

SUPREME COURT OF NIGERIA

20TH DECEMBER, 1996. SC. 60/1989.

**CORAM:- A. B. WALI, M. E. OGUNDARE, E. O. OGWUEGBU,
U. MOHAMMED, A. I. IGUH, JJSC.**

E. D. TSOKWA & SONS COMPANY LTD. APPELLANT
AND
UNION BANK OF (NIG.) LTD. RESPONDENT

BANKING - Bill of Exchange Act s. 48 - Comes into play only when a cheque is dishonoured - And not when it is lost.

BANKING - Cheques - Customer drawing money before the clearing of paid in cheques - Where those cheques got lost - And were never cleared - The customer is liable to repay the amount drawn.

BANKING - Liquidated amount - Being claimed by the appellant - Was not proved.

EVIDENCE - Allegation of fraud in a civil case - Whether proved according to the required standard.

EVIDENCE - Burden of proof - Rests on the person that pleaded particular facts - Discharge of this burden will now shift onus to the other party.

MORTGAGES - Legal fee for mortgage preparation - Where the mortgage is not proved - No judicial notice will be taken - About debiting a mortgagor with such fees.

PLEADINGS - Averments in pleadings - Whether supported by any probative evidence.

FACTS

The plaintiff/appellant was a customer of the defendant/respondent at its Gboko Branch in Benue State. Plaintiff paid in some 3 cheques into his account with the defendant. The cheques which were sent in clearing got lost in transit. Meanwhile against banking practice, the defendant's then manager allowed plaintiff to draw some money without the clearing of the said paid in cheques. The said manager was subsequently terminated for similar malpractices.

Plaintiff filed this action before the High Court seeking inter alia, a proper declaration of its actual financial position with the defendant. Plaintiff contested that it is not owing the sum of N736,812.29 to the defendant. The trial Court found in the plaintiff's favour by holding that it is only indebted to the defendant in the sum of N116,717.00. Defendant's appeal to the Court of Appeal was allowed in part as that court held that plaintiff is owing the sum of N456,717.00 to the defendant. Being dissatisfied plaintiff has appealed to the Supreme Court and the defendant has cross-appealed, on a total of 4 issues.

ISSUES FOR DETERMINATION

“(i) Whether, in the circumstances of this case, the plaintiffs are discharged as drawers of the relevant cheques by reason of the provisions of S.48 of the Bills of Exchange Act.

(ii) Whether the court below was correct in reversing the decision of the High Court regarding the sum of N44,820.00.” Etc, see. p. 2260

HELD (Unanimously dismissing the plaintiff's appeal and allowing defendant's appeal in part per lead judgment of **WALI JSC**)

Bill of Exchange Act s. 48

1. Reading the pleadings as a whole to wit the Amended Statement of Claim and the Amended Statement of Defence, it would be discerned therefrom that the appellants intended to rely on the provision of S.48 of the Bills of Exchange Act. But that notwithstanding, S.48 of the Act comes into play when only a cheque is dishonoured and not lost. (p. 2263 B)

Allegation of fraud in a civil case

2. The appellants claimed that the Respondents dismissed its Manager to defraud the appellants. The Respondents on their part denied the allegation and averred that the Manager connived with P.W.3 the Managing Director of the Appellants to destroy the cheques. The Appellants alleged fraud against the Respondents and it was their duty to prove the allegation in conformity with the standard of proof in criminal cases. This evidence was lacking, the Respondents had no duty to prove the appellants case for them. In civil cases it is the duty of the plaintiff to prove his case to the standard required but not to rely on the weakness of the defendant's case. (p. 2263 C)

Customer drawing money before the clearing of paid in cheques

3. The evidence led by the respondents that the three cheques were lost was neither challenged nor contradicted. There was no evidence that the amounts equivalent to the ones on Exhibits A, B, and C respectively and

drawn by the appellants on their account with First Bank of Nigeria Yola was debited, despite the fact that the same were paid into Appellant's account with the Respondents and their value withdrawn by them with the active connivance of the Respondent's Manager who was dismissed by the Respondents for other such similar malpractices. Both the drawer and the payee in the instant case are the same person. The appellants cannot escape liability when the cogent and undisputed evidence by the respondents was that non-presentment of Exhibits A, B, and C was due to circumstances beyond their control and not attributable to negligence on their part. Accordingly the learned Justices' conclusion on Exhibits A, B, and C that the appellants (then as respondents) are liable for the total sum of N340,000.00 cannot be faulted. I therefore answer Issue 1 in the negative. (pp. 2264 D & 2265 C)

Liquidated amount claimed - Whether proved

4. Looking at the excerpts of the evidence above, could it be said the appellants had strictly proved the liquidated amount being claimed? I answer the question posed in the negative for the following reasons:-

1. *The cheque for N44,820.00 paid in by the appellants was drawn in favour of E.D. Tsokwa and Sons which is not the same persons as the appellants.* (p. 2266 C)

Burden of proof

5. In civil cases, the onus of proving particular facts as averred in the pleading is on the person that pleads them, and in the case in hand, the appellants/respondents. It is only after this burden had been discharged that the respondents/appellants would be required to call evidence in rebuttal. The complaint by the Respondents/Cross-Appellants is well founded that both the trial court and the Court of Appeal were wrong in shifting the initial burden of proof on them rather than on the appellants/respondents. (p. 2271 C)

Averments in pleadings

6. In the present situation it was the Respondents/Cross-Appellants who were asserting that the facts as pleaded by them exist and so the onus of proving the same fell on them and not on the appellants/respondent. There was no evidence proving the grant of credit facilities, nor was there any evidence that the appellants/respondents authorized the execution of the two legal Mortgages to wit, Exhibit 1 and Exhibit 2 tendered and rejected. Even if Exhibit 2 tendered and rejected were to be admitted, (which is not conceded) it would not have made the respondents/cross-appellants case

of probative value was adduced. (p. 2272 C)

Legal fee for mortgage preparation

1. The question of taking judicial notice that a mortgagor is debited with the fees for the preparation and execution of a deed of legal mortgage to secure loan facilities by the Respondents/Cross-appellants does not arise since the facts as alleged by the respondents/cross-appellants were not proved. (p. 2273 A)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Who is the drawee of a cheque

1. Adio JSC had in Eebunike v. A.C.B. (supra) referred to the drawer of a cheque drawn in the drawer's favour on a bank as "drawer" and "drawee" of the cheque. It is contended in this case, and conceded to by counsel for the defendant, that this is erroneous. I have no hesitation in agreeing with learned counsel that when a person issues a cheque in his own favour and drawn on a bank, that person is a drawer and payee (or specified person) in respect of the cheque but the bank on which the cheque is drawn is the drawee of the cheque. The statement in Egbunike v.A.C.B. to the contrary must be taken as made per incuriam. (p. 2280 F)

2. Proof - Documents which primarily fall on plaintiff to establish

It is for a plaintiff to prove his case and not for the defendant to disprove it. I do not share the view that section 149(d) applies where a defendant fails to tender in evidence documents which the plaintiff has the primary duty of establishing before the court. After all, a defendant who is satisfied that the plaintiff has failed to discharge the onus placed on him (plaintiff) by section 137(1) of the Evidence Act is entitled to rely on the evidence of the plaintiff without calling any evidence himself. (p. 2289 H)

REPRESENTATION

T. E. Williams, for the Appellant

G. O.K. Ajayi, SAN, (S. A. Sowemimo Esq. with him) for the Respondent

CASES REFERRED TO

Odiase v. Agho (1972) All NLR 175

Nigerian Ports Authority v. Construction General Cogefarsm (1974) 12 SC 81

Okuarume v. Obabokor (1965) 1 All NLR 360

Okubule v. Oyagbola (1990) 4 NWLR (Pt. 147) 73

Ike v. Ugboaja (1993) 9 KLR 62

Nigerian Maritime Services Ltd. v. Afolabi (1978) 2 SC 79

Adegoke v. Adibi (1992) 5 NWLR (Pt. 242) 410

Egbunike v. A.C.B. Ltd. (1995) 2 KLR 372 B Read v. Brown 22 Q.B.D.

B 128

Anyanwu v. Mbara (1992) 5 N.W.L.R. (Part 242) 386 at 398

Idahosa v. Oronsaye (1959) 4 F.S.C. 166

Aderemi v. Adedire (1966) N.W.L.R. 398

A.C.B Ltd. v. A. G. North (1967) N.W.L.R. 231 C

C

STATUTES REFERRED TO

Bills of Exchange Act Cap. 35 LFN 1990 ss. 48, 50(2)(c)(i) 46(2) 69

Evidence Act ss. 149(d), 135 - 140

D

LEAD JUDGMENT BY WALI JSC

The claims of the appellant as set out in his Amended Statement of Claim are as follows:-

“(1) A declaration of the court that the plaintiff is not indebted to the first defendant to the sum of N736,812.29 as at 31st March, 1983.

E *(2) A declaration that the defendants were in error when they charged/debited the plaintiff’s account with interest of N117,939.91 - calculated on disputed sum/debt from 5/6/81 to 3/3/83.*

(3) A declaration of the court of the actual financial position of the plaintiff at the defendants’ branch Gboko.

F *(4) An order of the court compelling the defendants to rectify their books of accounts to reflect the actual indebtedness of the plaintiff as at 31st March, 1983.”*

The respondent in answer to the Amended Statement of Claim filed an Amended Statement of Defence in which the crucial averments G in the said Amended Statement of Claim were denied.

After pleading were settled, the case went to trial in which each side called witnesses to prove the averments in his pleading. Learned counsel for both the appellant and the respondent addressed the court to buttress the cases they presented and thereafter the learned Judge adjourned the case for H judgment. In his reserved judgment delivered on 20th March, 1986, the learned trial Judge found in favour of the appellant as follows:-

“In the light of the above I hold that the plaintiff have proved quite substantial part of their claim on a balance of probability. They are entitled to judgment. I therefore grant a declaration that the plaintiffs

are not indebted to the defendants in the sum of N736,812.29 as at 31st March, 1983. I found as a fact that the plaintiffs are indebted to the defendants in the sum of N116,717.00. How I arrived at this figure are carefully set out above.

2. I further declare that the defendants can only calculate interest on the debt of N116,717.00.

B

3. The defendants are hereby ordered to rectify their books of account to reflect the findings of the court."

Dissatisfied with the judgment of the trial court, the respondent [then as appellant] appealed against it to the Court of Appeal. At the end of the exercise before it the Court of Appeal unanimously allowed the C appeal in part. Adio JCA [as he then was] delivered the judgment of the court in which he concluded:-

"In the circumstance, this court affirms the declaration granted by the trial court to the respondents that they were not indebted to the appellants in the sum of N736,812.29k as at 31st March, 1983, and the order made by the trial court requiring the appellants to rectify their books of account to reflect the findings of the court. The finding of the trial court that the respondents were indebted to the appellant in the sum of N116,717.00 and its declaration that the appellants could only calculate interest on the debt of N116,717 .00 are hereby substituted with a declaration that the respondents are indebted to the appellants in the sum of N456,717.00 as at 31st March, 1983 and a further declaration that the appellants are entitled to calculate interest on only the aforesaid debt of N456.717 respectively. The declarations and the order of the trial court, as modified or varied in the manner mentioned above, are or should be as follows:-

F

1. The plaintiffs/respondents are granted a declaration that they were not indebted to the defendants/respondents in the sum of N736,812.29k as at 31st March, 1983.

2. The plaintiffs/respondents are granted a declaration that they were indebted to the defendants/appellants in the sum of N456,717.00 as at 31st March, 1983.

G

3. The plaintiffs/respondents are granted a declaration that the defendants/appellants are entitled to calculate interest on only the aforesaid debt of N456,717 .00.

4. The defendants/appellants are hereby ordered to rectify their books of account to reflect the judgment."

Aggrieved by the Court of Appeal decision, the plaintiff as appellant and the defendant as respondent filed appeal and Cross - appeal respectively to this Court.

I deem it pertinent at this stage to state in brief, the facts involved in this case which are as follows-

The appellants were bankers while the respondents were their customers at the Gboko branch of the appellants in which they had current accounts. The appellants were operating the current accounts for the purpose of and in connection with their business. In the process, the appellants paid several cheques into the accounts and also withdrew large sums of money, with the connivance of the respondent's manager to the equivalent of the sums to which the cheques were related in most cases. Some of the afore-said cheques paid into these accounts and against which the appellants withdrew money were lost and, therefore, not presented to the banks on which they were drawn. The loss of these cheques was not brought to the appellant's notice. As a result, he sought for declaration stated in paragraphs 18(1), (2) (3) and (4) of the Amended Statement of Claim [supra].

Learned Senior Advocate filed and exchanged briefs which were orally elaborated upon on the day the appeal was heard.

In the brief filed on behalf of the appellants, the following two issues were raised for consideration and determination by this Court:-

“(i) Whether, in the circumstances of this case, the plaintiffs are discharged as drawers of the relevant cheques by reason of the provisions of S.48 of the Bills of Exchange Act.

(ii) Whether the court below was correct in reversing the decision of the High Court regarding the sum of N44,820.00.

In the brief filed by the respondent, no new issues were formulated as regards the main appeal, but however raised the following two issues in the cross-appeal-

“(i) On whom did the onus of proof of the value of the three cheque drawn by the plaintiff/respondent lie?

(ii) Was the plaintiff obliged to pay the cost of preparing the mortgage deeds?”

In the brief of the respondent, Learned Senior Advocate raised a preliminary objection as regards the competence of the second Issue in the appellant's brief contending that it involves a question of mixed law and fact for which no prior leave was sought for and obtained. He therefore urged this court to discountenance all arguments advanced in support of that issue.

On page 154 of the record, Learned Senior Advocate for the appellant, in an application dated 12th September, 1988 sought leave of the Court of Appeal *“to appeal (in so far as the appeal concerns questions other than questions of law alone) to the Supreme Court from the*

decision of the Court of Appeal herein delivered on 1st day of July, 1988."

This application was granted on 21st September, 1988 as per the Court of Appeal order contained on page 156 of the record which reads:-

"It is Hereby Ordered:

(1) That the application for leave to appeal to Supreme Court is granted." B

The application was made and granted within the statutory period of three months from the date of delivery of judgment and therefore in order. The preliminary objection must be as a result of over-sight and is accordingly over - ruled.

Learned Senior Advocate for the appellant took the two questions he raised in his brief together. He quoted in extenso the findings of the learned trial judge relating to the three cheques drawn by the appellants on their first Bank Yola account and paid into their account with the defendant's Branch in Gboko on different dates to wit: C

(a) On 9th June, 1980 a cheque for N150,000.00 drawn on First Bank Yola. D

(b) On 3rd October, 1980 a cheque for N90,000.00 drawn on First Bank Yola.

(c) On 1st September, 1981 a cheque for N100,000.00 drawn on First Bank Yola.

The respondents complained that their manager against established banking practice credited the appellants' account with the three sums (supra) and allowed them to immediately withdraw the said amounts without first clearing the cheques with the First Bank, Yola. The appellants also complained that the respondents did not notify them that the cheque in question were lost in transit until after one year, seven months and six months respectively and submitted that that was a breach of S.48 of the Bills of Exchange Act and that the respondents were vicariously liable for the ensuing loss sustained by the appellants resulting from the reckless acts of their servants, particularly their branch Manager who the appellants claimed was dismissed in order to cover up the fraud perpetrated on the appellants. Learned Senior Advocate therefore submitted that the Court of Appeal was wrong in its conclusion on this issue that the loss of the cheques (supra) the value of which the appellants had already withdrawn from their accounts with the respondents without corresponding evidence that the appellant's account with the First Bank Yola was debited with the value of the cheques aforesaid did H not cause any loss to the appellants.

On question II which is the second Issue raised in the appellant's brief, Learned Senior Advocate adopted his same style of arguments on Issue I by quoting in extensio the findings and conclusion of the trial

court as well as that of the Court of Appeal relating to the said issue.

It was the contention of the learned Senior Advocate that since D.W3 who was the Manager of the defendant on the date he testified admittedly accepting lodgment of Union Bank of Nigeria, Gboko Cheque No. 362037/055593 for N44,820:00, the Court of Appeal ought not to B have disturbed the findings of the learned trial judge that the defendant were vicariously liable to the appellant in the said sum. He submitted that since the enactment of the Bills of Exchange [Amendment] Act 1964, cheques presented for payment through a bank to a customer's account do not require any endorsement, even if the customer's name as payee is C not on the cheque. He therefore urged that the appeal be allowed.

In reply to the Issue I relating to the three cheque drawn by the appellants on First Bank of Nigeria Yola the total sum of which is N340,000.00, it was the contention of Chief Ajayi Learned Senior Advocate appearing for the respondents that the pleading of the appellants did not D disclose sufficient materials in relation to the said cheques to enable anyone to reasonably infer that the appellants would be relying on S.48 of the Bills of Exchange Act Cap.21, Laws of the Federation of Nigeria which is now Cap 35 Laws of the Federation of Nigeria 1990. He submitted that the decision of the Court of Appeal that the appellants could not shift position to rely on S.48 E which was not pleaded could not be faulted. Learned Senior Advocate also said there was no appeal against this finding of the Court of Appeal and therefore appellants could not rely on S.48 of the Act. He cited *Odiase v. Agho* (1972) 1 All NLR 175 in support. He went on to submit that the Court of Appeal rightly found that S.48 of the Bills of Exchange Act was not F applicable to the facts of this case in that:-

(i) The section only applies to cases where a Bill has been dishonoured by non-acceptance or by non-payment.

(ii) That the cheques drawn on the first bank Yola were never presented to the said Bank for payment for the reason that they got lost.

G The comment by Adio JCA (as he then was) as regards the applicability of S.50(2) (c) (i) of the Bills of Exchange Act, was an obiter and not the basis of the Court's decision. Chief Ajayi SAN further submitted that the Court of Appeal reviewed the undisputed facts in this case surrounding the three cheques and came to the correct conclusion that H the appellants lost nothing since their account with the First Bank of Nigeria Yola was not debited with the same. He again contended that the appellants did not appeal against this finding.

On Issue II relating to the cheque of N44,830.00 drawn on Union Bank of Nigeria Gboko and paid into the respondents by the appellants,

Learned Senior Advocate submitted that the appellants did not advance arguments in support of the proposition that a bank which received a cheque for payment that had no account with it and did not credit same to the person the payer of the cheque could claim the value of the same from the bank. He therefore urged this court to dismiss the appeal.

Reading the pleadings as a whole to wit the Amended Statement of Claim and the Amended Statement of Defence, it could be discerned therefrom that the appellants intended to rely on the provision of S.48 of the Bill of Exchange Act. But that notwithstanding, S.48 of the Act comes into play when only a cheque is dishonoured and not lost. The respondents in their evidence in support of their pleading went on to show that they could return not the three cheques to the appellants because they were lost. **The appellants claimed that the respondents dismissed its Manager to defraud the appellants. The respondents on their part denied the allegation and averred that the Manager connived with P.W.3 the Managing Director of the appellants to destroy the cheques. The appellants alleged fraud against the respondents and it was their duty to prove the allegation in conformity with the standard of proof in criminal cases.** See *Nigerian Ports Authority v. Construzioni Generali Farsura Cogefar Spa & Anor.* (1974) 12 SC 81 and *Okuarume v. Obabokor* (1965) 1 All NLR 360. **This evidence was lacking, the respondents had no duty to prove the appellants case for them. In civil cases it is the duty of the plaintiff to prove his case to the standard required but not to rely on the weakness of the defendant's case.**

Returning to the value of the three cheques which the appellants claimed, I have already said that S.48 of the Bills of Exchange Act is not available to appellants since the said cheques were lost but not dishonoured. It was common ground that the three cheques were issued by the appellants in favour of themselves on their account at the First Bank of Nigeria Yola and paid into their account with respondents. The evidence proved that the appellants were allowed to withdraw the amount in dispute by the respondents before the three cheques were cleared which consequently got lost. It was in evidence by P.W. 1 that E.D. Tsokwa (P.W.3) is the sole signatory of the appellant's two accounts with the respondents. P.W.2, the Accountant employed by the appellants to audit their Accounts with respondent and in relation to the three cheques testified as follows:-

“The unauthorised debits are made up to eleven items, four cheques and seven transfers. The first cheque is for N150,000.00. It was lodged in by the plaintiffs, defendants credited it, and reversed over a year later. The plaintiffs had treated the cheque as cleared but it was

reversed after the statutory period. The defendants had not power to do so. It forms part of over-all debit balance.

The second cheque was for N90,000 which was reversed after two months of lodgment. The third one was for N 100,000, this was reversed after six months. It was lodged on 9th February, 1981 and reversed on the 1st B September, 1981. It forms part of over-all debit balance.

Under cross examination the witness admitted that at the time he audited the appellant's accounts with the respondents he was a pupil accountant, it was he that prepared Exhibit "J" the appellant's statement of account based on the documents given to him by the appellants.

C On Exhibit D which was the purported Statement of account sent to them by respondents, D.W.3 testified on it thus under cross examination:-

"We used certain stamps in our office Exhibit D was not signed. The figures cannot be taken to be correct. Exhibit D is not authentic even though it emanates from our office. This is because it was not signed.

The evidence led by the respondents that the three cheques were lost was neither challenged nor contradicted. There was no evidence that the amounts equivalent to the ones on Exhibits A, B and C E respectively and drawn by the appellants on their account with First Bank of Nigeria Yola was debited, despite the fact that the same were paid into Appellant's Account I with the respondents and their value withdrawn by them with the active connivance of the respondent's Manager who was dismissed by the respondents for other such similar F malpractices. Both the drawer and the payee in the instant case are the same person. The appellants cannot escape liability when the cogent and undisputed evidence by the respondents was that non-presentment of Exhibits A, B and C was due to circumstances beyond their control and not attributable to negligence on their part S.46(2) (a) of the Bill of Ex-G change Act provides as follows:-

46(1)

(2) Presentment for payment is dispensed with -

(a) Where, after the exercise of reasonable diligence, presentment, as required by this Act cannot be effected;"

H See (1) A.I. Egbunike

(2) Maria Gold Obiageli

Egbunike (Trading as Metropolitan Paints and Chemicals Co.)

V.

African Continental Bank Ltd.

(1995) 2 NWLR (Pt.375) 34 at 48.

Where Adio JSC in the lead judgment of the court said on a similar issue:-

"In the circumstance, the presentment, of the cheques for payment could not reasonably be expected having regard to the dishonourable conduct of the then Manager of the respondent who happened to be a brother of the first appellant. Consequently, Section 41(3) of the Bills of Exchange Act becomes applicable. Paragraph (b) Section 41(3) of the Act excuses presentment of a bill of exchange for acceptance and such bill may be treated as dishonoured by non acceptance where, after the exercise of reasonable diligence, such presentment cannot be effected. Presentment for payment is also dispensed with under Section 46(2)(a) of the Act where, after the exercise of reasonable diligence, presentment for payment cannot be effected."

Accordingly the learned Justices conclusion on Exhibits A, B and C that the appellants (then as respondents) are liable for the total sum of N340,000.00 cannot be faulted. I therefore answer Issue I in the negative.

The controversy in Issue II involves Exhibit "E" with which a cheque to the value of N44,820.00 drawn on the Union Bank of Nigeria, Gboko by a customer in favour of E.D. Tsokwa and Sons. Exhibit E is the Bank Teller with which the said cheque was paid by the appellants to the respondents the value of which the latter had failed to credit the former with. This allegation was denied by the respondents in paragraph 13(b) (iii) of the Further Amended Statement of Defence to the effect that "they deny receiving same and shall at the hearing require the strict proof thereof." In an attempt to prove the claim, the appellants adduced evidence as follows:-

P.W.1

"One of the tellers borne (sic) the value of N44,820.00. This is the teller. Tendered. No objection. Marked as Exhibit 'E' and read. This amount was not credited to the plaintiff's account."

P.W.2

"The third was Union Bank Gboko drawn in favour of the plaintiffs by another customer of the Union Bank. It is for N44,820.00 this cheque was paid in by the plaintiffs and was not credited to the plaintiffs. I saw the teller."

In rebuttal of the evidence above, D.W.3 testifying for the respondents said:

"A cheque for N44,820.00 was lodged into plaintiff's account. The plaintiffs operate account in the name of the E.D. Tsokwa and Sons Co. Ltd. Exhibit 'E' shows that lodgment of N44,820.00 was made to E.D. Tsokwa and Sons. The defendants did not accept that lodgment

because the stamp on it does not belong to the defendants and we have no account for E.D. Tsokwa and Sons."

Under cross examination the witness further testified thus:-

'The sum of N44,820.00 was not credited to the Account of plaintiff on 24th February, 1981. Exhibit 'E' shows that E.D. Tsokwa and Sons paid into his Account Cheque of N44,820.00. From the records I inherited the only account we have in Union Bank (Nig.) Ltd. Gboko is for E.D. Tsokwa and Sons Co. Ltd. Although the defendants accepted the lodgment of N44,820.00, I cannot say where that money went to. The stamp-used in receiving the amount is not meant for that purpose it has no date.'

C P.W.2 said under cross examination:

"For any document of Account to be acceptable, it must contain the signature and the stamp of the relevant Bank."

Looking at the excerpts of the evidence above, could it be said the appellants had strictly proved the liquidated amount being claimed? I answer the question posed in the negative for the following reasons:-

1. The cheque for N44,820.00 paid in by the appellants was drawn in favour of E.D. Tsokwa and Sons which is not the same person as the appellants.

2. The appellants did not satisfactorily prove lodgment of the said cheque since the respondents denied receiving it by leading evidence to show that the stamp used on the teller Exhibit E was neither signed nor dated, and was not the type being used for such purpose.

3. There was no proof by the appellants that they lost anything by showing that the cheque lodged into the respondents was cleared.

4. Even if to say the cheque was cleared (which is not the case here) the appellants being not the payee are not entitled to be credited with the proceeds. The best the respondents could do is to pay the proceeds into their suspense Accounts pending same being claimed by the payee.

The findings and conclusions by Adio JCA (as he then was) that:

".....official stamp" on the teller (Exhibit "E") was not the type of official stamp being used to stamp tellers used for making payments into customers' accounts and that the stamp did not contain any date. Further, there was no evidence that the mark or initial of the person, who stamped and signed the teller, was that of any official of the appellants' branch at Gboko. A customer of a bank who fills a bank teller and gives the teller and the money to which it relates to just any of the bank's employees for payment into his account does so at his own risk. If it turns out that the bank employee in question is not an official duly authorized to accept or receive such payment for and on behalf of the bank, the bank will

not be vicariously liable if the employee fraudulently converts the money to his own use. See Salawu v. Union Bank (1986) 4 N.W.L.R. (Pt.38) 701. Failure to prove that the initial on the teller, Exhibit "E", was that of an employee of the appellants is fatal to the respondents' case."

These are on firm grounds and cannot be faulted, I therefore answer Issue II in affirmative. B

The main appeal fails in toto.

The Cross Appeal

The respondents after obtaining leave of this court filed their cross- appeal, and along with the Amended Respondents brief of arguments, filed the brief in support of the cross-appeal. Three grounds C of appeal were filed by the respondents/cross - appellants from which the following two Issues were formulated in the supporting brief:-

(i) On whom did the onus of proof of the value of the three cheques drawn by the plaintiffs/respondents lie?

(ii) Was the Plaintiff obliged to pay the cost of preparing the D mortgage deeds?

On Issue (i) the Learned Senior Advocate submitted that the Court of Appeal as well as the trial court were wrong in putting the onus of proof as regards the discrepancies relating to the facts pleaded in paragraph 9C of the Amended Statement of Claim on the respondents/Cross-appellants. He said E the onus was on the appellants to prove what they had alleged and it was only when they had made out a prima facie case that the respondents/cross-appellants would be required to produce rebutting evidence. He contended that the appellants/respondents had to initially prove:-

(i) That it had drawn the particular cheques for the specific amount F pleaded;

(ii) That Mobil (Nigeria) Ltd. had only received those specific amounts;

(iii) That the defendants had nonetheless debited the plaintiff's account with a large amount than that for which the cheque had been G drawn and which had been paid to Mobil (Nigeria) Ltd.

Learned Senior Advocate referred to and analysed the evidence adduced by the appellants/respondents, particularly that of P.W.1 and P.W.2 and submitted that the fact that the respondents/cross-appellants pleaded in paragraph 13(c) of the further Amended Statement of Defence H that "the defendants hereby gave notice that at the hearing of this suit they will rely on all the wasted cheques referred to in the paragraph" (to wit paragraph 9 C of the Amended Statement of Claim) would not change the position to shift the onus of proof on the respondents/cross-appel-

lants. He further submitted that S.148(d) of the Evidence Act was wrongly applied by the lower court and the court below.

On Issue (ii) in the cross-appeal, Learned Senior Advocate submitted that both the trial court and the Court of Appeal erred in making a different case for the appellants/respondents from that which they had B pleaded. He referred to the portion of the trial court's judgment where the learned trial judge after reviewing the evidence concluded as follows:-

"The Mortgagor was Emmanuel Danjuma Tsokwa & Sons. The Mortgagee was the defendants and the plaintiffs were the customer. The plaintiffs never signed the Exhibit 'N'. According to the defendants, the C party to pay the legal fee of N20,701.09 was the mortgagor. The Mortgagor in Exhibit "N" was Emmanuel Danjuma Tsokwa & Sons and not the plaintiffs who were named as customer. It was wrong therefore for the defendants to debit the accounts of the plaintiffs;"

and that of the Court of Appeal where he said it went off to raise a D completely different Issue for the appellants/respondents as follows:-

"Even if loans were granted by the appellants to the respondents, it is not every time that a bank grants a loan to a customer that the customer is required to execute a deed of mortgage, prepared at the customer's expense, on his property in favour of the bank as security for the loan. Therefore, in order to recover from a customer or to make him liable for the fees charged by a Solicitor for the preparation of a mortgage deed, a bank has to lead credible and satisfactory evidence to show that it granted a loan to the customer and that one of the conditions, subject to which the loan was granted and to which customer agreed, was that the customer would execute F a deed of mortgage, prepared at the customer's expenses, on his property as security for the loan. In the absence of such an agreement, there will be no legal basis for making the customer liable for the solicitor's fees charged for the preparation of a mortgage deed. In the present case, there was no evidence before the learned trial judge that the respondents ever agreed to G bear the expenses of preparing the deeds of mortgage."

He contended that the questions raised in the pleadings and for which the Court of Appeal was required to provide solutions were:-

"(i) Whether the learned trial judge was justified in rejecting one of the mortgage Deeds in evidence; and H (ii) Whether the plaintiff was bound to pay for the work which evidently had been done".

and then submitted that had the Court of Appeal dealt with the Issues raised before it first, it would not have concluded in the way and manner it did in the excerpts of its judgment quoted (supra). He therefore

urged the court to allow the cross-appeal for the reasons which he finally summarised and produced as follows:-

“(iv) *Because the plaintiff is not entitled to sue for the value of a cheque paid to the defendant as Banker for collection and payment to a third party who has no account with the Bank.*

(v) *Because the learned trial judge and the Court of Appeal wrongly relied on the cheque counterfoils to show the amount for which the corresponding cheques had been drawn when the plaintiff’s own witnesses had said that the counterfoils did not tally with the cheque leaves;*

(vi) *Because the Defendant was not obliged to answer a case which had been abandoned, or not made out.*

(vii) *Because the plaintiff failed to lead any evidence to show the amount for which it wrote the three cheques in respect of which its account was debited.*

(viii) *Because the plaintiff failed to show that the drawee of the cheques, Mobil (Nigeria) Limited, had not received the amount for which the plaintiff’s account had been debited.*

(ix) *Because it was never the plaintiff’s case that it had not agreed to pay for the preparation of mortgage deeds, but that it had never applied for any Mortgage at all.*

(x) *Because the mortgage deeds produced by the defendant showed that the plaintiff had in fact applied for Mortgage;*

(xi) *Because the Court of Appeal failed to consider the Defendant’s complaint about the wrongful rejection of the mortgage deed and instead made out for the plaintiff a case which it had not made out for itself.*

(xii) *Because the requirement that the cost of preparing the security documents is borne by the borrower is a matter of which the court ought to have taken judicial notice.”*

The appellants/respondents Counsel did not file respondent’s brief to the cross-appeal, nor did he ask for the leave of this court to make oral submissions, in answer to the cross-appeal’s brief and oral submissions made in elaboration thereof.

In paragraph 9 C of the Amended Statement of Claim the appellants averred thus:

“C. *Discrepancies in bank statement over cheques issued by the company:*

Date	Cheque No	Value	Amount Debited	Discrepancy	H
30/4/79	362037/000102	364.20	N38,107.32	N36,743.12	
26/9/79	126	15,418.70	27,413.56	11,994.86	
5/1/81	444	137.71	13,753.71	13,616.00	

N63,353.98

The plaintiff shall at the hearing rely on the above mentioned cheques and the corresponding stamps and the defendant is hereby given notice to produce the originals of same.

During trial the plaintiff will urge the Honourable Court to strike out all items of Discrepancies in bank statement over cheques issued by the company totalling N63,353.96 which forms part of the said total debit balance of N736,812.29 in the plaintiff's account with the defendant. The plaintiff further states that the said cheques and sums hereto referred to in this paragraph were payment made to Mobil (Nigeria) Limited Bukuru, Jos, and the plaintiff shall at the hearing found and rely on relevant records of the transaction kept by Mobil (Nigeria) Limited Bukuru in their normal course of duty."

In answer to paragraph 9(c) of the Amended Statement of claim (supra) the respondents in paragraph 13(c) of the Further Amended Statement of Defence pleaded as follows:-

"(c) In answer to the discrepancies alleged in paragraph 9 C of the statement of claim, the defendants aver as follows:-

- (i) The plaintiffs' cheque Number 000102 of 30/4/79 was drawn for the sum of N38,107.32 and not for N364.20 only.*
- (ii) Their cheque No. 000126 of 26/9/79 was drawn for N27,413.56 and not for N15,418.70.*
- (iii) Their cheque No. 000444 debit against the plaintiffs was drawn for N13,753.71 on 9/1/81 and not for N137.71.*

The defendants hereby give notice that at the hearing of this F suit, they will rely on all the wasted cheques referred to in this paragraph."

As urged by the Learned Senior Advocate the onus is on him who asserts. See *Okubule v. Oyagbola* (1990) 4 NWLR (Pt.147) 723 and *Ike v. Ugboaja* (1993) 6 NWLR (Pt.301) 539. It is only when a claimant has produced credible evidence that prima facie established his claim, the G onus would then shift on the person asserting the opposite to adduce evidence in rebuttal. See *Nigerian Maritime Services Ltd. v. Afolabi* (1978) 2 SC.79 and *Adegoke v. Adibi* (1992) 5 NWLR (Pt.242) 410.

The claim by the appellants/respondents was in respect of cheques Nos.362037/000102 of 30/4/79 for N364.20. 000126 of 26/9/71 for H N15,418.70 and 000444 of 5/1/81 for N137.71 in favour of Mobil (Nigeria) Ltd. Bukuru, Jos by the appellants/respondents and which they alleged were inflated by N37, 743,12, N11,944.86 and N13,616.00 respectively, by the respondents and wrongly debiting their account with total excess of N63,353,98 instead of N15,920.61.

The evidence called by the appellants/respondents in proof of this averment was given by P.W.1 who said that there were discrepancies between cheque stubs and cheque leaflets. He did not indicate from the cheque stubs the counter-foils of the cheques and the amount in each and the corresponding discrepancies. All he did was to tender the two cheque stubs which were admitted as Exhibits F1 and F2. P.W.3 the Managing Director of the appellants B and the only signatory of their cheques, said nothing on Exhibits F1 and F2 containing the counter-foils of the alleged inflated cheques. There was no attempt by the appellants to call any body from Mobil (Nigeria) Ltd, Bukuru, Jos, the payee of the cheques to put in evidence the relevant records of transaction kept by Mobil (Nigeria) Ltd., Bukuru, Jos as pleaded in paragraph C 9(c) of the Amended Statement of Claim. **In civil cases, the onus of proving particular facts as averred in the pleading is on the person that pleads them, and in the case in hand, the appellants/respondents. It is only after this burden had been discharged that the respondents/appellants would be required to call evidence in rebuttal.** See D Ike v. Ugboaja (supra).

The complaint by the respondents/cross-appellants is well founded that both the trial court and the Court of Appeal were wrong in shifting the initial burden of proof on them rather than on the appellants/respondents. See Egbunike v. A.C.B. Ltd. (1995) 2 E NWLR (Pt.375) 34 at P.53.

On Issue (II) which is related to N21,000.00 with which the appellants/respondents accounts was debited as fees for the two legal mortgages executed, the appellants/respondents averred as follows in paragraph 15 of the Amended Statement of Claim:-

“Furthermore, the plaintiff states that the said debit balance of N736,812.29 also includes a debit of the sum of N20,701.09 being payment made in favour of Izundu & Co. (Solicitors) for perfecting a legal Mortgage of Certificate of Occupancy No. 95/344 for facilities in the tune of N90,000.00 and N650,000.00 from the defendants. The plaintiff G denies ever applying for the said facilities as alleged by the defendants in the said debit notes dated 27/7/82. The plaintiff shall at the hearing found on the defendants debit notes dated 27/7/82 and Zanda Izundu & Co’s bills dated 14/6/81 and 14/6/82. The plaintiff shall further at the hearing urge the court to expunge the said sum of N20, 701.09 from its H accounts as debt owed to the defendants.”

In answer to paragraph 15 of the Amended Statement of Claim (supra) the respondents/cross-appellants pleaded thus in paragraph 15 of the Further Amended Statement of Defence:-

“15. In answer to paragraph 15 of the statement of claim, the defendants aver that the sum of N20,701.90 paid to Messrs Zanda Izundu and Co. as fees for perfecting two legal mortgages were fees for perfecting two legal mortgages were fees due and payable by the mortgagor under the Legal Practitioners Remuneration for Professional Services and the plaintiffs are therefore estopped from denying liability for the charges.”

It was the appellants/respondents case that they never applied for credit facilities from the respondents/cross-appellant in the sums of N90,000 and N650,000 respectively and therefore the Legal Mortgagees prepared by Zanda Izundu and Co. were done without their authority. They denied being parties to their execution.”

In the present situation it was the respondents/cross appellants who were asserting that the facts as pleaded by them exist and so the onus of proving the same fell on them and not on the appellants/respondent. What was the evidence presented by the respondents/cross appellants on this issue? It was given by D.W.3 the Manager of the respondents/cross-appellants and all he said was that the appellants/respondents have securities for loans in their company by way of two legal mortgages on Certificates of Occupancy deposited with the respondents/cross-appellants. **There was no evidence proving the grant of credit facilities, nor was there any evidence that the appellants/respondents authorised the execution of the two legal Mortgages to wit, Exhibit 1 and Exhibit 2 tendered and rejected Even if Exhibit 2 tendered and rejected were to be admitted, [which is not conceded] it would not have made the respondents/cross-appellants’ case any better as no evidence of probative value was adduced.** I therefore endorse the conclusion of the Court of Appeal on the issue that:-

“Even if loans were granted by the appellants to the respondents, it is not every time that a bank grants a loan to a customer that the customer is required to execute a deed of mortgage, prepared at the customer’s expense, on his property in favour of the bank as security for the loan. Therefore, in order to recover from a customer or to make him liable for the fees charged by a Solicitor for the preparation of a mortgage deed, a bank has to lead credible and satisfactory evidence to show that it granted a loan to the customer and that one of the conditions, subject to which the loan was granted and to which the customer agreed, was that the customer would execute a deed of mortgage, prepared at the customer’s expense, on his property as security for the loan. In the absence of such an agreement, there will be no legal basis for making the customer liable for the Solicitor’s fees charged for the preparation of a mortgage deed. In the present case, there

was no evidence before the learned trial Judge that the respondents ever agreed to bear the expenses of preparing the deeds of mortgage."

The question of taking judicial notice that a mortgagor is debited with the fees for the preparation and execution of a deed of legal mortgage to secure loan facilities by the respondent/cross-appellants does not arise since the facts as alleged by the respondents/cross-appellants were not proved.

Issue II is answered in the negative.

In the final result the main appeal fails and it is dismissed while the cross-appeal succeeds in part and it is allowed to that extent. The final order shall now read as follows:-

1. The appellants/respondents are granted a declaration that they are not indebted to respondents/cross-appellants in the sum of N736,812.29 but in the sum of N520,070.98k.

2. The appellants/respondents are granted declaration that the respondents/cross-appellants are entitled to calculate interest on the sum of N520,070.98k only.

The respondents/appellants are granted N1,000.00 for the main appeal and the cross-appeal against the appellants/respondents.

OGUNDARE JSC

I have had the privilege of reading, in draft, the judgment of my learned brother Wali, JSC just delivered. I agree for the most part with him but wish to say a few words of my own.

The plaintiff company herein was at all times material to this case a customer of the 1st defendant bank. The plaintiff had sued the defendant and one Stanley Bassey Akpoke claiming:

"1. A declaration of the court that the plaintiff is not indebted to the first defendant to the sum of N736,812.29 as at 31st March 1983.

2. A declaration of the court that the plaintiff is indebted to the first defendant to the sum of N5,681.40 or any other sum less than N736,812.29 as at 31st March 1983.

3. A declaration that the defendants were in error when they charged/debited the plaintiff's account with interest of N117,939.91 calculated on a disputed sum/debt from 5/6/81 to 3/3/83.

4. An order of the court compelling the defendants to rectify their books of accounts to reflect the actual indebtedness of the plaintiff as at 31st March 1983."

At an early stage in the proceedings on the application of the

plaintiff, the name of Stanley Basey Akpoke was struck out and the action proceeded against the defendant bank. Pleadings were ordered, filed and exchanged and, by leave of court amended. The case proceeded to trial on the plaintiff's amended Statement of Claim and the defendant's further amended Statement of Defence. At the conclusion of trial, and after addresses by B learned counsel appearing for the parties, the learned trial Judge, in a reserved judgment, found for the plaintiff and adjudged as follows:- “

“In the light of the above I hold that the plaintiffs have proved quite substantial part of their claim on a balance of probability. They are entitled to judgment. I therefore grant a declaration that the plaintiffs C are not indebted to the defendants in the sum of N736,812.29 as at 31st March, 1983. I found as a fact that the plaintiffs are indebted to the defendants in the sum of N116,717 .00. How I arrived at this figure are carefully set out above.

I further declare that the defendants can only calculate interest D on the debt of N116,717.00.

The defendants are hereby ordered to rectify their books of account to reflect the findings of the court.”.

Being dissatisfied with the judgment of the trial court the defendant bank appealed to the Court of Appeal. The latter court allowed the appeal, E set aside the judgment of the court below and, in its stead, adjudged as hereunder:

“1. The plaintiff/respondents are granted a declaration that they were not indebted to the defendants/respondents in the sum of N736,812.29k as at 31st March, 1983.

F *2. The plaintiffs/respondents are granted a declaration that they were indebted to the defendants/appellants in the sum of N456,717 .00 as at 31st March, 1983.*

3. The plaintiffs/respondents are granted a declaration that the defendants/appellants are entitled to calculate interest on only the afore-G said debt of N456, 717.00

4. The defendants/appellants are hereby ordered to rectify their books of account to reflect the judgment.”

It is against the judgment of the Court of Appeal that the plaintiff company has now appealed to this court on three grounds of appeal. The H defendant also cross-appealed against that part of the judgment of the court below where the court had held that the defendant was not entitled to debit the plaintiff's account with N63,353.96 in respect of three cheques drawn by the plaintiff in favour of Mobil (Nigeria) Ltd, and that part where the plaintiff was held not liable to pay the sum of N20,701.09

being the cost of preparing mortgage deeds.

Two questions are set down in the plaintiff's briefs as calling for determination in respect of its appeal, that is to say -

(i) Whether, in the circumstances of this case, the plaintiffs are discharged as drawers of the relevant cheques by reason of the provisions of Section 48 of the Bills of Exchange Act and

B

(ii) Whether the court below was correct in reversing the decision of the High Court regarding the sum of N44,820.00.

The defendant, with leave of this court, filed an amended respondent's brief in which it proffered arguments in support of its position as regards the plaintiff's appeal and also arguments in support of its cross-appeal. The plaintiff has not filed a brief either in response to defendant's objection to Question (ii) nor in response to defendant's arguments on the cross-appeal. At the hearing of the appeals however Mr. T.E. Williams learned counsel for the appellant proffered oral arguments only in respect of Question (i). Chief G.O.K. Ajayi, SAN learned leading counsel for the defendant, proffered oral arguments in respect of the two appeals. Before proceeding to determine the questions placed before us, I need state briefly the facts.

The plaintiff was a customer of the defendant bank at its Gboko branch in Benue State. The plaintiff lodged into its account a cheque for N150,000.00 on 19/6/80. The said cheque was drawn by the plaintiff on its account with the First Bank of Nigeria Ltd., Yola branch and although the cheque was sent for clearance it was never seen again as it got lost in transit. The plaintiff however, drew out the money in full before the cheque was cleared. The same fate befell two other cheques drawn by the plaintiff on its account with the First Bank of Nigeria, Yola Branch. The first cheque was for the sum of N90,000.00 and this amount was drawn in full on 3/10/80. The second cheque was for N100,000.00 lodged by the plaintiff on 1/9/81 who thereafter withdrew the whole amount before it, too was cleared. Not having got value for the amounts of these cheques the defendant on diverse dates debited the plaintiff's account in the various sums of these cheques. The amounts of the three cheques totalled N340,000.00. The plaintiff also claimed to have made some lodgements into his account totalling N63,353.96 but for which the account was not credited. The plaintiff also claimed that he delivered a cheque for N44,820.00 to the defendant with instructions to pay the same into the account of E.D. Tsokwa and Sons but which was never done. The final complaint of the plaintiff was that its account was debited with a sum of N20,701.90 being payment in favour of Izundu and Co. Solicitors for

C

D

G

H

perfecting a legal mortgage of its certificate of occupancy in respect of the facilities said to have been applied for by the plaintiff. The plaintiff denied ever applying for such facilities. The immediate cause of plaintiff's action was a statement sent by the defendant to the plaintiff which read that the plaintiff was, as at 31st March 1983, owing the defendant the sum of N736,812.29.

B Question (1):

The learned trial Judge had found as follows:

"From the pleading and evidence the following facts emerged. That the plaintiffs on 9/6/80 lodged a cheque for N150,000.00 drawn on First Bank Yola and meant for collection. That the defendants instead of debiting plaintiffs account credited it and at the same time allowed the plaintiffs to start to withdraw the money, against all banking practices. The plaintiffs did not hear anything about this cheque until 5/8/81 when their account was debited with this amount. This was more than one year. The defendants did not notify the plaintiffs that the cheque was not cleared. All that the third witness for the defendants told the court was that the cheque was presumed lost. The same thing happened to another cheque for N90,000.00. This cheque was paid into defendants bank on 3/10/80 for collection. Against the long standing practice of the bank, the defendants credited the account of the plaintiffs instead of debiting it. Plaintiffs were allowed to drawn on the account.

Defendants did not notify the plaintiffs that the cheque was not cleared as required by the Bills of Exchange Act. Then on 5/8/81 (pretty seven months after) the account of the plaintiffs was debited. On enquiry by the plaintiffs, they were told that their cheque was presumed lost in transit. The plaintiffs lodged another cheque for N100,000.00 into their accounts with the defendants on 1st September, 1981. Their account was quickly credited without waiting for the cheque to be cleared. For more than 6 1/2 months the plaintiffs did not hear anything about this cheque until when their account was debited and a debit note saying 'cheque presumed lost in transit forwarded to the plaintiffs.'

"The defendants agreed that the life of a cheque is six months. That if a cheque was paid in for collection, it is deemed cleared if it was not dishonoured or lost in transit. According to the evidence if it is dishonoured for any reason whatsoever, it must be returned to the customer. If it is lost in transit, the customer will be notified. In the above three cheque for N150,000.00, N90,000.00 and N100,000.00, none was returned to the plaintiffs. The plaintiffs were not notified that the cheques were lost in transit until one year, 7 months and 6 'bd months respectively. In the circumstance the plaintiffs were justified in believing that their cheques

were cleared. Since the defendants did not give the plaintiffs notice of the alleged missing cheques within a reasonable time, they are grossly negligent and they must bear the consequences of their negligent act. Apart from being negligent in giving notice the defendants violated the banking practice of allowing the plaintiffs to draw against uncleared cheques considering the magnitude of the amounts involved. By violating the banking practice and placing the various amounts in the plaintiffs' credit, were the plaintiffs not justified in drawing upon them? Of course they were. For Lord Lindley in *Capital and Counties Bank Ltd. v. Gordon* (1903) A.C. 240 said:

"It must never be forgotten that the moment a bank places money to its customer's credit, the customer is entitled to draw upon it, unless something occurs to deprive him of that right"

If there was any fraud perpetrated, the defendants through their servants encouraged and aided it and they cannot be allowed to benefit from their reckless acts. For if the defendants had adhered strictly to the banking practice of debiting the plaintiffs' account and not paying on the uncleared cheques, this ugly situation would have not arisen. The defendants are vicariously liable for the reckless acts of its servants, since they acted within their actual, usual or ostensible authority. By Section 73 of Bills of Exchange Act Cap 21, a cheque is a bill of exchange drawn on a banker payable on demand. And by Section 48 of the Act, where a bill is dishonoured by non-acceptance or by non-payment notice must be given to the drawer. And where such notice is not given any drawer or endorser is discharged from liability.

In the present case, the three cheques were not presented for payment. The plaintiffs were not given notice of non-payment within a reasonable time. In their evidence the defendants did not give evidence to the effect that cheques were forwarded to the paying bank and they got lost in transit. The evidence was that the cheques were presumed lost. The defendants did not in respect of the three cheques observe the normal banking practice. In paragraph 6(a) of the Amended statement of defence, the defendants pleaded that they would produce evidence to the effect that the plaintiffs had no money in their account with the First Bank Yola. D.W.4 gave evidence and the defendants did not prove through him that the plaintiffs' accounts with the First Bank Yola was in the red.

In the light of the above, I can see no justification for the defendants to debit the Account of plaintiffs in the sum of N150,000.00; N90,000.00 and N100,000.00"

The Court of Appeal, Per Adio, J.C.A. (as he then was) commenting on the application of Section 48 of the Bills of Exchange Act observed:

“With reference to the question whether the respondents could rely on Section 48 of the Bills of Exchange Act or any banking practice, the real position is that, in so far as this aspect of this case is concerned, It was quite clear that the respondents did not specifically plead Section 48 of the Bills of Exchange Act or any banking practice relating to dishonour B or loss of a cheque and they did not place sufficient materials before the court in relation to the cheques to which Exhibits ‘A’, ‘B’ and ‘C’ related to enable anyone to reasonably infer that they were relying on Section 48 of the Bills of Exchange Act or on any similar or relevant banking practice. The 3rd P.W. was the Managing Director of the respondents and C apart from the averment: ‘The plaintiffs denied the transactions’ in paragraph 4 of the Amended Statement of Claim in relation to the cheques to which the debit notes, Exhibits ‘A’, ‘B’ and ‘C’ related, the following was the evidence of the 3rd P.W. on the point:

‘I know the defendants. They are bankers to the plaintiffs. In D 1981 the plaintiffs received debit notes from the defendants. On examination we found that we have nothing to do with those notes.

The position, being as stated above, the respondents could not properly or legally shift their position and rely on the provision of Section 48 of the Bills of Exchange Act, Cap 21 or on any banking practice E having the same effect. Parties are bound by their pleadings and they will not be allowed to deviate from them. They will not be allowed to set up in court a case which is at variance with their pleadings. See *Ehimare v. Emhonyon*. (1985) 1 NWLR (Pt.2) 177; and *Abaye v. Ofili* (1986) 1 NWLR (Pt.15) 134.”

F The learned Justice of Appeal further observed:

“An official of the First Bank, Yola testified as the 4th D.W. and his evidence is at page 83 of the record of proceedings. He told the court the respondents had an account in the First Bank, Yola, and that cheques numbers 597857, 597884 and 144520 were in the series of cheques supplied by G the bank to the respondents. He concluded by saying that cheques number 597857 for N150,000.00, 597884 for N90,000.00 and 144520 for N100,000.00 were not presented to the First Bank, Yola, for payment. The aforesaid three cheques were the cheques drawn by the respondents on their account at the First Bank Yola, and which they paid into their account in the H appellants’ branch and from which account they immediately withdrew N340,000.00 before the appellants discovered that the cheques were lost and did not get to the First Bank, Yola, for necessary action.

The foregoing showed certain features pertaining to the three cheques which make their case separate and distinct from the other cheques

in question in this case. One feature is that the possibility of the respondents losing any sum of money or thing because of the loss of the cheques is nil. Another feature is that the respondents were the drawers and the drawees of the cheques. The third feature is that the three cheques were lost; they were not dishonoured. If the respondents did not lose any sum of money or thing and were not likely to lose any sum of money or thing by the loss of the three cheques, the question then is whether it was just, fair and equitable for the learned trial Judge to hold that they were not liable for the sum of N340,000.00 for which they were issued bearing in mind the fact that the whole sum of N340,000.00 had been withdrawn by the respondents from their account in the appellants' branch into which they paid the three cheques and the fact that until today the three cheques had not been presented to the First Bank, Yola, for payment out of the funds in the respondents' account in that bank upon which the cheques were drawn. The obvious and reasonable answer is in the negative. Further, assuming for the purposes of argument, that the three cheques were dishonoured and not lost. It has been shown that the drawers and the drawees of the three cheques were the respondents. The provision of Section 50(2) (c) (i) of the Bills of Exchange Act Cap 21, is that notice of dishonour is dispensed with as regards the drawer, where the drawer and the drawee are the same person. The result is that even if the three cheques had been dishonoured, the trial court should have applied the provision of Section 50(2) (c) (i) of the Act and should have held the respondents liable for the said sum of N340,000.00 instead of discharging them for liability under Section 48 of the Act. Finally, on this point, it is clear from the provisions of the Bills of Exchange Act that it is not intended that if a bill is lost before it is overdue, the holder should have no remedy. The provision of Section 69(1) of the Act is that where a bill has been lost before it is overdue, the person who was the holder may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost is found again. Under the provision of Section 70 of the Act, in any action or proceeding upon a bill, the court may order that the loss of the instrument shall not be set up, provided that an indemnity be given to the satisfaction of the court against the claims of any other person upon the instrument in question.

Having regard to the reasons given above, the trial court erred in law in holding that it could see no justification for the appellants to debit the account of the respondents in the sum of N150,000.00, N90,000.00, and N 100,000.00."

It is contended in this appeal by the plaintiff that the Court below

was in error in holding that the plaintiff was a “drawee” of each of the three cheques under consideration. It is submitted that the drawee in each case, was the First Bank Yala. Plaintiff then contends that the Court below in the circumstance was wrong in holding that Section 50(2) (c) (i) of the Bills of Exchange Act applied. Plaintiff further contends that Section 48 of the B Act applied. Mr. Williams in his oral address submits that the obiter dictum of this Court, per Adio JSC, in *Egbunike & Anor. v. African Continental Bank SC.253/89*, a judgment delivered by this court on 3/2/95 [now reported in (1995) 2 NWLR (Pt.375) 34] was given per incuriam. He submits that the drawer of a cheque is the person who writes the cheque and the drawee is the paying C bank, while the person in whose favour the cheque is drawn is a specified person. He submits that the Court of Appeal was wrong in saying that the plaintiff was the drawer and drawee of the cheques when it could have said that the drawer and the specified person were the same. Learned counsel contends that Section 50(2) (c) (i) of the Bills of Exchange Act does not D apply in this case but Section 45 of the Act applied and that by that section, the plaintiff is discharged.

Chief G.O.K. Ajayi, SAN for the defendant concedes it that the plaintiff was not a drawee of the totalling N340,000.00 because those cheques were drawn on First Bank Yola, who was being requested to pay E the amount of those cheques. He submits that First Bank of Nigeria Yola was the drawee of those cheques while the plaintiff was both the drawer and payee of the cheques. Learned Senior Advocate further submits that the concession he has made does not improve the position of the plaintiff in this appeal as that ground was not the only ground upon which the F court below gave judgment. He contends that the main ground upon which the court gave judgment had not been challenged in this appeal.

Adio, J.S.C. had in *Egbunike v. A.C.B.* (supra) referred to the drawer of a cheque drawn in the drawer’s favour on a bank as “drawer” and “drawee” of the cheque. It is contended in this case, and conceded G to by counsel for the defendant, that this is erroneous. I have no hesitation in agreeing with learned counsel that when a person issues a cheque in his own favour and drawn on a bank, that person is a drawer and payee (or specified person) in respect of the cheque but the bank on which the cheque is drawn is the drawee of the cheque. The statement in H *Eghunike v. A.C.B.* to the contrary must be taken as made per incuriam.

As Chief Ajayi has rightly pointed out, however, the Court below did not base its decision on this error alone. As can be gleaned from the passage in the judgment of Adio, JCA. earlier quoted by me, there are other reasons given for allowing the defendant’s appeal before the court

below on this point. That Court found that the plaintiff did not lose any money or thing because of the loss of the cheques here concerned. It also found that the three cheques were lost and not dishonoured. It, therefore, concluded that it would not be just, fair and equitable for the plaintiff who had withdrawn from his account with the defendant bank a total sum of N340,000.00 covered by those cheques to be allowed to make away with that sum of B money. These findings have not been challenged in this appeal. I have no reason whatsoever to interfere with the other reasons given by the court below for allowing the defendant's appeal on the point under consideration. Section 69 of the Bills of Exchange Act Cap 35 laws of the Federation of Nigeria 1990 provides for the right of a holder of a bill that is lost (such as the defendant is, in this case). Section 45 would not, on the evidence in this case, C apply in that, not only are the drawer and the payee one and the same person, it is in evidence that the cheques were never presented as they were lost. For the reasons given by the court below in the lead judgment of Adio, JCA, I too agree that Section 48 could not be called in aid by the plaintiff in this case as D it was never the basis of plaintiff's case. Furthermore, the relevant cheques were never dishonoured, an essential requirement to make for the application of Section 48; they got lost.

As the error made by the court below in referring to the plaintiff as the drawer and drawee of the relevant cheques has not occasioned a E miscarriage of justice. I answer Question (i) in the negative.

Question (ii):

As stated earlier in this judgment, an objection was taken by the defendant in his brief to question (ii). Question (ii) would appear to be predicated on ground (2) in the plaintiff's Notice of Appeal. The ground F reads-

(ii) The court below erred in law in reversing the decision of the High Court regarding the sum of N44,820.00.

Particulars of Error

(a) There was evidence which the High court accepted that although the G defendants cannot say where the money went to, they did in fact accepted (sic) the lodgment with or payment to them by cheque in the sum of N44,820.00.

(b) Since a cheque is a negotiable instrument, the mere fact that the original payee of the cheque was a person or persons other than the H plaintiff herein is immaterial in law.

(c) There is no evidence that a notice of dishonour was ever given and so the drawer of the cheque is Not discharged from any liability to the plaintiff."

It is the contention of the defendant that the real substance in

that ground involves a question of mixed law and fact. That being so, contends the defendant, the plaintiff ought to have sought and obtained leave of either the Court of Appeal or of this court to appeal on that ground. Subsection (3) of Section 213 of the Constitution gives right of appeal from the Court of Appeal to the Supreme Court on question of fact or mixed law and fact only with the leave of the Court of Appeal or the Supreme Court. It is on record that the plaintiff sought and obtained leave of the court below to appeal to this court on questions other than questions of law alone. (See page 156 of the record of appeal). For that reason, therefore, the objection is misconceived and is accordingly struck out.

C Question (ii) relates to the cheque for N44,820.00. The learned trial judge found:

“The plaintiffs paid into their A/C at Union Bank of Nigeria Gboko cheque No.362037/055593 for N44,820.00. The cheque was paid in on the 24th February 1981. The paying in slip bears Union Bank of Nigeria D Ltd. Gboko. Although this paying in slip Exhibits ‘E’ stated that the A/C to be credited was E. D. Tsokwa & Sons. There was no such account with the defendants branch at Gboko. Did the defendants receive the lodgement? The defendants in paragraph 13(6) (iii) of the amended statement of claim pleaded thus:

E “(iii) As regards the lodgment of the sum of N44,820.00 by Union Bank, Gboko cheque allegedly lodged on 24/2/81, the defendants deny receiving same and shall at the hearing require the strictest proof thereof’

In his evidence in chief D.W. 3 stated as follows:

F “The sum of N44,820.00 was not credited to the A/C of plaintiffs on 24/2/81. Exhibit’ E’ shows that E.D. Tsokwa & Sons paid into this A/C cheque of N44,820.00. From the records I inherited, the only account we have in Union Bank Nigeria Ltd. Gboko is for E.D. Tsokwa and Sons Co. Ltd. Although the defendants accepted the lodgment of N44,820.00, I cannot say where the money went to. The stamp used in receiving the cheque is not meant for that G purpose. It had no date.

It is no in dispute that the plaintiffs have two accounts in the defendants Gboko Branch. All in the name of E.D. Tsokwa and Sons Co. Ltd. If the plaintiffs perhaps inadvertently wrote in Exhibit ‘E’ ‘Credit E.D. Tsokwa & Sons’ ,it is no justification for the defendants who accepted the lodgment to H have not credited the account of the plaintiffs, knowing fully well that E.D. Tsokwa & Sons have no account with them. D.W. 3 admitted that the defendants accepted the lodgment. It is defendants Gboko cheque. Immediate clearance was no problem. D.W. 3 admitted that the accounts of the plaintiffs was not credited. I see no legal or equitable justification for not crediting the

account of the plaintiffs. The argument that an official stamp not meant for receiving lodgment was used appears to me to be porous. Whatever stamp that was used, the truth was that the lodgment was received by the defendants branch at Gboko. The account of the plaintiffs must be credited with this sum of N44,820.00 since the defendants did not contest that the cheque was dishonoured and returned to the plaintiffs. “

B

On appeal to the Court of Appeal, that court, per Adio JCA, observed:-

“If there is any dispute or controversy on the question whether a customer paid a sum of money into his account in a bank, the customer may prove the payment by the oral evidence of the person who paid the money into the bank for and on behalf of the customer. Alternatively, he may prove it by producing the bank teller duly stamped with the bank’s official stamp, bearing the initials of an official of the bank and showing that the aforesaid sum was paid into the bank in favour of the customer. See Aeroflot v. United Bank for Africa (1986) 3 NWLR (Pt.27) D 188. In this case, there was evidence before the trial court that the ‘official stamp’ on the teller (Exhibit ‘E’) was not the type of official stamp being used to stamp tellers used for making payments into customers’ accounts and that the stamp did not contain any date. Further, there was no evidence that the mark or initial of the person, who stamped and signed the teller, was that of any official of the appellants’ branch at Gboko. A customer of a bank who fills a bank teller and gives the teller and the money to which it relates to just any of the bank’s employees for payment into this account does so at his own risk. If it turns out that the bank employee in question is not an official duly authorised to accept or receive such payment for and on behalf of the bank, the bank will not be vicariously liable if the employee fraudulently converts the money to his own use. See Salawu v. Union Bank (1986) 4 NWLR (Pt.38) 70. Failure to prove that the initial on the teller, Exhibit ‘E’, was that of an employee of the appellants is fatal to the respondents’ case. Finally, on this point, the evidence, the evidence of 3rd D.W. at page 77 of the record, was inter alia, as follows:

‘A cheque for N44,820.00 was not lodged into plaintiffs’ A/C. The plaintiffs operate A/C in the name of E.D. Tsokwa and Sons Company Ltd.’

The averment in paragraph 1 of the Amended Statement of Claim, at pages 33 to 39 of the record, was, inter alia, that the plaintiff H (respondents) was at all material times a limited liability company incorporated in Nigeria carrying on business at Gongola, Plateau and Benue States as the defendant (appellants) at all material times well knew. The appellants (defendants) in paragraph 1 of their Amended Statement of

Defence, at pages 64, 60, 67 of the record, admitted paragraph 1 of the Amended Statement of Claim. If the appellants knew very well at all material times that the respondents, E.D. Tsokwa & Sons Co. Ltd., their (appellants') customers, were registered in Nigeria as a Limited liability company, the appellants could not properly or legally have credited the respondents' account with the sum of N44,820.00 paid into their branch at Gboko in favour of another body known as E.D. Tsokwa & Sons in the same way as it could not properly or legally credit the account of E.D. Tsokwa & Sons, if one was in its Gboko branch, with money paid into the appellants' branch in favour of the respondents. The situation is the same even if all the shares in E.D. Tsokwa & Sons Co. Ltd., are held by E.D. Tsokwa & Sons because an incorporated body is a separate and distinct legal entity from its members. See *Salomon v. Salomon & Co .. (1897) A.C. 22.*"

Plaintiff in his brief contends as follows:

"Points (a) and (b) go to the question whether the defendant bank in fact received the lodgment of the money whilst point (c) raises the further question whether, if they did, it was proper for them to credit the plaintiff's account. Each of these question will now be considered.

4.3 Was the Money in Fact Lodged? The learned trial judge relied on the admission made by DW3 who after all was the Bank Manager on the date he was giving evidence and must be presumed to have studied the records of the bank relating to the matter. The evidence is on P.77 lines 12-17 of the Record. The plaintiff submits that the Court of Appeal ought not to have disturbed the findings of the learned trial Judge on the facts.

4.4 Vicarious Liability of the Bank: It is submitted that the facts of *Salawu v. Union Bank* (supra) are materially different from the facts of this case. That case cannot therefore apply and the Court of Appeal was, with respect, in error in applying it.

4.5 Crediting Plaintiff's Account: It is submitted that since the enactment of the Bills of Exchange (Amendment) Act 1964 cheque presented for payment by or through a bank to be applied after collection for the account of its customer (even cheque) do not require any endorsement. The bank asked to collect may decline to do so if it fears that it may be liable to the payee what it cannot do is to agree to collect and then do nothing."

In reply the defendant contends as follows:

"The real issue for determination in connection with this sum N44,820.00 is whether, where A pays a cheque to a Bank with instructions to pay it to the Account of B who has no account with the Bank and the Bank accepts it as such can A subsequently sue the Bank for the value of the cheque on his own account if the cheque is not credited to

B's non-existent account.

The appellant has not advanced any arguments in support of the proposition that a Bank who receives a cheque for payment to the Account of "A" who has no account with it is liable to B, the payer of the cheque, for failing to pay the value of the cheque to A's nonexistent account.

It is with the greatest respect an absurd proposition to expect or B to affix liability to a Bank who receives a cheque which it is required to pay to A who has no Account with it, to collect the proceeds of the cheque and to pay the same to B merely because (B) happens to be the payer."

In his oral submission before us Chief Ajayi, SAN submits that it was the payee of the cheque for N44,820.00, that is, E.D. Tsokwa and C Sons that could claim in respect of the cheque and not the plaintiff, that is, E.D. Tsokwa and Sons Company Ltd.,

It is not in dispute that the cheque for N44,820.00 drawn in favour of E.D. Tsokwa and Sons was paid to the defendant bank to the credit of E.D. Tsokwa and Sons. The teller (Exhibit E) shows that the name of the Account holder entered in it is "E.D. Tsokwa and Sons". The defendant accepted the lodgment but did not credit plaintiff's accounts with the said sum of N44,820.00. It has not been disclosed by the defendant what happened to the money. Exhibit E shows the sum of N44,820.00 was to be credited to the account of E.D. Tsokwa & Sons which had no account with the defendant E bank. It has not been shown that E.D. Tsokwa & Sons was one and the same person as E.D. Tsokwa & Sons Company Ltd. an incorporated body. The plaintiff can, therefore, not complain that its account was not credited with the sum of N44,820.00; the said amount, by Exhibit E. was not meant to be credited to its account. On the whole, I am not satisfied that the plaintiff has successfully faulted the reasoning of the court below, per Adio, J.C.A., in refusing this item of plaintiff's claim.

Consequently, I answer Question (ii) in the affirmative. And with this conclusion I must hold, and I do so hold, that plaintiff's appeal fails and it is accordingly dismissed.

I now turn to the defendant's cross-appeal. This relates to two issues, that is to say: the issue of three cheques drawn by the plaintiff in favour of Mobil (Nigeria) Limited, and (2) the cost of preparing a mortgage deed.

The Mobil Cheques: The plaintiff, in paragraph 9c of its amended H statement of claim, pleaded thus:

"9. The plaintiff at its expense engaged a firm of chartered accountants viz: Ojike, Okechukwu & Co. 55, Western Avenue, Lagos, to investigate its account with the defendants Gboko Branch. The result of

the investigation reveals that the plaintiff's indebtedness with the defendant has been grossly inflated and made up as follows:-

xx xxx xxx xxxx xxx xx xx xxx

"C. Discrepancies in bank statement over cheques issued by the company:

<u>Date</u>	<u>Cheque No</u>	<u>Value</u>	<u>Amount</u>	<u>Discrepancy</u>
			<u>Debited</u>	
B 30/4/79	362037/000102	364.20	N38,107.32	N36,743.12
26/9/79	126	15,418.70	27,413.56	11,994.86
5/1/81	444	137.71	13.753.71	<u>13,616.00</u>
				<u>N63,353.98</u>

C *The plaintiff shall at the hearing rely on the above mentioned cheques and the corresponding stamps and the defendant is hereby given notice to produce the originals of same.*

During trial the plaintiff will urge the Honourable Court to strike out all items of Discrepancies in bank statement over cheques issued by D the company totalling N63,353.96 which forms part of the said total debit balance of N736,812.29 in the plaintiff's account with the defendant. The plaintiff further states that the said cheques and sums hereto referred to in this paragraph were payment made to Mobil (Nigeria) Limited Bukuru, Jos, and the plaintiff shall at the hearing found and rely on E relevant records of the transaction kept by Mobil (Nigeria) Limited Bukuru in their normal course of duty."

The defendant replied thus:

"13(c) In answer to the discrepancies alleged in paragraph 9C of the statement of claim, the defendants aver as follows:-

F (i) The plaintiffs' cheque Number 000102 of 30/4/79 was drawn for the sum of N38,107.32 and not for N364.20 only.

(ii) Their cheque No. 000126 of 26/9/79 was drawn for 27,413,56 and not for N15,418.70.

G (iii) Their cheque No. 000444 debited against the plaintiffs was drawn for N13,753.71 on 9/1/81 and not for N137.71.

The defendants hereby give notice that at the hearing of this suit, they will rely on all the wasted cheques referred to in this paragraph."

In respect of this item of claim the learned trial judge found -

H "The plaintiffs in their paragraph 9(c) of the Amended statement of claim, contended that they issued a cheque No. 362037/000102 dated 2/4/79 for N364.20. The account of the plaintiffs was debited with N38, 107.32. They tendered Exhibit F2 to support their case. Exhibit F2 is the Counterfoil of the original cheque. Although Exh. F2 contains so many counterfoils, the relevant counterfoil for this case is the first one.

The defendants in paragraph 13(c)(i) pleaded as follows:

‘(i) The plaintiffs cheque number 000102 of 30/4/79 was drawn for the sum of N38,107.32 only. The defendants hereby give notice that at the hearing of this suit, they will rely on all the wasted cheques referred to in this paragraph’

The plaintiffs tendered Exhibit F2 to prove that cheque No. 000102 of 2/4/79 was for N364.20. Defendants pleaded that the cheque was for N38,107.32. There was no evidence whatsoever to support defendants assertion. Surprisingly the original cheque which ought to be in the possession of the defendants was not produced. Infact defendants gave no evidence to support their pleading. I have no choice but to accept the evidence of the plaintiffs that their account was wrongly inflated by N37,743.12. The correct debit is N364.20 and not N38, 107.12. The account of the plaintiffs should be credited with N37,743.12.

On Exhibit F2 also, the plaintiff issued a cheque No. 000126 dated 6/6/79 for N15,418.70. Plaintiffs account was debited with N27,413.56 instead of N15,418.70. The defendants in paragraph 13(c) (ii) of the Amended Statement of Defence denied this in the following words:

“(ii) Their cheque No. 0001126 of 26/9/79 was drawn for N27,413.56 and not for N15.418.70.

The defendants stated that at the hearing they would rely on the wasted cheques. At the hearing the defendants did not produce the wasted cheque to support the averment. Infact the defendants gave no evidence at all about this cheque. Exhibit F2 showed that the amount drawn on that cheque was N15,418.70. I have no other evidence to contradict this. I accept it as true. The plaintiffs account should be credited with N11,994.86. This is the difference between N27,413.56 and N15,418.70.

Plaintiffs account was again debited with the amount of N113,753.71. Cheque No. 000444 of 9/1/81 found on Exhibit F1 was for the sum of N137.71. The defendants by their paragraph 13(c) (iii) pleaded as follows:-

“(iii) Their cheque No. 000444 debited against the plaintiffs was drawn for N13,753.71 on 9/1/81 and not for N137.71.”

The defendants did not produce the wasted cheque to support their contention. Plaintiffs tendered Exhibit F1 to support their claim. I have no reason to doubt the genuiness of Exhibit F1. there being no other evidence to contradict it. The plaintiffs account should be credited with the difference between N 13,753.71 and N 137.71 i.e. N13.616.00”

Commenting on defendants attack on the findings of the learned trial Judge, the Court below, per Adio JCA, said:

“The main or fundamental issue, in this connection, is whether

the appellants or the respondents had the burden of proving the amount for which each of the cheques in question was issued. The best evidence of the amount for which each cheques was issued was the (wasted) cheque itself which from the normal course of things, should ordinarily be in possession of the appellants who were the bankers that retained it when it was presented for payment. In fact, the appellants after stating in paragraph 13(c) of the Amended Statement of Defence what they contended was the correct amount for which each of the cheques in question was issued. averred -

“The defendants hereby give notice that at the hearing of this suit, they will rely on all the wasted cheques referred to in this paragraph.”

C It is sufficient, in this connection, to say that the appellants who were in possession of the wasted cheques relating to the alleged inflated sums having withheld the cheques, the presumption is that the wasted cheque, if produced, would have been adverse to the case of the appellants. See section 148(d) of the Evidence Act. There is, therefore, no D valid legal basis for setting aside the judgment of the trial court on this aspect of the case whatever view one may take of the complaint of the appellants about what the trial judge did with Exhibits ‘F1’ and ‘F2.’”

This passage has now come under attack in the defendant’s cross appeal.

E The main contention of the defendant is that the Court below wrongly placed the burden of proof on the defendant. It is argued thus:

“It is trite law that he who asserts must prove. Here, if no evidence were led on either side, the plaintiff would fail in its claim. Thus the initial burden clearly lay on the plaintiff to prove:

F (i) That it had drawn the particular cheques for the specific amount pleaded

(ii) That Mobil (Nigeria) Limited had only received those specific amounts;

G (iii) That the defendant had nonetheless debited the plaintiff’s account with a large amount than that for which the cheque had been drawn and which had been paid to Mobil (Nigeria) Limited.”

The necessary statutory provisions relating to burden of proof in civil cases are to be found in Sections 135-140 of the Evidence Act, Cap 112 Laws of the Federation of Nigeria 1990. Generally, a party who makes allegations in a pleading should produce evidence to substantiate them as part of his case, and it is not sufficient for him to rely upon the emergence of evidence from the opposite party for the purpose of proving allegations in his own pleading - per Abbott, F.J. in *Akinfosile v. Ijose* (1960) 5 FSC 192, 198; (1960) SCNLR 447. The onus was on the plaintiff to prove the allegations made by it

in paragraph 9C of its amended statement of claim; it was not for the defendant to disprove those allegations. The Court below was, in my respectful view, in grave error to place the burden on the defendant to prove the amounts on the relevant cheques involved in paragraph 9C.

What is the evidence led by the plaintiff in support of paragraph 9C? PW 1, Michael Opeseyi testified:

"These are two cheque stuffs (sic) that were handed over to the external auditors There were discrepancies between cheque stuff (sic) and cheque leaflets."

Cross-examined, he admitted:

"The amount in one cheque leaf was altered from N500.00 to N1,500.00. I don't know whether the alteration was reported to the police."

P.W.2 also gave evidence to the like effect. He testified thus:

"The plaintiffs give us all relevant materials to enable us to audit the accounts. We investigated the accounts up to 31st March, 1983. We discovered some debits and the defendants could explain them. We found some lodgments not credited. We did not contact the defendants. We noticed some discrepancies in the cheques issued. The amounts on the leaflets were different from the stuffs. (sic)."

P.W.1 made no attempt to identify the cheque stubs that related to the allegations in paragraph 9C. Nor did he explain why the relevant wasted cheques were not tendered in evidence. Neither PW1 nor PW3 who was the sole signatory to the plaintiff's two accounts, gave evidence in support of paragraph 9C. Having admitted that there were discrepancies between cheque stubs and cheque leaflets, the duty was placed on the plaintiff to prove that that was not the case with the cheques issued in favour of Mobil (Nigeria) Ltd. This it failed to do. In such a situation it could not be said that plaintiff proved that part of its case.

The court below applied against the defendant the presumption in Section 149(d) (formerly 148(d) of the Evidence Act to the effect that *"Evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."*

There was no evidence that the defendant withheld from the plaintiff the wasted cheque leaves that would have resolved the issue. Where the defendant after being served with notice to produce the wasted cheques failed to do so, the plaintiff ought to have led secondary evidence, such as evidence from Mobil (Nig.) Ltd. as to the amounts they actually received, to prove the amounts on those cheques. It is for a plaintiff to prove his case and not for the defendant to disprove it. I do

not share the view that Section 149(d) applies where a defendant fails to tender in evidence documents which the plaintiff has the primary duty of establishing before the court. After all, a defendant who is satisfied that the plaintiff has failed to discharge the onus placed on him (plaintiff) by Section 137(1) of the Evidence Act is entitled to rely on the evidence of the plaintiff without calling any evidence himself - See: Nasr v. Saini (1968) 1 All NLR 274. Section 137(1) provides:

“137(1) In Civil cases the burden of first proving the existence or nonexistence of a fact lies on the party against whom the judgment of the Court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.”

Not having discharged the burden on it, the onus did not shift to the defendant as provided in sub-section (2) of section 137. The two courts below, with respect, were in error to find against the defendant in respect of the allegations made by the plaintiff in paragraph 9C of its amended Statement of claim. The sum of N63,353.96 is to be added to the amount credited to the defendant by the court below.

The Cost of Preparing the Mortgage Deed:

Plaintiff pleaded thus:

Further more the plaintiff states that the said debit balance of N736,812.29 also includes a debit of the sum of N20,701.09 being payment made in favour of Izundu & Co (Solicitors) for perfecting a legal mortgage of Certificate of Occupancy No. 95/344 for facilities in the tune of N90,000.00 and N650,000.00 from the defendants. The plaintiff denies ever applying for the said facilities as alleged by the defendants in the said debit notes dated 27/7/82. The plaintiff shall at the hearing found on the defendants debit notes dated 27/7/82 and Zandu Izundu & Co's bills dated 14/6/81 and 14/6/82. The plaintiff shall further at the hearing urge the court to expunge the said sum of N20,701.09 from its accounts as debt owed to the defendants.”

The defendant, in answer, pleaded -

“In answer to paragraph 15 of the statement of claim the defendants aver that the sum of N20,701.09 paid to Messrs Zanda Izundu and Co. as fees for perfecting two legal mortgages were fees due and payable to the mortgagor under the Legal Practitioners Remuneration for professional services and the plaintiffs are therefore estopped from denying liability for the charges.

The deed of Legal mortgage and the deed of third party mortgage both dated 20th May, 1982, for the sum of N90,000.00 and N650,000.00 respectively shall be relied on at the hearing of this suit.”

Testifying on the issue, PW 1 deposed:

"The account of the plaintiffs was debited with N20,701.09 for an unauthorised job. We did not authorise one Izundu to do a job for us, but the bank debited our Account. After the defendants had debited the plaintiff's account, they sent bills from one Izundu to the plaintiffs. These are the bills to the plaintiffs by the defendants."

PW3, Emmanuel Danjuma Tsokwa, the plaintiff's managing director also testified and deposed:

"I do not know one lawyer Izundu. He has not appeared in the transactions I had with the defendants. I never took any credit facilities from the defendants to justify lawyer Izundu carrying out legal duties on my behalf. I never took out a mortgage with the defendants. The defendants had no power to deduct N20,000.00 from my account to pay for the preparation of mortgage agreement."

Later in his evidence, he said:

"I observed that A/C No. 1 was debited with this N21,782.82. I did not authorise the defendants to sign deed of legal mortgage. My signature never appeared in any legal mortgage. If there was any signature it was forged."

I never took a loan of N90,000.00 from the defendants. Nor did I take a loan of N650,000.00 in 1982."

Cross-examine, he testified:

"I never deposited Wukari Local Government Certificate of Occupancy Nos. 571 and 572 with the defendants. I have not got such C of Os. I did not apply to Gongola State Government for consent to Mortgage these plots. I have a Gongola State Certificate of Occupancy No. 133. I did not apply to Gongola State Government to mortgage it. I did not mortgage this C of O to the defendants for N650,000.00 I have a C of O No. GS 544. I gave it to the defendants to enable them import Peugeot Pick-Up Vans for me. I did not mortgage it for the sum N90,000.00. These C of Os. were deposited as security to enable them import cars for me. I did not intend to import the cars. Plaintiffs had enough money to import these cars. Our bankers guaranteed us in the Central Bank for the costs of the vehicles to be imported. This was why I handed the Certificate of Occupancy to the defendants. Plaintiffs have a Security. The Company Secretary had no authority to sign any letter."

To further questions, he testified:

"We requested for two loans totalling N750,000.00 from the defendants. I do not know who signed for Director and Secretary of plaintiffs in a Mortgage Deed of N650,000.00. I deny knowing who signed for our company in a Mortgage Deed for N90,000.00 I did not mort-

gage my two plots”.

Re-examined, PW3 explained:

“The Certificate of Occupancies (Sic) No. GS 133 and GS 544 were given to the defendants to enable them import vehicles for me. The N21,000.00 debit Note was mentioned by plaintiffs in paragraph 9(a) of the amended statement of claim. I applied for credit facilities for N750,000.00 but were not approved and granted by the defendants.”

DW3, Anthony Omosigho Kani, testified for the defence. He deposed:

“The plaintiffs have securities for loans in our Company. They are legal mortgages. Two in number. The first legal mortgage is for N650,000.00 Plaintiffs signed it. It was stamped and registered”

After the document had, in a ruling, been admitted in evidence the witness continued:

“There is another legal mortgage for N90,000.00. It is between the plaintiffs and the defendants. It was stamped and registered. It was signed by a representative of the plaintiffs.”

Concluding his evidence-in-chief, the witness said:

“Exhibit ‘M’ was prepared by Zanda Izundu & Co. Solicitors residing at Anugu. He was paid and the account of the plaintiffs debited.”

E Cross-examined, the witness deposed:

“Legal mortgage is an agreement between the mortgagor and mortgagee. Both parties to the agreement must sign and they must put their seals on the agreement. E.D. Tsokwa & Sons did not sign as mortgagor. E.D. Tsokwa & Sons cannot enter into a binding legal agreement. F Exhibit ‘N’ has been in our custody since 1982.

There was an application for the loan of N650,000.00”

The learned trial Judge resolved the issue thus:

“The defendants tendered Exhibit ‘N’ as one of the alleged legal mortgages. It was headed third party legal mortgage. The Mortgagor was G Emmanuel Danjuma Tsokwa & Sons. The Mortgagees was the defendants and the plaintiffs were the customer. The plaintiffs never signed the Exhibit ‘N’ According to the defendants the party to pay the legal fee of N20,701.09 was the mortgagor. The Mortgagor in Exhibit ‘N’ was Emmanuel Danjuma Tsokwa & Sons and not the plaintiffs who were named as customer. It was H wrong therefore, for the defendants to debit the accounts of the plaintiffs.

The second legal mortgage for N650,000.00 was not properly executed. The purported deed of mortgage was not signed and sealed by the defendants. It was rejected in evidence and marked exhibit ‘2’ rejected. There was no sound basis for debiting the account of the plain-

tiffs with the sum of N20,701.09"

On appeal to the Court below, that court, per Adio, JCA. observed:

".....in order to recover from a customer or to make him liable for the fees charged by a Solicitor for the preparation of a mortgage deed, a bank has to lead credible and satisfactory evidence to show that it granted a loan to the customer and that one of the conditions, subject to which the loan was granted and to which the customer agreed, was that the customer would execute a deed of mortgage, prepared at the customer's expense, on his property as security for the loan. In the absence of such an agreement, there will be no legal basis for making the customer liable for the Solicitor's fees charged for the preparation for a mortgage deed. In the present case, there was no evidence before the learned trial Judge that the respondents ever agreed to bear the expenses of preparing the deeds of mortgage."

This passage has come under attack in the cross-appeal. I have given careful consideration to the submissions of the defendant on this issue. I regret I am not persuaded to find in defendant's favour. I agree entirely with the observations above of the Court below. The defendant led no evidence of the grant of facilities to the plaintiff requiring the latter to execute a deed of legal mortgage to secure the facilities. On the contrary DW3 said that plaintiff overdrew on his account in an irregular manner. The position taken by the defendant in this case was that E. D. Tsokwa & Sons was not legal person. Yet Exhibit 'N' shows it was the mortgagor, and not the plaintiff. Indeed, the Deed was not executed by the plaintiff. In the absence of clear evidence that the plaintiff agreed to bear the cost of the legal mortgage executed by E.D. Tsokwa & Sons, I cannot see how it could be made liable for the cost. In the circumstances, I uphold the decision of the two courts below disentitling the defendant to claim from the plaintiff the legal bill of N20,701.09.

In the net result, the cross-appeal succeeds as regards the issue of N63,353.96 on the cheques to Mobil (Nigeria) Limited but fails on the issue of the legal bill of N20,701.09. Declarations (2) and (3) made by the Court below in favour of the plaintiff are varied by me to read "the sum of N520,070.96" instead of "N456,717.00" Subject to this variation I affirm the judgment of the Court below and dismiss the plaintiff's appeal.

It is for the reasons I have given above that I agree with the conclusion reached by my learned brother, Wali, J.S.C that the plaintiff's appeal be dismissed and the defendant's cross appeal allowed in part. I abide by the order for costs made by my brother, Wali, J.S.C.

OGWUEGBU JSC

I have had the advantage of reading in draft the judgment of my learned brother Wali, J.S.C just delivered. I agree with his reasoning and conclusion. I adopt them as mine. I abide by the consequential order of costs contained in the lead judgment.

B

MOHAMMED JSC

This appeal is without any merit and for the reasons given by my learned brother, Wali, J.S.C. , in his judgment, with which I am in agreement, I will also dismiss it.

Against all banking practice, the Managing Director of the appellant, purported to have paid in money into his company's account with the respondent, by using bogus cheques drawn on an account which he maintained with the First Bank, Yola. At the time the Yola cheques were presented for lodgment in appellant's account with the respondent's branch at Gboko, Mr. E.D. Tsokwa had no 'funds in his account in First Bank, Yola. Nevertheless, the Manager of respondent's bank in Gboko, Mr. Akpoke, who seems to be in connivance with the appellant to defraud the respondent's branch at Gboko, permitted Mr. Tsokwa to withdraw equivalent sums from his account. This permission was given against all banking practice, because the Manager did not wait for the cheques to be cleared through the Clearing House.

To make the case more complicated, the cheques drawn on First Bank, Yola, were not credited to the appellant's account in Gboko and the Manager of the respondent did not present them for payment at Yola. They all "mysteriously vanished" and could not be traced.

From the facts above, the appellant had lost nothing in the process but took out a lot through manipulation of bogus cheques.

I also agree with my learned brother, Wali, J.S.C., that the cross-appeal should succeed in part. The main appeal is dismissed. I abide by all consequential orders made, including the assessment of costs.

IGUH JSC

H I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Wali, J.S.C. and I agree with the reasoning and conclusions therein reached.

A close study of the pleadings and the record of proceedings in this case clearly reveals that Section 48 of the Bills of Exchange Act was

neither relied upon by the plaintiff in its statement of claim nor at the trial. Without doubt, it is clearly unnecessary to plead law, statutes or sections thereof before reliance can be placed on them. But material facts which lead to the legal result sought out be relied upon must be fully pleaded. In other words, where the case of a party depends on some law, statute or sections thereof, all he is required to do is to plead completely the material facts necessary to bring his case within that law or statute. See *Read v. Brown* (1989) 22 QBD. 128. Once such material facts have been sufficiently pleaded, the inference to be drawn from such pleaded facts and the particulars of the law to be relied upon for such an inference need not be pleaded. See *Re Vandervell's Trust (No.2)*, *White v. Vandervell Trustess Ltd.* 1974) 3 A.E. 205 at 213, *Anyanwu v. Mbara* (1992) 5 NWLR (Part 242) 386 at 398 etc.

In the present case, it cannot be seriously contended that the plaintiff placed sufficient materials before the court in relation to the various cheques in issue for any suggestion that Section 48 of the Bills of Exchange Act would be relied upon. I think the court below was perfectly right when it held that the plaintiff not having pleaded facts in respect of which the provisions of Section 48 of the Bills of Exchange Act would lawfully apply could not properly shift ground and turn round to rely on the said Act. See *J.O.Idahosa and Another v. D.N. Oronsaye* (1959) 4 F.S.C. 166; (1959) SCNLR 407. A party is bound by his pleadings and shall not be permitted to set up a different case. See *Aderemi v. Adedire* (1966) NMLR 398, *A.C.B Ltd. v. A.G. North* (1967) NMLR 231 etc. It is not open to a party to depart from his pleadings and set up an entirely new case at the hearing. See *Adenuga v. L.T.C.* (1950) 13 WACA. 125, *Ehimare v. Emhonyon* (1985) 1 NWLR (Part 2) 177 etc.

At all events Section 48 of the Bills of Exchange Act provides thus

“Subject to the provisions of this Act, when a bill has been dishonouredby non-payment, notice of dishonour must be given to the drawerand any drawer to whom such notice is not given is discharged”

It seems to me plain that Section 48 of the Act cannot be applicable to the undisputed facts of this case. This is because that section of the law would appear to apply only to cases where a bill has been dishonoured by non-acceptance or nonpayment. This is unlike the evidence in the present case where the cheques in issue were never presented for payment so that no question of non-acceptance or nonpayment did therefore arise.

There is next the undisputed facts that the cheques in issue were never in fact paid or debited to the plaintiff's account, that they were lost

and were never dishonoured and that the plaintiff did not therefore lose their value or any part thereof. In these circumstances, it is clear to me that the court below was absolutely right to have refused to order the defendant to make a donation of the N340,000.00 in issue to the plaintiff.

On the cross-appeal, it is clear that the court below rightly identified B the fundamental issue arising there-from which is whether it was the plaintiff or the defendant that had the burden of proving the amount for which each of the cheques in question were issued. In this regard, it must be noted that the defendant duly tendered the Bank statement of the plaintiff's account. It is clear to me that the onus was on the plaintiff who was contending that the C Bank statement did not correctly represent the true state of his account to establish what he alleged. This he failed to do. I entertain no doubt that the finding of the Court of Appeal that the defendant failed to discharge the burden of proof placed on it in respect of the three cheques in issue was erroneous on point of law and totally unjustifiable.

D It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, Wali, J.S.C. with which I am in complete agreement, that the main appeal fails and is hereby dismissed. The cross-appeal succeeds in part and it is allowed to that extent. I subscribe to the consequential orders together with those as to costs therein made.

E

F

G

H