

SUPREME COURT OF NIGERIA
16TH JANUARY, 1996. SC.282/1989
CORAM:- S.M.A.BELGORE, A.B. WALLI, I.L. KUTIGI,
M.E. OGUNDARE, Y.O. ADIO, JJSC.

ANAMBRA STATE HOUSING
DEVELOPMENT CORPORATION APPELLANT
AND
J.C.O. EMEKWUE RESPONDENT

APPEALS - Grounds of appeal - Where the ground is one of law - Preliminary objection against it will be overruled.

APPEALS - Merit - Action to set aside a registered sublease - Refused by the two lower Courts - Appeal allowed for having great merit.

CONVEYANCING - Registration - Where purport of executing and registering title documents - Is clear from the parties' agreement - The title deeds should not be given unjustified wider meaning.

CONVEYANCING - Delivery - Executed title deeds - Where not delivered for failure to fulfill a fundamental condition - Legal implications.

LEASES - Surrender of lease - Though not intended by the respondent - Effect of his failure to fulfill a fundamental obligation under the contract.

LEASES - Setting aside of lease - Though the lease has been executed and registered - Where the case has great merit - The lease will be set aside.

FACTS

At the respondent's request, the plaintiff /appellant offered a house at the Bridge Head Housing Estate Onitsha, to the respondent (a legal practitioner) at the price of N40,000. The price for the 99 years lease was to be liquidated by 4 equal monthly payments within 6 months of accepting the offer. It was the practice of the appellant upon payment of 50% of the purchase price to execute the title deeds, but appellant will withhold delivery of the deed and possession until full payment is made by the respondent. This was done and the lease was registered upon payment of a total of N20,000 by the respondent.

Respondent failed to pay any other money despite repeated demands.

Appellant returned the N20, 000 paid by the respondent, revoked the grant and asked the respondent to execute a deed of surrender which he refused to do. Appellant filed this action seeking to set aside the said registered lease that was executed in the respondent's favour. Both the trial court and the Court of Appeal dismissed the plaintiffs claim. The lower court was of the view that plaintiff may only claim the balance of the price but not to set aside the lease. Being dissatisfied, plaintiff has further appealed to the Supreme Court raising some issues.

ISSUE FOR DETERMINATION

(c) Whether the initial contract culminating in Exhibits 0, 0.1 was EXECUTORY OR EXECUTED, and in any event whether Exhibit A constitutes VALUABLE CONSIDERATION for the subsequent agreement to set aside Exhibits 0, 0.1, etc. see p. 111 H

HELD (Unanimously allowing the appeal per lead judgment of BELGORE JSC)
Surrender of lease

1. It is true the respondent had no intention to surrender the lease, but he failed to fulfil his fundamental obligation under the contract to pay in full the N40, 000.00 within six months of his Exhibit H accepting the offer. The release of the property to the respondent was clearly conditional on his payment of the sum of N40,000.00 within the time; he never fulfilled this obligation. He was given more time he still failed. What he ought to have done in six months remained unperformed in over three years and when given his money back he gladly kept it and still wanted the property. Had he returned the cheque uncashed and insisted on paying the remaining N20, 000.00 and had not resorted to a mortgage bank that was not privy to their contract, replying on his behalf, perhaps the result might be different. (p. 105 E)

Conveyancing - Registration

2. The purport of registering the Exhibit 0 and Exhibit 01 is fully explained in the Exhibit G and subsequent correspondence by the parties. It was clear that the respondent would never be let into possession unless he paid the full price. The time to pay the full price is six months - up to now the respondent has not fulfilled his main obligation to pay the full price; his bluff to sue never materialized up to the time of the judgments in the Courts below, The execution of Exhibit 0 and 01 should not be given a wider meaning than is justified by the circumstances of this case - they were merely to assure the respondent that he would be let

into possession on payment of full price, and the execution was the practice after

payment of 50% of the purchase price. (p. 106 B)

Title deeds - Where not delivered

3. In the present case the agreement between the parties could be discerned from the contents of Exhibits G and H. It influenced the execution of Exhibits 0 and 01. The deeds were signed, sealed but not delivered. Non delivery was due to failure of the respondent to fulfil a fundamental condition to pay the full price within the time stipulated. There is nowhere throughout the hearing of this case that the respondent ever denied not fulfilling the fundamental condition of the contract. He accepted an offer of a sublease, part paid and went to sleep. He was never let into possession and he could not sue for trespass despite his bluff to sue. Had the Court of Appeal adverted to doing substantial justice without resorting to technicalities (which in this case were even unproved) the result would have been that the plaintiff was entitled to relief sought against the respondent. (p. 106 D)

Grounds of appeal

4. In view of Exhibits A and B and the receipt of the cheque and the encashment thereof by the respondent without more than his threat to sue, the contract certainly was at an end despite Exhibits 0 and 01. The ground is surely a ground of law as to whether a contract exists or has lapsed. The preliminary objection therefore is misplaced and hereby overruled. (p. 108 D)

Setting aside of lease

5. There is great merit in this appeal and I allow it for the foregoing reasons in setting aside the decision of the Court of Appeal which affirmed the decision of the trial Court. I therefore set aside the sublease now in issue; and the registration in Land instrument of 23rd March, 1981 is hereby set aside and the entry in respect thereof in No.16 at page 16 in Vol 1049 of Register of Deeds kept at Lands Registry Enugu is ordered to be removed. (p. 108 G)

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Housing Authorities are like mortgagees

I will have to state clearly that the statutory corporations, with authority to build houses and sell on terms to people who otherwise would be unable to build on their own, are in some way mortgagees to the buyers. But instead of outright loan to the buyer they provide ready built houses to be paid for on certain terms.

The terms range according to the laid down policy of corporation. Some require

a certain percentage of the full price to be as first deposit and the remainder to be paid in certain installments. They are in some cases flexible as to time but in most cases spell out when and how to liquidate the full price. All these terms are without prejudice mortgagor's right to pay the full price outright; or if he defaults for just a few days or even weeks in a reasonable way he still retains his equity of redemption, i.e. even if the contractual date had passed. (p. 106 H)

2. *When equity of redemption could have been exercised*

As the appellant willingly extended the period of final payment on constant default by the respondent opportunity was on the respondent's side to have his equity of redemption exercised. He never did and what the appellant actually did was magnanimous in sending the respondent N20, 000.00 had so far paid, which he gladly kept. In that case the appellant could foreclose, which it did in another guise. (p. 107 F)

D WALIJC

3. *Conditional deed – Effect*

A transaction executed by a deed does not become effective until it is delivered; and where its effectiveness is made subject to fulfilment of certain condition, the effectiveness will remain in abeyance until the condition fulfilled. It is a mere escrow. It is clear from the oral and documentary evidence presented by the appellant, Exhibit 0, was executed and registered by the parties' subject to the payment in full of the purchase price of the property in dispute by the respondent. It is for this reason that the appellant is still retaining both the original and the duplicate copies of Exhibit 0. The respondent was not put into possession of the property, nor did the legal estate in it vest in him. His conduct of accepting and cashing the cheque of N20, 000 being refund of the money deposited by him as part payment for the purchase of the house, is a clear manifestation of accepting the rescission of the provisional offer to him in Exhibit G. (p. 115 C)

G

OGUNDAREJC

4. *Title documents - Registration is not evidence of delivery*

The reasonable inference to be drawn is that the Deed of Lease was to talc effect on the Defendant paying the balance of the purchase price. It was undoubtedly for this reason that the Plaintiff held on to the deed and did not hand it over to the Defendant. The fact that the Deed of Lease was registered is not evidence of its delivery. There having been no delivery by the plaintiff of the Deed of

Lease, no interest in the property situate at Plot J125 in the Niger Bridge Head

Housing Estate Phase II has passed to the Defendant. He was, therefore, under a misapprehension of the law when' fie threatened to sue the Plaintiff in trespass; he had not anytime been led into possession. (p. 122 G)

REPRESENTATION

Dr. J. O. Ibik, S.A.N., with M. U. C. Ozioko for the Appellant

B

A. N. Anyamene S.A.N., with S. W. Ilonuba for the Respondent

CASESREFERREDTO

Household Fire Insurance v. Grant (1979) 4 EXD 216

Majekodunmi v. National Bank of Nigeria Ltd. (1978) 3 SC. 119

C

Awojugbagbe Light Industries Ltd v. Chinukwe (1995) 4 NWLR (Pt. 390) 379

Okubule v. Oyagbola (1990) 4 NWLR (Pt. 147) 7237421

Adimora v. Ajufo (1988) 6 SCJN 181

Spurgeon v. Collier (1978) 1 Eden 55

D

Jennings v. Ward (1705) 5 Vern 520

Fairclough v. Swan Brewery (1912) A.C. 565

Salt v. Marguis of Northampton (1892) A.C.1.

Groves v. LT.ILtd (1976) 11 S.C. 19

Majekodunmi v. National Bank of Nigeria Ltd (1978) 5 S.C. 119 Nives v.

E

Nives (1880) 15 Ch D 649

Beesly v. Hallwood Estates Ltd (1961) Ch. 105

V.B.A. v. Stahibau GmbH (1989) 3 NWLR 374

STATUTEREFERREDTO

F

Constitution of the Federal Republic of Nigeria 1979 s. 213 (3)

BOOKSREFERREDTO

Halsbury's Laws of England (4th Bd.) Vol. 12 para. 1329, 1332-1334 Norton

Upon Deeds (1st Ed.) p. 15

G

LEADJUDGMENTBYBELGOREJSC

The appellant, a statutory corporation under the Laws of the former H Anambra State, was the plaintiff at the trial Court in this suit that came on appeal to this Court from the Court of Appeal, Enugu. The plaintiff was also the appellant at the Court of Appeal. The defendant is a legal practitioner and he resides at Enugu.

On 1st of May 1979, at the respondent's request, the Plaintiff (he referred to as appellant) made an offer of a house, type C3/03 at the Bride Head Housing Estate, Onitsha to the respondent. The selling price of the leasehold for ninety-nine years was N40,000.00 (forty thousand naira) to be liquidated by four equal monthly payments within six months of the acceptance of the offer. The annual B ground rent was to be determined later, but the allottee (respondent) was to be responsible for the fees attracted by the Survey of the plot and the preparation of the documents in respect of property once 50% of the N40,000.00 selling price was paid. It is pertinent for the full appraisal of the letter of offer (Exhibit G at the trial) to copy out the offer and letter of acceptance of the same by the C respondent:

"OFFER FOR THE SALE OF HOUSE TYPE C3/03 IN THE NIGER BRIDGE-HEAD LAYOUT ONITSHA PHASE II

We wish to refer to your application to us and wish to offer you our House Type C3/03 in the Niger Bridge-Head Layout, Onitsha Phase II under D the following terms and conditions:

- 1. The selling Price of the house is N40, 000.00 payable in four equal installments within the period of six months which is the construction period for the property;*
- 2. Our lease is for 99 years with effect from 1st January, 1979 so we E will sell the house to you under a sublease for the same duration, less 14 days, with the usual understanding that this will be renewable at the expiration of the terms, just as we presume that our own lease will be renewed by the Government of Anambra State;*
- 3. The ground rent will be determined later and will be payable F annually in advance;*
- 4. You will be responsible for the cost of the survey of the plot;*
- 5. You will be responsible for the cost of the preparation of the title documents in respect of the property, and as soon as you have paid to us 50% of the selling price of the house, the title documents will be engross for G execution by both parties, and you will be responsible for the cost of stamping and registration of the documents of title;*
- 6. There will be a covenant in the title documents that you will abide by our regulations in carrying out future extensions in the property in accordance with drawings and specifications prepared by us.*

H *We attach herewith the drawings showing you the present programme in respect of the property, i.e., what is going to be built for you, and also the details of the future expansion, i.e. two additional bedrooms in the first floor and the boys quarters on the ground floor.*

The Housing Estate has the following infrastructural facilities for

the benefit of the residents:

(a) Central Water Supply Scheme

(b) Internal Roads and Drainage System

(c) Central Sewerage System

(d) Primary School

B

(e) Modern Shopping Centre

(f) Landscaping and Environmental Facilities.

We shall be grateful if you let us know in writing whether the above terms and conditions are acceptable to you, and we are looking forward to receiving the cheque of N10,000.00 being the first 25% instalment as stated above.

C

Yours faithfully,

Sgd:

V. P. DHAMIJA

GENERALMANAGER (Plans Attached)

EXHIBIT H IN E/6/84 Tendered on 21/3/84

D

JAMESC. O. EMEKWUE

Office Address No. 1 Adelabu St.,

University of Nigeria Teaching Hospital,

P.M.B. 1129,, Uwani - Enugu

Enugu. 14th May, 1979.

E

The General Manager,

Anambra State Housing Development

Corporation,

P.M.B. 1123,

Enugu.

F

Dear Sir,

Acceptance of offer for the sale of House Type C3/03 in the Niger Bridge Head Layout. Onitsha; Phase II

Thank you for your letter, ed. 137 of 1st May, 1979, on the above subject - matter.

G

I hereby accept your offer for the sale of house type C3/03 in the Niger Bridge-Head Layout, Onitsha, phase II, and enclose herewith following remittances;

(a) African Continental Bank Ltd. Ogbette, Enugu Cheque No. A 035882 for N6,000 (Six thousand naira only); and

H

(b) Photocopy of your Corporation's receipt No. AD/02 of 12th May, 1977, for N4,000 (Four thousand naira). This was a deposit for Abakpa Nike, phase II, House Type C3/02 which was not allocated to me after all. I now pray

you to transfer this sum to the Onitsha Type C3/03 to bring my payment to N10,000 (ten thousand naira, only).

I look forward to hearing from you shortly. Thanks again your co-operation.

Yours faithfully

B Sgd.

J. C. O. Emekwu.”

Thus by 14th of May the respondent had accepted the Offer and made a payment of N10,000.00 being the first instalment. It was duly acknowledged on 22nd May 1979 (vide Exhibit J). The respondent then did nothing on the matter again, despite Exhibit G above, not until Exhibit K which reads:

ASHDC *“Exhibit K in E/6/84 Tendered on 21/3/84*

ANAMBRA STATE

HOUSING DEVELOPMENT CORPORATION

Telegrams: Housing

D Private Mail Bag 1123 Telephone;

Enugu 253625 Enugu-Nigeria

Our ref. ED. 137/A Date Dec. 24, 1979

Mr. James C. O. Emekwue University of Nigeria Teaching Hospital

P.M.B. 1129

E Enugu.

Dear Sir,

PLOT ALLOCATION HOUSE TYPE C3/03

NIGER BRIDGE HEAD. PHASE II, ONITSHA

F As you have paid us N10,000.00 for our house type C3/03 in Nigeria Bridge Head, Phase II, Onitsha, we wish to inform you that Plot No. J 125 is provisionally allocated to you subject to the following:

a) As you are aware, the selling price of the plot is N40,000.00 and balance of the purchase price must be paid within three months from the date of this

G letter, which is the estimated construction period of the house.

b) the documents of title will be prepared when you have paid 50% of the selling price of the house, and by this letter we are calling on you to pay your second instalment of N10,000.00 to enable us prepare the documents of title.

If after 30 days from the date of allocation, you have not paid the second H instalment, we will have no other alternative than to cancel your allocation and offer the above plot to other prospective purchasers on the waiting list.

c) The keys of the house will be handed over to you only when you have paid the full purchase price of the house.

d) We wish to inform you that our house type C3/03 is very popular, and if for any reason, you cannot comply with our terms of sale, you should let us allocate in good time so that the above plot which we offered to you can be allocated to someone else.

Enclosed is the site plan with your plot verged in red.

Yours faithfully

B

Sgd.

VP. DHAMIJA

GENERALMANAGER”

was written and he reacted as follows on 21st March 1980.

EXHIBIT L IN E/6/84 Tendered on 21/3/84

C

Mr. Uzoka

Mr. J.C.O. EMEKWUE,

Please collect the sum of

University of Nig.

N5,000 and issue a receipt

Teaching Hospital

to the purchaser.

P.M.B.1129

21-3-80

Enugu.

D

21-3-80

The General Manager,

Anambra State, Housing

Development Corporation

P.M.B. 1123,

E

Enugu.

Sir,

PLOT ALLOCATION HOUSE TYPE C3/03

NIGER BRIDGE HEAD, PHASE II, ONITSHA

F

I refer to your letter of 24th December 1979, Ref. No. Ed. 137/A on the above subject matter, and in response to it, hereby make a part payment of N5, 000. 00 (Five thousand naira only). The balance will be paid in a Week's time.

Thanks for your co-operation.

G

Yours faithfully, CES

receipt 03310 for N5,000.00

J.C.Emekwu

given to the payer.

31/3/80

Cashier please collect N5,000.00

for C3/03 Osha 21.3.80”

H

This delaying tactic of the respondent no doubt prompted the letter, Exhibit M, intimating him of the terms of Exhibit G (supra) and that should he fail to pay the second instalment within 30 days, the house would be allocated to one of those who had paid or on the waiting list for the house. He was given an

extension of twenty-one days, thereafter the allocation would be deemed cancelled. The respondent this time reacted promptly paid another N5,000.00 second instalment. Thereafter the respondent did nothing again and the appellant/corporation wrote Exhibit P reading as follows:

"EXHIBIT P IN E/6184 Tendered on 21/3/84

B *ASHDC*

ANAMBRA STATE

HOUSING DEVELOPMENT CORPORATION

Telegram: Housing

Private Mail Bag 1123

Telegram: Enugu253625

Enugu - Nigeria

Our ref: ED 137A

Date November 1981

C Mr. James Emekwue.

University of Nigeria Teaching Hospital

Enugu.

Dear Sir

FINAL DEMAND NOTICE ON PAYMENT - RE HOUSE TYPE

D. C3/03 IN THE NIGER BRIDGE HEAD LAYOUT, ON ITSHA

Our records show that up to the date of this letter, you have not bothered to pay up the balance on you house Plot J125u and collect your Keys.

As you are no doubt aware this house is now ready and the necessary infrastructures are also being provided. We, therefore, intend to hand over

E 7days within the month to those purchasers who have completed payment their houses.

I am constrained therefore to stress that if within the next 21 days from date of this letter, your balance of N20, 000. 00 is not paid by bank draft or cash,

I will assume that you are no longer keen on the purchase of this house and

F I will therefore reallocate it to a purchaser who will pay fully for the house and collect the keys from us.

Yours faithfully

J.C.Okeke

GAG.MANAGER”

It must be pointed out that the parties entered into the agreement without a third party. The offer and the acceptance of the allocation was never conditional on a third party providing loan to the respondent. It is therefore surprising that instead of responding to Exhibit P by the respondent, it was the

H Federal Mortgage Bank that wrote nine months later i.e. 7th August 1981, intimating that the respondent had applied for loan and that it was receiving the bank's attention. The letter is completely irrelevant there was no privity of contract between the bank and the appellant. A second letter by the Bank was written on 10th December 1981 to the appellant as if to say the Bank and not the

respondent was the purchaser from the appellant. At any rate, the Bank's two letters, Exhibits Q and R respectively did not indicate when the respondent actually applied for the Bank's loan facilities and has no reference to the offer and acceptance [Exhibits G and H (supra)] of May 1979. So by 20th April 1982, without hearing again from the respondent since his letter of 20th April 1980, B intimating of his having paid a second instalment of N10, 000.00, the appellant was advised to apply for the refund of the sum he had paid. This was followed by a letter of 15th June 1982 reading as follows:

"EXHIBIT T IN E/6/84 Tendered on 8/6/84

Dr. J. O. Ibik LLM, Ph.D (Lond) Office: (Mogboh & Ibik Chambers) C

OF MIDDLE TEMPLE 8, Chime Avenue

SOLICITOR & ADVOCATE P. O. BOX 543

OF THE SUPREME COURT OF NIGERIA New Haven Layout,

Enugu,

Telephone: 255098 (Office)

Nigeria

" 254084 (Home)

15th June, 1982 D

Our Ref; HDC/LM/SEC/82

Cables: "Buribik Enugu"

Your Ref;.....

A. N. Anyamene, Esq., S.A.N,

Solicitor for Mr. J.C. O. Emekwue, E

46 Zik Avenue,

P.O. BOX 594,

Uwani, Enugu

Dear Sir,

RE: PLOT JI25 NIGER BRIDGE-HEAD HOUSING ESTATE PHASE II, ONITSHA F

I act as Solicitor for Anambra State Housing Development Corporation (hereinafter referred to as my client) who has instructed me to reply to your notice (Ref: 15/82) and addressed to it regarding the above subject matter as follows: G

Your client (Mr. J. C. O. Emekwue) was indeed given compassionate consideration by my client throughout the transaction between them, and it was not until April 1982 that my client exercised its right of revocation which had matured since January 1980 - the deadline for payment of the balance of the purchase price. H

It is a pity that you client appeared unable to take advantage of the latitude given to him by my client.

In the circumstances I forward herewith V.B.A. Enugu, Cheque No. G0 H005701 dated 25/5/82 for the sum of N20, 000. 00 payable to your client as

full refund of 50% deposit of purchase price received by my client. Kindly issue your receipt therefore.

*Presently I shall forward for execution by your client engrossed copies of Deed of Surrender requisite for cancellation of the Deed of Sublease, 23/3/81 and B registered as 16/16/1049 since the whole transaction has become abortive. Counting upon your usual co-operation,
Yours faithfully,
Dr. J.O. Ibik,
Solicitor for A.S.H.D.C.”*

C This letter indicates that the practice of the appellant, in accordance with their conditions of allocation, was to execute a deed of title in favour of the allottee on payment of 50% of the price of the house. But the deeds would be retained by the appellant pending completion of the whole payment and other fees; similarly the allottee would not be placed in possession unless full price D was paid. That is why Exhibit T (supra) in penultimate paragraph indicated sending a deed of surrender to the respondent to execute, i.e. that Exhibit U, to restore the parties to their former positions. The respondent received the cheque for N20,000.00 as refund, cleared and kept the proceeds but refused to execute the deed of surrender. Thus he wanted to keep his money and the house E as well. That gave rise to appellant going to Court asking for the following reliefs:

WHEREFORE the plaintiff claims against the defendant as follows:-

“(a) An Order setting aside the Land Instrument dated 23rd March, F 1981 and made between the plaintiff of the one part and the defendant of other part which said instrument is registered as No. 16 at Page 16 in Volume 1049 of the Register of Deeds kept at the Lands Registry in the office at Enugu.

(b) N500 general damages for breach of agreement. “

G The stand of the appellant, all along, was that the property had not been formally transferred to the respondent. All that was done was to sign and seal the deed of assignment but it was never delivered to the respondent. The respondent relied on a letter by the appellant to the respondents and dated 18th February 1982 asking him to come and collect his title deeds as proof that he H had the property already vested in him. The letter, to all intent and purposes was not to derogate from Exhibit G and Exhibit H (supra) that unless full payment was made the property would not be delivered to the respondent. The respondent was not only grossly in arrears but was so for several years. Under normal circumstance, he ought to have completed payment of the full N40,000.00 by

15th November 1979. By the time the appellant took out the writ on 19th January 1984, the respondent was almost four years in default and had collected even the N20,000.00 he deposited.

The trial judge, to my mind, misconstrued a vital evidence in this matter when he held that it was not certain when the offer was communicated to the respondent. The offer, Exhibit G was written on 1st May 1979 and about two weeks later the respondent accepted by Exhibit H, that was on 14th May 1979. There was no dispute between the parties on this. He therefore held that the mere execution of the title deeds, Exhibits 0 and 01 by the parties, without more, conferred absolute title on the respondent even when the documents as signed and sealed by the parties were never delivered to the respondent due to nonfulfillment of the fundamental condition that the full price had not been paid and he was not only in arrears for more than three years but had also collected the deposit of N20, 000.00 he made. He held that what was open to the plaintiff was the demand for full sum, not repossession. He found no law authorizing the plaintiff taking possession of the property in view of the fundamental breach of the contract. This led to appeal to the Court of Appeal.

The Court of Appeal considered the issue of the refund of N20,000.00 sent to the respondent by the appellant and adverted to the threat of suit by the respondent wherein he said he would sue for N100,000.00 as damages. In this connection, the Court of Appeal referred to paragraph 19 of Statement of Defence reading:

"The Plaintiff subsequently made a gratuitous payment of N20, 000.00 to the defendant which sum the defendant is holding against the exemplary damages to which he is entitled in respect of the totally reprehensible act of trespass by the plaintiff."

and then adverted to the conflicting issues for determination as set out in the parties' briefs of argument. The Court then held as follows:

"In my view, the issue to be resolved in this appeal falls within a very narrow compass. Put simply, it is whether or not there was an agreement between the parties under which the defendant would surrender the interest he had previously acquired from the plaintiff in relation to the house. I shall in this judgment examine all the issues raised and keep in focus the central issue for determination."

It then set out the contents of Exhibit G (supra) and considered Exhibit H (supra) and found,

"After the defendant had paid 50% of the purchase price, the parties executed the Deed of Sublease on 23rd March 1981. This was duly registered.

Be it noted that in Exhibit 'K', the plaintiff had stated that the keys to the house would not be handed over to the defendant until he had paid the balance of the purchase price. This in my view represents a cornerstone of the agreement and by proceeding to execute the Deed of Sub lease in the property in favour of the defendant, the plaintiff had fully divested itself of the ownership rights in the property in favour of the defendant. If the defendant failed and or neglected to pay the balance, the plaintiff would have to hold on to the keys. As no time limit was stated within which the defendant must pay the balance, the law would read into the agreement a provision that this was payable within a reasonable time; *Niger Insurance Co. Ltd. v. Abed Brothers* (1976) 7 S. C. 35. If the defendant does not pay, the plaintiff would be entitled only to sue for the balance. The position then is that as at 20th May, 1982, the house subleased to the defendant vide Exhibit 'O' was no longer available to be offered to P.W.2"

D thus regarding the re-allocation of the property to another applicant other than the respondent as void. The Court of Appeal relied on the letter Exhibit V written on 5th May 1982 by the respondent to the appellant purportedly giving Notice of Intention to sue the appellant [adverted to earlier in this judgment], as authority by the respondent for his allocation not having been validly revoked.

E One thing is quite clear: the respondent was never let into possession despite Exhibit 'O' and because unless the full N40,000 was paid the appellant in their offer said he could not be given possession After the respondent wrote exhibit V (on 5th May 1982, supra), the appellant wrote him Exhibit T (supra) and enclosed N20,000.00 which was cashed duly but with full understanding of the F purport of the money as in Exhibit T. He kept the money but refused to execute the deed of release. The mere fact that the respondent never asked for refund, to my mind, is not an excuse for him to ignore the clear meaning of Exhibit T. Written several weeks after the respondent's Exhibit V in which he threatened Court action for trespass, even though he was never in any possession. But G instructive is the letter of the respondent's solicitor dated 13th September 1982 (Exhibit X) to the appellant's solicitor reading as follows:

" Barrister J. C. O. Emekwue has passed to me with instructions your letter No. HDC/LM/SEC/02 of 15th June under cover of which you forwarded H to him a cheque for N20, 000. 00 from your client the Anambra State Housing Development Corporation, said to be a refund of purchase price he paid for property situate at Plot J125, Nigeria Bridge-Head Housing Estate Phase II, Onitsha, which had already been conveyed by an instrument dated 23rd March, 1981, and registered as No. 16 in Volume 1049 of the Register of Deeds

at Enugu.

I had in my letter No. 15/82 of 5th Mgy, 1982, to your clients given them notice as prescribed by Section 28(2) of the Anambra State Housing Development Corporation Law 1976 of my client's intention to institute an action against them for exemplary damages for trespass to the property and for an injunction restraining your clients from interfering with my client's possession or right of property over the said premises. Your action in returning the cheque for the purchase price paid by my client evidence an irrevocable intention of depriving my client of the property. My client understands your clients have forcibly put another person in possession of the premises.

I am, on instructions, giving to your clients, notice of my client's intention to sue them for this flagrant show of naked power, and we look forward to meeting you at the usual arena.

Yours faithfully,

(Sgd.)

(A. N. Anyamene) “

Received 18/9/82.

The letter above is another manifestation of intention to sue but not an action per se. Further, the respondent had by that date cashed the N20,000.00 and never adverted to what he intended to do with it. It is true the respondent had no intention to surrender the lease, but he failed to fulfil his fundamental obligation under the contract to pay in full the N40,000.00 within six months of his Exhibit H accepting the offer. The release of the property to the respondent was clearly conditional on his payment of the sum of N40,000.00 within the time; he never fulfilled this obligation. He was given more time he still failed. What he ought to have done in six months remained unperformed in over three years and when given his money back he gladly kept it and still wanted the property. Had he returned the cheque uncashed and insisted on paying the remaining N20,000.00 and had not resorted to a mortgage bank that was not privy to their contract, replying on his behalf, perhaps the result might be different. If the respondent had kept the N20,000.00 as part of his anticipated damages for trespass, the mere notice of intention to sue has not matured to a suit up to when the High Court's Judgment was delivered on 25th September 1984 and the Court of appeals judgment of 28th April 1989.

The suit filed by the appellant was very clear and it asked that the conveyance be set aside because the respondent failed to fulfil his obligation under the contract. The case of Household Fire Insurance v. Grant (1879) 4 EXD 216 is completely irrelevant to this case. Exhibit T is clear as to its purport that

the agreement was at an end and the respondent cannot choose to retain the refund given to him and keep the agreement alive. Majekodunmi v. National Bank of Nigeria Ltd. (1978) 3 SC. 119 dismissed cursorily as irrelevant by the Court of Appeal, I must say with respect, is the one case that the Court ought not to have ignored.

B The purport of registering the Exhibit 0 and Exhibit 01 is fully explained in the Exhibit G and subsequent correspondence by the parties. It was clear that the respondent would never be let into possession unless paid the full price. The time to pay the full price is six months-up to now the respondent has not fulfilled his main obligation to pay the full price; his bluff to sue never
C materialized up to the time of the judgments in the Courts below. The execution of Exhibit 0 and 01 should not be given a wide meaning than is justified by the circumstances of this case - they were merely to assure the respondent that he would be let into possession on payment of full price, and the execution was the practice after payment of 50% of purchase price.

D In the present case the agreement between the parties could be discerned from the contents of Exhibits G and H. It influenced the execution of Exhibits 0 and 01. The deeds were signed, sealed but not delivered. Non delivery was due to failure of the respondent to fulfil a fundamental condition to pay the
E full price within the time stipulated. [See Awojugba., Light Industries Ltd. v. Chinukwe & Anor. (1995) 4 NWLR (Pt. 390) 3 There is nowhere throughout the hearing of this case that the respondent ever denied not fulfilling the fundamental condition of the contract. He accepted an offer of a sublease, part paid and went to sleep. He was never let into possession and he could not sue for trespass
F despite his bluff to Okubule v. Oyagbola (1990) 4 NWLR (Pt. 147) 723, 7421. Had the Court of Appeal adverted to doing substantial justice without resorting to technicalities (which in this case were even unproved) the result would have been that the plaintiff was entitled to relief sought against the respondent. Adimora v. Ajufo (1988) 6 SCNJ 181. The original contract from Exhibits G and
G H was subject to a fundamental condition thus making the existence of Exhibits 0 and 01 executory on payment of full price whereby they would be delivered and the respondent then would be let into possession. The conduct of the respondent certainly manifested dilatoriness and would seem to attempt withholding fulfilling his obligation indefinitely whereas time was very impor-
H tant. He collected what he had paid in part fulfilment of the contract and still insisted the contract remained operative; this was unconscionable of him.

I will have to state clearly that the statutory corporations, with

authority to build houses and sell on terms to people who otherwise would be unable to build on their own, are in some way mortgagees to the buyers. But instead of outright loan to the buyer they provide ready built houses to be paid for on certain terms. The terms range according to the laid down policy of each corporation. Some require a certain percentage of the full price to be paid as first deposit and the remainder to be paid in certain installments. They are in some cases flexible as to time but in most cases spell out when and how to liquidate the full price. All these terms are without prejudice to mortgagor's right to pay the full price outright; or if he defaults for just a few days or even weeks in a reasonable way he still retains his equity of redemption, i.e. even if the contractual date had passed. [Howard v. Harris (1683) 1 Vem 190; Spurgeon v. Collier (1578) 1 Eden 55; Jehhings v. Ward (1705) 5 Vern 520.] What found its way into our statutes is no more than the historical Common Law practice of protecting the weak borrowing from the overbearing lender. Once the lender (mortgagee) was adequately protected to recover his money in full plus interest at reasonable time even if somewhat outside the contracted period the mortgagor's equity of redemption should not be vitiated. What is essentially a mortgage in this case is dressed up as a conveyance with the right to withhold possession from the mortgagor until he liquidated the debt; but should he fail to liquidate by unreasonably defaulting in payment and was in arrears for long the mortgagee's right of foreclosure should also not be vitiated.

In fact, registration of deeds - Exhibits 0 and 01 - without delivery of the property to the respondent is to make sure the borrower (in this case indirectly the respondent) is assured he would have the house delivered up to him. That is why the period of payment is six months and the registration of the deeds is done after the payment of 50% of the price within the same period but without delivery because the full price had not been paid. As the appellant willingly extended the period of final payment on constant default by the respondent opportunity was on the respondent's side to have his equity of redemption exercised. He never did and what the appellant actually did was magnanimous in sending the respondent N20,000.00 he had so far paid, which he gladly kept. In that case the appellant could foreclose, which it did in another guise.

What is contained in Exhibit G as an offer and accepted in Exhibit H by the respondent, read as a contract contains nothing unconscionable. If treated as a mortgage there is nothing on its face making it irredeemable. It is not a transaction containing any condition rendering redemption illusory or limiting it as to make the contract invalid. [Fairclough v. Swan Brewery (1912)

A. C. 565; Salt v. Marquis of Northampton (1892) A.C.1.] Despite their roots in unconscionability where the lender took advantage of the poor borrower by this century, they were even being applied where the parties were bargaining on equal terms and at arms length [Knightsbridge Trust Ltd. v. Byrue (1939) Ch. B 441,457.

A preliminary objection was raised on the two grounds of appeal argued in the brief of the appellant's argument. We have struck out ground 2 as incompetent. The contention is that the first ground, at best, is of mixed law and facts, and as such leave was needed to file it. Leave having been obtained, the C ground of appeal offends S.213(3) of the Constitution of 1979 and that being the case there is no appeal before the Court have carefully looked at the first ground of appeal complained about and to my mind its purport can be summarized as follows:

"That once the respondent defaulted in payment of the entire contract D sum within six months and within reasonable time thereafter and the 50% of the contract sum he had paid was refunded to him and he accepted and did nothing more about the matter (despite his threat to sue), the contract is deemed rescinded in view of the agreement of offer and acceptance made up of the correspondence between the parties."

E In view of Exhibits A and B and the receipt of the cheque and the encashment thereof by the respondent without more than his threat to sue the contract certainly was at an end despite Exhibits 0 and 01. The ground is surely a ground of law as to whether a contract exists or has lapsed. The preliminary objection therefore is misplaced and hereby overruled.

F It must be emphasized that the rule always is based on unconscionability. Is it unconscionable of the appellant to withhold delivery to the respondent in view of dilatoriness of the respondent despite reminders and warnings to pay up what was due in six months after Exhibits H was written by him accepting Exhibit G? The respondent, three years after Exhibits G and H G defaulted in paying up, he was even glad, so it seems despite his bluff that he would sue, to receive back the N20,000.00 refunded to him by the appellant.

There is great merit in this appeal and I allow it for the foregoing reasons in setting aside the decision of the Court of Appeal which affirmed the H decision of the trial Court. I therefore set aside the sublease now in issue; and the registration in Land instrument of 23rd March, 1981 is hereby set aside and the entry in respect thereof in No. 16 at page 16 in Vol 1049 of Register of Deeds kept at Lands Registry Enugu is ordered to be removed. The award of damages is not proved and it is not hereby made. I award N1,000.00 as costs in this Court

N500.00 as costs in the Court of Appeal and the costs awarded by the trial High

Court is hereby reversed as costs to be paid by the respondent to the appellant.

WALIJSC

I have been privileged to read before now, the lead judgment of my B learned brother Belgore JSC, and I agree with his conclusion that there is merit in the appeal and it therefore succeeds.

The facts in this can simply be narrated as follows:-

As a result of an advertisement published in the dailies by the plaintiff, Anambra State Housing Development Corporation, for the sale of house being C built by it in Onitsha the defendant J.C.O. Emekwue applied in December 1978 (Exhibit F) for the sale of one of the houses to him. In response to the defendant's application, the plaintiff made an offer (Exhibi G) to him for the sale of one of such houses to wit: Plot J 125 Nigeria Bridge Head Estate Phase II, paragraph 1 of Exhibit G stated the selling price to be N40,000 while paragraphs 3, 4, 5, and 6 D contained other conditions attached to the sale.

As stipulated in paragraph 1 of Exhibit G the defendant paid the 1st instalment of N10,000. See (Exhibit J). And subsequent to Exhibit J, the plaintiff wrote a letter (Exhibit K) allocating plot J. 125 to the defendant The defendant accepted the allocation in Exhibit K with all the conditions attached, by Exhibit L along with Exhibit L the defendant paid N5,000 as part payment of the 2nd instalment with a promise to pay the remaining N5,000 of the 2nd instalment in a week's time. The defendant did not honour his promise and the plaintiff wrote Exhibit M to him. The defendant replied Exhibit M in Exhibit N and forwarded F the balance of N5, 000 for the 2nd instalment. This was on 2nd April, 1980.

After completing the payment of 50% of the selling price, the plaintiff executed a deed of sublease of the property in favour of the defendant stipulated in paragraph (6) of Exhibit K. It was registered and the plaintiff kept both the G original and the counterpart, pending the completion of payment of the 50% of the selling price as agreed to in Exhibit K. The original deed of sublease and its counterpart were Exhibits 0 and 01 respectively.

Notwithstanding the time limit stipulated in Exhibit K within which the defendant was to pay up the whole selling price which he failed to honour the H plaintiff wrote Exhibit P dated 11th November, 1981, to the defendant in the last paragraph of which he stated that unless the defendant paid up the balance of N20,000 within the next three weeks of Exhibit P the plaintiff "Will assume that you are no longer keen on the purchase of this house and I will therefore re-

allocate it to a purchaser who will fully pay for the house and collect the keys from us.”

The defendant did not respond to Exhibit P and the plaintiff wrote Exhibit S dated 20th April, 1982 in which he informed the defendant that plot J 125 which was previously and provisionally allocated to him had been re-allocated to another purchaser on full cash payment ‘and in the circumstances action could not be taken on his letter dated 7th April, 1982. He should therefore apply for a refund of earlier deposit of N20,000.

The letter referred to supra was the one written by the Federal Mortgage Bank of Nigeria Enugu Area Office on behalf of the defendant that the latter had applied for a mortgage loan from the former to enable him pay for the property. There was nothing to show when the defendant applied for the loan.

Following Exhibit S the plaintiff through their Solicitors wrote Exhibit S “T” and ‘U’, dated 15th June, 1982 and 5th July, 1982 respectively in which they forwarded to the defendant through his Solicitors, U.B.A. Enugu Cheque No. G) HOO5701 dated 25th May, 1982 for the sum of N20,000 payable to the defendant as full refund of the 50% deposit of purchase price received by his client, and also forwarded Deed of surrender - 5(five) engrossed copies for signing by the defendant for full restoration of the parties to their respective former positions.

Then by a letter dated 5th May, 1982, written by the defendant’s Solicitors to the plaintiff the former threatened to sue the latter for a breach of contract resulting in trespass, a claim of N100,000 damages and injunction.

The defendant accepted the refund of N20,000 retained the prepared deed of Surrender and refused to sign it. He did not file any action.

This forced the plaintiff to file the present action seeking for all order of the Court to set aside the Deed of sublease dated 23rd March, 1981 executed and registered in favour of the defendant.

At the hearing of the case before the trial Court the plaintiff called three witnesses through whom a number of documentary exhibits were tendered and admitted. Thereafter the plaintiff closed his case. The defendant did not testify nor call any witness to testify on his behalf.

Learned Senior Advocates appearing for the parties addressed the Court after which the learned trial Judge delivered his considered judgment and concluded:-

“In the final analysis, I have no doubt in my mind that the plaintiff has not proved his case against the defendant. The plaintiff’s claim is hereby dismissed”

Dissatisfied with the judgment of the trial Court the plaintiff appealed

against it to the Court of Appeal, Enugu Division. The plaintiff's appeal was dismissed. Oguntade JCA with whom Katsina-Alu JCA agreed, after considering the argument in the appeal, opined and concluded as follows:-

"In fairness to the plaintiff, it did not ask that the Deed of Sublease be set aside because the purchase price was not paid but rather because it contended that the defendant by receiving the N20, 000. 00 had accepted to execute a deed of surrender. The correct view is that the parties to a contract can agree to rescind it under the maxim Eodem modoquo oritor eodem dissolvitur (What has been created by agreement may be extinguished by agreement); See Groves v. I.T.I. Ltd. (1976) 11 S.C 19. The truth is that there was in this case no agreement to extinguish the earlier contract. The case of Majekodunmi v. National Bank of Nigeria Ltd. (1978) 5 S.C 119 must be seen in the light of the peculiar facts of the case. In determining whether or not an offer has been accepted in order to create a binding contract, one must be guided by the peculiar facts in each case. In this case, the conduct of the defendant clearly negates the notion of an acceptance of plaintiff's offer. This appeal in my view has no merit. It is accordingly dismissed with N400.00 costs in favour of the respondent."

The plaintiff has now further appealed to this Court. Henceforth the plaintiff and the defendant will be referred to as the appellant and the respondent in this judgment.

Both parties filed and exchanged briefs of arguments. Preliminary objection was raised by the respondent in his brief with regard to the two grounds of appeal filed by the appellant. The preliminary objection on ground two was sustained and it was accordingly struck out when same was withdrawn. On ground one, I agree with my learned brother Belgore JSC that it can pass as a ground of law and the objection to its incompetence is hereby overruled. See the guide lines set out in Ogbechie & Ors. v. Onochie & Ors. (1986) 3 S.C. 54.

In the appellant's brief one main issue with others in the alternative have been raised for consideration and determination by this Court. There is some overlapping as regards the main issue and the alternative ones.

The respondent's single issue is in my view covered by the main issue in the appellant's brief, though the respondent does not subscribe to that as stated in his brief.

The appellant's issues read:-

"(a) Whether the Court of Appeal was right in refusing to set aside the verdict of the trial court, and by itself reaching the conclusion that there

was no acceptance to the offer (per Exhibits A, T, U, & U. 1) in respect whereof Oguntade J.C.A. expressing the view of the majority in the lead judgment held, inter alia, thus.-

“In this case I am unable to see that a real or apparent acceptance by the defendant by the mere fact that he encashed the cheque. At the very best, it was equivocalIt would seem however that the defendant encashed the cheque in the belief that he could hold the money against award of damages he hoped to get from the court in the suit he contemplated and later brought against the plaintiff”

OR, IN THE ALTERNATIVE

(b) Whether the majority panel correctly and dispassionately applied the well - enshrined TEST OF REASONABLENESS AND OBJECTIVITY holding that there was no acceptance by the respondent of the offer Exhibits A, T, U, & U.1 and if not, whether the appellant was prejudiced thereby.

(c) Whether the initial contract culminating in Exhibits 0, 0.1 EXECUTORY OR EXECUTED, and in any event whether Exhibit A constitutes VALUABLE CONSIDERATION for the subsequent agreement aside Exhibits 0, 0.1.

(3) Whether in the surrounding circumstances of the instant case the Court of Appeal (as a court of law and equity) ought not to have invoked powers pursuant to s. 16 of the Court of Appeal Act 1976 and pursuant INHERENT JURISDICTION and set aside Exhibits 0, 0.1.”

It was the contention of the appellant that his case in the trial Court was based on the respondent’s refusal to divest himself of the title conferred by Exhibits 0 and 0.1 despite his acceptance of the Cheque Exhibit A, fully knowing the purpose for which it was issue, learned Senior Advocate referred to paragraph 25(b) of the Statement of Claim and submitted that the learned trial Judge, without examining the cardinal question as to whether there was an offer which was accepted by respondent for signing Exhibit U, I proceeded to reject the appellant’s case brevi manu wherein he opined that there was no such agreement between the parties and therefore the respondent had no obligation to sign the deed of release. He further submitted that since the trial court had failed to make any specific finding as to the fact whether or not the appellant made an offer to the respondent to execute Exhibit U 1, thereby extinguishing Exhibits 0 and 0.1, the Court of Appeal was duty bound to evaluate the whole evidence, draw inference therefrom and reach the correct conclusion. He cited in support the case The Registered Trustees of Apostolic Faith Mission v. Umo Bassey James & Anor. (1987) 7 S.C. NJ 167 at 179 and 180. Learned Senior

Advocate further submitted that the Court of Appeal as per its majority judgment failed to exercise this duty by affirming the decision of the trial court. He therefore urges this court to intervene by setting aside the concurrent decisions of the two lower courts, allow the appeal and grant the relief in terms of paragraph 25 of the statement claim.

In answer to the submissions above learned Senior Advocate for the respondent contended that Exhibit T under cover of which the cheque for N20,000 was forwarded to the respondent being refund of the part payment for the house allocated to him by the appellant, contained no offer. He submitted that with the execution of the deed of sublease, in favour of the respondent, he legal estate in the property has passed to him and that the interest left in the appellant was a reversion. He said the lien the appellant had on the property did not authorize him to sell the property for nonpayment of the balance of the purchase price and that the only way to enforce the lien was to apply to the Court of Appeal, under its equitable jurisdiction for a declaration of charge and an order for sale of the same to raise the amount due. He referred to Williams on Vendor and Purchaser Vol. 1 [4th Edition] p. 988; Gibson's Conveyancing [18th Edition] p. 148; Nives v. Nives (1880) 15 CHD 649 and All Good v. Merrybent & Darlington Rly Co. [1886] 33 Ch. D 571 to support his submissions. Learned Senior Advocate further submitted that the conduct of the respondent in cashing the cheque forwarded to him by the appellant did not imply any agreement by the former to divest himself of his title in the property. He said cases where cashing of a cheque created a binding agreement are different and cited Achon v. National Employers Mutual Insurance Co. (Nigeria) Ltd. [1976] 12 S.C. 81 as an example and then further cited the case of Ajide v. Kelani (1985) 11 S. C. 124 at 168 (Lines 9 21) to buttress his arguments.

The issue to be decided in my view is a simple one. It is whether by the execution of the deed of sublease by the parties and its subsequent registration without delivering the same to respondent, the legal estate in the property in dispute has passed to the latter.

In the case of Awojugbagbe Light Industries Ltd. v. (1) P.N. Chinukwe & (2) N.L.D.B. Ltd. (1995) 4 NWLR (Pt. 390) 379, the issue of deed executed but not delivered came before this court for consideration wherein Bello CJN reiterated the law as follows:

"The importance of the intention of the parties to be bound by its terms for the purpose of rendering a deed effective in law is clearly set out in Halsbury's Laws of England 4th Edition Vol. 12 paragraph 1329 which reads:

Delivery of Deed:

"In order to be effective a deed must be delivered as the act and deed of the

party expressed to be bound by it, as well as sealed. No special form or observance is necessary for the delivery of a deed, and it may be made in words or by conduct. The usual form of delivering a deed by words is the executing party to say, while putting his finger on the seal, "I deliver this as my act and deed". It is not necessary, however, to follow this form of execution; nor is it necessary that the deed should actually be delivered over into the possession or custody either of the person intended to take the benefit of the deed, or to a third person to the use of the party taking tit, benefit of the deed; though if the party to be bound so hands over the deed that is sufficient delivery without any words. What is essential to delivery of the document as a deed is that the party whose deed the document is expressed to be (having first sealed it) shall be words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the provisions contained in it." (*Italics is mine*)

In Vincent v. Premo Enterprises Ltd. (supra) at p. 619 Lord Denning M.R. aptly stated the effect in law of a deed which a party did not acknowledge his intention to be immediately and unconditionally bound by the provisions contained therein. It is pertinent to set it out extensively.

"The law as to "delivery" of a deed is of ancient date. But it is reasonably clear. A deed is very different from a contract. On a contract for the sale of land, the contract is not binding on the parties until they have exchanged their parts. But with a deed it is different. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered. "Delivery" in this connection does not mean "handed over" to the other side. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Even though the deed remains in the possession of the maker, or of his solicitor, he is bound by it if he has done some act evincing an intention to be bound, as by saying "I deliver this my act and deed." He may, however, make the "delivery" condition: in which case the deed is called an "escrow" which becomes binding when the condition is fulfilled.

The law was much considered by the House of Lords in the leading case of Xenos v. Wickham (1866) LR2 HL 296. After the judges had been brought together to advise the House, Lord Cranworth said at page 323:-

"In the first place, the efficacy of a deed depends on its being sealed and delivered by the make of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time

has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow."

That was applied recently by this court in Beesly v. Hallwood Estates Ltd. B (1961) Ch. 105, where a company was held to be bound by a lease which had been signed, sealed and delivered by the company, even though it has not been sent to the other side at all. It was delivered as an escrow, subject to a condition that the tenant should hand over the counterpart. He did hand it over and the company was held bound accordingly because the condition had been C fulfilled." (Italics mine)

A transaction executed by a deed does not become effective until it is delivered; and where its effectiveness is made subject to fulfilment of certain condition, the effectiveness will remain in abeyance until the condition is fulfilled. See Beesly v. Hallwood Estates Ltd. (1961) Ch. 105. It is a mere D escrow.

It is clear from the oral and documentary evidence presented by the appellant, Exhibit O, was executed and registered by the parties subject to the payment in full of the purchase price of the property in dispute by the respondent. It is for this reason that the appellant is still retaining both the E original and the duplicate copies of Exhibit O. The respondent was not put into possession of the property, nor did the legal estate in it vest in him. His conduct of accepting and cashing the cheque of N20, 000 being refund of the money deposited by him as part payment for the purchase of the house, is a clear manifestation of accepting the recision of the provisional offer to him in Exhibit F G

It is for these and other reasons contained in the lead judgment of my learned brother Belgore JSC that I also hereby allow this appeal and set aside the decisions of the two lower court. I enter judgment for the appellant in terms of his claim contained in paragraph 25(a) of the Statement of claim. The claim G for damages for breach of contract is, however, refused.

I subscribe to the order for costs contained in the lead judgment.

KUTIGI JSC

H

I have had the preview of the judgment of my learned brother Belgore J.S.C. in this appeal. I agree with his conclusion that the appeal has merit and should be allowed. I allow it and endorse the orders contained in the said judgment.

OGUNDAREJSC

In pursuance of the housing policy of the Government, the Anambra State Housing Development Corporation, an agency of the then Anambra State Government, (hereinafter is referred) to as the Plaintiff) developed a housing estate at Onitsha known as Niger Bridge Head Housing Estate Phase II. Some of the houses in the estate are of type C3/03. One of such houses situate at plot J125 in the estate was offered for sale to Mr. J.C.O. Emekwue, a legal practitioner (hereinafter is referred to as the Defendant) at the cost of N40,000.00 (Forty thousand naira). The offer contained in a letter dated 1st May, 1979 Contained the following terms:

C “1. The Selling Price of the house is N40, 000.00 payable in four equal installments within the period of six months which is the construction period for the property;

D 2. Our lease is for 99 years with effect from 1st January, 1979 and so we will sell the duration, less 14 days, with the usual understanding that this will be renewable at the expiration of the term, just as we presume that our own lease will be renewed by the Government of Anambra State;

3. The ground rent will be determined later and will be payable annually in advance;

4. You will be responsible for the cost of the survey of the plot;

E 5. You will be responsible for the cost of the preparation of the title documents in respect of the property, and as soon as you have paid 50% of the Selling Price of the house, the title documents will be engrossed for execution by both parties, and you will be responsible for the cost of stamping and registration of the documents of title;

F 6. There will be a covenant in the title documents that you will abide by our regulations in carrying out future extensions in the property in accordance with drawings and specifications prepared by us.”

G The Defendant accepted the offer by a letter dated 14th May 1979 and paid the first instalment of N10,000.00 by a cheque for N6,000.00 and a transfer of N4,000.00 from his account on a previous aborted transaction with the Plaintiff.

H The Defendant did not pay the balance of N30,000.00 as stipulated in the letter of offer. The Plaintiff wrote to him a letter dated December 24, 1979 giving him 3 months within which to pay the balance. This letter is fully set out in the judgment of my learned brother Belgore JSC; I need not set it out again in this judgment. The Defendant’s response to this letter was to forward a cheque for N5,000.00 to the Plaintiff by a letter dated 21-3-80. On 3/4/80 he paid another sum of N5,000.00 making a total sum of N20,000.00 that the Defendant

paid to the plaintiff.

The Defendant having paid a total sum of N20,000.00 which is 50% of the purchase price of N40,000.00, the Plaintiff, in accordance with the terms of the offer caused the title deed to be prepared, executed by both parties and registered. The deed was not delivered to the Defendant but kept by the Plaintiff until full payment of the purchase price was made by him. B

On completion of the house too, the keys were not handed over to the Defendant as he was still to pay N20,000.00 being the balance of the purchase price. Demands were made by the Plaintiff for the balance but to no avail. No November 11, 1981 the Plaintiff wrote the following letter to the Defendant: C

“Dear Sir,

FINAL DEMAND NOTICE ON PAYMENT - RE HOUSE TYPE C3/03 IN THE NIGER BRIDGE HEAD LAYOUT, ONITSHA

Our records show that up to the date of this letter, you have not bothered to pay up the balance on your house Plot J125 and collect your keys. D

As you are no doubt aware this house is now ready and the necessary infrastructures are also being provided. We, therefore, intend to hand over the keys within the month to those purchasers who have completed payment on their houses.

I am constrained therefore to stress that if within the next 21 days from the late E of this letter, your balance of N20, 000.00 is not paid by bank draft or cash, I will assume that you are no longer keen on the purchase of this house and I will therefore reallocate it to a purchaser who will pay fully for the house and collect the keys from us.

Yours faithfully,

J.C. Okeke

Ag. GENERAL MANAGER”

Meanwhile, the Defendant made efforts to secure a loan from the Federal Mortgage Bank of Nigeria with which to pay the balance he was owing the Plaintiff. That Bank wrote two letters to the Plaintiff dated 7th August, 1981 G and 10 December 1981 to the effect that Defendant’s application to the Bank for loan was under consideration. As the balance of N20,000.00 remained unpaid, the Plaintiff on 20 April 1982 wrote to the Defendant revoking the allocation to him. The letter read:

“Dear Sir,

REVOCATION OF PROVISIONAL ALLOCATION RE: PLOT J125 C3/03 HOUSE TYPE NIGER BRIDGE HEAD PHASE II ONITSHA

Further to my letter ED. 137A of 22nd February 1982, I regret to confirm that Plot J125 which was provisionally allocated to you has been reallocated to H

another purchaser on full cash payment, and in the circumstances action cannot be taken on your letter dated 7th April, 1982.

You may therefore apply for a refund of your earlier deposit of N20, 000.

Yours faithfully,

B (Sgd.)

J.C.Okeke

AG. GENERALMANGER”

This development led to exchange of series of correspondence between the solicitors to the parties, that is, Dr. J.O. Ibik SAN for the Plaintiff and A.N. Anyamene Esqr. S.A.N for the Defendant. Dr. Ibik, in one of his letters dated 15th June 1982 sent to the Defendant through his Solicitor Plaintiff’s cheque for N20, 000.00 payable to your client as full retinal of 50% deposit of purchase price received by my client.” In another letter dated 5th July 1982 Dr. Ibik SAN again forwarded to the Defendant through his solicitor ‘5 (five) engrossed copies of Deed of Surrender requisite for full restoration of the parties to their respective former positions.” The Defendant on receipt of the cheque paid same into his account but did not sign the engrossed copies of the Deed of Surrender. Rather he caused h solicitor to issue a threat to sue “for this flagrant show of naked power

E When the Defendant would not sign the engrossed copies of the Deed of Surrender, the Plaintiff on 19/1/84 instituted the action leading to this appeal claiming -

“(a) *An Order setting aside the Deed of Lease dated 23rd March 1981, made between the parties hereto and registered as Land Instrument No. 16 at page 16 in Volume 1049 of the Lands Registry in the office, at Enugu.*

F (b) *N500 general damages for breach of agreement.”*

Pleadings having been filed and exchanged the action proceeded to trial before Ubaezonu J (as he then was) who, in a reserved judgment, dismissing plaintiff’s claims holding -

G “*It is my considered view that the title conferred on the defendant by Exhibits 0, 01 is complete and indefeasible, whether the document was handed over to the defendant or not in view of the fact that the self same Exhibit K written by the plaintiff and relied upon by it states what the remedy of the plaintiff is if the defendant fails to pay the balance of the purchase price. Paragraph (c) of Exhibit K specifically provides that ‘the keys of the house will be handed over to you (i.e. defendant only when you have the full purchase price of the house’ (brackets supplied by me sic). If therefore the defendant has failed to pay the full purchase price of the house what the plaintiff could do*

was to seize the keys of the house and prevent the defendant from taking physical possession of the house as provided in Exhibit K or in the alternative to sue for the balance of the price. I see no justifiable excuse for the plaintiff to unilaterally revoke or cancel the allocation or to allocate the house to P. W.2 or any other customer. “

Later in the judgment the learned trial Judge stated:

“I know of no law which empowers a court to set aside a deed on the ground that the balance of the purchase price is not paid - not even where no price at all has been paid as the seal in the deed itself imports a consideration.”

It is pertinent to mention that the defence rested its case on the case for the Plaintiff.

Being dissatisfied with the dismissal of its claim, the Plaintiff appealed unsuccessfully to the Court of appeal. The Plaintiff has further appealed to this Court upon two grounds of appeal.

Written Briefs of Argument were filed and exchanged and at the oral hearing of the appeal, Mr. Anyamene, SAN learned leading counsel for the Defendant raised a preliminary objection to the competence of the appeal contending that the two grounds of appeal were, at best, grounds of mixed law and fact and leave to appeal had not been obtained as required by section 213(3) of the Constitution. Dr. Ibik, SAN learned leading counsel for the Plaintiff conceded it that ground (2) was incompetent in that it was essentially a complaint against a minority decision and not against the majority decision which is the judgment of the Court that could be appealed against. He sought leave of Court to withdraw the ground. We granted leave and accordingly struck out Ground (2).

Dr. Ibik however submitted that ground (1) was a ground of law. We reserved our ruling on the preliminary objection in relation to Ground (1) and directed counsel to argue the appeal as if the ground was held to be competent. Learned leading counsel for the parties proffered oral arguments.

I will first give my ruling on the preliminary objection I must state at the onset that it is not disputed that the Plaintiff did not seek nor obtained leave before lodging this appeal: Now, Ground (1) reads:

*“(1) **ERROR IN LAW***

The Court of Appeal erred in law in affirming the decision of the trial court by holding per the majority decision of the Justices of Appeal Uwaifo, J.C.A. dissenting) that the encashment of the cheque Exh. A by the respondent (defendant) did not constitute conduct from which an intention to accept the offer is Exh. T could, and ought reasonable to, be inferred having regard to the surrounding circumstances at that material time, Oguntade J.C.A. deliv-

ering the lead judgment holding thus:-

‘The defendant did contend that the payment of N20,000 to him by the plaintiff was gratuitous. I do not think so. I think the purpose why the plaintiff sent the cheque for N20, 000.00 was to purchase the interest earlier transferred to the defendant. It would seem however that the defendant encashed the cheque in the belief that he could hold the money against an award of damages he hoped to get from the court in the suit he contemplatedagainst the plaintiff’

PARTICULARS OF ERROR IN LAW

(a) Exh. A being issued personally to the respondent (defendant) can legally be acceptable only by the respondent.

(b) Exh. T is ancillary to, and explanatory of, the real purpose and intent wherefore Exh. A was issued. A proper construction of Exh. X reveals that the true purpose and intent of the terms expressed in Exh. T were clearly understood.

(c) There is no evidence whatever to justify the view of the majority of the Justices of Appeal to the effect that the respondent encashed Exh. A ‘in belief that he could hold the money against the award of damages he hoped to get from the court in the suit he contemplated and later brought against the plaintiff.’ (op. cit)

(d) There is equally no evidence before the Lower Court that the contemplated suit in question had been commenced at or before the time when Exh. A was issued or encashed.

(e) There is however evidence of admission by the respondent (albeit endorsement on Exh. T) showing that Exh. A was collected by the respondent and

encashed subsequent to Exh. X.

(j) The encashment of Exh. A, in the circumstances, constitutes evidence by conduct from which an intention to accept the offer implicit in the said exhibit ought reasonably to have been inferred. See Majekodumi vs National Bank of Nigeria Ltd. (1978) 3 S.C. 119. Also see Afolabi vs. Polymera Industries

(Nig.) Ltd. (1967) 1 All NLR 144.”

I have carefully examined the above ground of appeal; I am satisfied that it is a ground of law. The ground does not question the evaluation of evidence by the lower court but the inference to be drawn from established facts based on admissible evidence. The ground in effect, complains that there has been a misconception of the law in its application to established fact. It also complains that the court below reached its decision as to the intention of the Defendant in encashing Plaintiff’s cheque for N20,000.00 when there was no evidence before it upon which it could reach such decision. All these, in my

respectful view, raise issues for law - see Ogbechi Vs. Onochie (1986) 2 NWLR 484; Ifediorah v. Ume (1988) 2 NWLR 5 U.B.A. v. Stahlbau GmbH (1989) 3 NWLR 374. Ground 1, therefore being a ground of law the Plaintiff has right of appeal as of right to this Court - See: Section 213(2) of the Constitution. The appeal is competent and the preliminary objection is overruled.

I now come to a consideration of the appeal itself. In the Appellant's, B Brief the following questions are set out as calling for determination in this appeal:

"(a) Whether the Court of Appeal was right in refusing to set aside the verdict of the trial court and by itself reaching the conclusion that there was no acceptance to the offer (per Exhs. A, T, U & U.1) in respect whereof, Oguntade JCA. expressing the view of the majority in the lead judgment held, inter alia, thus:-

'In this case I am unable to see that a real or apparent acceptance by the defendant by the mere fact that he encashed the cheque. At the very best, it was equivocal..... It would seem however, that the defendant encashed the cheque in the belief that he could hold the money against award of damages he hoped to get from the court in the suit he contemplated and later brought against the plaintiff.....'

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

(c) Whether the initial contract culminating in Exhs. O. O. 1 was EXECUTORY or EXECUTED, and in any event whether Exh. A constitutes VALUABLE CONSIDERATION for the subsequent agreement to set aside. Exhs. O. O.1"

The Defendant, for his part, states the question in these words:

"Whether the court below was right in upholding the findings and decision of the trial court that there was no evidence of an agreement subsequent to the execution of the deed of lease between the parties which obliged the respondent to execute a deed of surrender of his leasehold interest in the property he purchased from the appellant on terms of deferred payment as provided by the law which established the plaintiff"

To determine this appeal, it is necessary to consider (i) the legal effect of Exhibit, the Deed of lease and

(ii) Whether there was in existence a subsequent agreement, express or implied, whereby the Defendant was to surrender the interest he had purportedly acquired by virtue of the Deed of Lease. The learned trial judge H opined thus:

"It is my considered view that the title conferred on the defendant by Exhibits 0.01 is complete and indefeasible whether the document was handed over to the defendant or not"

What prompted this finding was the submission of learned counsel for the plaintiff to the effect that

“The title to the defendant is incomplete and defeasible because the document of title although signed and sealed yet it has not been delivered and that delivery was necessary to complete the transaction.”

B The Court of Appeal, per Oguntade JCA, expressed the same view when h said:

“.....by proceeding to execute the Deed of Sublease in the property in favour of the defendant, the plaintiff had fully divested itself of the ownership rights in the property in favour of the defendant.”

C With profound respect to their Lordships of both courts below they are wrong in the view held by them. It is the law that to be effective a deed must be delivered as the act and deed of the party expressed to be bound by it and the deed takes effect from the date of delivery which may, or may not, be the date expressed in the instrument - See: Awojugbagbe Light Industries Ltd. vs. Chinukwe & Anor. (1995)4NWLR (pt.390) 379 Halsbury’s Laws of England (4th edition) Vol. 12 paragraph 1329. Delivery does not take a special form or observance; what is essential is the intention of the parties, particularly the party whose deed the document is expressed to be which intention may be expressed in words or by conduct.

E Having regard to the facts in this case, it could not have been intention of the Plaintiff that Exhibit 0 should take effect on its execution the Defendant had only paid 60 of the purchase price whereas the Deed Lease stated that the full purchase price had been paid. Paragraph 2(i) of the deed reads:-

F *“That pursuant to the said agreement and in consideration of a Premium of N40,000.00 (Forty thousand naira) now paid by the Lessee to the Corporation, the receipt whereof the Corporation doth hereby acknowledges) the Corporation.....”*

G The reasonable inference to be drawn is that the Deed of Lease was to take effect on the Defendant paying the balance of the purchase price. It was undoubtedly for this reason that the Plaintiff held on to the deed and did not hand it over to the Defendant. The fact that the Deed of Lease was registered is not evidence of its delivery - See Jules v. Ajani (1980) 5 SC 96.

H There having been no delivery by the Plaintiff of the Deed of Lease, no interest in the property situate at Plot 1125 in the Niger Bridge Head Housing Estate Phase II has passed to the Defendant. He was, therefore, under a misapprehension of the law when he threatened to sue the Plaintiff in trespass; he had not any time been led into possession.

Assuming, without so deciding, that delivery had taken place, it would be on the condition that the Defendant paid up the balance of the purchase price. That would make the Deed of Lease a conditional deed, that is, an escrow and would only be effective and-binding on the fulfilment by the defendant of the condition, that is payment of the balance of the purchase price - see: Awojugbagbe Light Industries Ltd. v. Chinukwe & Anor. (supra); Halsbury's Laws of England B (4th edition) Vol. 12 paragraphs 1332 - 1334. See also: Norton Upon Deeds (1st edition) where at page 15 an escrow is defined as

".....an instrument delivered to take effect on the happening of a specified event, or upon the condition that it is not operative until some condition is performed. The pending the happening of the event or the C performance of the condition, the instrument is called an escrow Until the specified time has arrived or the condition has been performed the instrument is not a deed. It is a mere escrow. "

Being a mere escrow, therefore, the Deed of Lease passed no interest in the property to the Defendant. It follows therefore, that whatever view one D takes of Exhibit 0, they did not pass any interest in the property here concerned to the Defendant and he consequently acquired no legal title to the property.

There is undisputed evidence that the Plaintiff refunded, and the Defendant accepted, the deposit of N20,000.00 made by the Defendant in E respect of the property. The Plaintiff had earlier revoked the allocation of the property to the Defendant for non-fulfillment of his obligation under the contract to pay the full Purchase price notwithstanding the time indulgences granted him. The Defendant knew why the cheque for N20,000.00 was sent to him, (See Exhibit X). Following the revocation of the allocation to him, he gave F notice of intention to sue but did not sue. Then followed the refund by cheque of his deposit. Defendant threatened to sue but later changed his mind and encashed the cheque. The only reasonable inference to draw from his conduct is that he accepted the factual situation that his contract with the Plaintiff in respect of the property was at an end, more so that he was in G breach of the agreement by his inability to pay the balance of the purchase price due from him.

Finding by the court below, per Oguntade JCA that –

"..... the defendant encashed the cheque in the H belief that he could hold the money against the award of damages he hope to get from the court in the suit he contemplated and later brought against the plaintiff. "

is not based on any evidence on the printed record. The learned Justice of Appeal based his finding on paragraph 19 of the Statement of Defence where

the Defendant had pleaded:

“19. The plaintiff subsequently made a gratuitous payment of N20, 000. 00 to the defendant which sum the defendant is holding against the exemplary damages to which he is entitled in respect of the totally reprehensible act of trespass by the plaintiff.”

But he led no evidence in support nor was there any evidence that he at any time sued the Plaintiff. Pleading, of course, is no evidence and a case is decided on the admissible evidence adduced before the court - see: Dumbo v. Idugboe (1983) 1 SCNLR 29; (1983) 14 NSCC 22.

Having by his conduct accepted Plaintiffs rescission of the contract between the parties there is no longer any basis for keeping Exhibit 0, that is, the Deed of Lease alive, even though it remains ineffective and not binding either because it has not been delivered or, at best, it is a mere escrow. Consequently, the Deed ought to be set aside.

It is for the above reasons that I agree with my learned brother, Belgore JSC, a preview of whose judgment I have had advantage of, this appeal be allowed and it is hereby allowed by me too. I set aside judgments of both the Court of Appeal and the trial High Court. I enter judgment for the Plaintiff in terms of its claim (1) and hereby make an order setting aside the Deed of sublease dated 23rd March 1981, made between the parties hereto and registered as Land Instrument No. 16 at page 16 in Volume 1049 of the Lands Registry in the office at Enugu but probably now in the office at Awka. As there was no need for the Defendant to execute any Deed of Surrender since title has not passed to him, I cannot say there was an agreement which he breached by his refusal to execute such a deed. Consequently the claim for general damages for breach of agreement fails and it is dismissed.

I abide by the order for costs made in the judgment of my brother, Belgore JSC.

G

ADIO JSC

I have had the benefit of reading, in draft, the judgment just delivered by my learned brother, Belgore, J.S.C and I agree that the appeal should be allowed. I too allow it

H

The conveyance or transfer of the interest in the house in question by the appellant to the respondent was solely on condition that the respondent paid the amount payable under the terms of the offer made by the appellant to the respondent which respondent accepted. The respondent had refused and/or neglected to do so.

The respondent alleged that he retained the money paid to him by the appellant by cheque to enable him to appropriate it in relation to damages which might be awarded in his favour against the appellant. Having regard to the totality of the facts of the case, it was not only speculative but also an after thought. The respondent could not directly or indirectly make the court to B compel the appellant to make the house available to him when the respondent by his conduct had been guilty of a delay which might be taken to be evidence of abandonment of the acceptance the offer made to him by the appellant. See Coker v. Ajewole, (1976) 10 S.C. 17.

I have given due consideration to the preliminary objection raised by C the learned counsel for the respondent and I am of the view too that it should be overruled and is hereby overruled. The ground of appeal in question was a ground of law.

It is for the foregoing reasons and the detailed reasons given in the lead judgment of my learned brother, Belgore, J.S.C that I agree that the appeal D should be allowed. I too allow it and abide by the consequential orders, including the orders for cost.

E

F

G

H