a failure of fair hearing against the appellant.

Ground 6 attacked the holding of the trial Judge that the withdrawal or seizure of Exhibit 7, i.e respondent's passbook was wrongful. It was on such a premise that the learned trial Judge leaned to award damages of N2,000.00 to respondent. The Court below even though addressed C on the issue, made neither a reference to the matter nor pronounced on it. What the court below considered was only Ground 3 and this is clearly brought out on page 173 of the Record. Had the court below considered and pronounced on this ground it would not just have reduced the damages but set aside into the award because, the pivot on which the award D revolved had neither factual nor legal basis. Had the court below also considered the matter dispassionately as it ought to, it would have arrived at the irresistible conclusion that the withdrawal of Exhibit 7, the passbook, in the circumstances was lawful and regular.

Having considered the Grounds (4, 5 and 6) which the court below E failed to consider or pronounce upon, the next logical question to ask is, what are the consequences of such a failure? Failure to consider grounds of appeal. it is now established by decisions of this court, amount to lack of fair hearing and a miscarriage of justice. See *Atano v. A.G. Bendel* (1988) 2 NWLR (Pt. 75) 201. See also *Kotoye v. C.BN.* (1989) 1 NWLR (Pt. 98) F 419 where *Nnaemeka-Agu, J.S.C.* held at page 448 of the Report thus:

"For the rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice has been done because of lack of hearing. It is whether a party entitled to be heard before deciding G had in fact been given an opportunity of hearing. Once an Appellate Court comes to the conclusion that the party was entitled to be heard before a decision was reached but was not given the opportunity of a hearing the order/judgment thus entered is bound to be set aside."

Fair hearing within the meaning of section 33(1) of the 1979 Constitution means a trial conducted according to all legal rules formulated to H ensure that justice is done to the parties vide *Ntukidem v. Oko* (1986) 5 NWLR (Pt. 45) 909. Grounds of appeal, it should be borne in mind, are akin to pleadings and the trial court has a duty to consider the case of the parties as pleaded; where there is a failure to do so, then there is a failure of justice. Thus, in an appeal, the Court of Appeal has a legal duty to con-

sider all the grounds properly filed by way of the argument of issues distilled therefrom. This court has deprecated in no uncertain terms the practice of leaving grounds of appeal unconsidered. Thus, to mention but a few of such cases:

1. in *Balogun v. Labiran* (1988) 3 NWLR (Pt. 80) 66 at 80Kawu,JSC. said:

"Counsel submitted, and I agree with him, that the Court of Appeal was obliged to consider and pronounce on all the grounds of appeal properly filed and argued before it."

2. In *Ukwunneji v. The State* (1989) 7 SCN 34 at42; (1989) 4 NWLR (Pt. 114) 131. this Court stated the position more forcefully thus:

"It is the duty of the Court of Appeal to consider issues properly raised in the grounds of appeal before it. Where this has not been done, this court can notwithstanding the fact that the court below has not made any pronouncement consider the ground of law or facts so raised."

3. In *Okonji v. Njokanma* (1991) 7 NWLR (Pt. 202) 131 at 150. 151, 152. 154 and 155 where all three Justices (Wali. Babalakin and D Nwokedi, JJ.S.C.) commented inter alia on the grave error on the part of the Court of Appeal when it ignored additional Ground 5(a) of the grounds of appeal, particularly when the issue raised in that ground was the admissibility in evidence of the evidence of D.W.6 in a previous suit No. A/31/72, which the learned trial Judge considered and relied on in arriving at his decision against the appellants. Their Lordships' rebuke was irrespective of the fact that the panel of the court below which eventually heard the appeal was different from the panel that granted the appellant leave to argue that ground as an additional ground of appeal. The appeal in that case was allowed and the case was remitted to the Court of Appeal, Benin for F hearing by a differently constituted panel.

4. In *Anyaduba & Anor v. Nigerian Renowned Trading Company Ltd.* (1992) 5 NWLR (Pt. 243) 535, on the other hand, this Court had occasion to restate the law on the matter (per Omo, J.S.C.) who, dismissing the appeal, said at page 561 of the Report thus:

"An appellate court has duty to consider all the issues placed before it vide Okonji v. Njokanma (1991) NWLR (Pt. 202) 131. But in the instant case the issue on which the appeal was decided was the most important "live" issue before it, challenging as it does the order of non-suit on the claim for declaration of title. If a Court of appeal is of the view correctly H that a consideration of one issue is enough to dispose of the appeal, it is not under any obligation to consider all the other issues posed. If however it is erroneous in its decision, the consequence may be the setting aside of its decision on appeal with an order for re-hearing. The Court of Appeal

was right in its decision here, and its failure to consider those other issues has not led to miscarriage of justice."

In contradistinction to failure to pronounce on a ground of appeal, is the situation where a decision is based on a ground not argued. When such a situation occurs, a court will be guilty of making a case for a party which they did not make for themselves. Thus, in *U.B.A. v. Achoru* (1990) SCNJ 17at 24; (1990) 6 NWLR (Pt. 156) 254 this Court held (per Karibi-Whyte, J.S.C.) that-

"There is no doubt that if the court based its decision on a ground not argued before it, and on a reason not relied upon by the court below, the court would be making a case for the parties. It is well settled that the court would be wrong to do so."

See also *Ochonma v. Unosi* (1965) NMLR 321 in which it was held inter alia that the Judge was wrong to base his judgment on an interpretation of the transaction between the parties which neither of them had pleaded.

In consequence of all I have said above, I take the firm view that had grounds 45 and 6 been considered, they could have tilted the appeal in the court below in appellant's favour. My answer to Issue 2 is accordingly rendered in the negative.

ISSUE 3:

In considering Issue 3, it is pertinent to observe firstly, that appellants in ground 7 of their notice of appeal to the court below, complained against the decision of the trial court in awarding N2,000.00 damages to the respondent. The majority decision in that court varied the order of N2,000.00 damages and reduced same to N500. In doing so, the court below said inter alia:

"As the appellant Bank can afford to obtain the best legal advice available to avoid this action I should award to the oppressed respondent customer of the appellant Bank costs which I consider reasonable in the circumstances which I assess at N1,500.00"

"Having elsewhere in this judgment held that failure of the court below to consider or pronounce on ground 6 to which the withdrawal or seizure of Exhibit 7 related, it will appear clear that the award for its withdrawal or seizure had neither legal nor factual basis. Thus, when the court below, which was fully aware that Exhibit 7 per se has no quantifiable value; was the property of the 1st Appellant and no evidence was led by respondent whatsoever in the trial court as to what loss he had incurred thereby as a result of its being withheld from him the indeed told the trial court he transacted business with Exh. 7 during that period) went ahead, in an outburst of sentiment, to award punitive costs of N1 ,500 against the

appellants. The damages it had reduced from N2,000.00 to N500, set aside by side with the “bonus” punitive costs of N 1,500, it made up by imposing a total amount of the award to N2,000.00. As the learned authors of Halsbury’s Laws of England, 3rd Edition Vol. 9 page 303, paragraph 731 opined on issue of costs.

“Generally, the discretion of a county court as to costs must be exercised in the same manner and on the same principles as that of the High Court, where a similar rule applies. Thus, although the court has an absolute and unfettered discretion to award costs or not to award them, the discretion must be exercised judicially.” B

Costs follow the event; it is not designed or meant to be a bonus to the successful party. See Adenaiya v. Governor in Council Western Region (1962) 1 All NLR 300. C

As the holding of the court below that the appellants oppressed the respondent was not borne out either in his pleadings or in evidence, the sentiments brought into the award of damages and costs, had neither relevance nor were they part of the respondent’s case. As this court had occasion to state unequivocally in Victor Ezeugo v. Nelson Ohanyere (1978) 6 Sc. 171 at 184. D

“Sentiments command no place in judicial deliberations, for if it did, our task would be infinitely more difficult and less beneficial to society.” E

Secondly, the other reason proffered by the court below that the 1st appellant had the advantage of better legal services was non sequitur. At any rate, it was not an issue properly before that court. Thirdly, the reasons in any case are extraneous and uncalled for.

Finally, while it is true that a successful party should not be denied costs unless for good reasons, a defeated party ought not be damnified in costs for no cause or on flimsy, capricious and unfounded grounds. See Obayagbona & ors.v. Obazee & ors. (197 1-72) NSCC 383-386 and Akinbobola v. Plisson Fisko Ltd. (1991) 1 SCNJ 129; (1991) 1 NWLR (Pt. 167) 270. Costs, it must be borne in mind, are not awarded as punitive measures. See Rewane v. Okotie-Eboh (1960) 5 F.S.C. 200 at 206-207. F G

The Court below did not therefore exercise its discretion judiciously, and judicially in the award of costs of N 1,500.00 to the respondent. See Nneji v. Chukwu (1988) 3 NWLR (Pt. 81) 184 and Haco v. Brown (1973) 4 SC 149 at 154. My answer to issue 3 is also rendered in the negative.

In the result, this appeal succeeds and it is allowed by me. The majority decision of the Court of Appeal sitting in Kaduna dated the 4th day of February, 1988 is accordingly set aside. The Respondent’s case is dismissed in its entirety. The appellants will have costs in this court which I assess at N1,000 only. H

BELGORE JSC

I also allow this appeal and set aside the majority decision of the Court below. I adopt as mine the reasoning and conclusion of my learned brother, Onu, J.S.C., in the lead judgment. It is the duty of an appellate Court to consider all the issues raised before it and to leave any issue unadverted to for no reason whatsoever may result in injustice. I make the same consequential orders as contained in the lead judgment.

OGWUEGBU JSC

I entirely agree with the lead judgment just delivered by Onu, J.S.C., the draft of which I had the privilege of reading before now. The appeal is therefore allowed by me. The respondent's claim is accordingly dismissed. The appellants are entitled to costs which I assess at N1,000.00.

MOHAMMED JSC

I have had the preview of the judgment, just read, by my learned brother, Onu, J.S.C., and I agree with him that this appeal ought to succeed. I have nothing more to add. I also award N1,000.00 costs in favour of the appellants.

IGUH JSC

My learned brother, Onu, J.S.C. has in his lead judgment set out the facts and the applicable law in this appeal. I do not consider it necessary to repeat them all -over again. I agree with his reasoning and conclusions.

I wish however to make a brief comment by way of emphasis only on the first issue raised by the appellant in this appeal. This is couched as follows -

"I. Whether the majority in the Court of Appeal was right, in accepting the trial Judge's method of interpreting the guarantee agreement, by having recourse to extraneous documents not made by the same parties, when the words of the guarantee agreement, Exhibit 3, are clear, unambiguous and devoid of any unclarity."

It was the contention of the respondent in both courts below that the contents of two other documents, to wit, Exhibit 1 which is a private letter written by the respondent to the Sub-Manager of the 1st appellant, and Exhibit 2, another private document, should be read into or made use

of in interpreting the deed of guarantee, Exhibit 3. For the appellant, it was argued that Exhibit 3 stood on its own and was clear and unambiguous. It was submitted that Exhibit 3 was made independently of Exhibits 1 and 2 and that it ought therefore to be interpreted without any recourse to Exhibits 1 and 2 which are extraneous documents.

The learned trial Judge upheld the respondent's submission on B this issue and accordingly applied Exhibits 1 and 2 in the construction of Exhibit 3. In the same vein, the same argument of the appellant did not find favour with the court below which proceeded to affirm the decision of the trial court on the issue.

I think it is necessary at this stage to reproduce hereunder for easy C reference, clauses 1 and 2 of Exhibit 3 which in my view are relevant on the issue of whether or not the guarantee was a continuing security. These clauses provide as follows

1. In consideration of your giving time credit and/or Banking facilities and D accommodation to BABA ASSOCIATES OF P.O. BOX 2532, OF LAGOS ROAD, ILORIN. (HEREINAFTER REFERRED TO AS THE PRINCIPAL), I/WE the undersigned hereby guarantee to you the payment of and undertake on demand in writing made on the undersigned by you or any of your Directors, Managers of Acting Managers to pay to you all sums of money E which may now be or which hereafter may from time to time become due or owing to you anywhere from or by the Principal either as principal or surety and either solely or jointly with any other person upon current banking account bills of exchange or promissory notes or upon or any other account whatsoever or for actual or contingent liability including all usual F banking charges.

2. This Guarantee is to be a continuing security for the whole amount now due or owing to you or which may hereafter at any time become due or owing to you as aforesaid by the Principal (including any further advances made by you to the principal during the three calendar months period next G hereinafter referred to and all interest and bank charges on and in connection with such further advances). Provided always that the total amount recoverable hereon shall not exceed the sum of N6,000.00 (Six thousand Naira only) in addition to -

(i) such further sum for interest on that amount or on such less sum as H may be due or owing, and other banking charges in respect thereof as shall accrue due to you within six months before and at any time after either the date of demand by you upon the undersigned for payment or the date of the determination of this Guarantee pursuant to any notice of determina-

tion by the undersigned hereinafter provided and

(ii) costs and expenses recoverable from the principal and costs and expenses (on a full indemnity basis) arising out of or in connection with the recovery by you of the moneys due to you under this Guarantee which the undersigned agree to pay. Such interest (in the absence of any agreement to the contrary) shall be calculated with the usual rests and at the ruling rate from time to time for bank advances in the territory in which the liability of the Principal is incurred."

The first point that must be made is that it cannot seriously be argued that the above terms of Exhibit 3 are either unclear or equivocal. In my view, they are absolutely precise, clear and totally unambiguous.

It is trite that in the construction of documents, the cardinal principle is that the parties are presumed to intend what they have in fact said or written down. Accordingly the words employed by them will be so construed and should be given their ordinary and plain meaning unless, of course, circumstance, such as trade usage or the like, dictate that a particular construction ought to be applied in order to give effect to the particular intention envisaged by the parties. See *Aouad & Another v. Kessrawani* (1956) 1 FSC 35, *Nwangwu v. Nzekwu & Another* (1957) 3 F.S.C 36 and *A.G. Kaduna State and others v. Atta & 2 others* (1986) 4 NWLR (Pt. 38) 785. As a general rule therefore, words should be given their ordinary and plain meaning and additional words or clauses ought not to be imported into a written agreement or document unless it is impossible to understand the agreement or document in the absence of such additional words or clauses. See *Solicitor General, Western Nigeria v. Adebajo* (1971) 1 All NLR 178 and *Union Bank of Nigeria Ltd v. Ozigi* (1974) 3 NWLR (Pt. 333) 385.

The point must also be made that it is not the function of a court to make or rewrite a contract for the parties. See *Fakorede & Ors v. A.G. of Western State* (1972) 1 All NLR (Pt. 1) 178 at 189 and *British Movietonews Ltd. V London & District Cinema Ltd.* (1952) A.C. 166. And so, where parties have embodied the terms of their contract in a written document, extrinsic evidence, whether oral or contained in other writings" is not admissible save in a few accepted exceptions, to add to, vary, contradict or subtract from the terms of such document. See *Olaloye v. Balogun* (1990) 5 NWLR (Pt. 148) 24.

I think it ought also to be observed that in the construction of a document which *ex facie* is plain and unambiguous, reference cannot be made to previous negotiations. The document must be construed as at the time of its execution. A heavy burden of proof lies on the party who alleges

that a seemingly complete instrument or document is incomplete. See Tucker v. Bennet (1987) 38 Ch. D. at 15 and Heilbut, Symons & Co. v. Buckleton (1913) AC 30 at 47.

In the present case, it is not in dispute that Exhibit 3 is the Written deed of guarantee executed by the parties. The respondent failed to establish that Exhibit 3 is incomplete. With profound respect therefore, it seems to me clear that both the trial court and the court below were grossly in error to have employed Exhibits 1 and 2 for the construction or interpretation of Exhibit 3 which *ex facie* was clear and unambiguous.

Turning once more to Exhibit 3, it is beyond dispute that clauses 1 and 2 thereof are entirely clear and should therefore be construed literally. C It is equally plain that Exhibit 3, from its express terms is a “*continuing security*” or guarantee which is only determinable as provided in the document. Exhibits 1 and 2 were not incorporated by reference into Exhibit 3. It cannot also be seriously argued upon a close study of Exhibits 4 and 5 which are letters exchanged between the 1st appellant’s manager and the respondent that these documents can be construed as alteration or variation of Exhibit 3. The Court below was therefore in gross error to have affirmed the trial court’s finding that Exhibits 4 and 5 varied and/or altered Exhibit 3 and thereby discharged the respondents. I endorse the minority opinion of Achike, J.C.A. to the effect that Exhibits 4 and 5 in no way E altered Exhibit 3 and that the respondent was not discharged under the guarantee agreement. Issue number one must therefore be resolved in favour of the appellant.

It is for the above and the more detailed reasons contained in the lead judgment of my learned brother. Onu. J.S.C. that I too, allow this F appeal and set aside the judgments of the trial court and the court below. In substitution, therefore, the plaintiff’s claims are dismissed. I endorse the consequential orders including those as to costs contained in the lead judgment.

Appeal Allowed.

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