

**SUPREME COURT OF NIGERIA**  
17TH JANUARY, 1997. SC. 200/1990  
**CORAM:-1. L. KUTIGI, M. E. OGUNDARE, S. U. ONU,**  
**Y. O. ADIO, A. I. IGUH, JJSC.**

ZACCHEUS ABIODUN KOYA ..... PLAINTIFF/APPELLANT  
AND  
UNITED BANK FOR AFRICALTD. .... DEFENDANT/RESPONDENT

***APPEALS**-Decision of Court of Appeal -Where misconceived but not challenged - Remains the settlement of the issue between the parties.*

***APPEALS**-Ground of appeal - That was not raised at trial - May be allowed on appeal - Where it raised substantial issue of law.*

***BANKING** -Bank draft -Where negligently delivered by the appellant - Respondent cannot be held liable*

***JUDGMENTS** -Foreign currency -Whether a Nigerian court can give judgment in foreign currency - Is an issue of discretion - That need not be determined being merely academic in this case.*

**FACTS**

The plaintiff/appellant who has been a customer of the defendant/respondent procured a bank draft in the sum of \$ 10,000.00 from the respondent. The draft being account payee and not negotiable was collected by the appellant who mailed it to his son in the USA via NIPOST. The draft got lost in transit. The appellant wrote the respondent informing it of the loss and requesting that payment of the draft be stopped. But the payment has already been made by the respondent before receiving the appellant's letter.

Appellant sued the respondent before the Ibadan High Court seeking to recover the sum of \$10,000.00 being the value of the draft and N50,000.00 general damages. The trial court found in favour of the appellant but reduced the general damages to N5,000.00. Respondent's appeal to the Court of Appeal was allowed. Appellant has now appealed to the

Supreme Court raising 5 issues.

**ISSUES FOR DETERMINATION**

(a) *Whether a ground of appeal alleging error in law is a competent ground of appeal without the particulars and the nature of error in law properly stated.*

(b) *Whether it is proper to allow a ground not raised at the trial court to be argued when such ground was raised for the first time in the court of appeal on the ground that it contained substantial issue of law and special circumstances, which special circumstances, were not stated before allowing it to be argued.* Etc see p. 79

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

***Misconceived decision that was not challenged***

1. In effect, the court below did not state that “a ground of appeal alleging error in law is a competent ground of appeal without the particulars and the nature of error in law properly stated.” What that court decided which has not, nor is being challenged by any of the grounds of appeal herein, was that though inelegantly drafted or couched, these grounds of appeal embodied enough particulars of error as sufficiently comply with Order 3 rule 2(2) of the Court of Appeal Rules (ibid) to leave the court in no doubt of the precise nature of the error or misdirection complained of. The above finding, not having been challenged by the appellant in any of the grounds of appeal remains, rightly or wrongly, the settlement of that issue as between the parties to this appeal. (p.82 B)

***Ground that raises substantial issue of law***

2. In the case in hand, the court below held that ground 3 complained about and with which we are here concerned, raised substantial issue of law as to whether a Nigerian court can give judgment in foreign currency. This finding is not being challenged by the appellant. My answer to this issue is accordingly rendered in the affirmative. (p.83 C)

***Judgments - Foreign currency***

3. As to whether a Nigerian court could give judgment in foreign currency vide issue (e) I need only add that that question is not an issue of jurisdiction but rather that of discretion. My short answer to issue (c) is that it is purely an academic question into which I will advisedly refrain from further comments since any pronouncement made by me beyond this point on the issue, will amount to an obiter dictum (p.83 H)

***Bank draft - Where negligently delivered***

4The evidence was that the respondent issued the bank draft and in compliance with the demand of the appellant, handed it over to him. It was the appellant himself who “delivered” the bank draft by himself or through his

agent or by whatever manner he thought fit, to the “payee”. If such “deliver” was negligently carried out the respondent could not, in my view, be held liable. It was a clear case of *volenti non fit injuria*.(p.84 C)

## **NOTABLE POINTS OF INTEREST**

### **KUTIGI JSC**

#### ***1. Lower court need not delve into foreign currency issue***

However, having quite properly dismissed Plaintiff’s claims, it was no longer necessary for the Court of Appeal to have gone into the issue of whether or not a Nigerian court can make an award in a foreign currency - the United States dollars in this case. The Plaintiff herein having lost his case in its entirety, is indisputably not entitled to any award, foreign or local. Issue (c) which relates to an award in foreign currency by the trial court will therefore be, and is hereby struck out as unnecessary.(p.85 E)

### **OGUNDARE JSC**

#### ***2. Raising new point on appeal***

On the issue of raising new points on appeal, the general rule is that a party would not be allowed to raise a point on appeal which was not raised at the trial court if, however, the point raised would not involve adducing further evidence, the point would be entertained especially if it is a question of interpretation of documents or it is a point on an issue of law which is not settled, in order to state the law once and for all.(p.92 D)

#### ***3. Case of negligence not made out against respondent***

The General Post Office was Plaintiff’s agent and not Defendant’s for the purpose of transmission of the draft to the payee in the United States. If there was negligence at that stage, it was to his agent plaintiff he should direct his complaint. I agree with the Court below that a case of negligence was neither made out nor proved against the Defendant. Plaintiff’s case was, in my respectful view, rightly dismissed.(p.94 F)

#### ***4. Nigerian Courts can deliver judgment in foreign currency***

It is my respectful view that courts in this country can claim jurisdiction to entertain and determine cases where sums in foreign currency are claimed. The old rule in England, as well as in Nigeria, is judge-made and in the light of present day circumstances of extensive international commercial relationships, that rule should give way to a new rule as now in England more so that the difficulties hitherto experienced in enforcing such judgments no longer apply. It is for the reasons I have given above

that I hold that the Court below was in error in holding, as it did, that courts in Nigeria had no power to give judgment in foreign currency.  
(p.108 F)

**IGUHJSC**

**B 5. *Negligence - Plaintiff must give particulars***

The one issue that ought to be stressed is that a plaintiff, as a matter of law, is required. In an action on negligence, to state or give particulars of negligence alleged and to recover on the negligence pleaded in those particulars. It is not sufficient for a plaintiff to make a blanket allegation of negligence against a defendant in a claim on negligence without giving full particulars of the items of negligence relied on as well as the duty of care owed to him, by the defendant. Accordingly, in an action on negligence, a plaintiff, to succeed, must in addition to pleading and establishing the particulars of negligence relied on, he must also state and establish the duty of care owed to him by the defendant, the facts upon which that duty is founded and the breach of that duty by the defendant (p.110 H)

**6. *Nigerian courts can give judgment in foreign currency***

Where, for instance, the currency of a contract made, executed and enforceable in Nigeria is in foreign currency, our courts of competent jurisdiction would, in my opinion, have power to enter judgment in such foreign currency. See *Schorsch Meier GmbH v. Hennin* (1975) 1 All E.R. 152 and *Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc.* (1973) 3 All E.R. 498 or (1974) Q. B. 292. The underlining principle is said to involve, and I agree entirely with this, that it is the duty of a debtor to pay his debt to the creditor in the currency of the contract according to its clear terms. Besides, it does not seem to me open to question that our courts have ample power, again in appropriate cases, to order specific performance of a contract to pay in a stipulated or named foreign currency. (p.112 D)

**G REPRESENTATION**

Appellant absent not represented  
yAkin Olujinmi, Esq. for the Respondent

**H CASES REFERRED TO**

Merchant Bank Ltd. (1990) 4 NWLR (Part 144) 282  
North East Lines Corporation (1989) 3 NWLR (Part 101) 101 at 111  
Kuforiji v. V.Y.B. Nigeria Ltd (1981) 6-7 S.C.  
Obiora v. Osele (1989) 1 NWLR (Part 97) 279 at pp. 299-300

Egbe v. Adefarasin (1987) 1 NWLR (Part 47) 1  
 Ariori v. Elemo (1983) 1 S.C. 1 at 26 (1983) NSCC. 1  
 Okuojeror v. Sagay (1958) WNLR 70  
 Ogunade v. Ogunade (1965) NMLR 136  
 Jaffar v. Ladipo (1969) 1 ALL NLR 165  
 Skenconsult v. Ukey (1981) 1 SC 6 B  
 Chaplin v. Boys (1971) AC 356  
 Ward v. Kidswin (1662) Latch 77; 82 ER 283  
 Miliangos v. George Frank (Textiles) Ltd. (1975) 3 ALL ER 801  
 Bank of Baroda v. Mercantile Bank (Nig) Ltd. (1987) 3 NWLR 233  
 Melwani v. Corporation (1995) 6 NWLR 438 C

### **LEAD JUDGMENT BY ONU JSC**

This is an appeal against the judgment of the Court of Appeal, Ibadan Division (Coram: Akanbi, JCA. as he then was, Omololu-Thomas, J.CA. and Ogwuegbu, J.C.A. as he then was) delivered on the 1st day of September, 1988. In the action commenced on the 13th day of May, 1985. the plaintiff herein appellant, claimed against the defendant, now respondent as follows:-

*"The plaintiff's claim against the defendant is for special and general damages for negligence particularised below, arising out of the reckless, careless and negligent manner in which the defendant allowed its Bank Draft number HO. 044106 of 20th October, 1983. drawn in favour of West Virginia University Account ML Olusegun O. Koya to be negotiated in London in January, 1984 by its correspondent bank to a wrong person not the beneficiary, which wrongful act resulted in untold suffering and hardship on the beneficiary and thereby suffered damages."*

*Particulars of damages*

*(1) Special damages*

*(a) The sum of \$10,000 U.S. Dollars wrongfully paid by the defendant its servant and or agent to a wrong person not the beneficiary.....\$10,000.00.*

*(2) General damages*

*(b) Being aggravated damages for the hardship and suffering of the beneficiary and the nonchalant attitude of the defendant when informed of its carelessness, recklessness and H negligence.....N50,000.00"*

Pleadings were duly filed and exchanged by the parties and at the close of evidence led by either side, counsel addressed the trial court. At the close of the case, the learned trial Judge (Ibidapo-Obe, J.) in a

reserved judgment delivered on 10th June, 1985, found negligence proved against the respondent, stating *inter alia*:-

*"In the light of all these facts and the law in support, I am of the clear view that the defendant bank is liable to the plaintiff in negligence for the sum of \$10,000.00 U.S. Dollars. This answers my questions 1 & 2 posed in this judgment. ....*

*The claim for general damages of N50,000.00 is based on the "non-chalant attitude of the defendant when informed of its carelessness and negligence. I have said enough on this and in my view, the defendant bank was perhaps slow in taking action but not careless or reckless.*

*It is my view therefore, that the plaintiff is entitled to damages, but certainly not to aggravated damages of N50,000.00. Taking all the facts in this case into consideration, I assess general damages of N5,000.00 (Five Thousand Naira) in favour of the plaintiff.*

*In sum, the plaintiff's case succeeds and the defendant bank is found liable to the plaintiff in the sum of \$1 0,000.00 U.S. Dollars as the proceeds of the draft cheque dated 20/10/83 and general damages of N5,000.00 (Five Thousand Naira)."*

The respondent being dissatisfied, appealed to the Court of Appeal, Ibadan (hereinafter referred to as the court below) which set aside the trial court's decision on 1st September, 1988 thus allowing the respondent's appeal in its entirety. The appellant who was aggrieved by this decision has now appealed to this court upon nine grounds contained in its Notice of Appeal dated 9th November, 1988.

The facts of the case briefly stated are that on 20th October, 1983 the appellant who was a longstanding customer of the respondent purchased \$10,000.00 (Ten Thousand Dollars) draft payable to West Virginia University in the United States of America for the account of his son, Mr. Olusegun O. Koya, who was then a student there. The draft which was payable on presentation to the French American Banking Corporation in New York, having been collected by the appellant for the purpose of transmitting same to his son, later wrote on 25th January, 1984 to inform the respondent that the draft got lost in transit between the Ibadan General Post Office and U.S.A. and requesting that it be stopped. The truth of the matter, however, was that the draft had been paid on 12th January, 1984 through Oman Bank Limited in London.

The five issues identified for our determination are:

(a) Whether a ground of appeal alleging error in law is a competent ground of appeal without the particulars and the nature of error in law properly stated.

(b) *Whether it is proper to allow a ground not raised at the trial court to be argued when such ground was raised for the first time in the court of appeal on the ground that it contained substantial issue of law and special circumstances. which special circumstances, were not stated before allowing it to be argued.*

(c) *Whether or not trial court could award its judgment in Foreign currency to wit: U.S. Dollars.*

(d) *Whether the learned trial Judge was right in awarding damages to the appellant (then the plaintiff) for negligence of the respondent (then the defendant) in delivering the bank draft to a wrong person not the payee.*

(e) *Whether as a result of non-delivery of the draft to the proper addressee the plaintiff has suffered general damages.*

The respondent who would appear tacitly to adopt the issues formulated by the appellant both in its brief and through its counsel's oral submission at the hearing of the appeal on 21st of October, 1996 has raised a preliminary objection to some of the appellant's grounds of appeal as well as the Brief filed for being incompetent while those grounds that have not been argued should be deemed to have been abandoned to the following effect:-

#### Ground 1

It was learned counsel for respondent's complaint against this ground

(a) *that it offends against Order 8 rule 3 of the Supreme Court Rules, 1985 in that it is argumentative and narrative i.e. that the particulars are arguments and narrative.*

(b) *that it is contrary to Order 8 rule 2 (ibid) in that it does not allege any error or misdirection against the judgment of the court below, adding that the court below nowhere concluded "that grounds 7 and 9 of appeal failed to set out the particulars of the error complained about" as alleged by the appellant. What the court below held in substance, it is contended, was that though the particulars of the errors were embodied in the grounds of appeal, they leave the court "in no doubt of the precise nature of alleged error or misdirection complained of." This particular holding of the court below on the sufficiency of particulars embodied in grounds of appeal, it is further argued, has not been challenged by any of the grounds of this appeal. Rightly or wrongly therefore, it is maintained. that issue remains settled between the parties vide Sule v. Nigerian Cotton Board (1985) 6 S.C. 105; (1985) 2 NWLR (Pt.5) 17.*

(c) *that having regard to (a) and (b) above, grounds 1 and 2 are vague or general in terms and disclose no reasonable grounds of appeal pursuant to order 8 (ibid) and they should not be permitted to be argued as they are irrelevant to the*

*judgment of the court below. In effect, it is contended, they (the grounds) raise only academic issues about which this court should not concern itself. We were therefore urged to strike out these grounds.*

*(d) It was further contended that 'ground 3 is misconceived and unrelated to the judgment of the lower court in that nowhere in it did the lower court place any interpretation rightly or wrongly on Udza Uor and 2 ors v. Paul Loko (1988) 2 NWLR (Pt. 77) 430 at 434-440, and it should in consequence be deemed abandoned, accordingly struck out and the appeal dismissed. All the grounds of appeal, it is further maintained, being incompetent should along with the Notice of Appeal, be struck out pursuant to Order 8 rule 7 Supreme Court Rules. The ground of this contention, it is submitted, is, that the appellant in his Notice of Appeal filed nine grounds reduced to five issues vide paragraph 5 of his brief; that these issues which supercede the grounds vide Momodu v. Momoh (1991) 1 NWLR (Pt. 169) 608 and Orji v. Zaria Ind. Ltd. (1992) 1 NWLR (Pt. 216) 124 at 146 and which have not been canvassed, are deemed abandoned.*

As neither the learned counsel for the appellant nor he (appellant) himself was present at the hearing of the appeal on 21st October, 1996, the provision of Order 6 rule 8(6) of the Supreme Court Rules was invoked to regard the appellant's brief dated 17th October, 1990 as having been argued. Learned counsel for the respondent, Chief Akin Olujinmi, after adopting the respondent's brief filed on 7th November, 1990, made an oral submission in expatiation thereof, adding that from the list of some latest authorities he had submitted to buttress his argument, the appeal is incompetent. Moreover, he argued, some of the issues filed do not relate to the grounds to wit: grounds 2, 4, 5, 6, 7, 8 and 9, while arguments were proffered on those grounds rather than on the issues. Moreover, it is maintained, the issues filed related to the High Court decision rather, than that of the court below.

I have carefully examined all nine grounds of appeal argued by the appellant in its brief and I do not find full justification in the various complaints raised by the respondent except as regards issues 3 and 5 to which I will come later in this judgment and his failure to formulate and argue his appeal based on the issues rather than on grounds of appeal. This court has held times without number that counsel arguing appeals are advised to rely on the issues formulated rather than the grounds of appeal. This is because it is on the basis of the issues that the parties found their contention. See *Macaulay v. NAL Merchant Bank Ltd.*, (1990) 4 NWLR (Pt. 144) 283; *Niger Progress Ltd v. North East Lines Corporation* (1989) 3 NWLR (Pt. 107) 68 at 111 and *Adelaja v. Fanoiki* (1990) 2

NWLR (Pt.131) 137 at 148. Besides the appellant as plaintiff filed no reply Brief in answer to the objections therein raised by the defendant/respondent. Since the respondent in the argument of the instant case would appear to have adopted the five issues formulated by the appellant and which I have set out above as apt and can conveniently dispose of the appeal herein, I will to the extent of what I have demonstrated hereinbefore accordingly overrule the objections raised by the respondent and consider the five issues ((a) to (e)) set out in the appellant's brief at page-3 in place of the grounds of appeal thereof as follows:-

Issue (a)

On this issue which overlaps grounds 1 and 2, certain extracts in the judgment of the Court below said to have been taken *Suo motu* came under attack by learned counsel for the appellant who contended that it was after the ruling wherein grounds 1, 2, and 4 are alleged to have failed to state the particulars of error in law complained of were incompetent, being in breach of order 3 rule 2(2) of the Court of Appeal rules which requires that-

*"If the grounds of appeal alleged misdirection of error in law the particulars and the nature of the misdirection or error shall be clearly stated" coupled with the decisions in (i) Adeniji & Anor v. Disu (1958) 3 F.S.C. 104; (1958) SCNLR 408 and (ii) Chidiak v. Laguda (1964) NMLR 123 for failure of the respondent to show the particulars of error or misdirection. that grounds 7 and 9 should I have been rendered incompetent. The learned Justices. of the court below, in the same vein, it is contended on appellant's behalf that in law in allowing the respondent to argue ground 3 of its grounds of appeal notwithstanding that that point was raised in ground 2 thereon for the first time in the court below. The appellant contends therefore that the: respondent cannot raise new points as of right' which were neither raised in the court below nor without leave in this court unless substantial and special circumstances are shown." The case of Udza Uor & ors v. Paul Loko (1988) 2 NWLR (Pt.77) 430 at 434 and 440 was called in aid.*

With utmost due respect, what the learned justice, who wrote the leading judgment (Akanbi. J.C.A. as he then was)'said to wit:

(i) *"With respect to grounds (vii) and (ix) while it is true that the particulars of these grounds were not separately and distinctly set out from the grounds not perhaps with the dexterity and adroitness one would want to see, it seems clear that each of them sufficiently lays bare the substance of the complaints against the judgment of the trial court. as to leave one in no doubt of the precise nature of alleged error or misdirection complained of."*

(ii) *“Personally, I think that complaint again though not deftly or adroitly framed, provide sufficient information and materials as to put the respondent on notice of the basis for the challenge to the finding made by the trial court, which if I must repeat, the appellant contends, is unsupported by the evidence on record. Accordingly. I rule that grounds 7 B & 9 of the grounds of appeal are competent”.*

was so clear and devoid of equivocation as to leave nothing to doubt. **In effect, the court below did not state that “a ground of appeal alleging error in law is a competent ground of appeal without the particulars and the nature of error in law properly stated.”** What that court C decided which has not, nor is being challenged by any of the grounds of appeal herein. was that though inelegantly drafted or couched. these grounds of appeal embodied enough particulars of error as sufficiently comply with order 3 rule 2(2) of the Court of Appeal Rules (ibid) to leave the court in no doubt of the precise nature of D the error or misdirection complained of. The above finding, not having been challenged by the appellant in any of the grounds of appeal remains, rightly or wrongly, the settlement of that issue as between the parties to this appeal. See *Sule v. Nigerian Cotton Board* (supra ).

In the alternative. I take the firm view that the court below on E the point is correct since it accords with justice to allow an appeal for it to be decided on its merit and therefore ought not to be disturbed. See *Kuforiji v. V.Y.B. Nigeria Ltd. (1981) 6-7 S.C. 40*. The issue is accordingly resolved against the appellant.

The purport of issue (b) which was argued next is succinctly F whether it is proper to allow a ground not raised at the trial court to be argued on appeal. It is enough to say in respect of this issue that it does not strictly arise in this appeal in that it would appear clearly to have been abandoned in the court below when that court in its judgment held thus:

*“That said, I must revert to the objection raised in respect of G ground 3. As I said before the objection was not at the hearing pursued to its logical conclusion. The intimation in the respondent’s brief that an application to strike out the ground would be made. remained at best an unfulfilled intention. It was left floating in the air.”*

The law on the propriety of allowing a question or ground not raised or H considered at the trial court to be argued on appeal as was stated by this court in *Akpene v. Barclays Bank of Nigeria Ltd. (1977) 1 S.C. 47* (per *Obaseki.JSC.*)at pages 47- 48 is:

*“The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which was not raised or*

*tried or considered by the trial court (Shonekan v. Smith (1964) 1 All NLR 168, 173) but where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision of them, the court will allow the question to be raised and the points taken (Shonekan v. Smith (supra): Stool of Abinabina (1953) A.C. 205 at 215) and prevent an obvious miscarriage of justice.” This principle has been followed consistently by this court in such cases as*

1. Fadiora v. Ghadebo (1978) 3 S.C. 219 at 247.
2. Skenconsult (Nig) Ltd. v. Ukey (1981) 1 S.C. 6 at 18
3. Enang & Ors. v. Adu (1981) 11-12 S.C. 25
4. Ladunni v. Kukoyi (1972) 3 S.C. 31

**In the case in hand, the court below held that ground 3 complained about and with which we are here concerned, raised substantial issue of law as to whether a Nigerian court can give judgment in foreign currency. This finding is not being challenged by the appellant.** Besides, giving its reasons which informed the exercise of its discretion in allowing the fresh point to be taken it held *infer alia*:

*“Secondly, it is noteworthy that respondent’s counsel apparently in anticipation of his objection to ground 3 not being sustained, has put forward, an alternative argument that like the English Courts, the courts in Nigeria have power to give judgment in a foreign currency - in this case the dollar; moreso, as that was the claim as laid in the relevant paragraphs of the statement of claim.*

*Taking everything therefore into consideration, especially the fact that respondent has argued the point albeit as an alternative proposition, I am inclined to the view that there will be no injustice done to the respondent if that issue is pronounced upon.”*

**My answer to this issue is accordingly rendered in the affirmative.**

I shall now consider issues (c) and (e) together before I come to issue (d). The complaint in issue (c) is whether or not a trial court in Nigeria could award its judgment in a foreign currency while the grouse in issue (e) is as to whether as a result of non-delivery of the draft to the proper addressee the appellant has suffered damages.

**As to whether a Nigerian court could give judgment in foreign currency vide issue (e) I need only add that that question is not an issue of jurisdiction but rather that of discretion.**

**My short answer to issue (c) is that it is purely an academic question into which I will advisedly refrain from further comments**

since any pronouncement made by me beyond this point on the issue, will amount to an obiter dictum. Perhaps a more auspicious occasion will avail itself in future for this court to say more on the matter, I accordingly strike out the issue as incompetent.

Finally, issue (d) which poses the question whether the learned trial Judge was right in awarding damages to the appellant (then plaintiff) for the negligence of the respondent (then defendant) in delivering the bank draft to a wrong person, not the payee. This issue in my opinion looks hypothetical in as much as it is neither based on the evidence adduced at the trial nor founded on the two judgments of the lower courts. Granted, however, that it is well founded, not hypothetical and emanated from any of the grounds of appeal (which I do not concede), there was neither evidence nor the decision of the two lower courts that the respondent “delivered” the bank draft to a wrong person. **The evidence was that the respondent issued the bank draft and in compliance with the demand of the appellant, handed it over to him.** The following answer by the appellant to the cross-examination of Mr. Olanipekun learned counsel for the respondent in the trial court is illuminating on the point. Said he (appellant) amongst others:

*“I collected the draft personally from the bank I sent the draft as I always did .....*

***It was the appellant himself who “delivered” the bank draft by himself or through his agent or by whatever manner he thought fit to the “payee.” If such “delivery” was negligently carried out the respondent could not in my view be held liable. It was a clear case of volenti non fit injuria*** See Philip Obiora v. Paul Osele (1989) 1 NWLR (Pt.97) 279 at Pp. 299-300; Egbe v. Adefarasin (1987) 1 NWLR (Pt.47) 1 and A. Ariori & ors. v. Muraino Elemo & Ors. (1983)1 S.C. 13 at 26; (1983) NSCC 1. A case of negligence. as it were. was neither made out nor proved against the respondent. As the case between the parties was purely contractual and an award of damages for tort should be distinguished from that for contract, the appellant’s case was rightly dismissed. Indeed, the court below in its judgment summed up the whole matter in the following admirable words:

*“This is even moreso, as the respondent not only denied being negligent or being in any way liable but went further to allege in paragraphs 6, 7 and 8 of the Statement of Defence that its duty ended as soon as it handed the draft to the respondent whose duty it was to transmit it to the paying bank in the United States of America. There was uncontroverted evidence that the draft was handed to the respondent and from Exhibit’ A1 his letter to the Bank. it is clear that the draft was not lost while in appellant’s*

*possession. On the contrary, the letter showed that it got “lost in transit between the Ibadan General Post Office and United States of America.”* The above decision of the court below which, in my firm view, is unimpeachable and cannot be faulted. ought not to be disturbed and I so hold.

The result of all I have been saying is that this appeal lacks merit: it fails and it is accordingly dismissed by me. I assess the costs of this B appeal at N 1,000 in the respondent’s favour.

### KUTIGI JSC

I have had a preview of the judgment just delivered by my learned C brother Onu. J.S.C. The facts are quite simple and straight forward. The uncontroverted evidence was that the defendant bank issued the \$10,000.00 U.S. Dollars Bank Draft and handed it over to the plaintiff. The same plaintiff despatched the draft by express registered mail through the Post Office in Ibadan to his son in the United States of America. The D draft was never received by its intended beneficiary in the United States. Who is then responsible for the missing draft, the plaintiff or the defendant? The plaintiff blames the defendant. But how? I agree with the Court of Appeal that on the available evidence the plaintiff woefully failed to make out a case of negligence or any case at all for that matter against E the defendant bank. Plaintiff’s case was therefore in my respectful view rightly dismissed in the court below.

However, having quite properly dismissed plaintiff’s claims, it was no longer necessary for the Court of Appeal to have gone into the issue of whether or not a Nigerian court can make an award in a foreign currency - the F United States dollars in this case. The plaintiff herein having lost his case in its entirety, is indisputably not entitled to any award, foreign or local. Issue (c) which relates to an award in foreign currency by the trial court will therefore be. and is hereby struck out as unnecessary.

I therefore agree with the conclusion reached by my learned brother G Onu. J.S.C. that the appeal lacks merit and is accordingly dismissed with N 1,000.00 costs in favour of the defendant/respondent bank.

### OGUNDARE JSC

The plaintiff (who is now appellant before us) was, at all time H material to this case. a customer of the defendant Bank at its Molete, Ibadan branch. The plaintiff’s son, Olusegun O. Koya was, in 1983 a student at the West Virginia State University, Morgan Town, West Virginia U.S.A. Plaintiff was C responsible for payment of Olusegun’s fees. In

1983 he applied. through the defendant Bank for approval of the Central Bank of Nigeria to remit U.S. \$10,000.00 (ten thousand U.S. Dollars) to Olusegun to cover the latter's fees for that year: Approval was given and the plaintiff, having paid to his Bank (The defendant) the Naira equivalent, received from the Bank a Bank Draft Number No HO.044106 issued B by the Bank and dated 20th October 1983 in the amount of ten thousand U.S. Dollars for onward transmission to Olusegun in the United States.

The Draft was crossed and marked "Not Negotiable account Payee only" and was made payable to "West Virginia University account Mr. Olusegun O. Koya" and was drawn on the 'French American Bank- C ing Corporation. 120 Broadway New York N.Y. 10005.

Plaintiff sent the draft. by registered post, to the United States of America but it probably did not reach its destination .. When the draft did not reach Olusegun he complained by telephone to his father. When the bank draft did not reach its destination, the plaintiff by letter dated 25/ 1/ D 84 informed the defendant Bank that the said draft was "lost in transit between the Ibadan General Post Office and United States of America" and requested the Bank "to stop the draft and make necessary arrangement for another one to be written for the beneficiary." At the request of the Bank, the plaintiff, swore to an affidavit in which he deposed to the loss of the draft. It E was subsequently discovered that the draft had, in fact, been negotiated and paid by the French American Banking Corporation on 12/1/84 and the draft had been returned to the head office of the defendant in Lagos.

Meanwhile, Olusegun. because he ,could not pay his rent as a result of the non-receipt of the bank draft for his fees, was thrown out of F his apartment and sent out of the University for non-payment of fees.

Plaintiff instituted the action leading to this appeal claiming -

*"Special and general damages for negligence particularised below arising out of the reckless, careless and negligent manner in which the defendant followed its Bank Draft Number HO 044106 of 20th October G 1983 drawn in favour of WEST VIRGINIA UNIVERSITY Account Mr. OLUSEGUN O. KOYA to be negotiated in London in January 1984 by its correspondent bank to a 'wrong person not the beneficiary, which wrongful act resulted in untold suffering and hardship on the beneficiary and thereby suffered damages.*

H **PARTICULARS OF DAMAGES**

(i) **SPECIAL DAMAGES:**

(a) *The sum of \$10,000.00 US. Dollars wrongfully paid by the defendant, its servant and or agent to a wrong person not the beneficiary \$10,000.00*

(ii) *GENERAL DAMAGES*

(b) *Being aggravated damages for the hardship and suffering of the beneficiary and the nonchallant attitude of the defendant when informed of its carelessness, recklessness, and negligence N50,000.00*

Pleadings were filed and exchanged and the action processed to trial. At the conclusion of trial and after addresses by learned counsel for the parties, the learned trial Judge (Ibidapo-Obe J.) in a reserved judgment, found the defendant liable in negligence and adjudged as follows:

*"In sum, the plaintiffs case succeeds and the defendant Bank is found liable to the plaintiff in the sum of \$10,000.00 U.S. Dollars as the proceeds of the draft cheque dated 20/10/83 and general damages of C N5,000.00 (Five thousand Naira)."*

Being dissatisfied with this judgment, defendant appealed to the Court of Appeal which Court (Akanbi J.C.A, as he then was, Omololu-Thomas J.C.A. and Ogwuegbu, J.C.A. as he then was) allowed the appeal, set aside the judgment of the trial High Court and dismissed plaintiff's claim. Plaintiff has now appealed to this Court upon 9 grounds of appeal and, in his brief of argument has set out the following questions as calling for determination in this appeal, to wit:

*"(a) Whether a ground of appeal alleging error in law is a competent ground of appeal without the particulars and the nature of error in law properly stated.*

*(b) Whether it is proper to allow a ground not raised at the trial court to be argued when such ground was raised for the first time in the court of appeal on the ground that it contained substantial issue of law and special circumstances, which special circumstances were not stated before allowing it to be argued.*

*(c) Whether or not trial court could award its judgment in Foreign Currency to wit U.S. Dollars.*

*(d) Whether the learned trial Judge was right in awarding damages to the appellant (then the plaintiff) for negligence of the respondent (then the defendant) in delivering the bank draft to a wrong person not the payee.*

*(e) Whether as a result of non-delivery of the draft to the proper addressee the plaintiff has suffered general damages."*

The defendant, in its Brief, appears to have adopted these questions even though it raised some objections to the grounds of appeal. I shall deal with these objections later in this judgment. I need point out, however, that the plaintiff has not filed any Reply Brief in answer to the objection raised by the defendant.

Questions (a) & (b):

These questions are based on grounds 1 - 2 which, without their particulars, read:

“(1) *That the learned Justices of the Court of Appeal having concluded that grounds 7 and 9 of (now respondent) appeal failed to set out the particulars of the error complained about erred in law to have ruled that the two grounds were competent contrary to Order 3 rule 2(2) Court of Appeal Rules by the strings of decided cases by the Supreme Court especially Adeniji v. Disu (1958) SCNLR 408; (1958) 3 F.S.C 104; Chidiak v. Laguda (1964) NMLR 124 that the particulars must be clearly stated.*

“(2) *That the learned Justices of the Court of Appeal erred in law in its interpretation of Udza Uor & 2 ors v. Paul Loko (1988) 2 NWLR (Pt. 77) page 430 at 434 to 440 by allowing ground 3 of the respondent’s grounds of appeal to be argued notwithstanding that that point was raised for the first time in the Court of Appeal, this without prejudice that the appellant did not pursue the preliminary point as respondent cannot in the Court of Appeal as of right raise new points which were not taken before the court below without leave of the court, except where the point of law is substantial and special, circumstances shown, thereby engendered substantial miscarriage of justice and came to a wrong decision.*”

Defendant objects to these grounds for the reason that they are vague or general in terms and disclose no reasonable grounds of appeal and therefore, offend Order 8 rules 2 - 4 of the Rules of this Court. I have given consideration to the objection raised and, I regret, I find no substance in them. I cannot describe those grounds as vague or general in terms as suggested by the defendant. The defendant also states in its brief:

*“All the grounds of appeal, it is submitted are incompetent. The respondent urges that they be struck out and the notice of appeal struck out pursuant to Order 8 rule 7.”*

It has not been stated why the grounds are said to be incompetent. The objection to the grounds is bare and vague and, therefore, unsustainable. The objections to all the grounds are overruled.

At the hearing of the defendant’s appeal in the Court below plaintiff objected to some grounds of appeal as being incompetent in that they offended against the rules of court or that they raised issues not canvassed at the trial and in respect of which leave to argue same on appeal had not being sought nor obtained. Ruling on the plaintiff’s objections, the Court below, per Akanbi J.CA. in its final judgment observed:

*“It is also pertinent to observe that the respondent’s Counsel had in his brief questioned the competence of the appellant to argue grounds*

(i), (ii), (iv), (vii), (viii) and (ix) in which complaints of errors in law and/or misdirections were given. It was submitted that those grounds being incompetent ought to be struck out. Reliance for this submissions was placed on the following cases:

*Anadi v. Okeke Okoli* (1977) 7 SC 57-68.

*National Investment & Properties Company Ltd & Thompson B Organisation* (1969) NMLR 99 at 101

*Anachuna Anyaoke & ors v. Dr. Felix Adi & ors.* (1986) 3 NWLR (Pt.31) 634 at 731, 741.

*Saka Atuyeye & ors v. E. O. Ashamu* (1987) 1 NWLR A (Pt.49) 267 at 268.

With respect to ground (iii) the respondent's counsel also in his brief stated thus:-

'This ground raised fresh point for the first time on appeal; it was never raised in the lower court and unless the appellant comply with the usual procedure for this purpose the respondent will apply to the Honourable Court for the ground to be struck out.' Unfortunately, respondent counsel avoided spelling out the usual procedure he would want appellant to comply with. Besides, he did not at the hearing apply for a striking out of the ground. I can only assume that he has given up the idea. I snail deal with this ground further in this judgment. The appellant's counsel for his part has not filed a reply brief and has not in his submission attempted to proffer any answer to the objections raised. That notwithstanding I suppose being part of the contention in the respondent's brief. I am obliged to comment on them. I have examined carefully each of the grounds complained of. and I agree with respondent's counsel that ground (i) failed to state the particulars of the error in law complained of and/or the circumstances relating to the banking transaction which he said the trial Judge failed to consider'. I also agree that no particulars of the alleged error in law were given in grounds (ii) and (iv) of the grounds of appeal. Accordingly grounds (i), (ii) and (iv) will be and are hereby struck out.

With respect to grounds (vii) and (ix), while it is true that the particulars of these grounds were not separately and distinctly set out from the grounds and perhaps with the dexterity and adroitness one would want to see. it seems clear to me that each of them sufficiently lays bare the substance of the complaints against the judgment of the trial court, as to leave me in no doubt of the' precise nature of alleged error or misdirection complained of.'

Strictly, the complaint in ground 7 was to the effect that the

respondent neither pleaded nor adduced satisfactory evidence to justify the finding of the trial court that the bank 'draft in question was sent by registered post. The crucial point then is to look at the pleadings to see if there is any justification for the complaint. Equally so, in ground 9, the complaint of the appellant was that there was no evidence to support that part of the finding of the learned trial Judge that the various endorsements on the 'cheque' which made it 'negotiable throughout the world' were not made by the authorised payee'. Personally, I think that complaint again though not deftly or adroitly framed, provide sufficient information and material details as to put the respondent on notice of the basis for the challenge to the finding made by the trial court, which if I must repeat, the appellant contends, is unsupported by the evidence on record. Accordingly, I rule that grounds 7 & 9 of the grounds of appeal are competent. In doing so I am not unmindful of the school of thought that holds that where there is a complaint of misdirection or error, the misdirection or error complained of, should be quoted in the grounds of appeal and the particulars I thereof set out paragraph by paragraph. For my part, I do not think a non-adoption of this approach or format should render an appeal incompetent. For what seems to me to be essential is the need for the appellant to frame his ground in such a way that whether the particulars are embodied in the grounds or are separately and distinctly set out, the gravamen of his complaint becomes patently clear and obvious. Order 3 Rule 2(2) of the Court of Appeal Rules requires no more no less.

That said, I must revert to the objection raised in respect of ground 3. As I said before, the objection was not at the hearing, pursued to its logical conclusion. The intimation in the respondent's brief that an application to strike out the ground would be made, remained at best an unfulfilled intention. It was left floating in the air.

But be that as it may, it is well to say that although a Court of Appeal will not readily allow a fresh point of law to be taken on appeal, without its first having the benefit of the views of the lower court on the issue, it will allow argument on the point if there are special circumstances and substantial points of law, to warrant the exercise of the court's discretion in appellant's favour. See *Abinabina v. Enyimadu* (1948) 12 WACA 171; (1953) A.C. 207; *United Marketing Co v. Kara* (1963) 1 WLR 523; *Djukpan v. Orovuyovbe & Anor* (1967) NMLR 287 at 289, *Lidza Uor, & ors v. Paul Loko* (1988) 2 NWLR (Pt. 77) 430.

In the instant case, I must first observe that ground 3 raises substantial issue of law and it is whether a Nigerian Court can give judgment in a foreign currency as did the trial Judge in this case.

Until 1975, the line of authorities in England, was that the English Court, could not give judgment in any foreign currency. Before then the claim must be in pounds sterling. The case of *Schorsch Meier GmbH v. Hennin* (1975) 1 All E.R. 152 which the respondent's counsel cited and strongly commended to us, effected a revolutionary change in the thinking of the English Court. In that case, Lord Denning M.R. characteristically innovative and daring, broke new grounds when he said:

*'the time has now come when we should say that when the currency of a contract is a foreign currency - that is to say that, when the money of account and the money of payment is a foreign currency - the English Courts have power to give judgment in that foreign currency.'* C

Secondly, it is noteworthy that respondent's counsel apparently in anticipation of his objection to ground 3 not being sustained, has put forward, an alternative, argument that like the English Court, the Court in Nigeria have power to give judgment in a foreign currency - in this case the dollar - more so, as that was the claim as laid in the relevant paragraphs of the Statement of Claim. D

*Taking everything therefore into consideration, especially the fact that respondent has argued the point albeit as an alternative proposition, I am inclined to the view that there will be no injustice done to the respondent if that issue is pronounced upon."* E

It is the above passage that has come under attack in this appeal. The pith of plaintiff's contention is that having regard to the views held by the Court below of the "offensive" grounds of appeal before it, that court ought to have struck them out and that should dispose of the appeal before it. The defendant, on the other hand, submits that the decision of the court below on the point is Correct and accords with the justice of the case. It further contends that, although the court below was of the view that some of the grounds of appeal before it were "inelegantly drafted", that court also held that the grounds embodied sufficient particulars of error as to leave the court in no doubt of the precise nature of the alleged error or misdirection complained of. F G

I have myself considered the reasons given by the court below for rejecting the plaintiff's objections in that court. I can find nothing to fault in the passage complained of. I see no substance whatever in plaintiff's submissions on Question (a). True enough, where error of law or misdirection is made a ground of appeal. the particulars of the error of law or misdirection must be given *Nta v. Anigbo* (1972) 5 SC 156; *Adeniji v. Disu* (supra) *Anadi v. Okoli* (1977) 7 SC57; *Osarawu v. Ezeiruka* (1978) 6-7 Sc. H

135. The particulars, however, need not be separately set out; it

may be embodied in the ground itself provided the ground is framed as to leave no one in doubt of the errors being complained of. As Lewis, J.S.C. put in *N.I.P.C. v. Thompson Organisation* (1969) 1 All NLR 138, 142.

*‘The whole purpose of grounds of appeal is to give notice to the other side of the case they have to meet in the appellate court.....In particular, we must reiterate what this court has said many times, that if errors of law are alleged then the errors complained of must be fully set out in the grounds of appeal.’*

See also *Atuyeye & Ors. v. Ashamu* (1987) 1 NSCC 117, 130; (1987) 1 NWLR (Pt.49) 267 where Oputa, J.S.C. observed: “All that Order 3 Rule 2(2) of the Court of Appeal Rules relied upon by Mr. Oseni in his objection requires is that a ground of appeal alleging error in law should clearly state the particulars and nature of the error. I agree that in practice, it is customary after stating ‘Error in Law’ to follow that up with ‘Particulars of the Error’. I do not think there is anything wrong in including’ the particulars of the error’ in the error itself.”

On the issue of raising new points on appeal, the general rule is that a party would not be allowed to raise a point on appeal which was not raised at the trial court - *Okuojeror v. Sagay* (1957) SCNLR 188; (1958) WNLR 70; *Ogunade v. Ogunade* (1965) NMLR 136; *Jaffar v. Ladipo* (1969) 1 All NLR 165. If, however, the point raised would not involve adducing further evidence, the point would be entertained especially if it is a question of interpretation of documents - *Shonekan v. Smith* (1964) 1 All NLR 168, or it is a point on an issue of law which is not settled, in order to state the law once and for all- *Hindi v. The State* (1974) 5 SC 39; *Akpene v. Barclays Bank Ltd.* (1977) 1 SC 47; *Fadiora v. Ghadebo* (1978) 3 SC 219; *Skenconsult v. Ukey* (1981) SC 6. In the appeal on hand, the court below entertained arguments on ground 3 before it because, in its view. the ground raised a substantial issue of law, id est, whether a Nigerian Court could give judgment on a foreign currency. Its decision to entertain the ground is not an issue of jurisdiction but one of exercise of discretion. Having regard to the nature of law in issue I am satisfied that it exercised its discretion judiciously more-so that both parties argued the point of law in their respective briefs of argument before that Court.

Before I consider Question (c) I need first to consider Questions (d) & (e) that raise the issue of liability. The plaintiff argues thus:

*‘The crux of ground 4 was the negligence of the respondent in allowing the Exhibit, that is the bank draft to be negotiated and paid in London instead of New York. The learned Justices of the court of appeal*

erred in law in the interpretation placed on the Banking Law as to endorsement of the exhibit. 'NOT NEGOTIABLE ACCOUNT PAYEE ONLY', throughout the world - The learned justices failed to advert their mind that the draft was not negotiable except by payment to the beneficiary in America West Virginia University Account Olusegun O. Koya, through the named French American Banking Corporation, Broadway B New York U.S.A to the beneficiary ONLY as endorsed on the draft."

The plaintiff argues further that having regard to all the circumstances of the case, the defendant was negligent. The defendant has argued to the contrary.

The court below, per Akanbi JCA., after a review of some cases, C local and foreign, observed:

*"From the above cases. it appears to me that for a claimant in an action for negligence to succeed, he must not only in his statement of claim plead that the party against whom he is complaining is guilty of negligence, he ought to go further to give particulars of the alleged D negligence and of how and in what respect the duty owed to him has been breached by the person against whom the complaint is brought. He must also aver that he suffered damage in consequence of the breach. And those are the averments that are to be proved by him at the trial of the action, if the claim must succeed. E*

*In the instant, I have earlier in this judgment set out in full the various paragraphs of the plaintiff's statement of claim and a considerable part of the evidence led in support. On an examination of each of the paragraphs, it seems to me that only paragraphs 10, 14 and 19 contain some peripheric allegation of 'negligence, recklessness and carelessness F against the defendant for allowing the bank draft to be negotiated in London without reaching its destination the United States of America.'*

*Even so it is not dear whether this charge of negligence was made against the defendant qua defendant or against it as the principal of the foreign bank in whose name, the draft was drawn. Paragraph 10 G of the Statement of Claim in that respect was not so explicit. Besides, the relationship between the issuing bank in Nigeria and the United States Bank was not clearly defined. More importantly, the particulars of negligence was not set out and even if the said paragraphs 10,14 and 19 could be said to be the required particulars, the respondent in my view H would still have to show how the appellant 'allowed' the draft to be negotiated in London. The appellant (sic) had a duty to make these averments and to prove them by evidence. This is even moreso, as the respondent (sic) not only denied being negligent or being in any way liable but*

went further to allege in paragraphs 6, 7 and 8 of the Statement of Defence that its duty ended as soon as it handed the draft to the respondent whose duty it was to transmit it to the paying bank in the United States of America. There was uncontroverted evidence that the draft was handed to the respondent, and from Exhibit A 1, his letter to the appellant Bank, it is clear that the  
 B draft was not lost while in the appellant's possession. On the contrary, the letter showed that it got lost in transit between the Ibadan General Post Office and United States /of America,' Exhibit A 1 did not say that the bank was responsible for the loss of the cheque or its transmission to Mr. Koya, who was said to have negotiated it in London. There are all sorts of possi-  
 C bilities. This negligence' may be that of the respondent himself. It may be that of the Ibadan General Post Office. It may be that of the bank in the United States of America and many more. And this is all the reason why clear particulars of the negligence complained of ought to have been given and proved. On the totality of the evidence adduced at the trial therefore, it  
 D cannot in my view be said that a case of negligence was made out or that whatever damage might have been suffered by the respondent resulted from any breach of duty owed to him by the appellant."

I agree entirely with the views expressed in the above passage. It is difficult to discern from plaintiff's pleadings and evidence what wrong-  
 E doing he was accusing the defendant of or what duty of care the Bank breached. The defendant Bank did all that was required of it to process plaintiff's application to the Central Bank for approval to remit the fees. Approval was given: The defendant Bank issued its draft. Plaintiff collected the draft and, on his own, sent it by registered post. If the draft fell  
 F into wrong hands in the process, how could the Bank be held responsible for this? The General Post Office was plaintiff's agent and not defendant's for the purpose of transmission of the draft to the payee in the United States. If there was negligence' at that stage, it was to his agent plaintiff should direct his complaint. I agree with the Court below that a case of  
 G negligence was neither made out nor proved against the defendant. Plaintiff's case was, in my respectful view, rightly dismissed.

With this conclusion, it is unnecessary, as rightly held by the court below, to go into the issue of damages, special or general. For the same reason, Question (c) which raises the issue of the propriety of a  
 H Nigerian court entering judgment for an award in foreign currency has become otiose. I will however touch briefly on it in view of the extensive consideration given to the subject by the court below. That court concludes that the trial Judge was wrong in giving judgment to the plaintiff partly in a foreign currency, in this case, U.S. dollars. It is the submission

of the plaintiff that the court below was wrong in that the currency of the contract was in U.S. dollars. The case of Tawa Petroleum Products v. Owners of M.V. Sea Winners 3 Nigerian Shipping Cases at page 25 is relied n in support of the contention that a Nigerian court could give judgment in foreign currency. In that case, Belgore J. (as he then was) had observed:

*“.....in the absence of any statutory limitations to my mind, B the determining factor is the language of the contract. The duty of the court in construing a contract is to echo its language. If the party (sic) contracted for payment in Dollars there is no reason why the court should order payment in Nair.”*

The defendant’s submission is in favour of the lower court’s C decision. It is argued thus:

*“It is submitted that the decision of the lower court on the point was unassailable as Nigeria was no signatory to the Treaty of Rome. Neither was it made part 5 of our municipal law. The reasoning of the lower court which is contained at pages 96-97 of the records is commended to your Lordships D as sound and their conclusion ought not to be reversed.*

*The appellant submits that the court could give judgment in a foreign currency since that was the basis of the parties’ contract in this case. This is a misconception. No contract was involved in this case, neither was any contract tendered, pleaded or proved. The action was E based on the tort of negligence, not on contract.*

*The question is thus: Can a Nigerian, suing another Nigerian in a Nigerian court for the tort of negligence claim (special or general) damages in a foreign currency? It is submitted that the answer must be in the negative.* F

*The evidence of the appellant before the High Court was to the effect that there is no automatic right to the procurement of (foreign currency) dollar from the Central Bank (page 15 lines 14-16 also Section 3-8 Exchange Control Act 1962). It is subject to approval of the discretion of the Central Bank of Nigeria which was not a party to the discretion of the Central Bank of Nigeria which was not a party to the case and therefore not bound by the court’s award in dollars. A judgment which therefore compelling the Central Bank to exercise its discretion to give approval to the procurement of the dollars will be incapable of performance. A court should not make an order which is unenforceable. H*

*Also, dealings in foreign exchange without requisite approval constitute offences under the Exchange Control (Anti-Sabotage) Decree No. 7 of 1984 and the Exchange Control Act No. 16 pf 1962.”*

The Court below, per Akanbi. JCA, had observed:

“Until 1975, the line of authorities in England, was that the English Court, could not give judgment in any foreign currency. Before then the claim must be in pounds sterling. The case of *Schorsch Meier GmbH v. Hennin* (1975) 1 All E.R. 152 which the respondent’s counsel cited and strongly commended to us, effected a revolutionary change in the thinking of the English Court. In that case, Lord Denning M.R. characteristically, innovative and daring, broke new grounds when he said:

‘The time has now come when we should say that when the currency of a contract is a foreign currency - that is to say that, when the money of account and the money of payment is a foreign currency - the English Courts have power to give judgment in that foreign currency.

I must confess that if it were possible I would willingly have followed this recent decision of the English court. But it is clear to me that with the present state of our law I can not do that. For the legal peg will just not hold. Thus, it is important to emphasise that the decision on which respondent’s counsel relied, in asking us to say that our law like the law of England is not static, was the direct ‘impact of the (European) Common Market’ and the Treaty of Rome on the English Law. Before then, the Courts in England could not give judgment in any foreign currency. Judgment had to be in Pounds Sterling. See *Manners v. Pearson and Son* (1898) 1 CH 581 at 587; (1895-9) All ER at 356; *Re United Railways of the Havana and Regla Warehouse Ltd.* (1960) 2 All E.R. 332 at 356, (1961) A.C. at 1069; *The Ten HU* ( 1969) 3 All E.R. 1200 at 1206.

It was the Treaty of Rome and the political decision to make it part of the statute laws of England which made it possible for the English Courts to say that judgments could be given in foreign currency ..... We are not signatories to the Treaty of Rome. And it is not part of our laws. There is therefore no rational basis for following the decision in *Meire’s case*.”

Akanbi, J.C.A. concluded on the issue:

“Besides that, the fact cannot be ignored that the dollar is a powerful currency. The Naira is not. It is unstable and continues to change like the ‘weathercock with every gust that blows’. But that is the currency for which, in the absence of any statutory provision, judgment may be given in our Courts. That is the currency that will not involve the claimant and the defendant in the intricate problems of foreign exchange laws and controls. And a claimant who transacts business in a foreign currency must in any subsequent suit arising from that transaction, claim the Naira equivalent. It is his duty to adduce evidence to that effect; and the Court to give judgment in the local currency. In the result, therefore, I resolve this issue in favour of the appellant and hold that the trial Judge

*was wrong in giving judgment in a foreign currency."*

With profound respect to their Lordships of the Court below I do not share their conclusion that a Nigerian court could not give judgment in a foreign currency. The general law is that the issue of measure and quantification of damages is a matter of procedure to be governed by the In-fori - see Chaplin v. Boys (1971) AC 356. And it has been the rule in England since as long ago as 1605 that a court cannot give judgment in a foreign currency: Rastell v. Draper (1605) Yelv 80 at 80, 81; 80 ER 55. In 1625 it was agreed by all the Judges in Ward v. Kidswin (1662) Latch 77; 82 ER 283 (reported in Norman French but translated in the Havana Railways case (infra) that "in the case of foreign coin, such as Flemish, one must declare the value in English." From that time on and for a period of about 350 years, the rule has taken root that an English court can only give judgment in sterling. See: Manners v. Pearson & Son (1898) 1 Ch 581. 587; (1895-9) All ER o Rep. 415,417 where Lindley, MR declared:

*"..... Speaking generally, the courts of this country have no jurisdiction to order payment of money except in the currency of this country. Whatever sum is ordered to be paid, whether for principal, interest, or damages, must be expressed in English money, or such order cannot be enforced by the ordinary writs of execution."*

And in Re United Railways of the Havana and Regla Warehouses Ltd. (1960) 2 All ER 332, sub non Tomkinson v. First Pennsylvania Banking and Trust Co. (1961) AC 1007; (1960) 2 WLR 696, the House of Lords had opportunity to reaffirm this rule. There Lord Reid at page 345 of the 1st Report declared:

*"The reason for the existing rule is, I think, primarily procedural. A plaintiff cannot sue in England for payment of dollars - it would not be right that he should. So, at best, he could only have the dollars converted to sterling at the date of judgment."*

After mentioning a number of practical objections against the date of judgment, the date of payment and the date of the writ, Lord Reid at page 346 concluded:

*"That rule may in some cases be artificial, it may even be unjust, but it has been accepted for a long time, it is clear and certain, and no other rule could be relied on to produce a more just result indeed no other rule is really practicable."*

Viscount Simonds who gave the leading opinion in the case had, at page 340, declared:

*"The question summarily stated is what sum in sterling is recoverable by a plaintiff suing in the courts of this country for a sum of*

*money payable in foreign currency in a foreign country under an instrument of which the proper law is a foreign law. Admittedly, the claim must be for a sterling sum and the judgment must be in sterling.”*

Lord Radcliffe, in his concurring speech, declared at page 350:

“I take it myself that any contract to settle a debt in the currency of the country in which the settlement to be made is a contract for the payment of money in the eyes of our law, and this notwithstanding the fact that, if action is taken in England for breach of contract, the remedy sought must be damages, not debt, and those damages must be expressed in sterling for the purposes of judgment.”

Lord Denning in his own speech emphatically declared at page 356:

“And if there is one thing clear in our law, it is that the claim must be made in sterling and the judgment given in sterling. We do not give judgments in dollars any more than the United States courts give judgments in sterling.”

In *The Teh Hu* (1969) 3 All ER 1200, the Court of Appeal in England extended the rule to arbitral awards. Salmon L.J at page 1206 declared:

“It is well settled that an English court cannot give judgment for the payment of an amount in foreign currency ..... Nor, in my view, can an arbitrator make an award in foreign currency except perhaps by agreement between the parties.”

It may be mentioned that this rule does not exist in many other countries - see Dr. Mann: *Legal Aspect (if) Money* (3rd Edn. 1971) where a list of such countries is given. In these other countries, e.g. Germany, a plaintiff can claim payment of a sum of money in a foreign currency and get judgment for it.

The sum total of these opinions is that procedurally an action cannot be brought in an English court for recovery of payment of a sum expressed in foreign currency, except it is brought in a sum expressed in sterling, recoverable by way of damages. This is the rule we inherited from the received law and has been the attitude of our courts that an action for recovery of a sum of money expressed in foreign currency cannot be brought unless the claim is expressed in Nigerian currency. This attitude of our courts is reinforced by the passage into law of the Exchange Control Act, 1962.

The position has now changed in England. The first break-through appears to be *Schorsch Meier v. Hennin* (1975) 1 All ER 152. The Court of Appeal decided that as the courts were no longer precluded from ordering a defendant to pay a sum of money or from granting a decree of

specific performance for the payment of a sum of money, there was no justification for the rule that judgment could only be given for a sum of money in sterling and that where the currency of the contract was a foreign currency the English courts had powers to give judgment in that currency. It is often thought, as did the Court below, that that decision was based on the European Economic Community Treaty (otherwise known as the Treaty of Rome). But this is not entirely correct. Art. 106 of the Treaty was only one of the grounds for the decision and, as I shall show presently, this ground was severally criticised by the House of Lords in the later case of *Miliangos v. George Frank (Textiles) Ltd.* (1975) 3 All ER 801 even though *Schorsch Meier* was approved (by majority decision) in that case. C

Lord Denning MR who had in the *Havana* case (*supra*) declared that “*if there is one thing clear in our law, it is that the claim must be made in sterling and the judgment given in sterling*” reversed himself in *Schorsch Meier v. Hennin* (*supra*). He observed at pages 155-156:

“*Why have we in England insisted on a judgment in sterling and nothing else? It is, I think because of our faith in sterling. It was a stable currency which had no equal. Things are different now. Sterling floats in the wind. It changes like a weathercock with every gust that blows. So do other currencies. This change compels us to think again about our rules. I ask myself: why do we say that an English court can only pronounce judgment in sterling? Lord Reid in the Havana case thought that it was ‘primarily procedural’ I think so too. It arises from the form in which we used to give judgment for money. From time immemorial the courts of common law used to give judgment in these words: ‘It is adjudged that the plaintiff do recover against the defendant X in sterling.’ On getting such a judgment the plaintiff could at once issue out a writ of execution for X. If it was not in sterling, the sheriff would not be able to execute it. It was therefore essential that the judgment should be for a sum of money in sterling; for otherwise it could not be enforced.* D E F

*There was no other judgment available to a plaintiff who wanted G payment. It was no good his going to a Chancery Court. He could not ask the Lord Chancellor or the Master of the Rolls for an order for specific performance. He could not ask for an order that the defendant do pay the sum due in the foreign currency. For the Chancery Court would never make an order for specific performance of a contract to pay money. They would not make it for a sterling debt: see *Crampton v. Vana Railways Co.* (1872) LR 7 H Ch AC 562, and *Halsbury’s Laws of England* 3rd Edn (1961), vol. 36 p. 279. Nor would they make it for a foreign currency. In the *Havana* case (1960) 2 All ER at 345 (1961) AC at 1052 Lord Reid said:*

*“A plaintiff cannot sue in England for payment of dollars and he cannot get specific performance of a contract to pay dollars - it would not be right that he should.”*

Those reasons for the rule have now ceased to exist. In the first place, the form of judgment has been altered. In 1966 the common law words *B* ‘do recover’ were dropped. They were replaced by a simple order that the defendant ‘do’ the specified act. A judgment for money now simply says that: ‘It is this day adjudged that the defendant do pay the plaintiff’ the sum specified: see the notes to RSC ord 42, r 1, and the appendices. That form can be used quite appropriately for a sum in foreign currency as for a sum in *C* sterling. It is perfectly legitimate to order the defendant to pay the German debt in deutschmarks. He can satisfy the judgment by paying the deutschmarks; or, if he prefers, he can satisfy it by paying the equivalent sum in sterling, that is, the equivalent at the time of payment.

In the second place, it is now open to a court to order specific *D* performance of a contract to pay money. In *Beswick v. Beswick* (1967) 2 All ER 1197, (1968) AC 58, HL: affg (1966) 3 All ER 1, (1966) Ch 538 the House of Lords held that specific performance could be ordered of a contract to pay money, not only to the other party, but also to a third party. Since that decision, I am of opinion that an English court has power, not only to order *E* specific performance of a contract to pay in sterling, but also of a contract to pay in dollars or deutschmarks or any other currency.

*Seeing that the reasons no longer exist, we are at liberty to discard the rule itself.”*

Later in his judgment. the learned and noble Master of the Rolls said at *F* pages 156157:

*“The time has now come when we should say that when the currency of a contract is a foreign currency - that is to say, when the money of account and the money of payment is a foreign currency - the English courts have powers to give judgment in that foreign currency; they can make an *G* order in the form: ‘It is adjudged this day that the defendant do pay to the plaintiff so much in foreign currency (being the currency of the contract) ‘or the sterling equivalent at the time of payment’. If the defendant does not honour the judgment, the plaintiff can apply for leave to enforce it. He should file an affidavit showing the rate of exchange at the date of the appli- *H* cation and give the amount of the debt converted into sterling at that date. Then leave will be given to enforce payment of that sum.*

*It must be remembered that if the English courts refuse to give a judgment in deutschmarks, the German company could readily find a way round it. They could bring proceedings in the German courts to get*

*judgment there in deutschmarks for OM 3. 756.03. Then they could bring that judgment over to England and register it in the High Court here. On registration here, the sum would have to be converted into sterling on the basis of the rate of exchange prevailing at the date of the judgment of the original court that is, at the rate in force at the date of the Gemlan judgment: see 5.2(3) of the Foreign Judgments (Reciprocal Enforcement) Act 1933. By that means the company would get judgment for the full sum they now seek, i.e 641 or thereabouts, and not 452."*

Forster J agreed with Lord Denning and the reasons given by him. Lawson LJ. while agreeing that there was need for a change of the rule felt bound by the decision of the House of Lords in the Harana Railway's case. He reasoned thus at pages 160-161:

*"In Manners v. Pearson & Sons (1898) 1 Ch at 587. (1895-9) All ER Rep at 417 Lindley MR based the rule on jurisdiction and gave as his reason for it, not the uncertainty which has concerned the 17th and 18th centuries judges, but the fact that an order in a foreign currency could not be enforced by the ordinary writs of execution. The ordinary processes, if not writs of execution, nowadays include the legal processes of other countries which have reciprocal arrangements with the United Kingdom. Further, the Judges of that period may have thought, as many Judges have thought since (for an example see Re United Railways of Havana and Regla Warehouses Ltd (1960) 2 All ER at 345, (1961) AC at 1052) that a court could not make an order for specific performance of a contract to pay a specific sum in a foreign currency. In Beswick v. Beswick (1967) 2 All ER 1197, (1968) AC 58 the House of Lords adjudged that an order for the specific performance of an undertaking to pay by instalments specific sums in sterling could be made. If such an order can be made for the payment of sterling, I can see no reason why an order should not be made for the payment of specific sums in a foreign currency. Say another case, like Re Reading's Petition of Right (1949) 2 All ER 68, (1949) 2 KB 232 occurred. Suppose an army officer serving in Germany, who was the holder of an imprest account, withdrew large sums of deutschmarks, deserted to the United Kingdom and put the stolen deutschmarks in a safe deposit. Suppose that by the time the military police found him sterling had been devalued against the deutschmark. It would be an affront to justice if our courts could only give judgment for the sterling equivalent at the date of conversion. Why should he not be made to deliver up the deutschmarks? All the reasons which have been given for a chauvinistic approach to foreign currency, with the exception of those based on the difficulty of execution by writs and garnishee orders have become meaningless; and the consequences of adhering to*

*the practice of giving judgment in sterling has been to do injustice to foreign traders and to allow defaulting British traders to get a benefit which brings discredit on the administration of justice in his realm.*

*I am, however, a timorous member of this court. I stand in awe of the House of Lords. I have asked myself whether counsel for the plaintiffs' submission to the effect that there is no case binding on the court which requires us to dismiss the appeal was sound. He submitted that in all the cases in which reference has been made to giving judgment in sterling the question under discussion was a different one altogether. That may well be so as to the specific issues raised, but in both Owners of Steamship Celia v. Owners of Steamship Volturno (1921) 2 AC 544, (1921) All ER Rep 110 and Re United Railways of the Havana and Regla Warehouses Ltd. (1960) 2 All ER 332, (1961) AC 1007, the approach of some of their Lordships to the specific issues was to find out what was the real nature of the cause of action which produced the claim. See Lord Summer's speech in Owners of Steamship Celia v. Owners of Steamship Volturno (supra) and the speeches of Viscount Simonds and Lord Denning in the Havana case, (1960) 2 All ER at 340,356, (1961) AC at 1043, 1069. Both their Lordships in the latter case pointed out that a claim in respect of a foreign debt was a claim in damages, not in debt. Viscount Simonds referred to, and approved, the case which established this proposition. Ward v. Kidswin (1966) Latch77. Jones J, one of the Judges in that case, is reported in the Havana case (1960) 2 All ER at 340, (1961) AC at 1044 as saying that -*

*'the action is properly brought in detinet alone for Hamburg money which is of no value and as if the action were brought for a piece of plate. It is disturbing to find that a rule which does injustice to a foreign trader is founded on archaic legalistic nonsense of this kind. It is, however, my duty to apply the law, not to reform it. I have reluctantly been driven to the conclusion that, subject to counsel for the plaintiff's submission based on the European Communities Act 1972, this must be deemed to have been approved and followed by the House of Lords in Re United Railways of the Havana and Regla Warehouses Ltd (supra).'*

The Schorsch Meier case came for consideration by the House of Lords in Miliangos v. George Frank (Textiles) Ltd, (supra). Their Lordships, in their various speeches, reviewed the law and, by majority (Lord Simon of Glaisdale dissenting) overruled their earlier decision in the Havana Railways case and affirmed the decision of the Court of Appeal in the Schorsch Meier case not on the ground of the application of the Treaty of Rome but on the ground of there being a need for a change in the age-long Judge-made law due to changing circumstances now pre-

vailing. Lord Wilberforce, in his leading opinion observed at page 808:

*“My Lords, I have quoted extensively from these opinions, not only because they embody the standing authority on the question now at issue, but also in order to make clear what, I think, appears from all of them to be the basic presupposition. This is that procedurally an action cannot be brought here for recovery or payment of a sum expressed in foreign currency, and that, in effect it can only be brought for a sum expressed in sterling, recoverable by way of damages. I now have to ask, what is the position at the present time? Have any fresh considerations of any substance emerged which should induce your Lordships to follow a different rule?”*

After considering a number offactors, the learned and noble Lord said at page 812:

*“These considerations and the circumstances I have set forth, when related to the arguments which moved their Lordships in the HA-VANA RAILWAYS case (1960) 2 All ER 332, (1961) AC 1007, lead me to the conclusion that, if these circumstances had been shown to exist in 1960, some at least of their Lordships, assuming always that the interests of justice in the particular case so required, would have been led, as one of them very notably has been led, to take a different view.*

Concluding, Lord Wilberforce said at pages 814-815:

*“My Lords, in conclusion I would say that, difficult as this whole matter undoubtedly is, if once a clear conclusion is reached as to what the law ought now to be, declaration of it by this House is appropriate. The law on this topic is Judge made; it has been built up over the years from case to case. It is entirely within this House’s duty, in the course of administering justice, to give the law a new direction in a particular case where, on principle and in reason, it appears right to do so. I cannot accept the suggestion that because a rule is long established only legislation can change it - that may be so when the rule is so deeply entrenched that it has infected the whole legal system, or the choice of a new rule involves more far - reaching research than courts can carry out.”*

It would appear from the opinion of Lord Simond that his main reason for dissenting from the opinions of his brethren is that he was not satisfied that the change in the law was one to be made by the court but by parliament. He said at page 832:

*“To sum up on this part of the case: (1) the decision to, abrogate the HA VANA rules (1960) 2 All ER 332, (1961) AC 1007 is not one which Judges are qualified to take; (2) to overrule the HA VANA case (supra) would be a departure from the limitations which your Lordships*

have for good reasons self-imposed on the use to be made of the 1966 declaration (1966) 3 All ER 77, (1966) 1 WLR 1234: (3) the HAVANA rules (*supra*) have juridical adhesions so that their abrogation will cause dislocations elsewhere which have been insufficiently considered; (4) it has not been established that any other rules than the HAVANA rules (*supra*) would be more conducive to general justice; (5) abrogation of the HAVANA (*supra*) breach-date rule will create a number of undesirable anomalies; (6) if the breach-date rule is to be abrogated, there are a number of alternatives, the choice between which is not a purely or even a primarily juridical issue.”  
 B And concluded:

C “The main ground of my dissent from the opinions of my noble and learned friends is that this type of issue is unsuitable for law reform by judiciary. It is the sort of case where in my view, a wide range of advice, official especially but also commercial, is required. The training and experience of a Judge is unsuitable for this type of decision-making  
 D unaided: his circumspection is too narrow; his very qualities of keen perception of his immediate problem tend to militate against sound judgment of the wider and more general issues involved. But if courts are to undertake legislative responsibilities, something might be done to equip them better for the type of decision-making which is involved. Official  
 E advice and a balanced executive view might be made available by a law officer or his counsel acting as *amicus curiae*. I venture to suggest consideration of some such machinery.”

Lord Fraser of Tullybelton in his own speech at page 841 was emphatic as to what the rule should be. He said:

F “I think that a party suing for recovery of a debt due in a foreign currency should be entitled to claim payment of and to get judgment for, the amount of the debt expressed in the foreign currency.”

Having reviewed the position in England I now turn to Nigeria. The rule until recently, appears to be that which was received from the English law,  
 G that is. that a court here, where a contract debt is expressed or damages are payable, in a foreign currency, will only award an equivalent sum of that foreign currency in the Nigerian currency. There is, however, now a growing tendency for courts to award judgments in foreign currency. see, for example, Bank of Baroda v. Mercantile Bank (Nig.) Ltd. (1987) 3 NWLR (Pt.60) 233  
 H where the claim before the trial court was in U.S. dollars and judgment was entered for the plaintiff as claimed. There is also Metronex (Nig.) Ltd. v. Griffin & George Ltd. (1991) 1 NWLR (Pt.169) 65 I where at p. 659 the Court of Appeal, per Salami. J.C.A. observed:

“Furthermore, the relief sought in both respondent’s writ and

*statement of claim and amended statement of claim is for an indebtedness which is expressed in pounds sterling the mount of which has been consistently placed at 81,067.00. It is not the appellant's case that the respondent cannot couch its claim in foreign currency. Even if their opposition to the application is on that basis there are decided authorities pointing to the contrary. See Schorsch Meier GmbH v. Hennin (1975) 1 B All ER 152 at 156; Miliangos v. George Frank Textiles Limited (1975) 3 All ER 80 I; (1976) AC 443; The Halcyon the Great (1975) 1 AER 882, 883 and Barclays Bank International Limited v. Levin Brothers (Bradford) Ltd. (1977) 3 All ER 900."*

The same learned Justice of the Court of Appeal expressed similar view C in Olaogun Enterprises Ltd, v. Seaby Jerustoberi & Maskinfabrike (1992) 4 NWLR (Pt.235) 361 at P. 385-386 when he said:

*"The respondent's claim in both the writ of summons and the statement of claim is set out in Danish Krone. It is not being contested on behalf of the appellant that the respondent cannot seek relief or remedy D in Danish Krone, a foreign currency and the currency in which the agreement was entered into. The respondent is entitled to make its claim in a currency other than our local currency. See Schorsch Meier GMBH v. Hennin (1975) 1 All ER 152,156.*

*'Since that decision, I am of opinion that an English court has E power, not only to order specific performance of a contract to pay in sterling, but also of a contract to pay in dollars or deutschmarks or any other currency.'*

*See also Miliangos v. George Frank Textiles Ltd, (1975) 3 All ER 801, (1976) Ac 443; The Halcyon the Great (1975) 1 All ER 882; F Barclays Bank International Ltd. v. Levin Brothers Bradford Ltd.(1976) 3 All ER 900 and Metronex Nigeria Limited v. Griffin & George Ltd. (1991) 1 NWLR (Pt. 169) 651. 659.*

*In the circumstance the appellant is bound to settle its just debt at the prevailing exchange rate as and when it is convenient to it to do so. G Its liability is in Danish' Krone and not in Naira and current equivalent of which he must find to settle its liability in Krone. It will be both unjust and inequitable to allow the appellant to resile from its agreement to pay for the goods in Danish Krone."*

In the instant appeal, the Court of Appeal decided that a Nigerian H court has no power to give judgment in foreign currency. This decision, given on 1st September 1988, was never brought to the attention of the Court of Appeal in Metronex( Nig) Ltd. v. Griffin & George Ltd. (supra) and Olaogun Enterprises Ltd, v. Seaby Jerustoberi & Maskinfabrik (su-

pra) The three cases were, however, considered by the Court of Appeal in *Melwani & Anor v. Chanhira Corporation* (1995) 6 NWLR (PtA02) 438 where the plaintiff had, inter alia, claimed refund of the sum of US \$2,820, I 15.00. The trial court entered judgment in his favour in that sum with interest. On appeal, the Court of Appeal, per Uwaifo J.C.A. held that the view B expressed by Salami J.C.A. in the *Metronex (Nig.) Ltd.* case was obiter and the decision in *Olaogun Enterprises Ltd.* was given per incuriam,. Uwaifo J.C.A in his lead judgment made reference to the *Schorsch Meier* case and opined that C that view. The application of Article 106 was just one of the reasons given by the Court of Appeal (England) for the decision in the case. The House of Lords, as I have shown earlier in this judgment, in *Miliangos v. George Frank (Textiles) Ltd.* (supra) was not one with the Court of Appeal on the issue of Article 106 but, by majority, followed *Schosch Meier* for the reason that D there is need for a change in the old rule of practice that an English court could not give judgment for a sum in foreign currency. Uwaifo, J.C.A. at 467-468 said:

*"I do not myself see how the courts can get round the intendment of the Exchange Control Act, (1962) by merely giving judgment in foreign currency unless they are prepared to forget that a court does not act E in vain; see sections 7,8 and 9 of the Act which fall under Part II of the Act. I need not set them out. But I will reproduce paragraph 1 of the Third Schedule to the Act which reads:*

*'1. The provisions of Part II of this Act shall apply to sums required F to be paid by any judgment or order of any court or by an award as they apply in relation to other sums, and it shall be implied in any judgment or order of any court in Nigeria, and in any award given under the law of Nigeria, that any sum required to be paid by the judgment, order or award (whether as a debt, as damages or otherwise) to which the said provisions G apply shall not be paid except with the permission of the Minister.'*

*This provision does not, even by implication recognise that any court in Nigeria can give judgment in a foreign currency. Rather it incorporates the provisions of Part II of the Act by including the payment of awards made by court judgments (in Naira, in my understanding) subject H to the permission of the Minister in circumstances falling within Part II of the Act for payment to any person resident outside Nigeria."* His Lordship appeared not to be aware that, at the time he was delivering judgment in the case. the Exchange Control Act 1962 had been repealed by the Exchange Control (Repeal) Decree, No.8 of 1995 which came into

force on 1st April, 1995.

Uwaifo, J.C.A referred to the Admiralty Jurisdiction Decree No. 59 of 1991. section 17 of which provides:

*“17.(1) The Court shall have the power to give judgment in any monetary currency (accepted as legal tender by the laws of any other country) in which any of the parties has suffered loss or damages if -* B

*(a) the goods or consignment are paid for or are to be paid for in that foreign currency; or*

*(b) the goods are insured in that currency and part of the amount so claimed is confined to that portion in foreign currency: or*

*(c) the consideration or loss is derived from, accruing in brought C into or received, as the case may be, in foreign currency or for the benefit of the party making a claim before the court.*

*(2) A judgment awarded by the Court in any foreign currency shall be recoverable as if it were a judgment of the court awarded in the currency of Nigeria.* D

*and commented thus at page 469 of the Report*

*“This is a provision which ought to satisfy genuine business interests which are for the overall economic well-being of all concerned. The jurisdiction is given only to the Federal High Court in admiralty matters upon the specified guidelines and limited instances. This, in my E view, is a pointer that there is no general principle that the Nigerian courts have jurisdiction to give judgment in foreign currency. The Admiralty Jurisdiction Decree has only recently created an exception. The present case does not in any way fall within the provision of section 17 above.”* He finally held - F

*“The learned trial Judge was clearly in error to have given judgment for the plaintiff in US. dollars.”*

For the reasons -

1. The Exchange Control Act. 1962 has been repealed and the Naira allowed to float as market forces may determine. G

2. By section 17 of the Admiralty Jurisdiction Decree 1991 the Federal High Court is given jurisdiction to award judgments in foreign currency. It cannot, in my respectful view be the intention of the legislature that other High Courts in the Federation are not to have such jurisdiction. H

3. The Arbitration and Conciliation Act, Cap 19 Laws of the Federation of Nigeria 1990 empowers the courts in Nigeria to enforce arbitral award irrespective of the country in which it is made and applies the articles of the Convention on the Recognition and Enforcement of

Foreign Awards in Nigeria. The courts in Nigeria can, therefore, enforce arbitral awards made in foreign currency. It is inconceivable that the courts that can enforce arbitral awards in foreign currency cannot entertain claims made in foreign currency.

4. The Foreign Currency (Domiciliary Accounts) Act, Cap 151 B authorises citizens of Nigeria, persons resident in Nigeria, Corporate bodies in Nigeria, diplomats, foreign diplomatic missions and international organisations to import foreign currency and deposit same in a designated local bank account maintained in an approved foreign currency. I cannot see any procedural difficulty that can stand in the way of a creditor claiming from such an account holder in foreign currency.

5. The Foreign Judgments (Reciprocal Enforcements) Act, Cap 152 allows for the enforcement in Nigeria of judgments given in foreign countries (which invariably would be in foreign currency). To adopt Lord Denning's reasoning in the SCHORSCH MEIER case, if the courts in D Nigeria hold on to the old rule a foreign creditor could bring proceedings in the court of his country and after obtaining judgment there, register the judgment in Nigeria for the purpose of enforcement under the Act.

6. This court in Broadline Enterprises Ltd v. Monterey Maritime Corporation (1995) 9 NWLR (Pt. 417) 1 at 30 has held. per Iguh, JSC. that- E *"There can be no doubt that the courts, in appropriate cases, have power and jurisdiction to enter judgment in favour of a party in the foreign currency claimed."*

Maliangos v. George Frank (Textiles) Ltd. (supra) was followed. This court entered judgment in favour of the plaintiff in the sum of US F \$190,587.00.

It is my respectful view that courts in this country can claim jurisdiction to entertain and determine cases where sums in foreign currency are claimed. The old rule in England, as well as in Nigeria, is judge - made and in the light of present day circumstances of extensive international commercial relationships, that rule should give way to a new rule as now in England more so that the difficulties hitherto experienced in enforcing such judgments no longer apply. G

It is for the reasons I have given above that I hold that the court below was in error in holding, as it did, that courts in Nigeria had no H power to give judgment in foreign currency. And for the same reasons I must also hold that Melwani, even though not directly on appeal before us, was wrongly decided. Having held, however, that the plaintiff's claim in negligence was not proved the conclusion I have just reached is of no comfort to the plaintiff in this appeal.

In conclusion, from all I have been saying above, I have no hesitation in agreeing with the conclusion reached by my learned brother Onu J.S.C that this appeal is totally lacking in merit and is accordingly dismissed by me with N1 ,000.00 costs to the defendant Bank.

---

**ADIO JSC**

B

I have had a preview of the judgment just read by my learned brother, Onu, J.S.C. and I agree that the appeal fails. Accordingly, I dismiss it. I abide by the order for costs.

---

**IGUH JSC**

C

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Onu, J.S.C. and I agree entirely that this appeal is without substance and should be dismissed.

I desire however to make a few comments on the fourth issue only by way of amplification. This issue questions thus -

D

*“Whether the learned trial Judge was right in awarding damages to the appellant (then the plaintiff) for negligence of the respondent (then the defendant) in delivering the bank draft to a wrong person, not the payee”.*

The facts that gave rise to this appeal have already been fully set out in the leading judgment. It suffices to state for the purpose of this contribution that the appellant, as plaintiff, in the trial court, had filed an action against the respondent, then defendant, claiming as follows -

E

*“The plaintiff claims against the defendant is for special and general damages for negligence particularised below, arising out of the reckless, careless, and negligent manner in which the defendant allowed its bank draft number HO 044106 of 20th October, 1983 drawn in favour of West Virginia University, Account Mr. Olusegun O. Koya to be negotiated in London in January 1984 by its correspondent bank to a wrong person not the beneficiary, which wrongful act resulted in untold suffering and hardship on the beneficiary and thereby suffered damages.*

G

*Particulars of Damages:*

*(1) Special damages:*

*(a) The sum of \$ 10,000.00 U.S. Dollars wrongfully paid by the defendant, its servant and or agent to a wrong person not the beneficiary \$10, ' 000.00*

H

*(2) General damages:*

*(b) being aggravated damages for the hardship and suffering of the beneficiary and the non-challant attitude of the defendant when informed of its carelessness, recklessness and negligence N50,000.00.”*

Sometime in 1983, the plaintiff, a customer of the defendant, applied to the defendant for the purchase of U.S. \$10,000.00 draft payable to West Virginia University for the account of his son, Olusegun O. Koya who was then studying there. After the issue of the draft, the plaintiff, in accordance with banking practice collected it from the defendant for the purpose of transmitting it to the beneficiary, his said son in the United States. On the 25th January, 1984, the plaintiff wrote to advise the defendant that the draft got lost in transit between the Ibadan General Post Office and the United States of America. He requested that the draft be stopped and a replacement issued. The draft had in fact been cashed apparently by a wrong person on the 12th January, 1984 through Oman Bank Limited, London. It is as a result of this loss that the plaintiff brought this action for special and general damages for negligence.

On the facts established before the trial court, the defendant, once the plaintiff collected the draft from it, had nothing more to do with it and was in no way responsible for the cashment or utilisation of the proceeds thereof by another person. The contention of the defendant is that it was the plaintiff's act of negligence in the mode of the transmission of the draft to the beneficiary in the United States that was solely responsible for or largely contributory to assisting its negotiation outside the bank's mandate.

The learned trial Judge after a consideration of the evidence and the submissions of learned counsel found for the plaintiff and concluded as follows on the issue of liability -

*"In the light of all these facts and the law in support, I am of the clear view that the defendant bank is liable to the plaintiff in negligence"*

The defendant's appeal to the Court of Appeal against this judgment of the trial court was on the 1st day of September, 1988 allowed, Akanbi, J.C.A., as he then was, in his leading judgment, with which Omololu-Thomas, J.C.A. and Ogwuegbu, J.C.A., as he then was, agreed concluded thus-

*"On the totality of the evidence adduced at the trial, therefore, it cannot in my view be said that a case of negligence was made out or that whatever damage that might have been suffered by the respondent resulted from any breach of duty owed to him by the respondent (sic)."*

*The plaintiff has now appealed to this court against this decision of the Court of Appeal.*

*The one issue that ought to be stressed is that a plaintiff, as a matter of law, is required, in an action on negligence, to state or give particulars of negligence alleged and to • recover on the negligence pleaded in those particulars. It is not sufficient for a*

plaintiff to make a blanket allegation of negligence against a defendant in a claim on negligence without giving full particulars of the items of negligence relied on as well as the duty of care owed to him, by the defendant. See *Machine Umudje and Another v. Shell-BP Petroleum Development Company of Nigeria Ltd.* (1975) 9-11 S.C 155 at 166-167. As was explained, quite rightly, by Willes, J. in *Gautret v. Egerton* (1867) L.R. 2 CP. 371 at 374 -

*“The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover secundum allegata et probata. What is it that a declaration of this sought (i .e. of negligence) should state in order to fulfil those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence without showing in what respect he was negligent, and how he became bound to use care to prevent injuries to others ..... (Words in brackets and Italics supplied for emphasis).*

Accordingly, in an action on negligence, a plaintiff, to succeed, must in addition to pleading and establishing the particulars of negligence relied on, he must also state and establish the duty of care owed to him by the defendant, the facts upon which that duty is founded and the breach of that duty by the defendant.

In the present case, the plaintiff nowhere in his Statement of Claim pleaded any particulars no matter how vague, of the ingredients of negligence leveled against the defendant. All he alleged in paragraph 10 of his pleading was the wild and blanket averment to the effect -

*“that the defendant, its servants and/or agent recklessly, carelessly and negligently allowed the bank draft to be negotiated in London without reaching its destination in the United States of America.”*

No particulars of whatever nature in respect of the defendant’s alleged acts of recklessness, carelessness or negligence were given, supplied, pleaded or indeed testified to by the plaintiff. On the contrary, his evidence before the trial court is that he applied for and obtained the draft from the defendant and despatched the same through the post office to the beneficiary. The defendant’s case which was not controverted was that its duty ended after the delivery of the draft to the plaintiff at Ibadan. In my view, the plaintiff’s failure to plead or establish by evidence, the particulars of negligence he was relying on against the defendant is fatal to his case.

It is also plain to me that in the absence of evidence that the defendant had any thing to do with the transmission of the draft to the beneficiary during which exercise it was lost in transit, the defendant cannot be held liable in negligence for its loss. On issue number 4 alone,

which must be resolved in the defendant's favour, the court below cannot be faulted for dismissing the plaintiff's claims.

There is next the issue whether or not the trial court could make an award in respect of a claim payable in foreign currency. This issue has arisen in view of the fact that one of the items of special damages claimed is the sum of U.S. \$10,000.00 allegedly lost by the plaintiff as a result of the defendant's negligence. The contention of the defendant is that there is no jurisdiction in the Nigerian Courts to give judgment in foreign currency.

I have already held that no case of negligence was established by the plaintiff against the defendant. Consequently, any consideration of this issue will be entirely academic and unhelpful in the determination of this appeal. In view, however, of the prominence the issue received in the judgment of the court below, I need draw attention to the decision of this court in *Broadline Enterprises Ltd. v. Monterey Maritime Corporation* (1995) 9 NWLR (Pt.417) 1 in which it was pointed out that our courts, in appropriate cases, have the power and jurisdiction to enter judgment in the foreign currency claimed depending entirely on the particular facts and circumstances of a case. Where, for instance, the currency of a contract made, executed and enforceable in Nigeria is in foreign currency, our courts of competent jurisdiction would, in my opinion, have power to enter judgment in such foreign currency. See *Schorsch Meier Gmbh v. Hennin* (1975) 1 All E.R. 152 and *Jugoslavenska Oceanska Plovidha v. Castle Investment Co. Inc.* (1973) 3 All E.R. 498 or (1974) Q.B. 292. The underlining principle is said to involve, and I agree entirely with this, that it is the duty of a debtor to pay his debt to the creditor in the currency of the contract according to its clear terms. Besides, it does not seem to me open to question that our courts have ample power. Again in appropriate cases, to order specific performance of a contract to pay in a stipulated or named foreign currency. See *Beswick v. Beswick* (1967) 2 All E.R. 1197 or (1968) A. C. 58 (CHL).

In the present case, the U.S. \$10,000.00 claimed is a specific item of special damages suffered by the plaintiff as a result of the defendant's alleged tort of negligence. Negligence however, was not established by the plaintiff against the defendant. Accordingly, it is my view that the court below was right in dismissing the plaintiff's claim for his loss of the said U.S. \$10,000.00 foreign currency.

It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, Onu, J.S.C. that I, too, dismiss this appeal. I abide by the order for costs therein made.

Appeal dismissed.