

**SUPREME COURT OF NIGERIA**  
 20TH JUNE, 1997. SC. 80/1995  
**CORAM:- A. B. WALI, I. L. KUTIGI, E. O. OGWUEGBU,**  
**U. MOHAMMED, A. I. IGUH, JJSC**

ALLIED BANK OF NIGERIA LIMITED ..... APPELLANT  
 AND  
 JONAS AKUBUEZE ..... RESPONDENT

**BANKING** - *Cheques - Cheque drawn by a customer - If there is enough funds in that account - The bank will be liable in damages - Where it failed to honour the cheque.*

**BANKING** - *Current accounts combination - Separate current accounts kept by a customer - The bank is entitled to combine them - Unless precluded by express or implied agreement.*

**BANKING** - *Current accounts combination - Right of bank to combine them - Is limited to where the accounts are held in the same right - That is same name, character or capacity.*

**BANKING** - *Current accounts combination - Where the accounts in issue are not in the same right - And transactions in the accounts were never mixed up - Implied agreement to keep the accounts separate exist.*

**BANKING** - *Current accounts combination - Without obtaining respondent's prior consent - And the failure to honour his cheque - Are wrongful.*

**BANKING** - *Cheques - Wrongful dishonour of a customer's cheque - Amounts to a breach of contract - Which entitles a trading customer to substantial damages - Though actual damage was neither pleaded nor proved.*

**COURTS** - *Judgments - Exhibits - Trial court's reason for rejecting Exhibit O - Is erroneous - Though the error is immaterial - As no injustice was occasioned.*

**DAMAGES** - *Exemplary damages - Whether recoverable in an action in contract - As in this case of a bank wrongfully dishonouring a customer's cheque.*

**DAMAGES** - *Exemplary damages - Purpose thereof - Is to punish defendant*

*and vindicate the strength of the law - Three categories under which it may be awarded in actions in tort.*

**DAMAGES** - *Excessive award - Substantial damages - Where respondent is entitled to substantial damages - For wrongful dishonour of his cheque - Excessive award will be reduced by that Supreme Court.*

**EVIDENCE** - *Pleadings - Evidence that is inconsistent with pleadings - Though already admitted inadvertently - Will be disregarded.*

**PLEADINGS** - *Documentary evidence - Where the document or fact pertaining thereto was not pleaded - The exhibit will not be acted upon.*

**PLEADINGS** - *Failure to plead a particular defence - Court must confine itself to pleaded issues - Save where there is need to raise a fundamental issue suo motu.*

**PLEADINGS** - *Evidence - That is at variance with the pleadings - Must be disregarded - As it goes to no issue.*

### **FACTS**

The plaintiff/respondent was a customer of the defendant/appellant. Plaintiff maintained two distinct and separate current accounts with the defendant in separate names though he was the sole signatory to both accounts. Plaintiff owned account No. 126 with two other persons which he operates for import business while account No. 1028 is used for his supermarket business. On 13/6/86, the defendant wrongfully dishonoured plaintiff's Cheque for the sum of N7,100.00 drawn on his account No. 1028 which said account was in credit to the tune of the amount drawn.

Plaintiff filed an action against the defendant before the High Court Onitsha claiming the sum of N1,000,000.00, N500,000.00 thereof being general damages and the remainder being exemplary damages for breach of Contract. The trial Court found for the plaintiff and awarded the sum of N72,000.00 exemplary damages to him. Defendant's appeal to the Court of Appeal was dismissed. Defendant has further appealed to the Supreme Court raising 3 issues.

### **ISSUES FOR DETERMINATION**

*"1. In the circumstances of this case, whether under the state of our law the appellant was duty bound and or legally enjoined to notify the respondent and or obtain his consent before exercising its legal right to combine two*

*accounts maintained, owned and operated by the respondent with the appellant. Etc, see p. 1213*

**HELD** (Unanimously allowing the appeal in part per lead judgment of **IGUH JSC**)

**Failure to plead a particular defence**

1. It is therefore, quite clear, on the state of the pleadings that the appellant at no time pleaded any combination of the respondent's two accounts. On point of fact, the defence of combination of the accounts was specifically denied, the appellant maintaining that it merely with-held the respondent's balance in his account No, 1028 so as to stop the respondent from withdrawing on the same account until the debit balance in Account No. 126 is cleared. This defence was therefore not an issue raised by the parties in their pleadings. In this regard, it cannot be over emphasized that it is an elementary and fundamental principle of the determination of disputes between parties that Courts of law must limit themselves to the issues raised by the parties in their pleadings as to act otherwise might well result in the denial to one or the other of the parties of his right to fair hearing. Accordingly, and this is trite, a judgment of Court must confine itself to the issues as settled by the parties in their pleadings and not otherwise unless, of course, the question concerns a fundamental issue such as jurisdiction which a trial or an appellate Court is in the interest of justice, perfectly entitled to raise suo motu at any stage of the proceedings. (p. 1217 B)

**Evidence that is at variance with pleadings**

2. It suffices to state at this stage that the inconsistency in the evidence of the appellant's witnesses on the issue of the defence of a combination of the two accounts notwithstanding, it ought to be pointed out that its claim on combination which is clearly at variance with its pleadings went to no issue and was rightly dismissed by both Courts below. This is because parties are bound by their pleadings and evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the Court. (p. 1218E)

**Already admitted evidence that is inconsistent with pleadings**

3. It would make no difference that such evidence which is inconsistent with the pleadings, as in the present case, had been received by the Court. Again, this is because, evidence which is infact adduced, but is contrary to the pleadings, should never be admitted. It matters not that the other side did not infact object to it or that the trial judge did not reject it. Although, it is the duty of counsel to object to inadmissible evidence and the duty of the trial court to

refuse to admit such inadmissible evidence, if notwithstanding this, evidence not pleaded or which is contrary to the pleadings is inadvertently admitted, it is the duty of the Court to disregard it as irrelevant to the issue properly raised by the pleadings and thus to treat such inadmissible evidence as if it had never been admitted. (p. 1218 G)

### **Cheque - Drawn by a customer**

4. The first basic point that must be made is that a bank is bound to honour a cheque issued by its customer if the customer had enough funds to satisfy the amount payable on the cheque in respect of the relevant account. Refusal to honour the cheque will amount to a breach of contract which would render the bank liable in damages. So too, when the banker credits the current account of its customer with some money, the banker becomes a debtor to the customer in that sum. See Joachimson v. Swiss Bank Corporation (1921) 3 K.B. 110. Conversely, when a banker debits the current account of its customer with a certain sum, the customer becomes a debtor to the bank in that sum. Whichever party is the creditor is entitled to sue the other, if demand for payment was made, but not honoured. (p. 1219 E)

### **Separate current accounts kept by a customer**

5. Now turning to the issue of combination of accounts, the general principle is that unless precluded by agreement, express or implied from the course of business, the banker is entitled to combine current accounts kept by a customer in his own right, even though at different branches of the same bank, and to treat the balance, if any, as the only amount standing to his credit; but the banker may not arbitrarily combine a current with a loan account. (p.1219H)

### **Right of bank to combine current accounts**

6. Where, therefore, a customer of a bank operates two or more current accounts, the bank is entitled to combine the two or more accounts kept by the customer in his own right even though at different branches of the same bank, and to treat the balance, if any, as the only amount really standing to his credit, unless precluded by agreement, express or implied, from the course of business from so doing. I think it needs be pointed out that a customer having two accounts "in his own right" may only mean that he has both accounts in his name or in the same name, character or capacity and that neither account is a trust account. See British and French Bank Ltd. v. Opaleye, supra. The right to combine accounts does not exist where the accounts are not held in the same right, as where one is a trust account (p. 1222 C)

**Where the accounts combined are not in the same right**

7. Additionally it is indisputable that the two accounts are neither in the name of the respondent nor in the same name, character or capacity. It is also not in dispute that the respondent at no time mixed up his transactions with the bank in respect of the two accounts. This was admitted by the appellant's witnesses. While account 1028 was used by the respondent for his local business as a dealer in supermarket, account 126 remained for use in his foreign or international business exclusively. And I ask myself whether under the circumstance there is no strong implied agreement to keep both accounts separate and distinct. I think the answer must be in the affirmative. Account 1028, on the other hand, was used for the respondent's local supermarket business under another title, to wit, the New World Supermarket. I do not think in the circumstance that the two accounts can be said to be held in the same right, character and capacity. As found by both Courts below, a finding with which I entirely agree, it cannot be seriously argued that there was no understanding that those two accounts were meant to be separate and to be so kept. (p. 1222 H & 1224 F)

**Pleadings - Documentary evidence**

8. It ought not be over-stressed that documentary evidence, to be admissible in evidence, needs not be specifically pleaded, so long as the relevant facts and not the evidence by which such a document is covered are pleaded. See Alhaji Babatunde Thanni and Another v. Sabalemotu Saibu and others (1977) 2 S.C. 89 at 114 and U.A.C. Ltd. v. Saka Owoade 13 W.A.C.A. 207. In the present case it is conceded that the document, Exhibit O, was not pleaded. It is also clear that not a single fact pertaining to and/or covering it was pleaded by the appellant. It was therefore not open to the trial Court or, to any other Court of pleadings for that matter, to act on such an unpleaded document on which no issue was raised by the parties at the trial. (p. 1227 A)

**G Trial court's reason for rejecting Exhibit O**

9. With profound respect, I am unable to accept that the reasons given by the trial Court for disregarding Exhibit O were tenable. It is not disputed that Exhibit O was signed by the respondent who never raised the defence of non est factum, mistake, misrepresentation or the like in connection therewith. I entertain no doubt that the respondent by signing Exhibit O must be bound by its terms. The clear implication is that the respondent by signing Exhibit O without reading it and without compulsion intended his signature to authenticate his full agreement to its contents. If he agreed with the contents, he clearly gave his consent to every clause therein. It was therefore erroneous

for the learned trial Judge to have attached undue weight to failure by the respondent to read Exhibit O before appending his signature thereto. However what an appeal Court has to decide is whether the decision of the Judge was right and not whether his reasons were, and misdirection not occasioning injustice is immaterial. (p. 1227 E)

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### **Combination of account without consent**

10. I am also in total agreement that the Court below was right when it held that Account 126 under the name Joe Brown Commercial Agencies could not be combined on the strength of Exhibit O with Account No. 1028 under a totally different name, to wit, New World Supermarket. In the circumstance, it seems to me clear that Exhibit O even if it was duly pleaded and properly admitted in evidence cannot, at all events, avail the appellant. Accordingly, I must uphold the findings of both Courts below to the effect that the appellant had no right to combine the two accounts operated by the respondent without obtaining his prior consent. I also fully endorse their views that the appellant had no legal right in the circumstances to block the respondent's account No.1028 or to dishonour his cheque Exhibit A. Issues I and 2 are therefore resolved against the appellant. (p. 1228 B)

### **Wrongful dishonour of a customer's cheque**

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11. In this regard, it is long established that refusal by a banker to pay a customer's cheque, when it holds in hand, in the relevant account, an amount equivalent to or more than that endorsed on the cheque belonging to the customer, amounts to a breach of contract for which the banker is liable in damages. On the issue of damages, however, in this class of cases, a distinction has been drawn between trading and non-trading customers. As regards trading customers or customers in business, the law presumes injury to them without proof of actual damage and they are entitled to substantial damages although they neither pleaded nor proved actual damage. But a person who is not a trader or in business is only entitled to nominal damages for the wrongful dishonour of his cheque. He is not entitled to recover substantial damages for such wrongful dishonour of his cheque, unless the damages which he suffered is alleged and proved as special damages. In the present case, however, the respondent was at all material times admittedly a trading customer of the appellant. His cheque, Exhibit A., was unlawfully dishonoured by the appellant at a time he had enough funds in his account number 1028 which he operated in the running of his new World Supermarket business. It cannot be in dispute that he was entitled to an award of substantial damages, having proved that his cheque, Exhibit A, was wrongfully dishonoured by the

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appellant. The vital question is whether the award of N72,000.00 exemplary damages made by the Trial Court to the appellant and affirmed by the Court below is justifiable in Law. (p. 1228 E)

**Whether exemplary damages is recoverable in contract action**

B 12. It is trite that the relationship between a banker and its customer is founded on simple contract. This, the learned trial judge clearly recognized in the above passages of his judgment. But with the greatest respect, it does not appear to me right that exemplary damages, as postulated by the learned trial judge, are recoverable as a matter of law in an action in contract by a customer C for the dishonour of his cheque by a banker. Indeed with the exception of the anomalous case of breach of promise of marriage, exemplary damages are, as a rule, not recoverable in actions for breach of contract. (p. 1230 D)

**Exemplary damages - Purpose thereof**

D 13. Perhaps it ought to be stressed that exemplary damages, properly so called, may only be awarded in actions in tort but only in three categories of cases, namely:- (i) "*Oppressive, arbitrary or unconstitutional action by the servants of the Government.*" See Rookes V. Barnard (1964) A.C 1129 at 1223 and 1224.(ii) *Where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff,"* See Rookes v. Barnard, supra at 1226; and (iii) *Where exemplary damages are expressly authorized by statute.* See Rookes v. Barnard; supra at 1227. See too Chief F.R.A. Williams v. Daily Times of Nigeria (1990) 1 N.W.L.R. (Part 124) 1 at 30 - 31. A claim for exemplary damages F postulates that the action of the defendant is such that the damages awarded against him are intended to punish the defendant and to vindicate the strength of the law and not merely as compensation for the injured plaintiff. See Cassell and Co. Ltd. v. Broome (1972) 1 ALL E.R. 801 at 829 H.L. As already explained, they may also, save in the case of breach of promise of marriage, as aforesaid, G only be awarded in cases of tort but under the three categories above mentioned. The present claim being a simple action for breach of contract based on the wrongful dishonour of the respondent's cheque cannot, in my view, be an appropriate case for an award of exemplary damages. I think the learned trial judge was in definite error to have made an award of exemplary damages H to the respondent in this case of wrongful dishonour of the respondent's cheque, Exhibit A. (p. 1230 F)

**Damages - Excessive award**

14. The award of N1,000.00 by this Court as substantial damages to the appel-

lant in the Balogun Case was made on the 9th March, 1978, 14 years after the present award of N72,000.00 exemplary damages was made to the present respondent by the trial Court on the 31st July, 1992. As a matter of common knowledge and notoriety, I take judicial notice of the fact that although the downward trend of the value of the Naira had reared its head in 1992, it was clearly not as pronounced as it is today. This notwithstanding, it seems to me B that having regard to the award of N1,000.00 made by this Court in 1978 as substantial damages to the plaintiff in the Balogun case in a claim similar to the present one, the award of N72,000.00 damages to the respondent in 1992 as affirmed by the Court below is, to say the least, so extremely high as to make it, in my opinion, an entirely erroneous estimate of the damages to which the C respondent was entitled. Taking everything into consideration, I think the justice of the case will be fully met if an award of N25,000.00 is made to the respondent for this wrongful dishonour of his cheque.<sup>5</sup> (p. 1232 E)

## NOTABLE POINTS OF INTEREST

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### IGUHJSC

*1. Multiple accounts of a customer are to be kept distinct save agreed otherwise*

The relationship between banker and customer in the absence of an express agreement between the parties to the contrary, is implied from the course of E business between them. There is also an implied agreement to keep multiple accounts of a customer distinct and separate from each other in the absence of an agreement to the contrary. (p. 1224 A)

### OGWUEGBUJSC

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*2. Damages - When appellate court would make alteration*

An appellate Court would make an alternation of an award of damages made by a trial Court only if the award is shown to be either manifestly too high or manifestly too low or if the award was made on wrong principle of law or when

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<sup>5</sup> It would seem that if the time the damages was awarded fell into recent years when it is obvious that the value of the naira has further gone down, the amount of N72,000.00 awarded may not be deemed too high, seeing that N1,000.00 in 1978 which was equivalent to U.S. \$1,000.00 is now worth about N85,000.00. Whatever be the case, counsel for the plaintiff could have sought to retain the awarded amount on different reason, since the H award of examplary damages is held not proper at all in this case. This is because if it is considered that the claim was a fifty fifty claim for general damages and examplary damages, any amount deemed fit by the appellate court may be divided into two since the award of examplary damages is totally out of place.

the appellate Court is convinced that the figure was arrived at on a wholly erroneous estimate of the damage suffered by the plaintiff. (p. 1236 G)

*3. When exemplary damages cannot be awarded*

As a general rule, exemplary damages cannot be awarded in a purely contractual action. See Addis v. Gramophone Co. Ltd. (1909) A.C. 488. Where a plaintiff has a cause of action both in tort and for breach of contract, he may be able to recover exemplary damages by framing his claim in tort. If the Court is particularly outraged by the defendant's conduct, it can sometimes achieve the same result by awarding damages for injury to the plaintiff's feelings. (p. 1237 A)

**REPRESENTATION**

P. I. N. Ikwueto for the appellant

A. C. Emengo for the respondent

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**CASES REFERRED TO**

Garnett v. Mckewan (1861 - 73) ALL E. R. 686

Prince v. Oriental Bank Corporation (1873) A.C. 325 at 333

Greehalgh v. Union Bank of Manchester (1924) ALL E.R. 318

E Ogundeyi v. IBWA Ltd. (1993) 2 N.W.L.R. (Part 278) 690

Williams v. Daily Times (1990) N.W.L.R. (Part 124) 1

Kalio v. Kalio (1977) 2 S. C. 15

Adeniji v. Adeniji (1972) 1 ALL N.L.R. (Part 1) 278

Uba v. Union Bank of Nigeria PLC (1995) I N.W.L.R. (Part 405) 72

F Garnett v. Mckewan (1872) L.R. 8 Exch. 10

Presswork and Assemblies Ltd. (1972) A.C. 785 at 819

U.A.C. Ltd. v. Owoade 13 W.A.C.A. 207

Radburn v. Kemp (1971) 1 W.L.R. 1502 C.A.

Quirk v. Thomas (1916) 1 K.B. 516 at 527, 531 and 538

G Balogun v. The National Bank of Nigeria Ltd. (1978) 3 S.C. 155

Pott v. Clegg 16 M & W. 321 (153) E.R. 1212

Elf (Nig) Ltd. v. Sillo (1994) 6 N.W.L.R. (Part 350) 258 at 274

Ziks Press Ltd. v. Alvan Ikoku 14 W.A.C.A. 188

**H BOOKS REFERRED TO**

Law of Banking and Negotiable Instruments - By professor K.I. Igweike pp.64-68

Halsbury's Laws of England 3rd Ed. p.172

**LEAD JUDGMENT BY IGU H.JSC**

In the High Court of former Anambra State of Nigeria, the plaintiff, who is now the respondent, instituted an action against the appellant, who therein was the defendant, claiming as follows:-

*"The plaintiff claims the sum of N1,000,000.00 (One Million Naira) in damages whereof N500,000.00 (Five Hundred Thousand Naira) is general damages and N500,000.00 (Five Hundred Thousand Naira) is exemplary damages for breach of contract between the plaintiff - a trader and the defendant - Commercial bankers by dishonouring cheque No. C/D. ONSA 721289 for N7,100 only drawn by the plaintiff on his account No. 1028 held in the Defendant's bank at No. 4 Oguta road, Onitsha and deliberate refusal of the Defendant to allow the Plaintiff to operate the said account thereby frustrating his business.  
Further or other reliefs."*

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

The plaintiff who at all material times was a customer of the defendant bank maintained two distinct and separate current accounts with it. These are Account No. 1028 run in the registered business name of New World Supermarket and Account No. 126 which he operated under the name of Joe Brown Commercial Agencies. Account No. 1028 was used by the plaintiff for his local business, but Account No. 126 was being operated in connection with his international or Overseas import business only.

It is not in dispute that the plaintiff was the sole signatory to both accounts. The case for the plaintiff is that on the 13th June, 1986, the defendant wrongfully dishonoured Exhibit A, his cheque No. C/D ONS A21289 for the sum of N7,100.00 drawn on his Account No. 1028. His account No. 1028 was at all material times in credit in the sum of over N7,100.00 which was the value of his dishonoured cheque, Exhibit A. He stated that at no time did he authorize the defendant to combine his Account No. 1028 with Account No. 126. He explained that he was not the sole owner of Account No. 126, that he owned it jointly with one Ifeanyi Ngolu and Emmanuel Oraezueme and that the said Account No. 126 had nothing to do with his Account No. 1028. He admitted signing Exhibit 0 when he applied for an overdraft in account No. 126. He however claimed that he did not know its details as he did not read it before he signed the same. He founded his claim on the dishonour of his cheque Exhibit A on Account No. 1028 when there was sufficient funds in that account to cover Exhibit A.

The case for the defendant is that both Accounts numbers 1028 and 126 were owned by the plaintiff who, also, was their sole signatory. It asserted

that as at the 13th June, 1986 on which date Exhibit A was drawn on Account No. 1028, the defendant had accrued a debit of N11,497.26 in his Account No. 126. It however admitted that as at the said 13th June, 1986 when Exhibit A was presented for payment, Account No. 1028 was in credit to the tune of N7,276.36. The defendant denied combining the plaintiff's Accounts Numbers 1028 and B 126. It merely withheld the plaintiff's balance in his account No1028 until he serviced his obligation to the bank in respect of Account No. 126. It explained that this is normal and in accordance with banking rules and regulations.

It was pursuant to these rules and regulations that the plaintiff's cheque, Exhibit A, for N7,100.00 which is the basis of this action, was returned C unpaid.

Additionally the defendant made reference to Exhibit O, under which it claimed it could also dishonour the cheque Exhibit A. Exhibit O is the document signed by the plaintiff following his application to the defendant for an overdraft in account No. 126. This application for a three month temporary overdraft is Exhibit N. The defendant rested its justification for combining the two accounts in Exhibit O.

At the conclusion of hearing, the learned trial judge, Nweje, J. after an exhaustive review of the evidence on the 31st day of July, 1992 found for the plaintiff in the sum of N72,000.00 being exemplary damages for the wrongful dishonour of the plaintiff's cheque drawn on account number 1028 with the defendant bank when the said account had sufficient funds to cover the cheque. Said the learned trial judge:-

*"It is my considered view that the defendant's treatment of the plaintiff was outrageous and cruel enough to entitle him to damages which I F assess at N72,000.00. The judgment of this Court is therefore hereby entered for the plaintiff for the sum of N72,000 against the defendant plus costs assessed at N2,000, making a total of N74,000.00."*

Being dissatisfied with this judgment, the defendant lodged an appeal to the Court of Appeal, Enugu Division which in a unanimous decision G dismissed the appeal on the 13th day of February, 1995.

Aggrieved by this decision of the Court of Appeal, the defendant has further appealed to this Court. I shall hereinafter refer to the plaintiff and the defendant in this judgment as the respondent and the appellant respectively.

H Altogether, six grounds of appeal were filed by the appellant. These grounds of appeal, without their particulars are as follows:-

**ERROR IN LAW**

*"1. The Court of Appeal erred in law and thereby came to a wrong conclusion when it held that "it seems clear from the facts that these two*

*accounts are separate and distinct from one another and they were operated as such by the customer and that bank from when the accounts were opened. It follows upon the principles enunciated above that these two accounts can be combined only with the consent of the respondent if reasonable notice so to do has been given to the respondent.*

2. *The Court of Appeal erred in law and thereby occasioned a great miscarriage of Justice in holding that Exhibit O. does not avail the Appellant on the reasoning that "in the context of this case the account in question was opened in respect of JOE BROWN COMMERCIAL AGENCIES and the only account which may be combined with that account has to be such accounts as are opened in the name of Joe Brown Commercial Agencies.* C

3. *The Court of Appeal erred in law and thereby came to a wrong conclusion when it upheld the view of the trial Court that the Appellant had no right to have combined the two accounts held by the Respondent without obtaining his prior consent.*

4. *The Court of Appeal erred in law and occasioned a great miscarriage of Justice when it concluded that the trial Court considered the defence of the Appellant based on Exhibit O.*

5. *The Court of appeal erred in law and thereby occasioned a great miscarriage of Justice when it failed to consider the case presented by the Appellant.* E

6. *The Court of Appeal erred in law and thereby came to a wrong conclusion when it upheld the award of the sum of N72,000.00 made by the trial Court."*

Pursuant to the rules of this Court, the parties, through their respective counsel, filed and exchanged their written briefs of argument. F

In the appellant's brief, the following three issues are set out as arising for determination in this appeal, namely:-

"1. *In the circumstances of this case, whether under the state of our law the appellant was duty bound and or legally enjoined to notify the respondent and or obtain his consent before exercising its legal right to combine two accounts maintained, owned and operated by the respondent with the appellant.* G

2. *Whether the Court of Appeal judiciously and judicially considered the case of the Appellant before it and determined the issues properly raised by the appellant before the Court of Appeal.* H

3. *Whether the award of N72,000.00 damages made by the Trial Court and confirmed by the Court of Appeal was justified in law."*

The respondent, for his own part, identified six issues in his brief of argument for the determination of this Court. These are:-

*"3.01. Whether the court of Appeal adopted the wrong principles in holding that the two bank accounts of the respondent which were separate and independently operated in the appellant's Onitsha branch can only be combined with the consent of the respondent or if reasonable notice to do so has been given to the respondent. (Grounds 1 and 3.)*

B *3.02. Whether the Court of Appeal erred in the light of the facts on record in finding as the trial Court also found, that Exhibit 'O' did not avail the appellant as a defence. (Ground 2).*

*3.03 Whether the Court of Appeal was wrong in it's view that the trial Court considered the defence raised by the appellant vide Exhibit 'O'.*

C *3.04. Whether the Court of Appeal failed to consider the case presented before it by the appellant in that Court. (Ground 5).*

*3.05. Whether the Court of Appeal was wrong in upholding the award of damages made by the trial Court in the absence of a showing that the trial Court acted in breach of the guiding principles for award of damages. (Ground 6 ).*

D *3.06. Whether the Supreme Court will in the absence of a showing of special circumstances interfere with concurrent findings of two Courts below. (Grounds 1,2,3,4, & 6)".*

I have closely examined these questions set out by learned counsel E in their respective briefs of argument. In my view, the issues formulated by the respondent are adequately covered by the issues identified in the appellant's brief which I find sufficiently comprehensive for the determination of this appeal. I shall therefore adopt, in this judgment, the set of issues formulated in the appellant's brief of argument for my consideration of this appeal.

F At the oral hearing of the appeal, the learned counsel for the appellant P.I.N, Ikweto Esq. proffered oral arguments in expatiation of the submissions contained both in the appellant's written brief of argument and in its reply brief. Relying on the English decisions in Garnett v. Mckewan (1861 - 73) ALL E.R.686, Prince v. Oriental Bank Corporation (1873) A.C. 325 at 333 and G the views of the learned authors of Halsbury's Laws of England, 3rd Edition, Vol. 2 Paragraph 322 at Page 172, learned counsel submitted that unless precluded by an agreement, express or implied from the course of business, a banker is entitled to combine different accounts kept by a customer in his own right even though at different branches of the same bank and to treat the H balances, if any, as the only amount standing to his credit. He contended that the decision of Swift, J. in Greehalgh v. Union Bank of Manchester (1924) ALL E.R. 318 to the effect that where a banker has more than one account, in the same right, of the same customer, no right of set off exists between the two accounts without notice on the ground that the very fact of having two ac-

counts implies that the customer has instructed the banker to keep the accounts separate, is erroneous and was given per incuriam. He argued that this is in view of the decision in Garnett v. Mckewan, supra, which was approved by the Privy council in Prince v. Oriental Bank Corporation, supra. Besides, he stressed, that the said decision in the Greehalgh's Case was overruled in Halesoven Presswork and Assemblies Ltd. v. Westminster Bank Ltd. (1971), 1 Q.B. 1 at 35. He submitted that the current position of the law is that a banker may combine the accounts of a customer unless precluded by an agreement which may be express or implied and, in such case, no notice to the customer may be required. Not only is there no such agreement in the present case, there is, on the contrary, Exhibit O by which the appellant was expressly authorized to combine the accounts of the respondent. Learned Counsel, in answer to a question from the Court, admitted, however, that Exhibit O was not pleaded in the appellant's Statement of Defence but contended that even outside Exhibit O, the appellant bank had a common law right to combine the respondent's accounts unless there was an agreement to the contrary. D

On the issue of the damages claimed, learned counsel submitted that the respondent was not entitled to the award of any damages as the appellant justifiably exercised its right of set-off in combining the two current accounts owned and run by the respondent in the appellant bank. He contended that the award of N72,000.00 damages made by the trial Court to the respondent and affirmed by the Court below was influenced by irrelevant and unjustifiable materials and therefore erroneous on point of law. He urged the Court to allow the appeal and dismiss the respondent's claims in their entirety. E

Learned counsel for the respondent, A.C. Emengo Esq., in his reply, stressed, citing the decision in Emegokwue v. Okadigbo (1973) 4 S.C. 113, that parties are bound by their pleadings and that material evidence which is not pleaded goes to no issue and must be disregarded. He submitted that the appellant neither pleaded the document Exhibit ) nor sought to be relied on, nor the defence of the appellant's right to a combination of the respondent's two accounts with a view to determining the customer's actual balance. He G pointed out that the appellant in point of fact denied in its pleadings and evidence before the trial Court that the respondent's two accounts were ever combined. He contended that any arguments in support of a combination of the two accounts in this court or in the Court below and any findings in respect thereof will go to no issue and must therefore be discountenanced. H Alternatively, learned counsel, relying on the decisions of this Court in Ogundeyi v. IBWA Ltd. (1993) 2 N.W.L.R. (Part 278) 690 and British and French Bank Ltd. v. Okpaleye (1962) 1 ALL N.L.R. 126 submitted that a bank has no right to transfer any assets or liabilities from one account of a customer to the

other without prior notice and assent of the customer since the very basis of its agreement with the customer is that the two accounts shall be kept separate. He concluded the issue of combination of accounts by making reference to the 1991 Edition of the Law of Banking and Negotiable Instruments by Professor K. I. Igweike at Pages 64 - 68 and he submitted that this cannot apply on the facts of this case.

On the question of the award of damages, learned counsel submitted that an appellate Court will not interfere with the award of damages made by the two Courts below unless it is established that the findings of fact upon which it was made were perverse and not the result of a proper exercise of discretion. He called in aid the decisions in Williams v. Daily Times (1990) N.W.L.R. (Part 124) 1 and Soleh Boneh (Nig) Ltd. v. Ayodele (1989) 7 N.W.L.R. (Part 99) 549. He stressed that the respondent in this case was a trader, a business man who was obliged as the direct result of the dishonour of his cheque to close down his super market store. He contended that the damages awarded were not excessive and he urged the Court to dismiss this appeal.

I think it will be convenient to deal with the first two issues together and the third issue separately.

The first two issues deal mainly with whether the appellant had absolute right to combine the respondent's two accounts in issue or whether this could only be done with due notification and the consent of the respondent. The side question that arises therefrom is whether, at any rate, the appellant was entitled pursuant its alleged rights under Exhibit O to a combination of the respondent's said accounts. I will consider the appellant's rights to a combination of the two accounts first.

In this regard, it is desirable to reproduce hereunder for easy reference the only paragraphs of the pleadings of the parties which dealt with the question of the combination of the respondent's two accounts in issue. These are paragraphs 8 and 9 of the Statement of Claim and paragraph 14 of the appellant's Statement of Defence. These are reproduced as follows:-

"8. That after going through the contents of the letter written to the plaintiff by the Bank Manager, dated 17th June, 1986 he felt disorganized, and worried because the letter did not disclose any good reason for dishonouring his cheque and on the 1st July, 1986 he wrote a reply to the letter disclosing to the Manager that he is not the Sole owner of Account 126 and that in actual fact, the said account No. 126 has nothing to do with his account No. 1028

9. The Plaintiff avers that at no time did he authorize Defendant to combine account No. 126 with account 1028."

Paragraph 14 of the Statement of Defence then answered thus:-

"14. The defendant denies ever combining the plaintiff's account number 1028 with account number 126 as alleged and will at the trial put the plaintiff to the strictest proof thereof. Contrary to combination of both accounts as alleged by the plaintiff, the defendant merely with-held the plaintiff's balance in his account No. 1028 so as to stop the plaintiff from withdrawing on same account until the debit balance in his sister account No. 126 is upset in accordance with the defendant's practice and procedure."

It is therefore, quite clear, on the state of the pleadings that the appellant at no time pleaded any combination of the respondent's two accounts. On point of fact, the defence of combination of the accounts was specifically denied, the appellant maintaining that it merely with-held the respondent's balance in his account No, 1028 so as to stop the respondent from withdrawing on the same account until the debit balance in Account No. 126 is cleared. This defence was therefore not an issue raised by the parties in their pleadings.

In this regard, it cannot be over emphasized that it is an elementary and fundamental principle of the determination of disputes between parties that Courts of law must limit themselves to the issues raised by the parties in their pleadings as to act otherwise might well result in the denial to one or the other of the parties of his right to fair hearing. See Metalimpe v. A.G. Leventis and Co. Ltd. (1976) 2 S.C. 91, Kalio v. Kalio (1977) 2 S.C. 15, George v. Dominion Flour Mills Ltd. (1963) 1 S.C. N.L.R. 242, Oniah v. Onyia (1989) 1 N.W.L.R. (Part 99) 514, Shell B.P. Ltd. v. Abedi (1974) 1 ALL N.L.R. (Part 1) 13 etc. Accordingly, and this is trite, a judgment of Court must confine itself to the issues as settled by the parties in their pleadings and not otherwise unless, of course, the question concerns a fundamental issue such as jurisdiction which a trial or an appellate Court is in the interest of justice, perfectly entitled to raise suo motu at any stage of the proceedings. See Owoniboy Technical Services Ltd. v. John Holt Ltd. (1991) 6 N.W.L.R. (Part 199) 550, Osadebay v. Attorney-General, Bendel State (1991) 1 N.W.L.R. (Part 169) 525, Adegoke v. Adibi (1992) 5 N.W.L.R. (Part 242) 410 at 420, Commissioner for Works, Benue State and Another v. Devcon Development consultants Ltd. and Another (1988) 3 N.W.L.R. (Part 83) 407, Adeniji and others v. Adeniji and others (1972) 1 ALL N.L.R. (Part 1) 278 etc.

Apart from the appellant's pleadings, there is also the clear evidence of D.W.1, its representative before the trial Court, as follows:-

*"We did not combine the two accounts although the bank has the right to. We did not pay Exhibit A because the plaintiff was owing."*

There is similar evidence from the appellant's second witness, D.W.2, who

testified as follows:-

*"It is banking practice to combine 2 accounts if the customer so wishes; but in this very case we have not combined the two."* (Underlining supplied for emphasis)

It is thus clear that at no time did the appellant rely on a combination of the respondent's two accounts for its defence in his case.

D.W. 1 at some stage of his testimony, however, claimed:-

*"Where a customer has two accounts and one is a debit while the other is credit, the bank has a right of set-off. In the instance case we used the balance in Account 1028 to off-set part of Account 126. That left account 126 still in debit of N4,600.00 and over, while account 1028 is left with N6.36 which we left there plus N100.00 refund from a pay slip which left it now at N106.36."*

Similarly, D.W.2, at a later stage of his evidence after he had denied any combination of the respondent's two accounts by the appellant testified as follows:-

*"What we did was to exercise our right of set-off by transferring money from the account with credit into the one with debit. Exhibit S shows we transferred N7,270.00 from 1028 to 126 leaving N6.36 in 1028 credit. .... It is from this Exhibit O that we got the authority to transfer money from 1028 to 126."*

I will deal with Exhibit O later on in this judgment. **It suffices to state at this stage that the inconsistency in the evidence of the appellant's witnesses on the issue of the defence of a combination of the two accounts notwithstanding, it ought to be pointed out that its claim on combination which is clearly at variance with its pleadings went to no issue and was rightly dismissed by both Courts below. This is because parties are bound by their pleadings and evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the Court. See Emegokwue v. Okadigbo (1973) 4 S.C. 113, Kalu Njoku and Others v. Ukwu Eme and Others (1973) 5 S.C. 293 etc. It would make no difference that such evidence which is inconsistent with the pleadings, as in the present case, had been received by the Court. Again, this is because, evidence which is infact adduced, but is contrary to the pleadings, should never be admitted. It matters not that the other side did not infact object to it or that the trial judge did not reject it. Although, it is the duty of counsel to object to inadmissible evidence and the duty of the trial court to refuse to admit such inadmissible evidence, if notwithstanding this, evidence not pleaded or which is contrary to the pleadings is inadvertently admitted, it is the duty of the Court to disregard it as irrelevant to the issue properly raised by the pleadings and thus to treat such inadmissible evidence**

**as if it had never been admitted.** See National Investment and Properties Co. Ltd. v. Thompson Organization Ltd. and others (1969) N.M.L.R. 99 at 104.

The above principle of pleadings and evidence has long been established and recognized in the overall interest of Justice. As it was explained by this Court in George and Others v. Dominion Flour Mills Ltd. (1963) 1 ALL N.L.R. 71 at 72:-

*"The fairness of a trial can be tested by the maxim, audi alteram partem. Either party must be given an opportunity of being heard; but a party cannot be expected to prepare for the unknown; and the aim of pleadings is to give notice of the case to be met, which enables either party to prepare his defence and argument upon the issues raised by the pleadings and saves either side from being taken by surprise ..... The plaintiff will, and indeed must, confine his evidence to those issues but the cardinal point is the avoidance of surprise."*

It is therefore clear that the appellant having denied a combination of the respondent's two accounts and, the question not being an issue in the case between the parties, the two Courts below were right to have disregarded the same, notwithstanding the inadmissible evidence led and received on the point.

Having so said, I think it may be desirable to consider the issue of whether the appellant, at all events, had the right to combine the two accounts of the respondent. This is in view of the prominence the issue received in the judgments of both Courts below. I will now proceed to deal with this issue but will firstly consider a few preliminary basic issues that are relevant thereto.

**The first basic point that must be made is that a bank is bound to honour a cheque issued by its customer if the customer had enough funds to satisfy the amount payable on the cheque in respect of the relevant account. Refusal to honour the cheque will amount to a breach of contract which would render the bank liable in damages.**

So too, when the banker credits the current account of its customer with some money, the banker becomes a debtor to the customer in that sum. See Joachimson v. Swiss Bank Corporation (1921) 3 K.B 110. Conversely, when a banker debits the current account of its customer with a certain sum, the customer becomes a debtor to the bank in that sum. Whichever party is the creditor is entitled to sue the other, if demand for payment was made, but not honoured. See Augustine Uba v. Union Bank of Nigeria Plc (1995) 1 N.W.L.R. (Part 405) 72.

Now turning to the issue of combination of accounts, the general principle is that unless precluded by agreement, express or implied from the course of business, the banker is entitled to combine current accounts kept

by a customer in his own right, even though at different branches of the same bank, and to treat the balance, if any, as the only amount standing to his credit; but the banker may not arbitrarily combine a current with a loan account. See Garnett v. Mckewan (1872) L.R 8 Exch. 10. But see Buckingham and Co. v. London and midland Bank Ltd. (1895) 12 T.L.R. 70 where the banker B was precluded by the course of business and W.P Greenhalgh and Sons v. Union Bank of Manchester (1924) 2 K.B. 153 where the banker was precluded by agreement. See too Re E.J. Morel (1934) Ltd. (1962) Ch. 21, (1961) 1 ALL E.R. 796.

In Greenhalgh v. Union Bank of Manchester, supra Swift, J. at Page C 164 made bold to observe as follows:-

*"If a banker agrees with his customer to open two or more accounts, he had not, in my opinion, without the assent of the customer, any right to move their assets or liabilities from the one account to the other; the very basis of his agreement with his customer is that the two accounts shall D be kept separate, and if the customer pays bills drawn upon him not into his general account, where they will be discounted and he will receive the benefit of being able to draw against them, but into an account in which they will only be used either to pay bills accepted by the bank or bills drawn by the customer which they are specifically to meet, I do not think a banker, any E more than any other individual, can change them from the one account into the other without the customer's assent. On this point it seems to me that the only question to be decided is, what is the agreement between the banker and the customer? and, if that agreement is, as I find it to be in this case, that there shall be a general account into which bills are paid as cash and that F there shall be an account into which bills shall be paid for some other purpose, bills or their proceeds cannot be moved from one account to the other at the whim of the banker without the consent, express or implied, of the customer."*

The above dictum, although criticized by Lord Denning, M.R. in Halesowen G Presswork and Assemblies Ltd. v. Westminster Bank Ltd. (1971) 1 Q.B 25 at 35, (1970) 3 ALL E.R. 473 at 478 C.A., which criticism was approved by Lord kilbrandon in the same case, the judgment of the Court of Appeal in the case was reversed by the House of Lords. See National Westminster Bank Ltd. v. Halesowen Presswork and Assemblies Ltd. (1972) A.C. 785 at 819, (1972) 1 H ALL E.R. 641 H.L. The dictum however received the clear approval of this Court in British and French Bank Ltd. v. Opaleye (1962) 2 N.S.C.C. 21 when Bairamian, F.J, as he then was, succinctly put the matter as follows:-

*"It turns out to be a question of the agreement between the customer and the bank. Apparently, as one may infer from the opening part of*

*that passage, the agreement to keep the two accounts distinct and separate is inherent in the fact that the banker has agreed with his customer to open two or more accounts. If the bank may merge them without notice, one can see that it may do him great harm. Suppose, for example, that the customer has a private account and a business account; that the business account is in funds, but the other is in debit: the customer, not knowing what the bank has done or will do, gives out cheques on his business account to pay trade debts, say for goods bought; if the bank does not honour them on presentment, it will do him harm. That is illustrated in Buckingham and Co. V. London and Midland Bank, Ltd."*

In the said case of British and French Bank Ltd. v. Opaleye, supra, C this Court held inter alia that where a banker opens two accounts with a customer, one in the customer's own name and the other in a business name, there is, in the absence of any express agreement to the contrary, an implied agreement that the accounts are to be kept distinct and separate. By this decision, which to this day has remained undisturbed, this Court approved D and applied the decision of the English Court of Exchequer in Garnett v. Mckewan, supra, where Piggot, B. observed as follows:-

*"No one would say that a banker might set-off against his customer's account a debt due to him from his customer in an other capacity, a private debt, for example, a debt due to him as carrying on some distinct business. Nor has a banker any right to compound two accounts lodged with him by one person in two different capacities. He would have no right to blend them, a personal account and a trust account."*

Bramwell, B. In agreeing with Piggot, B had this to say:-

*"It is admitted that in some cases the bank could not debit the F customer with a debt due to him, for example, a debt due to the bank as carrying on a different business, as that of brewers. Nor again, would they not have any right to blend two accounts kept by one person with them in different characters, as a personal and a trust account"*

The issue of right to combine two accounts of a customer by a banker G was fully considered by the Court below where Ejiwunmi, J.C.A. with whom Achike and Tobi, JJ.C.A agreed concluded thus:-

*"It follows from the authorities reviewed above that our Courts have adhered to and followed in these types of cases the principles enunciated in the British French Bank V. Opaleye (supra), which are set out at H page 26 of the judgment thus:-*

*(i) In the absence of an express agreement, an agreement regulating the relationship of banker and customer is implied from the course of business between them.*

(ii) *Where a bank opens two accounts with a customer, one in the customer's own name and the other in a business name, there is, in the absence of any express agreement to the contrary, an implied agreement that the accounts are to be kept distinct and separate.*

(iii) *Where by agreement, express or implied, a customer's several B accounts with a banker are to be kept distinct and separate, the banker has no right to combine them or to transfer assets or liabilities from one account to another, without reasonable notice of the intention so to do, or without the assent of the customer."*

I think the Court of Appeal was entirely right in the above observation which I fully endorse. **Where, therefore, a customer of a bank operates two or more current accounts, the bank is entitled to combine the two or more accounts kept by the customer in his own right even though at different branches of the same bank, and to treat the balance, if any, as the only amount really standing to his credit, unless precluded by agreement, express or D implied, from the course of business from so doing.**

I think it needs be pointed out that a customer having two accounts **"in his own right"** may only mean that he has both accounts in his name or in the same name, character or capacity and that **neither** account is a **trust account**. See British and French Bank Ltd. v. Opaleye, supra. **The right to E combine accounts does not exist where the accounts are not held in the same right, as where one is a trust account** and the other, a personal account. See Re Gross, ex parte Kingston (1871) 6 Ch. App. 632, Union Bank of Australia Ltd. v. Murray Aynsley (1898) A.C. 693 P.C., bank of New South Wales v. Goulburn Valley Butter Co. Property Ltd. (1902) A.C. 543 P.C.

F Reverting now to the appeal in hand, it is not in dispute that the two accounts numbers 1028 and 126 with the respondent as the signatory thereof are in the firm names and style of New world Super Market and Joe Brown Commercial Agencies respectively. The respondent pleaded and testified that Account No. 126 was a trust account in that it was owned by him jointly with G one Ifeanyi Ngolu and Emmanuel Oraezume. The trial court would appear to have accepted the trusteeship nature of the said account when it stated as follows:-

*"Learned Defence counsel posed the issue of ownership of the two accounts. I do not think there is much to argue about that. The plaintiff H admitted that, in the papers he submitted to the defendant, he is shown as the owner. Apparently, the names of the said other co-workers were not in the bank's records. Exhibit N, apart, there is no issue as to ownership of the accounts."* (Underlining supplied for emphasis)

**Additionally it is indisputable that the two accounts are neither in**

**the name of the respondent nor in the same name, character or capacity. It is also not in dispute that the respondent at no time mixed up his transactions with the bank in respect of the two accounts. This was admitted by the appellant's witnesses. While account 1028 was used by the respondent for his local business as a dealer in supermarket, account 126 remained for use in his foreign or international business exclusively. And I ask myself whether under the circumstance there is no strong implied agreement to keep both accounts separate and distinct. I think the answer must be in the affirmative.**

On these accounts, the learned trial Judge, Nweje J. found as follows:-

*"Another thing certain and which the defence witnesses could not help admitting was that the plaintiff never mixed up his transactions with the bank in respect of the two accounts. Account 126 remained for use in his foreign business only. Account 1028 was used for his local business at the supermarket. Even when he was out of funds in account 126 he never drew from account 1028 to aid that account 126. Instead he took overdraft in that account 126. He had never sought and never was given such facilities in account 1028 which apparently never was out of funds."*

A little later in his judgment, he stressed:-

*"As I see this case, the essence of the matter is that the plaintiff opened those two accounts 126 and 1028, both current accounts in the same bank, using 126 for his overseas imports business done in the name Joe Brown commercial Agencies and using 1028 in his local business of New World Supermarket. It is not in dispute that he never mixed up these uses, that while he had debits and credits in account 126 he never asked for nor was given any facilities in 1028."*

*It cannot be argued, in the absence of such trap-documents as Exhibit O which I have already discountenanced, that there was no understanding that those two accounts were meant to be separate and to be so kept."*

He concluded:-

*"The following points stand out in the case as established.*

*1. Plaintiff kept two accounts with the defendant bank each for a separate and distinct purpose to the knowledge of the defendant.*

*2. The defendant without any, not to talk of reasonable notice to the plaintiff of their intention to freeze his account 1028 for his debits in account 126, refused to honour his cheque, Exhibit A drawn on account 1028 which had in it enough funds to pay it at that time."*

The Court of Appeal fully endorsed the above findings and observations of the trial Court. I myself have carefully studied the records and can

find no reason to disagree with both Courts below as the said findings and observations are fully supported by overwhelming evidence before the Court.

The relationship between banker and customer in the absence of an express agreement between the parties to the contrary, is implied from the course of business between them. There is also an implied agreement to keep multiple accounts of a customer distinct and separate from each other in the absence of an agreement to the contrary. See British and French Bank Ltd. v. Opaleye, supra.

In allowing the appeal in Opaleye's case, Bairamian, F.J observed:-

*"I have dealt with this case as if it were quite the English cases which I have cited from Halsbury, under the above statement of the law. I should, however, note that in those cases the accounts were in the same name, though one account was called the loan account and the other one current account, or, in the Greenhalgh case, the provisional bill account and the general account. In the case in hand one account is in the name of "Opaleye, Rafiu Afolabi Bello," and the other account is in the name of "Fakemo Brothers", and I think it can be said with justice that very strong implied an agreement to keep them separate and distinct, without any right on the part of the Bank to combine them or to transfer assets from one account to the other, at any rate not without reasonable notice of the intention so to do."*

I have myself considered the facts and circumstances of this case as found by the trial court and affirmed by the Court of Appeal. The two accounts in issue are neither in the personal name of the respondent nor in the same name, character or capacity. Account 126 was used exclusively for the respondent's foreign or international business under the distinct title, Joe Brown commercial Agencies.

**Account 1028, on the other hand, was used for the respondent's local supermarket business under another title, to wit, the New World Supermarket. I do not think in the circumstance that the two accounts can be said to be held in the same right, character and capacity. As found by both Courts below, a finding with which I entirely agree, it cannot be seriously argued that there was no understanding that those two accounts were meant to be separate and to be so kept.** Both parties are in agreement that at no time did the respondent for any reason mix-up his use of these two accounts which were kept separate and distinct. I think in these circumstances, if I may borrow the words of Bairamian, F.J., that it can be said with justice that there exists a strong implied agreement between the parties to keep the two accounts separate and distinct, and without any right on the part of the bank to combine them or to transfer assets from one account to the other, at any rate, not

without reasonable notice of the intention so to do.

There is next the issue of Exhibit O which was signed by the respondent at the time he obtained a temporary overdraft facility of N3000.00 from the appellant. The appellant claimed that by Exhibit O which the trial Court rightly described as "the main bulwark of the defence", it had the right to combine the two accounts held by the respondent to set off the credit in one with the debit in the other. Dealing with the place of Exhibit O, the learned trial Judge observed:-

*"This document, though not expressly or specifically pleaded by the defence, apparently came in under the "Material documents relating to these two accounts relied upon ....." in paragraph 5 of the Statement of Defence. Anyhow that is what I think. The document has now become the main bulwark of the defence."*

He went on:-

*"The plaintiff who admitted signing this document had said he did not know the details because he did not read it.*

*In considering the effect of this document, I have to read it in conjunction with Exhibit N and in the light of what the applicant there (in Exhibit N) asked for Exhibit N asked for a temporary overdraft to be repaid before April, 15th 1982.*

*I cannot, by any stretch of reasoning, think that this printed format, obviously supplied by the Bank (Defendant) and which the plaintiff never read when he signed it, has converted the "temporary overdraft" for about three months into a permanent bond that has to trail the plaintiff for ever. I can understand an application for a standing facility with no time limit being so tied and standing until abrogated by the specified notice - (paragraph 3 of Exhibit A): But, certainly, that does not in my view apply to an application with a definite time stipulation at the end of which the facility should expire. I see this Exhibit O entirely foreign to the intendments portrayed by Exhibit N on which it purports to be based. That document, although signed by the plaintiff - (as he said without reading it) - strikes me as a clever manoeuvre by the defendant to put things over the un-witting plaintiff. I will therefore disregard any defence placed on that Exhibit O and consider the case on its other aspects."*

The Court of Appeal, for its own part, dealing with the complaint that the trial Court was in error by failing to consider Exhibit O stated:-

*"In the first place, let me say straight away that it is not right for the appellant to argue that the lower Court did not consider Exhibit O in the course of this judgment. I am satisfied upon reading the judgment, that the learned trial judge duly considered Exhibit O, though he concluded that the*

said Exhibit O has no nexus with the act of the appellant in combining the two accounts. In effect the learned trial judge took the view that Exhibit O is of no avail to the appellant in the circumstances. I therefore need to consider whether the learned trial judge was right for so holding."

The Court below next set out the relevant portions of Exhibit O in B issue and after considering the matter arrived at the following conclusion:-

"For this purpose, I think that the operative clause which the ap-  
pellant may have been placing reliance on is the very last paragraph, that  
is, paragraph 9 of the document. In that paragraph it is stated that "You are  
entitled to consider that all accounts opened in my/our name with your  
C Bank, including any accounts in foreign currency, constitute a single com-  
bined current account ....." It seems that a plain reading of that clause  
envisages that all accounts which may be combined into a single current  
account must be those opened in the name of the customer. In the context of  
D this case the account in question was opened in respect of Joe Brown Com-  
mercial Agencies and the only other account which may be combine with  
that account has to be such accounts as are opened in the name of Joe  
Brown Commercial Agencies. With that view of the construction, of that  
clause, I am in full agreement with the learned trial Judge of the lower court  
that the document Exhibit O, does not avail the appellant. It follows there-  
E fore that I must uphold the view of the lower court that the appellant had no  
right to have combined the two accounts held by the respondent without  
obtaining his prior consent ....."

It must follow that the appellant was properly found to have wrongly  
dishonoured the respondent's cheque which was properly drawn on his  
F account No. 1028. Having done so, it is now argued that the damages  
awarded to the respondent were preposterous."

I think it is now necessary to set out the relevant portion of Exhibit O  
signed by the respondent and relied upon by the appellant as the source of  
the right to combine the respondent's two accounts. It reads as follows:-

G "You are entitled to consider that all accounts opened in my/our  
name with your Bank, including any accounts in foreign currency, to consti-  
tute a single combined current account, all debt and credit balances off-  
setting each other, and the benefit of the guarantees particularly ear-marked  
to each item of this current account shall remain assigned to secure the  
H balance of the said combined account without any novation being opposed  
by third parties."

The one vital point that must be mentioned is that no where in the  
pleadings, of the parties was Exhibit O pleaded, whether directly or indirectly.  
Learned counsel for the appellant, quite rightly, conceded this point at the

hearing of this appeal before us but argued that even outside Exhibit O, the bank has a common law right to combine accounts unless there is an agreement to the contrary. This aspect of the appeal I have, however, disposed of earlier on in this judgment.

**It ought not be over-stressed that documentary evidence, to be admissible in evidence, needs not be specifically pleaded, so long as the relevant facts and not the evidence by which such a document is covered are pleaded. See Alhaji Babatunde Thanni and Another v. Sabalemotu Saibu and others (1977) 2 S.C. 89 at 114 and U.A.C. Ltd. v. Saka Owoade 13 W.A.C.A. 207. In the present case it is conceded that the document, Exhibit O, was not pleaded. It is also clear that not a single fact pertaining to and/or covering it was pleaded by the appellant. It was therefore not open to the trial Court or, to any other Court of pleadings for that matter, to act on such an unpleaded document on which no issue was raised by the parties at the trial. See Lawal v. G.B. Ollivant (Nig) Ltd. (1972) 1 ALL N.L.R. 207.**

The trial Court without doubt, considered Exhibit O and thoroughly discredited it as a "clever manoeuvre" by the appellant "to put things over" the unwitting respondent. It further stressed the fact that Exhibit O was not read by the respondent before he signed it. These appeared to be its reasons for disregarding Exhibit O.

**With profound respect, I am unable to accept that the reasons given by the trial Court for disregarding Exhibit O were tenable. It is not disputed that Exhibit O was signed by the respondent who never raised the defence of non est factum, mistake, misrepresentation or the like in connection therewith. I entertain no doubt that the respondent by signing Exhibit O must be bound by its terms. The clear implication is that the respondent by signing Exhibit O without reading it and without compulsion intended his signature to authenticate his full agreement to its contents. If he agreed with the contents, he clearly gave his consent to every clause therein. See Victor Ezeago v. Nebon Ohaneyere (1978) 6-7 S.C. 171 at 184 and Denis Contractors Ltd. v. Foreham UDC (1956) A.C. 696.**

**It was therefore erroneous for the learned trial Judge to have attached undue weight to failure by the respondent to read Exhibit O before appending his signature thereto. However what an appeal Court has to decide is whether the decision of the Judge was right and not whether his reasons were, and misdirection not occasioning injustice is immaterial. See Ukejiana V. Uchendu 13 W.A.C.A. 45 at 46. I have already held on the state of the pleadings in the case, that it was not open to the trial Court to act on the unpleaded document, Exhibit O. I cannot therefore hold that the disregard of Exhibit O by the trial Court is in any way a matter of great moment in this case**

as, at all events, it was not open to the trial Court to act on it.

The Court of Appeal, for its own part, gave a careful consideration to Exhibit O and came to the conclusion, as already pointed out, that the material clause therein relied upon envisaged, that all accounts which could be combined must be those opened in the name of the customer, namely Joe Brown B Commercial agencies. With this view of the construction, I entirely agree. **I am also in total agreement that the Court below was right when it held that Account 126 under the name Joe Brown Commercial Agencies could not be combined on the strength of Exhibit O with Account No. 1028 under a totally different name, to wit, New World Supermarket. In the circumstance, it C seems to me clear that Exhibit O even if it was duly pleaded and properly admitted in evidence cannot, at all events, avail the appellant. Accordingly, I must uphold the findings of both Courts below to the effect that the appellant had no right to combine the two accounts operated by the respondent without obtaining his prior consent. I also fully endorse their views that the appel- D lant had no legal right in the circumstances to block the respondent's account No.1028 or to dishonour his cheque Exhibit A. Issues 1 and 2 are therefore resolved against the appellant.**

There is finally issue 3 which poses the question whether the award of N72,000.00 exemplary damages made by the trial Court and affirmed by the E Court below is justified in law. **In this regard, it is long established that refusal by a banker to pay a customer's cheque, when it holds in hand, in the relevant account, an amount equivalent to or more than that endorsed on the cheque belonging to the customer, amounts to a breach of contract for which the banker is liable in damages. On the issue of damages, however, in this F class of cases, a distinction has been drawn between trading and non-trading customers. As regards trading customers or customers in business, the law presumes injury to them without proof of actual damage and they are entitled to substantial damages although they neither pleaded nor proved actual damage. See Wilson V. United Counties Bank Ltd. (1920) A.C 102 at 112 H. L. G where after reviewing the authorities, Lord Birkenhead, L. C. stated:-**

*"The ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit."*

H See too Hirat Balogun V. The National Bank of Nigeria Ltd. (1978) 3 S.C. 155. **But a person who is not a trader or in business is only entitled to nominal damages for the wrongful dishonour of his cheque. He is not entitled to recover substantial damages for such wrongful dishonour of his cheque, unless the damages which he suffered is alleged and proved as special dam-**

ages. See Gibbons V. Westminster Bank Ltd. (1939) 2 K.B. 882 at 888. See too Rae V. Yorkshire Bank PLC (1988) BTLC 35 C.A. Where a non trader who was unable to prove special damage was awarded only nominal damages for the wrongful dishonour of his cheque.

**In the present case, however, the respondent was at all material times admittedly a trading customer of the appellant. His cheque, Exhibit A., was unlawfully dishonoured by the appellant at a time he had enough funds in his account number 1028 which he operated in the running of his new World Supermarket business. It cannot be in dispute that he was entitled to an award of substantial damages, having proved that his cheque, Exhibit A, was wrongfully dishonoured by the appellant. The vital question is whether the award of N72,000.00 exemplary damages made by the Trial Court to the appellant and affirmed by the Court below is justifiable in Law.**

In order to justify reversing the trial judge on the question of the amount of damages awarded, it will generally be necessary that the appellate Court should be convinced either that:-

- i. *The Court below acted upon some wrong principle of law or*
- ii. *That the amount awarded was so extremely high or so very small as to make it, in the judgement of the Court an entirely erroneous estimate of the damage to which the plaintiff/respondent is entitled.*

See Ziks Press Ltd. V. Ikoku (1951) 13 W. A. C. A. 188, Idahosa V. Oronsaye (1959) 4 F. S. C. 166, Bala V. Bankole (1986) 3 N. W. L. R. [Part 27] 141, Ijebu-Ode Local Government V. Balogun and Co. Ltd. (1991) 1 N. W. L. R. (Part 166) 136. It is not sufficient that the appellate Court would itself have awarded a different sum if it had been sitting as the Court of first instance. See Nance V British Columbia Electric Railway Co. Ltd. (1951) 2 All E. R 448 PC. But if the appellate Court thinks that the damages are radically wrong, it ought to interfere even though that the error cannot be pinpointed. See Radburn V. Kemp (1971) 1 W.L.R. 1502 C.A.

*In paragraph 17 of the respondent's amended Statement of claim, it was averred as follows:-*

*"By reason of the said breach of contract, the plaintiff has suffered loss and damage in the sum of N1,000,000.00 (One Million naira) whereby he claims N500,000.00 (Five Hundred Thousand Naira) as exemplary damages."*

It would appear that the learned trial judge having found that liability had been established by the respondent against the appellant for the wrongful dishonour of his cheque, Exhibit A, considered *that it was a proper case for exemplary damages.* Said he:-

*"The claim is for exemplary/general damages of N1,000,000.00. I*

agree with Defence Counsel, that ordinarily, exemplary damages are given in tortious acts of the colour and calibre he stated. But it is also correct to say that such damages can be given in contractual obligations containing such elements of disgrace as are found in breach of marriage and dishonour of a businessman's cheque, both of which are breaches of contract.

B The quantum however will, in each case, depend on the particular circumstances of the situation."

He went on:- "In the instant case, the volume of trade of the plaintiff could well be judged from the volume of transaction reflected in his bank account in question. At the time of the breach committed by the defendant, that

C account was in credit to the tune of N7,206 only.

I do not think his prospects of soon developing that business into a multi-million enterprise could be described as being within anyone's reasonable contemplation. All the same, the fact that what he claimed is excessive is no ground for denying him any award.

D It is my considered view that the defendant's treatment of the plaintiff was outrageous and cruel enough to entitle him to damages which I assess at N72,000."

It is trite that the relationship between a banker and its customer is founded on simple contract. This, the learned trial judge clearly recognized

E in the above passages of his judgment. But with the greatest respect, it does not appear to me right that exemplary damages, as postulated by the learned trial judge, are recoverable as a matter of law in an action in contract by a customer for the dishonour of his cheque by a banker. Indeed with the exception of the anomalous case of breach of promise of marriage, exemplary  
F damages are, as a rule, not recoverable in actions for breach of contract. See Addis V. Gramophone Co. (1909) A.C. 488 at 496 and Kenny V. Thomas (1962) 3 All E.R 814 C.A. See too Quirk V. Thomas (1916) 1 K.B. 516 at 527, 531 and 538 C.A. and Perera V. Vandiyar (1953) 1 W.L.R. 672.

Perhaps it ought to be stressed that exemplary damages, properly  
G so called, may only be awarded in actions in tort but only in three categories of cases, namely:-

(i) "Oppressive, arbitrary or unconstitutional action by the servants of the Government." See Rookes V. Barnard (1964) A.C 1129 at 1223 and 1224.

H (ii) Where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff," See Rookes v. Barnard, supra at 1226; and

(iii) Where exemplary damages are expressly authorized by statute. See Rookes v. Barnard; supra at 1227.

See too Chief F.R.A. Williams v. Daily Times of Nigeria (1990) 1 N.W.L.R. (Part 124) 1 at 30 - 31.

A claim for exemplary damages postulates that the action of the defendant is such that the damages awarded against him are intended to punish the defendant and to vindicate the strength of the law and not merely as compensation for the injured plaintiff. See Cassell and Co. Ltd. v. Broome (1972) 1 ALL E.R. 801 at 829 H.L. As already explained, they may also, save in the case of breach of promise of marriage, as aforesaid, only be awarded in cases of tort but under the three categories above mentioned. The present claim being a simple action for breach of contract based on the wrongful dishonour of the respondent's cheque cannot, in my view, be an appropriate case for an award of exemplary damages. I think the learned trial judge was in definite error to have made an award of exemplary damages to the respondent in this case of wrongful dishonour of the respondent's cheque, Exhibit A.

The trial Court in making its award of exemplary damages commented thus:-

*"I do not think his prospects of soon developing that business into a multimillion enterprise could be described as being within anyone's reasonable contemplation -"*

There was neither evidence in support of, nor any justification for this speculative posture of the learned trial judge and I entertain no doubt that it was on entirely wrong principles that the trial Court proceeded to make its award of N72,000.00 exemplary damages to the respondent. It is also clear to me that the Court of Appeal was in similar error by affirming the said N72,000.00 exemplary damages awarded by the trial Court to the respondent.

In further justification of this award, the Court below, quite rightly, took into consideration the decision of this Court in Hirat Balogun v. The National Bank of Nigeria Ltd. (1978) 3 S.C. 155. In that case, the High court of Lagos State had held that the appellant, a practising barrister and solicitor of the Supreme Court of Nigeria, whose cheque was wrongfully dishonoured by the respondent was only entitled to nominal damages as she was not "a trader" in the popular sense and neither pleaded nor proved actual damage. Accordingly an award of N10.00 nominal damages was made to her. On appeal, it was held by this Court that the appellant, a solicitor in practice, although not a trader, was in business and that the wrongful dishonour of her cheque must therefore attract substantial damages, whether or not she pleaded or proved any actual damage to herself. The appellant was accordingly awarded substantial damages in the sum of N1000.00 in substitution for the N10.00 nominal damages awarded to her by the trial Court.

In assessing what is fair and reasonable, it is always appropriate to bear in mind previous awards made by the Courts in comparable cases in the same jurisdiction or even in a neighbouring locality where similar social, economic and industrial conditions exist. See L.O. Ejisun v. M. Ajao and others (1975) 1 N.M.L.R. 4 at 7, Jag Singh v. Toong Fong Omnibus Co. Ltd. (1964) 1 B.W.L.R. 1382 etc. I also recognize that the Courts, ought, in appropriate circumstances, to keep up with the times and, in particular, with the economic strength or decline, as the case may be, of our national currency, the Naira. See L.O. Ejisun v. M. Ajao and others, supra and Dr. O. O. Kalu and Another v. Dr. S Mbuko (1988) 3 N.W.L.R. (Part 80) 86.

It is clear that there is a lot in common on the issue quantum of damages between the present case and that of Hirat Balogun's case, supra. The plaintiffs in both cases were customers to their respective defendant banks. They were both, at all material times, in business and their claims were in respect of the wrongful dishonour of their respective cheques. Being both in business, they were each entitled, without doubt, to an award of substantial damages for the wrongful dishonour of their cheques. In Hirat Balogun's case, however, the N10.00 nominal damages awarded to her by the trial Court was, on appeal, increased by this Court to N1000.00 as substantial damages for the wrongful dishonour of her cheque. The question is whether, as contended by the appellant's learned counsel, the award of N72,000.00 to the respondent by the trial Court as exemplary damages as affirmed by the Court below, is excessive or justified in law.

The award of N1,000.00 by this Court as substantial damages to the appellant in the Balogun Case was made on the 9th March, 1978, 14 years after the present award of N72,000.00 exemplary damages was made to the present respondent by the trial Court on the 31st July, 1992. As a matter of common knowledge and notoriety, I take judicial notice of the fact that although the downward trend of the value of the Naira had reared its head in 1992, it was clearly not as pronounced as it is today. This notwithstanding, it seems to me that having regard to the award of N1,000.00 made by this Court in 1978 as substantial damages to the plaintiff in the Balogun case in a claim similar to the present one, the award of N72,000.00 damages to the respondent in 1992 as affirmed by the Court below is, to say the least, so extremely high as to make it, in my opinion, an entirely erroneous estimate of the damages to which the respondent was entitled. Taking everything into consideration, I think the justice of the case will be fully met if an award of N25,000.00 is made to the respondent for this wrongful dishonour of his cheque.

The conclusion I therefore reach is that this appeal partially suc-

ceeds on the issue of damages only. The judgments of the Court of Appeal and the High Court of the former Anambra State in this case, in so far only as they relate to the award of N72,000.00 exemplary damages to the respondent against the appellant are hereby set aside. In substitution thereof, it is ordered that judgment be entered in favour of the respondent against the appellant in the sum of N25,000.00 being damages for the wrongful dishonour of the respondent's cheque, Exhibit A. As this appeal has only succeeded in part, I think it is a proper case in which the parties should bear their own costs. Accordingly there will be no order as to costs.

C

### WALI JSC

I have been privileged to read in advance the lead judgment of my learned brother Iguh JSC, and I entirely agree with his reasoning and conclusion for partly allowing the appeal on the issue of damages only.

For those same exhaustive reasons which I hereby adopt, I also partly allow the appeal and reduce the amount of damages awarded to the respondent from N72,000.00 to N25,000.00

Parties shall bear their own costs in this appeal.

E

### KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Iguh, JSC., and with which I agree. The issue of joining or combining the two different accounts kept by the plaintiff with the defendant which was vigorously argued by defendant's counsel was never an issue on the pleadings. The plaintiff pleaded in paragraph 9 of the Amended Statement of Claim that:-

*"9. The plaintiff avers that at no time did he authorize the defendant to combine Account No. 126 with Account No. 1028."*

While the defendant pleaded in paragraph 14 of the Statement of Defence as follows:-

*"14. The defendant denies ever combining plaintiff's account Number 1028 with Account No. 126 as alleged and will at the trial put the plaintiff to the strictest proof thereof. Contrary to combination of both accounts as alleged by the plaintiff, the defendant merely with-held the plaintiff's balance in his account No. 1028 so as to stop the plaintiff from withdrawing on same account until the debit balance in his sister account No. 126 is upset in accordance with the defendant's practice and procedure."*

Thus the defendant having categorically denied any combination of accounts cannot now turn round to set up the same defence. I however, find

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merit in the appeal against the quantum of N72,000.00 damages awarded to the plaintiff by the trial court and which was confirmed by the Court of Appeal. I agree with my learned brother that the award which is patently on the high side was an erroneous estimate of the damages to which the plaintiff is entitled. I will also reduce the award from N72,000.00 to Twenty five thousand B (N25,000.00) Naira only. I subscribe to the orders in the said judgment.

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### OGWUEGBUJSC

I had a preview of the judgment just delivered by my learned brother, C Iguh, J.S.C. and I agree completely with his reasoning and conclusions. I however wish to add a word or two on the issues of the combination of the accounts and the award of damages.

The respondent maintained and operated two current accounts with the appellant at its Oguta Road branch, Onitsha. The first is Account No. 1028 D in the business name of New World Market located at Plot 83, Omagba layout, Onitsha and the second is Account No. 126 in the name of Joe Brown Commercial Agencies. The respondent was the sole signatory to both accounts.

He issued a cheque No. C/D ONSA 721289 (Exhibit "A") for the sum of N7,100.00 for the benefit of one Dr. Osita Aduba who supplied certain E goods to the New World Super Market. The cheque was drawn on Account No. 1028 which was in credit in the sum of N7,276.36 on 13:6:86 when Exhibit "A" was presented for payment. On the same date, Account No. 126 was in debit of N11,497.26. Exhibit "A" was not honoured. In respect to the endorsement on Exhibit "A", the respondent went to the Oguta Road branch of the F appellant where he maintained the accounts.

In her evidence, D.W. 2 (Ngozie Virginia Nsofor) the Manager of the Oguta Road branch gave the reasons for the dishonour of Exhibit "A" when she testified as follows:-

*"We told him that we were going to transfer money - We told him we G had blocked the account 1028 and would not pay any cheques drawn on it till he made good the debt in Account 126 .....*

*It is banking practice to combine 2 accounts if the customer so wishes, but in this very case we have not combined the two. What we did was to exercise our right of set off by transferring money from the account with H credit into the one with debit. .... When the accounts are combined they become one and one ceases to exist."*

The relationship between the banker and his customer is that of debtor and creditor. In other words, money deposited with a banker by his customer in the ordinary way, is money lent to the banker with a superadded

obligation on the part of the banker to honour the customer's cheques so long as there are assets of his in the banker's hands. See Pott & Ors. v. Clegg 16 M & W. 321 (153 E.R. 1212) and Marzetti v. Williams 109 E.R. 842.

The question is whether the appellant had the right to combine the two accounts of the respondent without obtaining his consent? In his pleadings and evidence, the respondent maintained that he did not give the appellant any instruction to combine his Account No. 126, a joint account he owned with two others (Ifeanyi Ngola and Emmanuel Oraezueme) with Account No. 1028 on which the cheque was drawn. Under cross - examination the respondent testified that he operated Account No. 1028 as sole owner under the business name of New World Super Market and Account No. 126 in the name of Joe Brown Commercial Agencies through which he and other partners carried on the business of importation from overseas.

The statement of the law in Volume 2 of Halsbury's Laws of England (3rd edition) at p.172, in paragraph 322, is as follows:-

*"Unless precluded by agreement, express or implied from the course of business, the banker is entitled to combine different accounts kept by the customer in his own right, even though at different branches of the same bank, and to treat the balance, if any, as the only amount really standing to his credit."*

See Garnett v. M'Kewan (P.O) (1872) L.R. 8 Exch 10. However, a loan account and a current account cannot be treated as one and subsequent payments into a current account cannot be taken as satisfying the loan account. See Bradford Old Bank v. Sutcliffe (1918) 2 K.B. 833 and Re E.J. Morel (1961) 1 ALL E.R. 796.

The respondent cannot be said to have kept Account Nos. 1028 and 126 in his own right i.e. that he had both accounts in his own names. There is unchallenged evidence that both accounts were in the firm names of New World Super Market and Joe Brown Commercial Agencies and Account No. 126 was a trust account. None of them is in the name of the respondent.

The appellant also failed to prove any special contract or any usage or course of dealing with the respondent in respect of two accounts. Both accounts were maintained and operated separately by the respondent. In the circumstances, the appellant having agreed with the respondent to open the two accounts, it had no right to move the assets and liabilities of Account No. 1028 to Account No. 126 without the assent of the respondent express or implied. The basis of the agreement is to keep the two accounts distinct and separate. See Greenhalgh & Sons v. Union Bank of Manchester (1924) 2 K.B. 153 and British & French Bank Ltd. v. Opaleye (1962) 1 All N.L.R. 26. The right to combine does not therefore arise where the accounts are not held in the

same right as in the case before us. See Bank of New South Wales v. Goulburn Valley Butter Co. Property Ltd. (1902) A.C. 543.

As to damages, a banker is bound by law to pay a cheque drawn by a customer, within a reasonable time after the bank has received sufficient funds belonging to the customer. The latter may maintain an action in contract against the banker for refusing payment of a cheque under such circumstances although he has not thereby sustained any actual damage. See Marzetti v. Williams (supra), H. Balogun v. The National Bank of Nigeria Ltd. (1978) 3 S.C. 155 and Rolin v. Steward (1854) 14 C.B. 595.

In Marzetti's case (supra), a trader sued his bankers for wrongful dishonour of cheque although there was no evidence to show that the plaintiff sustained any injury from the banker's mistake. Lord Tenterden C. J. remarked:-

*"I cannot forbear to observe that it is a discredit to a person and therefore injurious in fact, to have a draft refused payment for a small sum, for it shows that the bankers had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade."*

That case, therefore, puts it beyond doubt that where a banker without justification dishonours his customer's cheque, he is liable to the customer in damages for injury to his credit and if the customer is also "in trade" at the time of such dishonour, then damages for such injury will be at large and a judge or jury may within reason award substantial damages although there is no evidence from such a customer of any actual damage suffered by him. In the case of a non-trader, the converse is the law ie, that in an action by a "non-trader" for wrongful dishonour of his cheque by his bankers, only nominal damages should be awarded unless the non-trader pleaded and proved actual damage in which case substantial damages may be awarded. See Gibbons v. West-minster Bank Ltd. (1939) 2 K.B. 882 at 888.

In the appeal before us, there is no doubt that the respondent is entitled to damages for the wrongful dishonour of his cheque. The appellant contended that the award of N72,000.00 damages by the trial Court and confirmed by the Court of Appeal is erroneous and unjustified by law. An appellate Court would make an alternation of an award of damages made by a trial Court only if the award is shown to be either manifestly too high or manifestly too low or if the award was made on wrong principle of law or when the appellate Court is convinced that the figure was arrived at on a wholly erroneous estimate of the damage suffered by the plaintiff. See Ijebu-Ode Local Government v. Balogun (1991) 1 N.W.L.R. (Part 166) 136, Onaga v. Micho & Co. (1961) 2 S.C.N.L.R. 101, Dumez v. Ogboli (1972) ALL N.L.R. 241 at 253, Elf (NIg) Ltd. v. Sillo (1994) 6 N.W.L.R. (Part 350) 258 at 274 and Ziks Press Ltd. v.

Alvan Ikoku 14 W.A.C.A 188.

As a general rule, exemplary damages cannot be awarded in a purely contractual action. See Addis v. Grammophone Co. Ltd. (1909) A.C. 488. Where a plaintiff has a cause of action both in tort and for breach of contract, he may be able to recover exemplary damages by framing his claim in tort. If the Court is particularly outraged by the defendant's conduct, it can sometimes achieve the same result by awarding damages for injury to the plaintiff's feelings. See Perera v. Vandiyar (1953) 1 W.L.R. 672; (1953) 1 ALL E.R. 1109. The respondent in the appeal before us framed in his claim in contract and this Court is not particularly outraged by the appellant's conduct. I am satisfied that this is an award that properly deserves the interference of this Court. I do not think that that amount of damages can stand.

Applying the principle in Balogun's case (supra), where the Court found the appellant to be in business, an award of N72,000.00 for a breach of contract of this nature is manifestly high. Exemplary damages are not recoverable for breach of contract except in the case of breach of promise of marriage which, in substance though not in form is nearer to tort than to contract. See Addis v. Grammophone Co. Ltd. (1909) A.C. 488.

In the result, the appeal succeeds in part. Judgment is accordingly entered in favour of the respondent against the appellant in the sum of N25,000.00 for the wrongful dishonour of the respondent's cheque. There will be no order as to costs.

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### MOHAMMED JSC

I entirely agree with my learned brother, Iguh, JSC, in the opinion so ably given in the lead judgment that the appellant, in this appeal, can only succeed on the issue of award of damages. The appellant has failed to make any dent on the judgment of the lower courts in respect of issues 1 and 2.

Therefore, in agreement with my Lord Iguh, I allow the appeal against the award of N72,000.00 as exemplary damages for the refusal of the appellant to honour the respondent's cheque when the respondent had adequate amount in his account. I will also reduce the award to N25,000.00 damages. I also agree that parties should bear their own costs.