

SUPREME COURT OF NIGERIA
10TH FEBRUARY, 1997. SC. 30/1994
CORAM:- A. B. WALI, I. L. KUTIGI, E. O. OGWUEGBU,
Y. O. ADIO, A. LIGUH, JJSC.

ALHAJI AMINU ISHOLA DEFENDANT/APPELLANT
AND
SOCIETE GENERALE BANK (NIG.) PLAINTIFF/
LIMITED RESPONDENT

ACTIONS - Statute bar - Whether the respondent's claim - Is statute barred.

ACTIONS - Limitation period - Appellant's contention that the action is statute barred - Whether admitted or opposed by the respondent

APPEALS - Judgment - Whether all the three Justices of the Court of Appeal - That heard an appeal - Must be present at the delivery of the judgment.

APPEALS - Judgment - Pronounced opinion of a member of the panel - Who has ceased to be a Justice of the Court of Appeal on the date of judgment - Is not a nullity.

BANKING - Overdraft - Cause of action - Where no specific date was agreed upon for repayment - There must be demand - Before cause of action will arise.

BANKING - Account position - Letter drawing appellant's attention to the position of his account - Cannot amount to a letter of demand.

BANKING - Interest on overdraft - Where there is no express agreement - Bank may only recover interest - If the borrower does not object.

BANKING - Drawing in excess of one's credit - Is a request for loan - the cheque is honoured - The customer has borrowed money by way of overdraft - Irrespective of no existence of formal agreement.

BANKING - Payment of money into an account - Failure to tender the bank Teller - Whether the alleged payment is proved.

COMPANY LAW - Evidence - Hearsay - Company being a juristic person -

Can give evidence of a transaction vide its servant - That did not take part in the transaction - And the evidence will not be hearsay.

PRACTICE & PROCEDURE - Reply - Its proper function in the settlement of pleadings - Reply will be unnecessary - For the sole purpose of denying averment contained in the statement of defence.

WORDS & PHRASES - Appeals - “Hearing”- As envisaged under s. 258(2) of the 1979 Constitution - Is as at the closure of the parties’ addresses - And the appeal is adjourned for judgment.

FACTS

Before the Ilorin High Court, the plaintiff respondent filed an action against the defendant/appellant claiming N 154,357.14 being the principal over-draft plus accumulated interests and other bank charges. Plaintiff also claimed several rates of interest for different periods. The suit which was originally filed in the undefended list was transferred to the general cause list following defendant’s notice of intention to defend. Before filing the action, plaintiff wrote several letters to the defendant and a formal demand letter.

The defendant denied the claim and alleged that the plaintiff misplaced the sum of about N64,000.00 he lodged into his account. Defendant further contended that the action not being filed within 6 years of its accrual was statute barred. The trial court found in the plaintiff’s favour and awarded the sum of N69,995 35 without granting the interest claimed on the over-draft. The defendant’s appeal to the Court of Appeal was dismissed. Being dissatisfied, the defendant has further appealed the Supreme Court raising 3 issues. Plaintiff cross appealed on the issue of interest.

ISSUES FOR DETERMINATION

“1. Whether the Lower Court was right to have affirmed the finding of the trial Court on the issue of Statute of Limitation when Exhibit 49 is a letter of demand and it pre-dated Exhibit 44, another letter of demand, relied upon to dismiss the plea of Statute of Limitation raised by the appellant at the trial. Etc, see p. 301

HELD (Unanimously dismissing the appeal and cross appeal per lead judgment of IGUHJSC)

Reply - Its proper function in the settlement of pleadings

1. It cannot be over-emphasized that the proper function of a reply in the settlement of pleading is to raise in answer to the defence, any matter which,

to be admissible in evidence, must be specifically pleaded, or which makes the defence not maintainable or which otherwise might take the defence by surprise or, where because of the defence filed, the plaintiff proposes to lead evidence in rebuttal or raise issues of fact not arising out of the two previous pleadings. A party who desires to rely on any material facts to defeat the defence that an action is statute-barred must expressly plead such facts in his reply to take the case out of the statute unless he has already done so in his Statement of Claim. Essentially, a reply may also constitute the defence of a plaintiff to a counter-claim of the defendant or to the new facts raised by the defendant in his Statement of Defence. Where, however, as in the present case, no counter-claim is filed, further pleadings by way of a reply to the Statement of Defence is generally unnecessary if the sole purpose is to deny the averment contained in the Statement of Defence. (p. 306 A)

Actions - Whether statute bar allegation was admitted

2. It seems to me plain that Exhibit 44, if in fact it was established, would constitute a complete answer to the defence under the Limitation Act as it would mean that this action which was filed on the 16th February, 1987 was instituted in under six years of the accrual of the cause of action Learned appellant's counsel cannot, with respect, be right when he submitted that the respondent required to file further reply in answer to the appellant's plea under the Limitation Act, that the respondent pleaded no facts which made the appellant's defence under the Limitation Act not maintainable or that the respondent must be deemed to have admitted the appellant's special plea as established. (p. 307 C)

Overdraft - When cause of action will arise

3. The cause of action does not arise until there has been a demand made or notice given. When therefore there is no specific date agreed upon for the repayment of an overdraft, as in the present case, a demand should be made or notice given. In other words, a cause of action on an unpaid overdraft is not deemed to accrue where no specific date for payment is agreed upon until there has been a demand made or notice given. (p. 307 F)

Banking - Account position

4. Indeed, ex facie, Exhibit 49 is only a letter drawing the attention of the appellant to the position of his account and inviting him for a discussion over this indebtedness. Without doubt, such letters usually written by Bankers to their customers whose accounts are in the red do not and cannot amount to letters of demand. See *Angyu v. Malami*, supra at page 253. I am in total

agreement with both courts below that Exhibit 44 dated the 9th February, 1992 is the first letter of demand addressed to the appellant by the respondent.(p. 308 G)

Actions - Statute bar

B 5. I, too, totally agree that the respondent's claim on the facts as found by the trial court and affirmed by the court below cannot in any way be said to be statute-barred as the suit was filed 5 years and seven days after the accrual of the cause of action in the transaction. Issue 1 is therefore resolved against the appellant.(p. 309 D)

C

Company and the issue of hearsay evidence

6. It cannot be over emphasized that a company being a legal persona or a juristic person can only act through its agents or servants and any agent or servant of a company can therefore give evidence to establish any transaction entered into by that company. Where the official giving the evidence is not the one who actually took part in the transaction on behalf of the company, such evidence is nonetheless relevant and admissible and will not be discountenanced or rejected as hearsay evidence. The fact that such official did not personally participate in the transaction on which he has given evidence may in appropriate cases, however, affect the weight to be attached to such evidence. (p. 309 H)

Drawing in excess of one's credit

7. The principle of law is long settled that if a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is nothing but a request for a loan and, if the cheque is honoured, the customer has borrowed the money by way of overdraft from the bank. In my view, the appellant, by overdrawing his account, requested for an overdraft which the respondent by honouring his cheque duly granted. It is immaterial to the respondent's claim that the appellant did not enter into a formal agreement with the respondent in 1980 before the overdraft facilities were granted. (p.310 E)

Payment of money into an account

H 8. Payment of money into an account may be proved either by the oral evidence of the person who actually made the payment personally to the bank or by the production of a bank teller or acknowledgment showing on the face of it that the bank had received the payment. This is because a bank teller, duly stamped with the official stamp of the bank and properly initialed by the

cashier, constitutes prima facie proof of payment of the sum of money therein indicated and a customer after producing such a receipt needs not prove more unless the payment is being seriously challenged. See *Aeroflot v. U.B.A.* (1986) 3 NWLR(Part27) 188 at 190. The appellant in the present case not only failed to tender the bank teller against which the alleged payment was made, he also failed to call his salesman who purportedly made the payment to B testify on the point.(p. 313 A)

Appeals - Validity of judgment

9. It seems to me clear pursuant to the provision of section 11 of the Court of Appeal Act, 1976 and section 258(2) of the 1979 Constitution of Nigeria that once an appeal in any cause or matter has been fully heard before the Court of Appeal and judgment is reserved, it shall not be necessary for all the three Justices who heard the appeal to be present together in court on the day appointed for delivery of the judgment. It is lawful if the written opinion of any one of them who is unavailable is read by any other Justice of that court. I need stress, therefore, that the fact that only two of the Justices who heard the appeal sat to deliver the judgment of court cannot be any matter of great moment as it is clearly unnecessary for all the three Justices who heard the appeal to be present together in court for the delivery of the judgment. Accordingly I am unable to accept learned counsel's submission that the judgment of the Court of Appeal in this case was void simply because only two Justices of the Court below who heard the appeal were present to deliver the judgment of court.(p. 314 F)

Pronounced opinion of a member of the Court of Appeal panel

10. It seems to me necessary to stress, at the risk of repetition, that the opinion of Uthman Mohammed, J.C.A., as he then was, having been written on the 12th May, 1993 on which date he was still a member of the Court of Appeal, and having been duly pronounced upon by Okunola, J.C. A. on the date of judgment on the 1st July, 1993, I find myself unable to subscribe to the submission of learned counsel for the appellant to the effect that the said opinion of Uthman Mohammed J.C.A., as he then was, is a nullity as he was no more a member of the Court of Appeal on the date judgment in the appeal was delivered.(p. 316 H)

Words & Phrases - "Hearing"

11. It seems to me quite clear from a close examination of Section 258(2) of the 1979 Constitution that the "hearing" therein envisaged is that concluded when the parties have closed their respective addresses, arguments of cases

and the appeal is adjourned for judgment. I therefore entertain no doubt that Uthman Mohammed, J.C. A., as he then was, took full part in the hearing of the appeal in issue notwithstanding the fact that he was not present when judgment in the appeal was delivered and that the pronouncement of his opinion by Okunola, J.C. A. was, to all intents and purposes, valid, constitutional and B in accordance with the law.(p. 319 D)

Interest on overdraft

12. It is beyond dispute that in the present case, there was no express agreement as to the rate of interest payable by the appellant on the overdraft as, on C the evidence, the facility was not granted in writing. But where there is no express agreement as to the rate of interest payable, it seems that the bank is entitled to charge interest rate on the basis that there is now an established custom to that effect or that the customer has impliedly consented where, without protest, he allows his account to be debited with such interest. D (p. 320 H)

REPRESENTATION

Yusuf O. Alli and K.K. Eleja for Appellant
B. A. Adebora for Respondent/Cross-Appellant

E

CASES REFERRED TO

Angyu Malami (1992) 9 N.W.L.R. (Part 264) 242 at 253
Union Bank of Nigeria Ltd. v. Professor Albert Ozigi (1995) 5 KLR 1
Himma Merchant Bank Ltd. v. Aliyu (1994) 10 KLR 50
F Bakare v. Ibrahim (1973) 6 S.C. 205
Lloyds Bank Ltd. v. Margolia (1954) 1 ALL E.R. 734 at 748
Nwodike v. Ibekwe (1987) 4 N.W.L.R. (Part 67) 718
A.C.B. Ltd v. Egbumke (1988) 4 N.W.L.R. (Part 88) 350 at 363
Aeroflot v. U.B.A (1986) 3 N.W.L.R. (Part 27) 188 at 190
G Oko v. Ntukidem (1993) 3 KLR 114
Ude v. Nwara (1993) 3 KLR 83
Eboigbe v. N.N.P.C. (1994) 10 KLR 68
Wayne W.A. Ltd. v. Ekwunife (1989) 12 S.C.N.J. 99

H STATUTES REFERRED TO

English Limitation Act 1623
Constitution of Nigeria 1979 ss. 226, 258(2)
Court of Appeal Act 1976 ss. 9, 11

LEAD JUDGMENT BY IGU HJSC

In the Ilorin Judicial Division of the High Court of Kwara State, the plaintiff instituted an action against the defendant claiming, as subsequently amended, as follows -

“(1) The sum of One Hundred and Fifty-Four Thousand, Three hundred and fifty-seven Naira, Fourteen Kobo (154,357. 14k) being the principal Overdraft, plus accumulated interests and other Bank charges as on the 31st day of October, 1986.

(2) Interest at the Bank rate of 15% per annum on the said sum from the 1st day of November, 1986 until 30th day of September, 1987.

(3) Interest at the Current Bank rate of 19% per annum from the 1st day of October, 1987 until the day of judgment.

(4) Interest at the rate of 10% per annum on the judgment debt from the date of judgment till final liquidation thereof.”

The suit was originally filed in the undefended list pursuant to the provisions of Order 3 Rules 8 - 14 of the Kwara State High Court (Civil D Procedure) Rules, 1975. Following the defendant's notice of intention to defend the suit under the provisions of Order 3 Rule 10 of the said Rules, he was admitted to defend the same whereupon the suit was on the 9th day of April, 1987 transferred to the General Cause List for hearing and determination. E

Pleadings were ordered in the suit and were duly, settled, filed and exchanged.

The plaintiff's case is that on the 13th February, 1980, the defendant opened a Current Account No. 00307811131 with the sum of N200.00 in his name. On the basis of some arrangement between them, the defendant operated this account and on various dates purchased Bank Drafts from the plaintiff bank by means of cheques drawn on his account. The total amount of drafts purchased by the defendant from the plaintiff bank together with his other withdrawals from the said account between the 13th February, 1980 and the 3rd March, 1981 was N447,772.71. On the other hand, the defendant's total lodgments into the account during the period amounted to N377,777.35. The defendant's account was therefore overdrawn to the tune of N69,995.35 as at the 3rd day of March, 1981. This was in addition to the accumulated interests, commissions and other charges which accrued to this account during the period which amounted to N5,630.11. The plaintiff claimed that as at the 3rd March, 1981 from which Gate the defendant stopped operating the account, his total indebtedness stood at N75,625.47. The account has remained dormant ever since although interest and commissions continued in the normal F G H

way of business to be charged and debited to the account. The plaintiff further claimed that the total outstanding debit balance in the defendant's account as at the 31st October, 1986 stood at N154,357.14.

The plaintiff wrote various letters to the defendant drawing his attention to the position of the account. As these letters were ignored, the plaintiff finally made a formal demand in writing to the defendant for the liquidation of his indebtedness. This was by Exhibit 44 dated the 9th February, 1982. As Exhibit 44 was further ignored, the plaintiff filed this action as above indicated. Relevant documents including the defendant's ledger cards Exhibit 2, and the bank statements of the defendant's current account were tendered and admitted in evidence at the hearing.

The defendant's position is a total denial of the plaintiffs' claims. He denied enjoying any overdraft facilities as claimed by the plaintiff. In particular, he claimed that the plaintiff in breach of its duties misplaced some N60,000.00 he lodged into his account by cash and cheques but were never reflected or credited to his said account. He further asserted that the statements of account upon which the plaintiff has founded its claims were unreliable, inaccurate and did not show the correct position of his account. During his cross-examination, however, the defendant put the amount he paid but not credited to his account at over N64,000.00

In the alternative the defendant contended that the plaintiff's action being in debt, was, in law unenforceable, in that the action in respect of the alleged debt was not filed within 6 years of its accrual and was therefore statute-barred by virtue of the provisions of the English Limitation Act, 1623. On the question of the interests claimed, the defendant denied knowledge of any banking tradition or custom in relation to interest chargeable on loans or overdrafts. He did not authorise or consent to the plaintiff charging any interest on his account. He also denied entering into any agreement with the plaintiff which entitled it to charge any interest, commission or Bank charges to his account. He described the plaintiff's claims as baseless and, at all events, statute-barred.

At the subsequent trial, both parties testified on their own behalf and tendered Exhibits. At the conclusion of hearing, the learned trial Judge, Fabiyi, J. after a careful review of the evidence on the 19th January, 1990 found for the plaintiff against the defendant and decreed as follows -

"In conclusion, I enter judgment in favour of the plaintiff against the defendant in the sum of N69,995.35 plus 10% interest from 16.2.87 until the judgment sum is finally paid up."

Dissatisfied with this decision of the trial court, the defendant lodged an appeal against the same to the Court of Appeal, Kaduna Division, which in

a unanimous decision, substantially dismissed the appeal on the 1st day of July, 1993, and affirmed the judgment of the trial court in favour of the plaintiff against the defendant in the sum of N69,995.35 being the balance of overdraft facility granted by the plaintiff to the defendant as at the 31st day of October, 1986. It was however ordered that the 10% interest chargeable on this judgment debt was to start running from the date of the judgment of the trial court on the 29th January, 1990 and not from the date the action was instituted on the 16th February, 1987. B

Aggrieved by this decision of the Court of Appeal, both parties appealed to this court. The defendant has complained in the main appeal against that part of the decision of the court below which upheld the finding of the trial court to the effect that he was indebted to the plaintiff in the sum of N69,995.35 and that the suit was not statute barred. The plaintiff, on the other hand, has attacked that part of the decision of the court below which affirmed that the various rates of interest claimed on the overdraft were not proved. I shall hereinafter refer to the plaintiff and the defendant in this judgment simply as the respondent or the respondent/cross-appellant and the appellant respectively. D

Nine grounds of appeal were filed by the appellant against this decision of the Court of Appeal. I find it unnecessary to reproduce them in this judgment. It suffices to state that the appellant, pursuant to the rules of this court, filed his brief of argument in which three issues were identified for the determination of this court. These are as follows - E

“1. Whether the Lower Court was right to have affirmed the finding of the trial court on the issue of Statute of Limitation when Exhibit 49 is a letter of demand and it pre-dated Exhibit 44, another letter of demand, relied upon to dismiss the plea of Statute of Limitation raised by the appellant at the trial. F

2. Whether the lower court was not wrong having regard to the admissible oral and documentary evidence led at the trial to have found in favour of the respondent to whom it awarded the sum of N69,995.35 and whether the respondent proffered enough qualitative evidence to entitle it to the relief granted and whether this is not a deserving case for this court to upturn the concurrent findings of facts of the lower and trial courts. G

3. Whether the judgment of the lower court delivered by only two Justices of that court was not a nullity after the third Justice that took part when the appeal was argued and judgment reserved was no more de jacto, de jure a member of that court before the lower court purported to have delivered the judgment in this case”. H

The respondent/cross appellant, for its own part also submitted three

issues in its brief of argument as arising in this appeal for determination. These are -

“(1) Whether or not the Lower Court was right in affirming the finding of the trial court that the respondent’s claim was not statute barred basing its decision on the fact that the action was filed within Six years of the first letter of demand which is letter of 9/2/1982 i.e. Exhibit 44.”

(2) Whether or not the Lower court was right in affirming the finding of fact by the trial court that on the totality of pleadings and evidence before the trial court that the respondent was entitled to N69,995.35 as overdraft facility against the appellant.

(3) Whether the judgment of the Lower Court is a nullity having regard to panel that heard the appeal on 12/5/93 and who has written his judgment and handed same to Honourable Justice Muritala Aremu Okunola after the conference on 12/5/93 was before the date of judgment on 1/7/93 elevated from the lower court bench to this court bench.”

A close study of the issues set out in the respective briefs of the parties reveals that they are patently identical and refer to the same questions. It is plain that they are both similar and it will not matter which of the two sets of issues is adopted for my consideration of this appeal.

There is next the cross-appeal by the respondent/cross appellant in which the sole issue for consideration is whether the Court of Appeal was right in affirming the decision of the trial court to the effect that the cross-appellant did not establish his entitlement to the various interest claimed by credible evidence. Both parties are in agreement on this sole issue for consideration in the cross-appeal.

At the oral hearing of the appeal, both learned counsel for the parties proffered additional arguments in amplification of the submissions contained in their written briefs of argument.

Learned counsel for the appellant, Yusuf O. Alli, Esq. submitted with regard to the first issue that the alleged debt claimed by the respondent was in law statute barred and unenforceable in that it did not accrue within 6 years of the institution of the action pursuant to the provisions of Section 3 of the Limitation Act, 1623 and/or the Limitation Decree 1966. He stressed that a special defence or plea, such as one founded on the statute of Limitation, must be replied to by a plaintiff in a reply and that failure to do so will amount to acceptance of such special plea of the defendant. He contended that it was not the case of the respondent that there was an agreed date for the repayment of the overdraft alleged. In his view, the Limitation Act in the present transaction commenced to run from the 28th day of July, 1980 on which date the account of the appellant was allegedly overdrawn. He therefore submitted

that this action became statute-barred from the 29th day of July, 1986 and that the respondent's suit which was filed on the 16th February 1987 was clearly out of time.

Alternatively he pointed out that it was Exhibit 49 dated the 9th February, 1981 and not Exhibit 44 of the 9th February, 1982 that was the respondent's first letter of demand. He argued that Exhibit 49 having preceded Exhibit 44, time the Limitation Act, 1623 started to run was from the 9th February, 1981 which, all the same, rendered this suit filed on the 16th February, 1987 statute-barred and incompetent. He made a third submission on the issue. This is to the effect that the time within which to claim the debt, if any, started to run from February, 1980 in which month the appellant stopped the operation of his account. The action, having been filed on the 16th February, 1987 was here again statute-barred.

On the second issue, learned counsel attacked the evidence of the respondent as hearsay and unreliable and submitted that the court below had no legal basis on the facts to have affirmed the finding of the trial court on the issue of the award of N69,995.35 in favour of the respondent.

On the third issue, learned counsel pointed out that Uthman Mohammed, J.C.A., as he then was, had ceased to be a Justice of the Court of Appeal on the 1st July, 1993 when judgment in the appeal was delivered by the court below. He explained that the said Uthman Mohammed, J.C.A., was on the 3rd June, 1993 sworn in as a Justice of the Supreme Court of Nigeria. Relying on the case of *Ogbunyiya and others v. Okuda and others* (1978) 3 L R N 318 at 327 - 328 learned counsel submitted that the learned Justice, having become a member of this court on the 3rd June, 1993, lacked jurisdiction to express any opinion on the judgment of the Court of Appeal in issue on the 1st July, 1993. He urged the court to allow this appeal.

Learned counsel for the respondent, Mr. Biodun A. Adebara, in his reply on issue I, conceded that it is the Limitation Act, 1623 that applies to this transaction but submitted, relying on the case of *Angyu v. Malami* (1992) 9 N W L R (Pt. 264) 242, that time would only start to run from the date demand for the recovery of the outstanding overdraft was made by the respondent. He stressed that it was the respondent's letter of the 9th February, 1992, Exhibit 44, that was the first demand addressed to the appellant and not Exhibit 49, dated the 9th February, 1981. He argued that Exhibit 49 was merely a letter reminding the appellant of his indebtedness and inviting him to come over to the respondent's office for discussion on the issue. He contended that time started to run in the present transaction from the date of Exhibit 44, that is to say, the 9th February, 1982. This action having been

filed on 16th February, 1987 could not therefore be said to be statute-barred as it was instituted 5 years and seven days after the cause of action arose.

On issue 2, learned counsel submitted that from the pleadings and evidence adduced before the court, the court below was justified in affirming the finding of fact arrived at by the trial court to the effect that the appellant B was liable to the respondent in the sum of N69,995.35. He stressed that the total lodgments made by the respondent into his current account amounted to N377,777.35 as against his total withdrawals which added up to N447,772.71. The withdrawals therefore outweighed the deposit by N69,995.35 for which judgment was entered for the respondent.

C On issue 3, learned counsel relied on the provisions of section II of the Court of Appeal Act, 1976. The crux of his submission is that if a member of a panel of Justices who heard an appeal participated in the conference in respect of the appeal and thereafter reduced his opinion in writing and gave the same to another Justice of that court for pronouncement before he retired D from service or was elevated to a higher bench, or even died or otherwise became incapable of reading his opinion, the validity of such an opinion cannot be questioned. He argued that in the present case, Uthman Mohammed, J.C.A., as he then was, with the rest of the Justices who heard the appeal, participated in the conference over the appeal. Thereafter, he wrote his opinion E ion which he handed over to Okunola, J.C.A. on the date the appeal was heard and before his elevation to the Supreme Court. In these circumstances, he submitted that his opinion in the appeal was entirely without fault and unimpeachable.

On the cross-appeal, the submission of Mr. Adebara is that the cross- F appellant pleaded sufficient facts and adduced enough evidence to be entitled to all the interest it claimed. He referred to the decision of this court in *Union Bank of Nigeria Ltd. v. Professor Alhert Ozi* (1993) 3 NWLR (Pt.333) 385 where it was observed that the power to fix the interest payable on Bank loans is vested by law in the Central Bank of Nigeria. He indicated that there G was the evidence of P.W.1 which was sufficient proof of rates of interest pleaded and that there was no need to tender the Central Bank guidelines on interest.

Mr. Alli, for his own part, submitted that the cross-appellant had failed to dislodge the concurrent findings of the trial court and the court below H that the interests claimed were not established. Relying on the case of *Himma Merchant Bank Ltd. v. Aliyu* (1994) 5 NWLR (Pt. 347) 667 at 676-677, learned counsel submitted that the cross-appellant proffered no credible evidence on the interest claimed and therefore failed to prove the same. He pointed out that the facts of the case of *Union Bank of Nigeria Ltd v. Professor Alhert Ozi*,

supra, relied on by the cross-appellant are distinguishable from the facts of the present case. According to learned counsel, in the former case, the Central Bank guideline was tendered, there was evidence of agreement by the parties as to the rate of interest and documents were also tendered in support of the various rates of interest claimed, unlike in the present case. He urged the court to dismiss the cross-appeal.

Turning now to issue number I in the main appeal, both parties are in agreement that the English Limitation Act, 1623 is not only a statute of general application but that it is the law governing the limitation of action in the present suit. Section 3 of this statute provides that all actions in debt, as therein stipulated, shall be commenced within six years from the accrual of the cause of action. The appellant in paragraphs 22 & 23 of his further amended Statement of Defence pleaded thus -

“22 The defendant will in further denial and or in the alternative defence to paragraphs 6, 7,8,9,10, 11, 12, 13, 14, 15, 17,18,19,20,21,22 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33 of the amended statement of claim contend that the plaintiff’s action/claims being in debt, is in law unenforceable, and invalid in that the alleged debts did not accrue within 6 years before this action was instituted and is barred by Limitation Act of 1623 and/or Limitation Decree 1966.

PARTICULARS:

(i) *Each of the alleged sum of money granted as overdraft/debt arose in 1980.*

(ii) *The plaintiff knew and or ought to know of each of the debt since they became accrued since 1980*

(iii) *The defendant never acknowledged any debt due to the plaintiff.*

(iv) *The defendant did not at any time specifically pay part of any acknowledged debt due to the plaintiff.*

(v) *The defendant was not guilty of fraud, mistake or concealment of any fact relating to any of the alleged overdraft claimed.*

23. *The defendant will therefore urge the court to dismiss this action as baseless, time statute barred and constitutes an abuse of the process of court.”*

Mr. Yusuf Alii of learned counsel has vigorously contended that the appellant, having set up a special plea of the Limitation Act, it became incumbent on the respondent to file a reply thereto. He argued that where, as in this case, a plaintiff fails to file a reply to such a defence, he would be deemed to have admitted the special plea of the defendant.

The first question must be whether the plaintiff/respondent can, on the state of the pleadings, be deemed to have admitted, whether directly or by

necessary implication, that this claim is statute - barred as averred by the defendant/appellant.

It cannot be over-emphasised that the proper function of a reply in the settlement of pleading is to raise in answer to the defence, any matter which, to be admissible in evidence, must be specifically pleaded, or which makes the defence not maintainable or which otherwise might take the defence by surprise or, where F because of the defence filed, the plaintiff proposes to lead evidence in rebuttal or to raise issues of fact not arising out of the two previous pleadings. See Bakare and Another v. Ibrahim (1973) 6 SC 205, Azeez Akeredolu v. Lasisi Akinremi (1989) 3 NWLR (Pt. 108) 164 at 172 etc. A party C who desires to rely on any material facts to defeat the defence that an action is statute-barred must expressly plead such facts in his reply to take the case out of the statute unless he has already done so in his Statement of Claim.

Essentially, a reply may also constitute the defence of a plaintiff to a counterclaim of the defendant or to the new facts raised by the defendant in D his Statement of Defence. Where, however, as in the present case, no counterclaim is filed, further pleadings by way of a reply to the statement of defence is generally unnecessary if the sole purpose is to deny the averment contained in the Statement of Defence. See Akeredolu v. Akinremi, supra.

In the present case, the respondent had in paragraphs 24, 25 and 26 E of its amended Statement of Claim averred as follows

“24 In February, 1981 and January, 1982 the plaintiff’s Manager wrote two letters Ref. SGBNIIILY AS/MOR dated 19th February, 1981 and SGBN/IL/SO/AK dated 15th January, 1982 respectively to the defendant reminding him of his indebtedness to the plaintiff and inviting him to the F plaintiff’s Office for a discussion over the said indebtedness, to which the plaintiff received no reply.

25. The plaintiff wrote a letter of demand to the defendant for the repayment of the Overdraft on the 9th day of February, 1982 by the letter written by the plaintiff’s Manager which letter was replied to by the defendant by his letter dated 16th February, 1982, all of which are hereby pleaded. G The defendant is hereby given notice to produce the original at the hearing.

26. The plaintiff’s Solicitor, Messrs SHITTU AROSANYIN and company also wrote a statutory letter of demand dated 15th August, 1985 to the defendant demanding the repayment of the said overdraft. This letter is hereby H pleaded. The defendant is hereby given notice to produce the original at the hearing.”

The respondent, therefore quite clearly, pleaded that after the respondent had

written several letters of invitation to the appellant inviting him for a discussion over his indebtedness which the said appellant ignored, the respondent was obliged to make a written demand on him for the repayment of the overdraft in issue. The said demand was made on the 9th day of February, 1982 and was tendered in evidence as Exhibit 44. It is clear from the respondent's amended Statement of Claim that Exhibit 44 was the first written demand by the respondent on the appellant in respect of the overdraft.

A second demand of the 15th August, 1985 was also pleaded in paragraph 26 of the amended Statement of Claim. The first demand pleaded is, however, Exhibit 44.

It seems to me plain that Exhibit 44, if infact it was established, would constitute a complete answer to the defence under the Limitation Act as it would mean that this action which was filed on the 16th February 1987 was instituted in under six years of the accrual of the cause of action. Learned appellant's counsel cannot, with respect, be right when he submitted that the respondent required to file further reply in answer to the appellant's plea under the Limitation Act, that the respondent pleaded no facts which made the appellant's defence under the Limitation Act not maintainable or that the respondent must be deemed to have admitted the appellant's special plea as established. I will now consider whether the appellant succeeded in establishing his defence under the statute of Limitation.

Generally, a debt is repayable either on demand, or on notice given or upon any other condition agreed upon by the parties. See *Lloyds Bank Ltd. v. Margolis and others* (1954) 1 All E.R. 734 at 748, *Joachimson v. Swiss Bank Corporation* (1921) All E.R. 92 at 99 etc. It is also an implied term in the relationship between a banker and his customer that there should be no right of action for the repayment of an overdraft until there has been a demand or notice given. See *Angyu v. Malami* (1992) 9 NWLR (Pt. 264) 242 at 252. **The cause of action does not arise until there has been a demand made or notice given. When therefore there is no specific date agreed upon for the repayment of an overdraft, as in the present case, a demand should be made or notice given. In other words, a cause of action on an unpaid overdraft is not deemed to accrue where no specific date for payment is agreed upon until there has been a demand made or notice given.** The next question must now be an identification of the first letter of demand made on the appellant by the respondent in respect of the overdraft in issue. Whilst the respondent pleaded and [1997] 12 NWLR Ishola v. S.G.B. (Nig.) Ltd (Iguh, J.S.C.) 423 A asserted that this is Exhibit 44, the appellant contended that it is Exhibit 49.

.After a careful consideration of the above issue, the learned trial

Judge in the clearest possible term held thus -

“.....The first letter of demand herein is Exhibit 44 dated 9.2.82.”

Affirming the above finding of the trial court, the court below observed as follows-

“In the present appeal, while the appellant is asserting that the first letter of demand was Exhibit 49 dated 9/2/1981, the respondent was saying that its first letter of demand to the appellant was Exhibit 44 dated 9/12/82. Learned trial Judge having examined the letters Exhibits 44 and 49, decided that Exhibit 44 was in fact the first letter of demand.....The learned trial Judge was indeed right because Exhibit 49 is not a letter of demand but a letter drawing the attention of the appellant to the position of his account. Such letters usually written by banks to their customers do not amount to letters of demand. See Angyus v. Malami supra at page 253.”

It is trite that where there are concurrent findings of a trial court and the Court of Appeal, then unless the findings are -

D (i) found to be perverse; or
(ii) not supported by the evidence; or
(iii) reached as a result of a wrong approach to the evidence; or
(iv) a result of a wrong application of a principle of substantive law or procedure,

E this court, even if disposed to come to a different conclusion upon the printed evidence, cannot do so. See Enang v. Adu (1981) 11-12 SC 25 at 42, Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718, Igwego v. Uzengo (1992) 6 NWLR (Pt. 249) 561 at 576 etc. The aforesaid findings of both courts below that Exhibit 44 dated the 9th February, 1992 is the respondent’s first letter of demand to the F appellant in respect of the overdraft have neither been proved to be perverse or unsupported by evidence nor erroneous on point of law or fact. I have myself studied both Exhibits 44 and 49 with the evidence before the trial court and it is equally clear to me that only two letters of demand were addressed by the respondent to the appellant. These are Exhibits 44 dated the 9th February, G 1982 and Exhibit 45 dated the 15th August, 1985. The latter is a statutory letter of demand addressed to the appellant by the respondent’s solicitors demanding payment of the overdraft. Neither of the parties pleaded or testified to Exhibit 49 as a letter of demand. **Indeed, ex facie, Exhibit 49 is only a letter drawing the attention of the appellant to the position of his account and invit-**
H **ing him for a discussion over this indebtedness. Without doubt, such letters usually written by Bankers to their customers whose accounts are in the red do not and cannot amount to letters of demand. See Angyu v. Malami, supra at page 253. I am in total agreement with both courts below that Exhibit 44**

dated the 9th February, 1982 is the first letter of demand addressed to the appellant by the respondent. But the question remains to be answered whether the present suit is caught by the provisions of the Limitation Act, 1623.

Exhibit 44 dated the 9th February, 1982 was firmly established as the first letter of demand addressed to the appellant by the respondent in respect of the overdraft. The respondent's cause of action in the transaction therefore arose on the said 9th February, 1982. It is also not in dispute that the respondent's action was filed on the 16th February, 1987. On the issue under consideration, the learned trial Judge found thus -

"The first letter of demand herein is Exhibit' 44' dated 9.2.82. This action was filed on 16.2.87. The period between is about five years i.e. less than six years envisaged by section 3 of the Limitation Act of 1623 and/or section 7 (1) of the Limitation Decree 1966. I cannot therefore acquiesce with the rationale that the plaintiff's claim is statute-barred."

For its part, the court below held -

".....since the first demand was made on 9/2/1982 while the' action was filed on 16/3/1987, the decision of the trial court that the respondent's claim was not statute-barred must be upheld."

I, too, totally agree that the respondent's claims on the facts as found by the trial court and affirmed by the court below cannot in any way be said to be statute barred as the suit was filed 5 years and seven days after the accrual of the cause of action in the transaction. Issue 1 is therefore resolved against the appellant.

Issue 2 questions the correctness or otherwise of the judgment of the trial court in favour of the respondent in the sum of N69,995.35 as affirmed by the court below. In this regard, the respondent predicated his claim against the appellant on debt arising from overdraft facilities it granted to the appellant. The only witness who testified for the respondent in respect of this overdraft was P.W.1, Surajudeen Agunbiade, a Loans officer of the respondent bank. Learned counsel for the appellant attacked the evidence of this witness as hearsay, irrelevant and totally unreliable since he admitted not being the Manager of the respondent bank at all material times. Mr. Niemes, who was the then Manager and who granted the overdraft facilities to the appellant was said to have left the bank before P.W.1 was employed.

With respect to learned counsel, **it cannot be over emphasised that a company being a legal person or a juristic person can only act through its agents or servants and any agent or servant of a company can therefore give evidence to establish any transaction entered into by that company. Where the official giving the evidence is not the one who actually took part in the transaction on**

behalf of the company, such evidence is nonetheless relevant and admissible and will not be discountenanced or rejected as hearsay evidence. The fact that such official did not personally participate in the transaction on which he has given evidence may in appropriate cases, however, affect the weight to be attached to such evidence. See *Kate Enterprises Ltd. v. Daewood (Nig.) Ltd.* (1985) 2NWLR (Pt.5) 116, *Anyaebosei v. R.T.Briscoe (Nig.) Ltd* (1987) 3 NWLR (Pt.59) 84, *Chief ogunbor and others v. Chief Ugbede* (1976) 9-10 SC 179 at 187 etc.

P.W.1 gave clear evidence that his knowledge of the transaction emanated from the official file kept by the bank from which he tendered, in evidence, Exhibits 1-45. These Exhibits were inclusive of ledger cards in respect of the appellant's account, his statement of account, cheques through which withdrawals were made from the account by the appellant, bank drafts purchased and various letters exchanged by the parties in respect of the account. In my view, it is misconceived to attack the evidence of P.W. 1 as hearsay, irrelevant or inadmissible on the sole ground that he did not personally take part in the transaction in issue.

Learned appellant's counsel also attacked the affirmation by the court below of the judgment entered in favour of the respondent by the trial court on the ground that no proof of previous arrangement in the matter of the overdraft facilities was established by the respondent. Again, with respect, **the principle of law is long settled that if a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is nothing but a request for a loan and, if the cheque is honoured, the customer has borrowed the money by way of overdraft from the bank.** See *Cuthbert v. Robarts Lubbock and Co* (1909) 2 Ch. 226 at 233 and *A.CB. Ltd. v. Egbunike and Another* (1988) 4 NWLR (Pt.88) 350 at 365.

In the present case, it is the concurrent findings of both trial court and the Court of Appeal that the total withdrawals of the appellant from his current account were N447,772.71 while his total lodgments were N337,777.37. These findings are fully supported by admissible evidence before the court, inclusive of the appellant's admissions at the trial. They are also neither perverse nor erroneous in any way. **In my view, the appellant, by overdrawing his account, requested for an overdraft which the respondent by honouring his cheque duly granted. It is immaterial to the respondent's claim that the appellant did not enter into a formal agreement with the respondent in 1980 before the overdraft facilities were granted.**

In respect of the said overdraft, the learned trial Judge stated thus -

“The defendant admitted that he withdrew a total sum of N447,772.71 via Exhibit ‘3A’ - ‘31’ and ‘5’ - ‘25’. They are all cheques drawn by the defendant on the plaintiff bank. The undisputed total sum lodged by the defendant in his account is N377,777.35k. The withdrawals outweigh lodgments by a sum of N69,995.35k according to P.W.I. This must be so, all things being equal.

Such will amount to an overdraft. The authoritative opinion of the learned authors Megram & Ryder in their book Pegets Law of Banking, 8th Edition at page 132 is here relevant. It reads:-

“The drawing a cheque or accepting a bill payable at the Bank, when there are no funds sufficient to meet it, is presumably a request for an overdraft.”

The Court of Appeal in affirming the above findings of the trial court observed as follows -

“Although learned counsel to the appellant extensively attacked the oral evidence of P.W.I and the credibility of that witness, learned counsel failed to realise that the finding of the learned trial Judge in respect of the sum of N69,999.35 overdraft was in fact based on documentary evidence including the appellant’s own cheques drawn on the respondent bank Exhibit 3A-31, Exhibits 5-25 and above all, the appellant’s own admission that the total withdrawals from his own account was N447,772.71k while his total deposit into the same account was only N377,777.35k. The sum of N69,995.35 as found by the trial Judge is the difference between the amount withdrawn and the amount deposited by the appellant into his account which has in evidence.”

Additionally there is the evidence of the appellant himself under cross examination where he admitted his above total withdrawals and deposits into his account as follows -

“I withdrew the sum of N447,772.71 based on the money I had in my account. I signed all the cheques exhibited in the case and duly utilised the amounts therein. I lodged the sum of N377,777.35 in my account.....”

I think it ought to be mentioned in all fairness to the appellant that his main defence was that he paid in an additional deposit of N60,000.00 or N64,000.00 plus which was not credited to his account by the respondent. This claim was however rejected by the trial court as follows - .

“The plank of the defendant’s defence rests on his joker that he paid in certain amounts which were not credited into his account. The defendant is not sure of the total sum paid in by him and not credited into his account. In his examination in chief he said that the total sum not credited to his account was over N60,000.00. During cross-examination, the defendant put

the figure as N64,000.00 plus. The defendant relied heavily on Exhibit '68'. This exhibit does not appear to advance the case of the defendant to any considerable length. The payment of the sum of N41,287.00 by defendant's 'sales man' or 'boy' is seriously in issue. This is more so as the plaintiff tenaciously maintained that the over-draft stood at N69,995.35k. The defendant's 'sales man' or 'boy' is faceless. His name remains a mirage and he has not been called to testify. The defendant, a shrewed business-man said he gave out his teller through the unnamed boy without first having a photo copy of same. Such sounds incredible. Exhibit '68' further talks of two cheques paid in. During the process of clearing both in Ondo and Lagos respectively, it appears both cheques got misplaced in transit and the defendant was duly notified. The defendant had the duty to contact their drawers for replacement of those cheques. After all, the defendant did not say that the cheques were honoured and his account was not credited with proceeds this time around. I regret to say that the defendant's joker went to no avail as his defence stood on a weak ground. The over-draft to the tune of N69,995.35k must stand in the prevailing circumstances."

In affirming the above finding of the trial court, the Court of Appeal commented -

"The only payment into the appellant's account which was in dispute between the parties at the trial court was the alleged payment of the sum of N60,000.00 or N64,000.00 plus by the appellant which was not credited into his account. Having alleged the payment, the onus was on the appellant to prove it by credible and admissible evidence. Payment of money into an account can be established either by the oral evidence of the person who actually paid the money to the bank or by producing a teller from the bank showing on the face of it that the bank had received the payment. It was held by the Supreme Court in *Aeroflot v. U.B.A.* (1986) 3 NWLR (Pt.27) page 188 at 190 that a teller duly stamped with the Bank's stamp and initialled constitutes *prima facie* proof of payment and a customer after producing such a receipt need not go further to show that it was in fact an official of the bank who actually stamped and initiated the teller and that he had the authority of the bank to so do. The appellant in the case at hand not only failed to produce the bank teller by which the alleged payment of N64,000.00 plus or N60,000.00 was made but also failed to ever call the salesman or boy who actually made the payment to give evidence. The appellant in his evidence was not even sure of the amount allegedly paid into his account. The learned trial Judge was therefore perfectly justified in rejecting the claim of the appellant that such payment was made."

Having alleged the said payment of N60,000.00 or N64,000.00 plus to

the respondent bank, the onus was squarely on the appellant to establish this very material fact by admissible and credible evidence. **Payment of money into an account may be proved either by the oral evidence of the person who actually made the payment personally to the bank or by the production of a bank teller or acknowledgement showing on the face of it that the bank had received the payment. This is because a bank teller, duly stamped with the official stamp of the bank and properly initialled by the cashier, constitutes prima facie proof of payment of the sum of money therein indicated and a customer after producing such a receipt needs not prove more unless the payment is being seriously challenged.** See *Aeroflot v. UB.A.* (1986) 3 NWLR CPt.27) 188 at 190. C

The appellant in the present case not only failed to tender the bank teller against which the alleged payment was made, he also failed to call his salesman who purportedly made the payment to testify on the point. The appellant was not even sure of the exact amount allegedly paid into his said account as at one moment, he said it was N60,000.00 D and at another, he increased it to “N64.000.00 plus”. It is plain to me that the payment of the sum of N60,000.00, later changed to N64,000.00plus, allegedly made by the appellant but not credited to his account was clearly not established and was rightly rejected by both courts below. It is therefore clear that the finding of the learned trial E Judge in respect of the sum of N69,995.35 overdraft enjoyed by the appellant from the respondent bank as affirmed by the court below is fully supported by the credible evidence before the court and entirely justified. Issue 2 must again be resolved against the appellant.

Issue 3 questions the validity of the judgment of the Court of Ap- F peal. The main contention of learned counsel for the appellant is that since Uthman Mohammed, J.S.C., was no more a Justice of the Court of Appeal as at the 1st July, 1993 when judgment in the appeal was delivered, he could not as at that date validly express a judicial opinion on the matter. In other words, learned counsel argued that His Lordship, having ceased to be a Justice of the G Court of Appeal on the 3rd June, 1993, on which date he was elevated to this court, any opinion delivered on his behalf in any judgment of the Court of Appeal after that date would be invalid, null and void as it could not be the opinion of a member of that court. In this regard, the decision of this court in *Ogbunyiya and others v. Okudo and others* (1978) 3 LRN 318 at 327 - 328 was H relied upon. He drew the attention of the court to Section 226 of the Constitution of the Federal Republic of Nigeria, 1979 and Section 9 of the Court of Appeal Act, 1976. Both sections inter alia provide in effect that the Court of Appeal shall be duly constituted for the purpose of hearing and determining

any appeal if it consists of not less than three Justices. He concluded by submitting that on the said 1st July, 1993, only two Justices of the Court of Appeal sat contrary to law and that their decision was therefore unlawful and void.

Section 226 of the 1979 Constitution provides thus -

B *"226. For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any other law, the Court of Appeal shall be duly constituted if it consists of not less than three Justices of the Court of Appeal and in the case of appeals from -*

(a)..... (b).....

C *So, too, section 9 of the Court of Appeal Act, 1976 provides thus - "The Court of Appeal shall be duly constituted for the purposes of hearing and determining any appeal if it consists of at least three Justices"Provided "*

D But there is the provision of section 11 of the same Court of Appeal Act, 1976 dealing with the delivery of judgments and which runs thus -

"When, after an appeal in any cause or matter has been fully heard before the Court of Appeal, judgment is reserved for delivery on another day, then, on the day appointed for delivery of the judgment, it shall not be necessary for all those Justices before whom the appeal in the cause or matter was heard to be present together in Court, and it shall be lawful for the opinion of any of them to be reduced into writing and to be read by any other Justices, and in any such case the judgment of the Court of Appeal shall have the same force and effect as if the Justice whose opinion is so read had been present in Court of Appeal and had declared his opinion in person."

See too section 258(2) of the 1979 Constitution.

It seems to me clear pursuant to the provision of section 11 of Court of Appeal Act, 1976 and section 258 (2) of the 1979 Constitution of Nigeria that once an appeal in any cause or matter has been fully heard before the Court of Appeal and judgment is reserved, it shall not be necessary for all the three Justices who heard the appeal to be present together in court on the day appointed for delivery of the judgment. It is lawful if the written opinion of anyone of them who is unavailable is read by any other Justice of that court. I need stress, therefore, that the fact that only two of the Justices who heard the appeal sat to deliver the judgment of court cannot be any matter of great moment as it is clearly unnecessary for all the three Justices who heard the appeal to be present together in court for the delivery of the judgment. Accordingly I am unable to accept learned counsel's submission that the judgment of the Court of

Appeal in this case was void simply because only two Justices of the Court below who heard the appeal were present to deliver the judgment of court.

Learned counsel for the appellant however submitted that as Uthman Mohammed, JCA., as he then was, who presided at the hearing of the appeal before the Court of Appeal was no more a Justice of that court on the 1st July, 1993 when judgment in the matter was delivered, his opinion was invalid, incompetent and rendered the entire judgment null and void.

I think it necessary for a better appreciation of this matter to set out briefly the relevant facts around which the issue under consideration revolves. The appeal against the judgment of the trial court in this case was fully heard at the court below on the 12th day of May, 1993 before the following Justices of that court, namely:-

1. Honourable Justice Uthman Mohammed, J.C.A.
2. Honourable Justice Muritala Aremu Okunola, J.C.A.
3. Honourable Justice Mahmud Mohammed, J.C.A.

It is clear from the record of proceedings that at the conclusion of the hearing of the appeal on the 12th May, 1993, all three justices who heard the appeal held a conference in respect thereof the same day. Thereafter Uthman Mohammed, J.C.A. as he then was, perhaps, aware of his imminent elevation to the Supreme Court of Nigeria, reduced into writing his agreement with their unanimous decision at the conference. He handed his opinion over on the same 12th May, 1993 to Okunola, J.C.A., for pronouncement on the date of judgment.

On the 3rd June, 1993, Uthman Mohammed, J.C.A., as he then was, was elevated and sworn in as a Justice of the Supreme Court of Nigeria. The appeal in issue came up for judgment on the 1st day of July, 1993 on which date, pursuant to Section 11 of the Court of Appeal Act, 1976, only Okunola and Mahmud Mohammed, JJ.C.A. sat. The leading judgment was delivered by Mahmud Mohammed, J.c.A. to which Okunola, J.C.A. concurred. Pronouncement on the opinion of Uthman Mohammed, J.c.A., as he then was, was then made by Okunola, J.C.A. which Pronouncement agreed with the judgment of the court. It seems to me established, firstly, that the opinion of Uthman Mohammed, J.C.A. as he then was, in the appeal was clearly written and ready since the 12th May, 1993 when he was still a Justice of the Court of Appeal and before his elevation to the Supreme Court of Nigeria, secondly, that the said Uthman Mohammed, J.C.A. did not and could not have sat on the panel of the Court of Appeal on the date judgment was delivered in the cause and, finally, that there was a mere pronouncement of his opinion in the

appeal by Okunola, J.C.A. on the date of judgment.

In this connection, attention must also be drawn to the provisions of Section 258(2) of the Constitution of Nigeria, 1979 which run thus-

“258(2) *Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion:*

Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered, and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing.”

The opinion of Uthman Mohammed, J.C.A., as he then was, was expressed in writing on the 12th May, 1993 when he was still a Justice of the Court of Appeal and delivered to Okunola, J.C.A. the same day for pronouncement on the date of judgment. The same was duly pronounced by Okunola, J.C.A. on the date of judgment on the 1st July, 1993. The record to proceedings of that day showed the panel of Justices before whom the judgment of court was delivered as follows:-

“1. Honourable Justice Muritala Aremu Okunola, J.C.A.

2. Mahmud Mohammed,

E The following note then appears -

“The Hon. Justice Uthman Mohammed, who was sworn in as a Justice of the Supreme court on Thursday, June, 3rd, 1993 was among the justices who heard this appeal”

F The record then sets out the judgment delivered personally by Okunola and Mahmud Mohammed, J.C.A. respectively. Thereafter, the proceedings conclude thus:-

“Pronouncement on the Judgment of Uthman Mohammed, J.C.A. (as he then was) by Muritala Aremu Okunola, J.C.A.

G *My learned brother, Uthman Mohammed, J.C.A. (as he then was) presided over this appeal. Reproduced hereunder is his opinion which he handed over to me after our conference on the day we heard this appeal and before his elevation to the Supreme Court.*

JUDGMENT OF UTHMAN MOHAMMED, J.C.A.

I agree,”

H **It seems to me necessary to stress, at the risk of repetition, that the opinion of Uthman Mohammed, J.C.A., as he then was, having been written on the 12th May, 1993 on which date he was still a member of the Court of Appeal, and having been duly pronounced upon by Okunola, J.C.A. on the date of judgment on the 1st July, 1993 .. I find myself unable to subscribe to**

the submission of learned counsel for the appellant to the effect that the said opinion of Uthman Mohammed, J.C.A., as he then was, is a nullity as he was no more a member of the Court of Appeal on the date judgment in the appeal was delivered.

Learned counsel for the appellant further drew the attention of the court to the case Ogbunyiya and others v. Obi Okudo and others (1978) 3 LRN B 318 to buttress his argument that Uthman Mohammed, J.C.A. as he then was, having become a Justice of this court on the 3rd June, 1993, lacked the jurisdiction or competence to give an opinion on the judgment of the Court of Appeal delivered on the 1st July, 1993. In the Ogbunyiya case, however, the following facts were established -

(i) *that the appointment of Nnaemeka-Agu, J. as he then was, as a Justice of the Court of Appeal took effect from the 15th June, 1977.*

(ii) *that he ceased to be a Judge of the High Court of Anambra State on the 15th June, 1977.*

(iii) *That on the 17th June, 1977 he physically sat in his capacity D as a Judge of the High Court of Anambra State to deliver the judgment on appeal.*

It was held, quite rightly, by this court that a High Court Judge who delivered a judgment in that capacity after his appointment to the Court of Appeal had taken effect was acting without jurisdiction and the judgment was null and E void.

The point must be stressed that the facts of the Ogbunyiya case are quite distinguishable from those of the present case. In the former case, the High Court Judge physically sat in his capacity as a High Court Judge at his Onitsha Judicial Division and delivered his judgment as a F High Court Judge after his appointment as a Justice of the Court of Appeal had taken effect and he had therefore ceased to be a Judge of the High Court. In the present case, however, thman Mohammed, J.C.A., as he then was, took part in the full hearing of the appeal after which it was adjourned to the 1st July 1993 for judgment. Conference in respect of G the appeal was held by all the three Justices concerned on the 12th May, 1993. The same day Mohammed, J.C.A. delivered his written opinion in the appeal to Okunola, J.C.A. for pronouncement on the date of judgment. His opinion in the appeal was indisputably written by him when he was still a Justice of the Court of Appeal. He neither wrote it after his H elevation to this court took effect nor did he physically sit in the Court of Appeal to join in the delivery of the judgment. Besides, the Ogbunyiya Case was purportedly decided by a single Judge of the High Court whose only invalid judgment was available in the case. This is as against the

present case where there is a leading judgment of the court with two concurring opinions including that of Uthman Mohammed, J.C.A., as he then was, which was pronounced on his behalf by Okunola, J.C.A. Additionally there were no corresponding provisions like Section 258(2) of the 1979 Constitution of Nigeria and section 11 of the Court of Appeal Act, 1976 that operated in B favour of the learned trial Judge in the Ogbunyiyi case. In my opinion, section 258(2) of the 1979 Constitution of Nigeria appears to cover the procedure adopted by the court below in the determination of the appeal before it.

Learned appellant's counsel then played his last card on the issue under consideration. He referred to the decision of the West African Court of C Appeal in *Onyeama Ezenwa v. Samuel Mazeli and others* (1955) 15WACA 67 at 69 where it was held that the hearing of a case continued up to the delivery of the judgment and that a trial Judge may properly reopen a case and make an order of further joinder of the parties at any stage of the proceeding before the delivery of his final judgment. The new point being canvassed by learned D counsel was that the hearing of a case continued until the delivery of judgment and that although Uthman Mohammed, J.C.A., as he then was, took part in the hearing of the appeal, he was no more a Justice of the Court below as at the date of the delivery of judgment which was part of the hearing. He also submitted that a Justice of the Court of Appeal, once elevated, retired, dismissed or dead ceases to be a member of that court and my not give an opinion E in respect of any appeal in which he took part in hearing before his elevation to a higher bench, retirement, dismissal or death.

The first point I desire to make is that the word "hearing" in respect of a cause or matter even though it may in most cases, connote the "hearing F and determination" thereof, there may be circumstances or something in the context in which it is used which either by natural interpretation, intendment, necessary implication or otherwise would diminish or cut down its ordinary meaning. See *Re Green* 51 L.J. Q.B. 44 per Lord Blackburn. See too *R. v. Canterbury (Archbishop)* 28 L.J.Q.B. 154 As Denman, C.J. plainly put it, sometimes to G "hear" is not quite the same as to "hear and determine" See *R. v. Warwickshire Justices*, 4 L.J.M.C. 62.

It is now necessary briefly to examine once again the provision of Section 258(2) of the Constitution of Nigeria, 1979 with a view to determining whether by natural interpretation, intendment, necessary implication or otherwise, H the context in which the word "hearing" is therein used may be said to have a limited meaning or to have confined its meaning in any way to "hearing" simpliciter as opposed to "hearing and determination". It is perhaps necessary to reproduce this section of the Constitution once again.

Section 258(2) of the 1979 Constitution provides -

“Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, and may state in writing that he adopts the opinion of any other Justice who delivers a written opinion.

Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered, and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing” .

(Italics supplied for emphasis)

In the first place the proviso to Section 258(2) of the 1979 Constitution provides that it shall not be necessary for all the Justices who HEARD an appeal to be present when judgment is to be delivered. Indeed, the second arm of that proviso provides that the opinion of an unavailable Justice who heard and appeal may be pronounced on judgment day by any other Justice whether or not he was present at the hearing. That Section of the Constitution by natural interpretation, intendment or by necessary implication appears clearly to limit the meaning of “hearing” therein stated up to the stage the parties have fully argued and concluded their respective cases and the appeal is thereafter adjourned for judgment.

It seems to me quite clear from a close examination of Section 258(2) of the 1979 Constitution that the “hearing” therein envisaged is that concluded when the parties have closed their respective addresses, arguments or cases and the appeal is adjourned for judgment. I therefore entertain no doubt that Uthman Mohammed, J.C.A., as he then was, took full part in the hearing of the appeal in issue notwithstanding the fact that he was not present when judgment in the appeal was delivered and that the pronouncement of his opinion by Okunola, J.C.A. was, to all intents and purposes, valid constitutional and in accordance with the law.

Reverting once more to the decision in Onyema Ezenwa v. Samuel Mazeli supra, I think it ought to be observed that the interpretation of the word “hearing” in that case was in relation to the issue of joinder of parties as plaintiffs under the provisions of Order IV Rule 5(1) of the then Supreme Court (Civil Procedure) Rules of Nigeria. Having regard to the said Rules of Court under consideration, the West African Court of Appeal arrived at the decision, and quite rightly in my view, that the hearing of a case continued up to the delivery of the judgment and that a trial Judge may therefore properly reopen a case and order the joinder of parties at any stage of the proceedings before final judgment. The decision in that case needs not therefore be binding in the present case in so far as the meaning of the word “hearing” in the context of the two enactments are entirely different.

I think I should point out that the provisions of Section 258(2) of the 1979 Constitution of Nigeria which I have set out earlier on in this judgment govern both this court and the court below alike. I need only observe that this court has times without number exercised its undaunted jurisdiction pursuant to the said Section 258(2) of the 1979 Constitution of Nigeria. This, it has done, by the opinion of an unavailable Justice, retired, elevated or dead, being pronounced by any other Justice of the court so long as such opinion was duly given at a time the retired, elevated or dead Justice was still a member of the court. See *Uba Ltd and Another v. Mrs N. Achoru* (1990) IOSCNJ 17; (1987) 1NWLR(Pt.48) 172; *Alhaja Juradat Animashaun v. Olojo* (1990) 10 SCNJ 43; (1990) 6 NWLR(Pt.154) flf; *Ademola Atoyebi v. Williams Odudu* (1990) 10 SCNJ. 52; (1990) 6 NWLR (Pt.151) 384; *The Registered Trustees of Apostolic Church v. Mrs. Emmanuel Olowoleni* (1990) 10 SCNJ 69; (1990) 6 NWLR (Pt.155) 514; *Globe Fishing Industries Ltd and others v. Chief Folarin Coker* (1990) 11 SCNJ 56; (1990) 7 NWLR (Pt.162) 2651 *Chief Asuguo Oko and others v. Chief James Ntukidem and others* (1993) 2 SCNJ 33; (1993) 2 NWLR (Pt.274) 124; *Dr. Kwazeme Ofundun v. S.E. Niweigha* (1993) 2 SCNJ 73; (1993) 2 NWLR (Pt.275) 253; *Gregory Obi Ude v. Clement Nwara and Another* (1993) 2 SCNJ 47; (1993) 2 NWLR (Pt.278) 638; *Jinadu Ajao and others v. Bello Adigun* (1993) 3 SCNJ 1; (1993) 3 NWLR (Pt.282) 389; *C.C.B (Nig.) Ltd v. Emeka Ogwuru* (1993) 32SCNJ 53 at 64; (1993) 3 NWLR(Pt.284) 630; *Ibrahim Kano v. Gbadamosi Oyelakin* (1993) 3 SCNJ 65 at 89; (1993) 3 NWLR (Pt.282) 399; *The State v. Nnolim and Another* (1994) 6 SCNJ (PU) 48 at 66; (1994) 5 NWLR(Pt.345) 394; *Eboigbe v. N.N.P.C.* (1994) 6SCNJ71 at81; (1994)5 NWLR (Pt.347) 649; *Alhaji Aliyu v. Dr. fA Sodipo* (1994) 5 SCNJ 1 at 23; (1994) 5 NWLR (Pt.342) 1; *Himman Merchants Ltd. v. Alhaji Inuwa* (1994) 6 SCNJ. (Pt. 1) 87 at 101; (1994) 5 NWLR (Pt.347) 667.

The procedure adopted by this court in the above cases was substantially applied by the court below in the determination of this appeal. In my view, there can be no reason whatever to fault this time tested procedure which, speaking for myself, is unimpeachable, promotes speedy administration of justice, is in accordance with the law and the Constitution of the land and is incapable of occasioning any miscarriage of justice or undue delay in the determination of causes before this court or the Court of Appeal. I will now briefly dispose of the cross-appeal.

The sole issue in the cross-appeal is whether the court below was right in upholding the decision of the trial court that the interest claimed was not established. Without doubt, a party that claims interest has the duty to plead and proffer credible evidence in proof thereof. See *Ekwunife v. Wayne* (1989) 12 SCNJ 99; (1989) 5 NWLR (PU22) 422. **It is beyond dispute that in the present case, there was no express agreement as to the rate of interest payable by the appellant on the overdraft as, on the evidence, the facility was not granted in writing. But where there is no express agreement as to the rate of interest payable, it seems that the bank is entitled to charge interest rate on**

the basis that there is now an established custom to that effect or that the customer has impliedly consented where, without protest, he allows his account to be debited with such interest. See Barclays Bank of Nigeria Ltd. v. Alhaji Maiwada Abubakar (1977) 10 SC 13, Even the appellant admitted in his evidence as follows -

“I know very well that when banks give out loans, they do it to B attract interest. Since I dont want to pay interest, I refused to take their loan.”

I will now examine how the cross-appellant pleaded and proved the interest claimed.

By paragraph 22 of its amended Statement of Claim, the cross-appel- C lant pleaded thus -

“22. The rates of interest fixed by the Monetary Authorities of the Central Bank of Nigeria for 1980 up to 1983 was 11%, for 1984 up to 30th September, 1986 it was 13% per annum, from 1st October, 1986up31stAugust, 1987itwas 15% and as from 1st of September, 1987 up to date is 10% per D annum.

In its evidence, however, P.W. 1 testified as follows -

“Interest rate varies and such is determined by the Central Bank. From 1980-83, the interest rate was 11%. From 83-86, it was 13%. From 86 to middle '87 it was 15%. From middle of 1987 to date it is 19%. We also E charge commission on turn overs at the rate of 0.2%. We also charge commissions on Bank drafts issued at the rate of N2.52.”

The trial court after a careful consideration of this issue was of the opinion that the interest claimed was not satisfactorily established. The court below affirmed this finding of the trial court when it observed - F

“In the case at hand, although the respondent pleaded in its Statement of Claim that the overdraft was granted under an agreement which specified the various rates of interest chargeable, such agreement was not proved at the trial “

These are concurrent findings of fact which I can find no reason from the G records to overturn.

In the final result, both the appeal and cross-appeal fail and are hereby dismissed. Each party will bear his/its own costs and, accordingly, there will be no order as to costs.

H

WALI JSC

I have the privilege of reading in advance a copy of the leading judgment of my learned brother Iguh, JSC and I agree with it in its entirety.

There is no doubt that from the evidence adduced in this case, exhibit 44 was the letter of demand from the respondent/cross-appellant for the payment of overdraft granted to the appellant by it. Exhibit 44 was dated 9th February, 1982. The cause of action matured on that date and the time for the purpose of application of S.3 of the Limitation Act 1623 or S. 7(1) of the Limitation Decree of 1966 would start running from that date. So, computing the 6 year limitation period provided in the sections of the two statutes referred to above it would be revealed that the suit was filed within the statutory limitation period of six years since it was filed on 16th February, 1987. Until a specific demand for payment of loan or over-draft granted to a customer by his bank is made, the date of cause of action remains at large. See *Angyu v. Malami* (1992) 9 NWLR (Pt.264) 242 and *Liyod Bank Ltd v. Margolis & Ors.* (1954) 1WLR 644? It is a condition precedent to the payment of the loan as over-draft.

As regards the admissibility of evidence of P.W.1 which learned counsel for the appellant made an issue of as hear-say, both the trial court and the Court of Appeal have in my view resolved it against the appellant rightly. In addition to the oral evidence of P.W.1 which was given as a foundation for the documents tendered through him as part of the Bank record, the said documents tendered and admitted contained over-whelming evidence in proof of the appellant's indebtedness to the respondent/cross-appellant in the tune of N69,995.35K. The two courts below made concurrent unimpeachable findings of fact on the Issue which I find no valid and convincing reason to interfere with see *Igwego v. Ezeugo* (1992) 6 NWLR (Pt.249) 561 and *Otubu & Ors v. Guobadia* (1984) NSCC 650; (1984) 10 S.C. 130.

My learned brother Iguh JSC, has exhaustively dealt with the point raised under Issue 3 as regards the validity of the Court of Appeal judgment to which Uthman JCA expressed his opinion with at the conference that he would dismiss the appeal, before his elevation to the Supreme Court. His opinion was pronounced in court by Okunola, J.C.A. on the day the judgment was delivered. The issue is well covered by sections 258(2) of the 1979 Constitution and 11 of the Court of Appeal Act 1976.

The fact that the case can be re-opened any time before judgment does not mean that the Court of Appeal judgment in this case is invalid. Even if for any reason the Court of Appeal had found it necessary to re-open the case before judgment, it could have done so and heard the appeal *denovo*.

It is for these and the fuller reasons in the judgment of my learned brother Iguh, JSC that I also hereby dismiss both the main appeal and the cross-appeal for want of merit. I subscribe to the consequential order as to costs made in the lead judgment

KUTIGIJSC

I read before now the judgment just delivered by my learned brother Iguh J.S.C. I agree with his conclusion that both the appeal and the cross-appeal ought to fail. They are accordingly dismissed with no order as to costs.

B

OGWUEGBUJSC

I have had the advantage of reading the draft of the judgment just read by my learned brother Iguh, J.S.C. It has carefully and exhaustively dealt with all the issues canvassed before us and I entirely agree with it.

There is however the third issue for determination in the appeal I will like to comment on because of its constitutional nature and it reads:

“Whether the judgment of the lower court delivered by only two justices of that court was not a nullity after the third Justice that took part when the appeal was argued and judgment reserved no more de facto, de jure a member of that Court before the lower court purported to have delivered the judgment in this case.”

The learned appellant’s counsel submitted that the Honourable Justice Uthman Mohammed, IC.A. (as he then was) having been sworn in as a Justice of this court on 3:6:93 ceased to be a Justice of the Court of Appeal on that date and was no more a Justice of that court on 1:7:93 when according to counsel, “the court purported to deliver the judgment appealed against herein.” Two dates which are material in this appeal are 3rd June, 1993 and 1st July, 1993. It was the further submission of learned counsel that as at 1st July, 1993, Hon. Justice Uthman Mohammed, J.S.C. could not validly under the Constitution of the Federal republic of Nigeria, 1979 and under the Court of Appeal Act, 1976 express a judicial opinion on any judgment in the court below.

He further contended that no other Justice of that court could read any opinion of His Lordship on any judgment after 3:6:93. He referred us to the case of Ogbunyiya & 7 Ors. v. Okudo & Ors (1978) 3 L.R.N. 318 at 327-328. He also submitted that the hearing and determination of a matter at the Court of Appeal starts from the time the parties exchange their briefs of argument and extends to the argument or oral hearing of the appeal and continues until judgment is delivered. He cited and relied on the case of Ezenwa v. Mazeli & Ors (1955) H 15WACA 67. Learned counsel referred us to section 226 of the Constitution of 1979 and Sections 9 and 11 of the Court of Appeal Act, 1976 as amended. He argued that the hearing of a case continues up to the delivery of judgment and in view of the mandatory provision of

section 226 of the constitution, he urged us to declare the judgment null and void.

It is appropriate for the proper appreciation of the issue of the competence of the court to identify the provisions of the Constitution and the Court of Appeal Act relied on by the appellant.

B Section 226 of the Constitution reads:

“226 For the purpose of exercising any jurisdiction conferred upon it by this constitution or any other law, the Federal Court of Appeal shall be duly constituted if it consists of not less than 3 Justices of the Federal Court of Appeal, and in the case of appeals from-

C (a).....

(b).....

Sections 9 and 11 of the Court of Appeal Act, 1976 as amended reads:

D *“9. The Court of Appeal shall be duly constituted for the purpose of hearing and determining any appeal if it consists of at least three Justices:*

Provided that nothing in this section shall preclude a Justice who does not concur in the opinion of the other Justices from delivering a dissenting opinion.

E *11. When, after an appeal in any cause or matter has been fully heard before Court of Appeal, judgment is reserved for delivery on another day, then, on the day appointed for delivery of the judgment, it shall not be necessary for all those justices before whom the appeal in the cause or matter was heard to be present together in court, and it shall be lawful for the opinion of any of them to be reduced into writing and to be read by any other*
F *justice; and in any such case the judgment of the court shall have the same force and effect as if the justice whose opinion is so read had been present in court and had declared his opinion in person.”*

Section 258 of the Constitution is equally relevant to this appeal.

Section 258(2) is a reaffirmation of section 11 of the Court of Appeal Act.

G Section 258 provides:

“258(1)

(2) Each Justice of the Supreme Court or the Federal Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any Justice who delivered a written
H *opinion:*

Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered, and the opinion of a Justice may be pronounced or read by another Justice whether or not he was present at the hearing.

(3).....

In this appeal, there is no argument that on being sworn in as a Justice of this court on 3:6:93, Uthman Mohammed, J.S.C. ceased to be a Justice of the Court of Appeal and this is so in the absence of any other material before us as to the effective date of his appointment as a Justice of the Supreme Court by the Provisional Ruling Council. However, the facts of the case of Ogbunyiya v. Okudo (supra) cited by the learned appellant's counsel are not on all fours with the facts of the present appeal as rightly stressed in the lead judgment of my learned brother, Iguh, J.S.C.

There is also no ambiguity in the provisions of Section 226 of the Constitution and section 9 of the Court of Appeal Act that the Court of Appeal shall be duly constituted for the purpose of exercising any jurisdiction which includes the hearing and determination of appeals, if it consists of at least three Justices.

The panel of the Court of Appeal, Kaduna Judicial Division which heard the appeal on 12:5:93 comprises the following Justices: Uthman Mohammed, J.C.A. (presiding), Muritala Aremu Okunola and Mahmud Mohammed, J.J.C.A. Judgment was reserved and no date was fixed as is the practice in the Court of Appeal where parties are notified later of the date of judgment. Judgment in this case was infact delivered on 1:7:93 after Uthman Mohammed, J.C.A. had been sworn in as a Justice of this court. Okunola and Mohammed, J.J.C.A. sat and delivered the judgment.

A certified true copy of the proceedings of 1:7:93 shows the following:

“Pronouncement on the judgment of Uthman Mohammed J.C.A. (as he then was) by Muritala Aremu Okunola, J.C.A. F

My learned brother, Uthman Mohammed, J.C.A. (as he then was) presided over this appeal. Reproduced hereunder is his judgment which he handed over to me after our conference on the day we heard this appeal and before his elevation to the Supreme Court.

Judgment of Uthman Mohammed, J.C.A. I agree.” G

The last line of the passage quoted above is the alleged judgment of Justice Uthman Mohammed, J.C.A. (as he then was). It is unsigned and undated. But for the statement credited to Okunola, J.C.A., one would not know the judgment referred to as the suit number was not stated. The original copy of the said judgment is not before us even though what is reproduced above is said to be a certified true copy. The lead judgment written by Muhmud Mohammed, J.C.A. bears a suit number, a date and was signed by him and so with that of Okunola, J.C.A. who concurred in the opinion of

Mohammed, JCA.

Since Uthman Mohammed JCA. (as he then was) was not physically present to read the alleged unsigned and undated judgment, I am unable to hold that the statement “I agree” appearing in the certified true copy of proceedings is the opinion envisaged in section 258(2) of the constitution or B section 11 of the Court of Appeal Act. At best, it is his concurrence in the conclusion arrived at the conference held after the hearing of the appeal which Okunola, J.C.A. pronounced. It would have been otherwise if no conference was held and judgment delivered after his elevation to the Supreme Court.

The pronouncement made by Okunola, J.C.A. should be seen as one C of those pronouncements which the Court of Appeal and this court make when one of the Justices who heard an appeal retires, dies or is elevated to the Supreme Court before judgment in the case is delivered after conference is held. See *Globe Fishing Industries Ltd. & Ors v. Coker* (1990) 7 NWLR (Pt.162) 265; *Oko & Ors v. .Ntukidem* (1993) 2 NWLR (Pt.274) 124; *Ofondu v. Niweigha* D (1993) 2 NWLR (Pt.275) 253; *Ude v.Nwara* (1993) 2 NWLR (Pt.278) 638 and *Duru v. The State* (1993) 3 NWLR (Pt.281) 283.

Situations such as the present had arisen in the past in the two appellate courts and they were resolved in the manner illustrated by the above cases and no question of nullity arose.

E In my humble opinion, section 226 of the constitution was not breached in this case. I am satisfied that the appellant faced with unimpeachable and concurrent findings of the courts below is looking for a route through which to escape from the consequences of those findings.

F For the reasons I have given above and the fuller reasons given in the judgment of my learned brother Iguh, J.S.C. I dismiss the appeal and abide by the consequential orders including those as to costs made in the lead judgment.

G **ADIO JSC**

I have had the advantage of reading, in draft, the judgment just read by my learned brother, Iguh, J.S.C., and I agree that the appeal and the cross-appeal fail. Accordingly, I too dismiss them. I abide by the order relating to costs.

H Appeal dismissed, Cross-appeal dismissed.