

SUPREME COURT OF NIGERIA

17TH JULY, 1997. SC. 204/1992

CORAM:- M. L. UWAIJS CJN, S. M. A. BELGORE,**A. B. WALL, I. L. KUTIGI, M. E. OGUNDARE,****E. O. OGWUEGBU, S. U. ONU, JJSC.**

CITY ENGINEERING NIG LTD. APPELLANT
 AND
 FEDERAL HOUSING AUTHORITY RESPONDENT

ARBITRATION - *Statutory period of limitation - In respect of enforcement of arbitration award - Runs from the date the cause of action arose.*

ARBITRATION - *Limitation period - In respect of action for damages for breach of implied promise to perform an award - Runs from the date of refusal to obey award.*

ARBITRATION - *Limitation period - Effect of Scott v. Avery clause on limitation period - The clause is no more applicable in Lagos.*

JUDICIAL PRECEDENT - *Arbitration - Previous decision of the Supreme Court - In Murmansk's case - On the issue of limitation period - Is binding on the Supreme Court.*

FACTS

The plaintiff/appellant and the defendant/respondent entered into a written agreement dated 17th December 1974. Clause 30 of the agreement provided that all matters in dispute between the parties should be referred to arbitration and that any award made pursuant thereto shall be final. When a dispute arose, the respondent terminated the contract. The parties later went to arbitration presided over by Architect Akinwande Olumide Craig. The arbitral proceedings commenced on 11th December, 1981, and in November 1985 an award was made in the sum of N3,722,118.75 in favour of the appellant.

When the respondent refused to carry out the award, the appellant brought an action before the High Court of Lagos State to enforce the award in 1988. The court found in favour of the respondent, on the ground that the appellant's application for enforcement had become statute barred. The appellant's appeal to the Court of Appeal was dismissed. The appellant has further appealed to the Supreme Court raising some issues

ISSUES FOR DETERMINATION

"(1) Can the statutory period of 3 months as provided for in paragraph C of Schedule 6 Section 4 of Law of Arbitration Cap 10 Laws of Lagos State for the making of an award in arbitration proceedings be waived by the conduct of any party to the proceedings without express written extension of the period by the arbitrator.

(2) In arbitration proceedings where an award has been made when does the period of limitation begin to run for the enforcement of the award - is it when the cause of action accrued or at the time of making an award?

(3) Is the claim for interest maintainable in proceedings for the enforcement of the award. Etc, see p.

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

Previous decision of the Supreme Court

1. In Murmansk, this Court per Elias CJN, decided that limitation period runs from the date of the accrual of the cause of action in the arbitration agreement and not from the date of the arbitral award. This decision is binding on this court unless we have any reason to depart from it. I am not convinced that any cause has been shown to inform me to depart from that decision. The decision accords with the weight of judicial opinion and textbook writers on the subject and has statutory backing. (p. 1891 C)

When statutory period of limitation begins to run

2. With profound respect to the learned authors, a distinction must be drawn between an action to enforce an arbitral award - this is provided for in the arbitration law itself, and the relief that can be granted in such an action is an order enforcing the award as if it were a judgment of the Court. And an action for damages for breach of an implied promise to perform a valid award where it is open to the court to order damages for failure to perform the award or decree, in appropriate cases, specific performance of the award or grant an injunction restraining the losing party from disobeying the award or grant a declaratory relief. In my respectful view, the statutory period of limitation in respect of the former form of action runs from the breach that gave rise to the arbitration. The action leading to the appeal before us belongs to that category of action. In respect of the latter category of action, limitation period runs from the date the losing party refuses to obey the arbitral award. In either case, the date of the award does not apply. (p. 1893 G)

Effect of Scott v. Avery Clause

3. The only other point left for me to comment on is the reference in Murmansk to Scott v. Avery. The common law rule that in an arbitration agreement where there is a Scott v. Avery arbitration clause, limitation period runs from the date of an arbitral award, no longer applies. For section 63 of the Limitation Law of Lagos State which provides:

"63. Notwithstanding any term in a submission to the effect that no cause of action shall accrue in respect of any matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purposes of this Law and of any other limitation enactment (whether in their application to arbitrations or to other proceedings) be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the submission."

has swept away this rule of law. I venture to mention that this also is now the position in England - see Section 34(2) of the Limitation Act, 1980. (p. 1894 C)

REPRESENTATION

Seyi Sowemimo for the Appellant
Respondent unrepresented

CASES REFERRED TO

Obembe v. Wemabod Estate Ltd. (1977) 5 SC. 115 at 129-130
Agromet Motoimport v. Maulden Engineering (1985) 2 ALL E.R. 436
Turner v. Midland Rly Co. (1911) 1 KB 832
Streamship Line v. Kano Oil Millers Ltd. (1974) 12 SC 1 at pp. 4-9
Egbe v. Hon. Justice J. A. Adefarasin (1987) 1 SC. 114

STATUTES AND RULES REFERRED TO

Supreme Court (Bench and Division) Rules Cap. 62, r. 4
Limitation Law (Laws of Lagos State 1973, cap. 70) ss. 8(1)(d), 63
Arbitration Law (Laws of the Northern States, 1963 Cap.) ss. 13, 5, 12(2), 13, 15
Arbitration Act, s. 5
Limitation Act, 1939, s. 2(1)
Limitation Act, 1980, ss. 7 34(2)
Land Clauses Act, 1845, s. 68

BOOKS REFERRED TO

Russel on Arbitration (20th edition) pages 5-6
Halsbury's Laws of England (4th edition) paragraphs 514 - 515
Mustill and Boyd, Commercial Arbitration (1982) pp. 162, 367-369

Prime and Scanlan, The Modern Law of Limitation (1993) p. 246

LEAD JUDGMENT BY OGUNDARE JSC

The principal question that calls for determination in this appeal is: when does the statutory period of limitation start to run for the purpose of the enforcement of an arbitration award; is it at the date of the accrual of the original cause of action or is it at the date of the arbitral award?

The parties herein entered into a written agreement dated 17th day of December 1974 whereby the appellant was to build a number of housing units at Festac Town, Badagry road, Lagos. The agreement contained in its Clause 30 a provision to submit all matters in dispute in connection with the execution of the contract to arbitration. Sub-clause (4) of Clause 30 provided that the award of the Arbitration would be final and binding. A dispute arose between the parties in the course of the execution of the contract. The Respondent rather than settle the dispute inter-partes by its letter dated 5th December 1980 threatened to terminate the contract. In its reaction to this threat, the Appellant by its letter dated 10th December 1980 duly notified the Respondent and requested its consent to the appointment of an Arbitrator pursuant to clause 30. Rather than give its consent, the Respondent by a letter dated 12th December 1980 terminated the contract. The Appellant invoked the arbitration clause in the agreement between them.

The parties eventually went to arbitration presided over by Architect Akinwande Olumide Craig. The arbitration proceedings commenced on 11th December 1981 and ended in November 1985 when the Arbitrator made his award in the sum of N3,722,118.75 in favour of the Appellant. By letter dated 17th August 1988, the Appellant's solicitors demanded from the Respondent the payment of the said sum. When payment was not forthcoming, the Appellant applied, by way of motion on notice, to the High Court of Lagos State, pursuant to section 31(3) of the Arbitration and Conciliation Act No. 11 of 1988, and/or section 13 of the Arbitration Law Cap. 10 Laws of Lagos State 1973 and Order 40 rule 4 of the High Court of Lagos State Rules, 1974 praying for the following reliefs:

"(i) That the applicant may have leave to enforce the award made in November, 1985 by Mr. Akinwande Olumide Craig, an Architect appointed in the arbitration under the agreement and conditions of contract between the applicant and the respondent dated 17th day of December, 1974 in the same manner as a judgment of the Honourable Court to the same effect.

(ii) An order that the respondent do pay costs of the application and the arbitration proceedings.

(iii) Interest on the award from 1st December, 1985 at the rate of

13% until the entire amount is paid.

(iv) And for such further order or orders as the Court may make in the circumstances."

The application was supported by an affidavit of 20 paragraphs sworn to by the Managing Director of the Appellant Company. There was no counter-B affidavit.

After hearing learned counsel for the parties, the learned trial Judge (Ayorinde J., as he then was) in a reserved ruling delivered on 21st September 1989 in which he quoted clause 30(1) & (4) of the agreement between the parties, and following Obembe v. Wemabod Estate Ltd. (1977) 5 SC. 115 at 129-C 130, observed:

"It is clearly shown in the above clause that Scott v. Avery clauses were not incorporated. It follows that the case in hand is one where the applicant ought to sue immediately the breach occurred in 1980. It was left then for the Respondent to stay proceeding pending the outcome of the D Arbitration.

The cause of Arbitration arose from 12/12/80. It is also the cause of action. The time limit as agreed by both counsel is 6 years under section 6 of the Limitation Law of Lagos State. The time from 1980 to 1988 is 8 years. On this issue, I agree that time ran out 6 years after 12/12/80."

E The learned Judge next considered the issue raised before him by the Respondent that the Arbitrator was bound to make his award within 3 months or within any extended time but that as the Arbitrator did not extend time as required by law, he was incompetent to make the award. The learned Judge, after quoting the relevant legislation, opined:

F *"There is force in the submission of Mr. Ogugen that the Arbitrator adjourned the sitting but did not enlarge time in writing. Schedule C is part of section 4 and it could not be ignored. The effect of non-compliance renders the subsequent proceeding null and void. Extension of time or enlargement of time are distinct from adjournment from time to time. The Arbitrator G was enjoined to complete within 3 months. Within the first instance he could adjourn as freely as he felt. But after the expiration of the first 3 months, he must specially enlarge time. He could do so as many times as the circumstances arose. He did not do so. The Arbitration was not taken within the time stipulated. See EJIFODOMI'S case (supra) at 115"*

H He adjudged -

"Finally, I hold and find that the cause of action arose in 1980 and time has run out. Secondly, the Arbitrator did not enlarge time in writing as required by law to complete within 3 months or extend or enlarge time if he could not complete. He acted outside the jurisdiction. He was functus officio

from February 1982. All proceedings thereafter are null and void including the purported award."

and dismissed the application.

The Appellant was dissatisfied with this decision and appealed to the Court of Appeal. In the lead judgment of Sulu-Gambari, JCA, that Court, on the issue of the period of limitation, said:

"I think there is force in the submission of the learned counsel for the respondent. The present case is one of a simple reference of any dispute to arbitration and contains no clause making an arbitration award a condition precedent to the bringing of an action. The whole purpose of this Limitation Act, is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after having lain by for the number of years respectively and omitted to enforce same, they are thus deprived of the remedy which they have omitted to use.

I think it is obvious that the Act cannot apply to a cause of action D which the person entitled to it cannot, because of his own contract, enforce against any one. I therefore agree with the decision of the learned trial judge that the time limit as agreed by both parties is six years under Order 6 of Limitation Law of Lagos State and the time has ran out."

On the issue of the competence of the Arbitrator, Sulu-Gambari, JCA held: E

"On the whole, without being persuaded by any authority to the contrary and I myself having searched and found none, I come to the conclusion that when the order was made in November, 1985, the arbitrator was giving such order outside the statutory period of three months. By that time, he was definitely functus officio and his order is therefore invalid and must F be so pronounced."

On these two issues the Court below, per Sulu-Gambari JCA, adjudged:

"On the whole, I agree that the learned trial judge was perfectly right in holding that the action was statute barred on two grounds, namely, G (i) that six years had elapsed before the action to enforce the arbitration award was instituted; and (ii) the arbitration proceedings exceeded beyond three months before completion when the arbitrator did not extend it in writing signed by him."

The appeal was dismissed.

The Appellant has now further appealed to this Court. And in its H brief of argument, it formulates the following questions as arising for determination in the appeal, to wit:

"(1) Can the statutory period of 3 months as provided for in paragraph C of Schedule 6 Section 4 of Law of Arbitration Cap 10 Laws of Lagos

State for the making of an award in arbitration proceedings be waived by the conduct of any party to the proceedings without express written extension of the period by the arbitrator.

(2) *In arbitration proceedings where an award has been made when does the period of limitation begin to run for the enforcement of the award -*

is it when the cause of action accrued or at the time of making an award?

(3) *Is the claim for interest maintainable in proceedings for the enforcement of the award.*

C (4) *Is the contract from which the arbitration proceedings arose under seal or an ordinary contract which the Appellant contends is a contract under seal which attracts a statutory limitation period of 12 years? This is a new point which with the leave of the Supreme Court will be taken on this Appeal."*

D I must, at this stage, remark that Question 4 does not any longer arise for determination as it was abandoned by the appellant. Indeed, it did not arise from the judgments of the two Courts below.

This appeal was first heard before a panel of five justices. At the conclusion of that hearing, but before judgment, the Court observed that E there are conflicting decisions of this Court on Question (2) above. That hearing was then aborted and a Full Court was empanelled to resolve the conflict pursuant to rule 4 of the Supreme Court (Bench and Division) Rules, Cap. 62. Learned counsel for the parties were invited to file supplementary briefs in respect of the decisions said to be in conflict. Supplementary briefs F were accordingly filed. The said decisions are:

1. Murmansk State Steamship Line v. Kano Oil Millers Ltd.

(1974) 12 SC 1 where this Court held that the statutory period of limitation should run from the date of the breach of the charterparty in 1964 when the "cause of arbitration" arose, and not from the date when the award was made G in 1966;

2. Obi Obembe v. Wemabod Estates Ltd. (1977) 5 SC. 115 where this Court discussed the different types of arbitration clauses; and

3. Kano State Urban Dev. Board v. Fanz Construction Co. Ltd. (1990) 4 NWLR (Pt. 142) 1 where this Court considered the application of sections 5 H and 13 of the Arbitration Law of Northern Nigeria.

At the oral hearing, Mr. Seyi Sowemimo appeared for the Appellant and proffered oral submissions. The Respondent was not represented by counsel and pursuant to the rules of this Court the appeal was taken as argued in Respondent's main and supplementary briefs.

In view of the importance of Question 2 to the determination of this appeal, I shall consider it first:

Question 2:

It is not dispute that -

(i) the agreement entered into by the parties on 17/12/74 contained clause 30, sub-clauses (1) and (4) of which read: B

"30(1) Provided always that in case any dispute or difference shall arise between the employer or his representative on his behalf and the contractor, either during the progress or after completion or abandonment of the Works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising hereunder or in connection therewith (including any matter or anything left by this contract to the discretion of the Employer or the deferment or adjustment by the Employer of any such appointment to which the Contractor may claim to be entitled) then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator, a person to be appointed on the request of either party by the President of the Nigerian institute of Architects. C

(4) The award of such Arbitrator shall be final and binding on the parties." E

(ii) that this agreement was unilaterally terminated by the Respondent on 12/12/80;

(iii) that the Appellant invoked the arbitration clause 30;

(iv) that Architect Akinwande Olumide Craig was appointed Arbitrator and he conducted an arbitration between the parties. F

(v) that the Arbitrator made, and published, his award in November 1985 in the sum of N3,722,118.75 in favour of the Appellant;

(vi) that the Appellant applied to the High Court of Lagos State in 1988 to enforce the award; G

(vii) the arbitration agreement of 17/12/74 did not contain a SCOTT VAVERY clause.

Now Section 8(1) (d) of the Limitation Law, Cap 70 Laws of Lagos State 1973 provided:

"8(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued -

(d) action to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under any enactment other than the Arbitration Law;" (underlining is mine)

It is generally accepted for the purpose of these proceedings that the arbitration agreement of 17/12/74 was not under seal nor was it under any enactment other than the Arbitration Law. It is thus accepted that the limitation period applicable to it is six years. The only dispute is as to the date the limitation period began to run. Was it 12/12/80 when the Respondent terminated the Agreement and Appellant's cause of action arose or November 1985 when the Arbitrator made and published his award?

It is Appellant's contention both in this Court and in the two courts below, that time started to run from November 1985 when the arbitral award was made. It is submitted that as the application to enforce it was brought in 1988, it was not statute-barred as the application was brought within the statutory period of six years. Support for the argument is found in Kano State Urban Dev. Board v. Fanz Construction Co. (supra) at page 37 where it was held by Agbaje, JSC. that an award by an arbitrator constitutes an independent cause of action. After referring in his supplementary brief to various dicta in that case and in Murmansk (supra) at pp 4-9 and Obembe v. Wemabod Estates Ltd. (1977) 5 SC. 115 at 129-130, Mr. Sowemimo, learned counsel for the Appellant submitted:

"The above extracts from these three decisions no doubt reveal some conflict in the mode of computation of time in relation to the statutory period of limitation. In resolving this conflict, this Honourable Court is respectfully urged to uphold its later decision in KSUDB V. FANZ CONSTRUCTION and Overruled its earlier decisions in OBEMBE V. WEMABOD ESTATES AND KANO OIL MILLERS cases.

It is submitted that the latter decision in KSUDB V. FANZ CONSTRUCTION is to be preferred as it is more in consonance with well established principles of law and provides greater access to the courts.

It is respectfully submitted that in reaching the decisions in Obembe v. Wema Board Estates Ltd. and the Kano Oil Millers cases over-looked the well established doctrine of MERGER."

Learned counsel referred to a number of authorities; I shall consider these later in this judgment. He submits before us that the original cause of action is now subsumed in the award and time starts to run from the date of the award. He observes that as the Respondent failed to apply to set aside the award, it cannot now challenge the validity of the award in the appellant's proceedings to enforce the award. He relied on Middlemiss Gould v. Hartlepool Corporation (1973) 1 ALLER 172, 175 F-G for this submission.

The Respondent, on the other hand, contends all along that time ran from 12/12/80 when it terminated the agreement giving rise to Appellant's cause of action. It is contended in the Respondent's supplementary brief that

there was no conflict in the three decisions of this Court in Murmansk, Obembe and KSUDB and that they were all rightly decided on their facts.

I shall start by resolving the argument that there was conflict in this Court's decisions in Murmansk and Obembe on the one hand and KSUDB on the other.

In Murmansk, the facts are that in 1964 the plaintiff entered into an agreement of charter-party with the defendant in the Kano State where the defendant was to provide a cargo of groundnuts for shipment in a ship to be provided by the plaintiff and presented at the Apapa port before February 28, 1964. The agreement contained a clause to the effect that the contract would be governed by Russian Law and that, in the event of any dispute arising out of it, such dispute should be referred to arbitration before a Moscow arbitral tribunal. The defendant, having been warned by the plaintiff that the ship might not put into the Lagos harbour before the agreed date of February 28, 1964, made other arrangement to have the cargo of groundnuts shipped to its destination abroad. (Russian law knew nothing of anticipatory breach of contract). This in due course amounted to a default by the defendant under the charter-party because, when the plaintiff later offered to present a different ship before the due date, the defendant could not go on with the contract. The dispute was then referred to a Moscow arbitral tribunal which on February 28, 1966 made an award in favour of the plaintiff against the defendant. The plaintiff thereupon brought an action in the Kano High Court for the enforcement of the award against the defendant. The Kano High Court in its judgment of January 14, 1974, dismissed the plaintiff's claim for the enforcement of the award on the ground that it was statute-barred. The Court took the view that the breach of the charter-party occurred in Nigeria in February 1964, although the award was made on February 28, 1966 in Moscow; the period of limitation therefore must be reckoned from 1966. The plaintiff appealed to the Supreme Court, claiming that the action was on the Moscow award and not on the breach of the charter-party two years earlier, and that the period of limitation should be reckoned from the latter date. The Supreme Court, after a careful hearing, dismissed the appeal on the following alternative grounds:-

- (i) that the learned trial judge should have thrown out the plaintiff's case on the ground that the present action had not been brought in accordance with section 13 of the Arbitration Law of the Northern States which, although it does not deal with foreign awards, requires that in order to enforce any arbitration award in the High Court, leave of the court or of a Judge must first be obtained. There was no evidence that that had been done in this case:
- (ii) Alternatively, the plaintiff's claim that the Convention on Recognition and

Enforcement of foreign Arbitral Awards of 1958 applies in Nigeria since March 1972 when Nigeria became a signatory to it, would seem to defeat the Writ of Summons which he issued only on February 2, 1972, that is, in the month previous to that when Nigeria first became bound; or

(iii) alternatively, there is clear authority for the proposition that the statutory period of limitation should run from the date of the breach of the charter-party in 1964 when the "cause of arbitration" arose, and not from the date when the award was made in 1966, unless the charter-party agreement contains what is called a Scott v. Avery clause to the effect that arbitration shall be a condition precedent to the commencement of any action at law. The appeal was dismissed on all three grounds.

The judgment of this Court was read by Elias CJN. My lords, as this judgment is very instructive on the issue before us I seek your indulgence to quote it in extenso. At pages 6-9 of the report, the learned and respected Chief Justice said:

"The present case is one of a simple reference of any dispute to arbitration and contains no clause making an arbitration award a condition precedent to the bringing of an action: Thompson v. Charnock (1799) 8 Term Rep. 139; a plaintiff can always bring an action at common law as soon as the cause of action arose. The action may then be stayed until the arbitration is disposed of: Graham v. Seagoe (1964) 2 Lloyd's Report 564 (sup. Ct., N.S.W.). Even in the Board of Trade Case (cited supra), Lord Atkinson made it clear that Thompson v. Charnock is still good law when he said at p. 625:

'Therefore, without overturning the case of Thompson v. Charnock, and the other cases to the same effect, your Lordships may hold that, in this case, where it is expressly, directly, and unequivocally agreed upon between the parties that there shall be no right of action whatever till the arbitrators have decided, it is a bar to the action that there has been no such arbitration.'

Later still, Lord Atkinson further pointed out at p. 628:

'With regard to the Statute of Limitation (21 Jac. 1, c. 16) it has no application, I think, to action or suits which, by the contracts of the parties to them, are placed in such a position that they cannot be commenced, begun, or enforced. The whole purpose of this Limitation Act, is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use. I think it is obvious that the Act cannot apply to a cause of action which the person

entitled to it cannot, because of his own contract, enforce against any one. We have underlined the portions in the passage just quoted in order to emphasize the fact that the period of limitation is deemed to run after the date of the award only when a party has by his own contract expressly waived his right to sue as soon as the cause of action has occurred. If there is no such Scott v. Avery clause, the limitation period begins to run immediately. A party is, however, precluded from setting up such an agreement as a defence if he has waived his right to insist on arbitration as a condition precedent: Toronto Railway v. National etc. Insurance Co. (1914) 20 Com. Cas. 1. As Lord Wright has rightly observed in Heyman v. Darwins Ltd. (1942) A.C. 336, at p. 37:

'The contract, either instead of or along with a clause submitting differences and disputes to arbitration, may provide that there is no right of action save upon the award of an arbitration. The parties in such a case made arbitration followed by an award a condition of any legal right of recovery on the contract. This is a condition of the contract to which the court must give effect, unless the condition has been waived, that is, unless the party seeking to set it up has somehow dissented himself to do so.'

It seems relevant here to refer to Russell on Arbitration, 18th Edition, at pp. 4 and 5 of which the following passage occurs:

'Date from which time runs: The period of limitation runs from the date on which the 'cause of arbitration' accrued; that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned.'

Thus, in Pegler v. Railway Executive (1948) 1 All E.R. 559; (1948) A.C. 332, the House of Lords held that the 'cause of arbitration' is the same as the 'cause of action' and that a fireman who brought his action more than six years after his conditions of service had been altered to his detriment was statute-barred from the date of the alteration, not when his exact losses were later quantified at arbitration.

A case which, though not on limitation of action, is nevertheless instructive on the question as to when a cause of action arises in any matter involving arbitration is Bremer Oeltransport Gmb. H v. Drewry (1933) 1 K.B. 753. There, the plaintiffs, as members of a limited partnership under German law entered into a charterparty with a British subject resident in France. The charterparty, which was made in England under English law, contained an agreement to refer any dispute to arbitration in Hamburg. A dispute which later arose was duly referred and the award was in favour of the plaintiffs who, thereupon, brought an action in England for the amounts due and payable under the award. The English court made an order for

service out of the jurisdiction and defendant objected on the ground that the action being on the Hamburg award was not maintainable. The Court of Appeal, held that the action of the plaintiff was an action upon the charterparty and not one upon the award itself and that, being really upon the charterparty made in England, the action was maintainable and the order for service out of the jurisdiction was proper. It follows, therefore, that if the action in such a case is really one on the charterparty and not on the award, which we think is the case in the present appeal, the statutory period of limitation must begin to run from the breach of the charterparty in 1964 and not from the making of the award in Moscow in 1966."

The case decided directly the issue under consideration in the appeal now before us.

I now turn to Obembe. The plaintiff was a consulting engineer operating under the name and style of "Obi Obembe and Associates." The defendants, in May 1969, appointed him as the consulting engineer in respect of the building known as "Unity House" which they proposed to erect at No. 37, Marina, Lagos. The conditions of the engagement of the plaintiff and his scale of fees were to be governed by those laid down in a booklet published by the Association of Consulting Engineers in London (Ex. 3). Pursuant to this, it was agreed that the plaintiff's fees for work done by him were to be calculated as a graded percentage of the engineering works as presented at page 38 of the booklet (Ex.3).

Soon after commencement of the building project, the parties had a disagreement about the quantity of the steel recommended by the plaintiff for the project. As a result the plaintiff's appointment was terminated by the defendants by letter dated 9th October, 1970 (Ex.10). The claim is, however, not for wrongful termination of his appointment but for the work which he had done pursuant to the project; it is based partly on the scale of fees laid down in the booklet (Ex.3) and partly on the letters exchanged by the parties. Plaintiff's claim was dismissed in its entirety. On appeal to the Supreme Court, the issues arising in the appeal were:

1. Whether the trial Judge had not misdirected himself when he stated in his judgment that if he had found the plaintiff's claim proved, he would have been unable to enter judgment in his favour in view of clause 17 in Part II of the Association of Consulting Engineers Booklet which provides for reference to arbitration in case of dispute;
2. Whether he erred in law in holding that the scale of fees in the booklet was inapplicable to the calculation of the plaintiff's fees;
3. Whether he also erred by refusing to give judgment for the plaintiff on the items based on that scale of fees, and

4. Whether the learned Judge erred both in law and on the facts in refusing to grant the amount claimed for the resident engineers when the plaintiff himself in a letter agreed to the basis of that claim.

In the judgment of this Court read by Fatayi-Williams JSC (as he then was), the Court observed at pages 128-131:

With respect to the complaint about the observation of the learned trial judge on the failure of the plaintiff to submit his claim first to arbitration before coming to court, Mr. Sofola, with his characteristic frankness, was also of the opinion that the learned trial judge was in error in making the observation. We also agree that the trial judge did not state the law correctly.

As the learned counsel for the plaintiff/appellant has rightly pointed out, arbitration clauses, speaking generally, fall into two classes. One class is where the provision for arbitration is a mere matter of procedure for ascertaining the right of the parties with nothing in it to exclude a right of action on the contract itself, but leaving it to the party against whom an action may be brought to apply to the discretionary power of the court to stay proceedings in the action in order that the parties may resort to that procedure to which they have agreed. The other class is where arbitration followed by an award is a condition precedent to any other proceedings being taken, any further proceedings then being, strictly speaking, not upon the original contract but upon the award made under the arbitration clause. Such provisions in an agreement are sometimes termed 'Scott v. Avery' clauses, so named after the decision in Scott v. Avery (1856) 5 H.L. Cas. 811, the facts of which are as follows. An insurance company inserted in all its policies a condition that, when a loss occurred, the suffering member should give in his claim and pursue his loss before a committee of members appointed to settle the amount; that if a difference thereon arose between the committee and the suffering member, the matter should be referred to arbitration, and that no action should be brought except on the award of the arbitrators. In considering the scope of these provisions, the court held that this condition was not illegal as ousting the jurisdiction of the courts.

In the case in hand, clause 17 of the 'Model Form of Agreement B' at page 37 of the Booklet (Ex. 3), which on the evidence, both oral and documentary, adduced by both parties, has been incorporated by reference into the agreement between the parties, reads:-

'Any dispute or difference arising out of this Agreement shall be referred to the arbitration of a person to be mutually agreed upon or, failing agreement, of some person appointed by the President for the time being of the Institution of Consulting Engineers.'

This clause is clearly different from the 'Scott v. Avery' clause. As a matter of fact, it belongs to the first class of arbitration clauses. We pause here for a moment to point out that when the dispute between the parties arose, the plaintiff, through his solicitors (the letter dated 9th January, 1971 - Exhibit 24 - refers) asked that the dispute should be referred to arbitration. The defendants, through their own solicitors, replied that a submission of the dispute to arbitration would serve no useful purpose. (See letter dated 19th January, 1971 - Exhibit 23).

As we have pointed out earlier, any agreement to submit a dispute to arbitration, such as the one referred to above, does not oust the jurisdiction of the court. Therefore, either party to such an agreement may, before a submission to arbitration or an award is made, commence legal proceedings in respect of any claim or cause of action included in the submission (See Harris v. Reynolds (1845) 7 Q.B. 71). At common law, the court has no jurisdiction to stay such proceedings. Where, however, there is provision in the agreement, as in Exhibit 3, for submission to arbitration, the court has jurisdiction to stay proceedings by virtue of its powers under section 5 of the Arbitration Act."

I pause here to observe that other than that this case discussed the two types of arbitration clauses either of which may be in an agreement, it is irrelevant to the case before us; it has nothing to do with the issue of limitation period. The facts are not germane to the facts of the instant appeal nor to the facts in Murmansk.

The third and last case is KSUDB. The facts are as follows.

The plaintiff/respondent Company Fanz Construction Company Ltd., sued the defendant/appellant Board, Kano State Urban Development Board, in a Kano High Court claiming against it a total of N6.922.742.00 being damages for a breach of an agreement in writing dated 16th July, 1975 entered into between the plaintiff and the defendant. According to the claim, the plaintiff in consideration of the sum of N11,368,652.02 agreed in the agreement to build 840 units of dwelling houses including infrastructures at Kundila Housing Estate, Zaria Road, Kano, according to the specifications supplied by the defendant. The contract price of the buildings, according to the plaintiff and to the agreement, was to be settled by instalments and by reference to the work completed on the building contract, payment being made upon presentation to the defendant by the plaintiff of certificate or certificates of completion of work, issued by the appropriate body.

What gave rise to this action, according to the plaintiff, was the non-payment by the defendant of the sum of money due on certificates of completion of work Nos. 30 and 31 duly issued by the plaintiff to the defen-

dant and also the non-payment of the fluctuation and variation claims made by the plaintiff against the defendant in accordance with the contract agreement between them.

In the plaintiff's claim it is expressly stated as follows:-

'Clause 31 of the said Agreement empowers the parties to refer any dispute arising from the said contract to a single Arbitrator appointed jointly B by the parties failing which either party can apply to the High Court. By a letter dated August 10, 1979 the plaintiff invited the defendant to agree to the appointment of an arbitrator in accordance with the said Clause 31 of the Agreement. The defendant turned this request down by its letter to the plaintiff dated 24th August, 1979.'

Thus, it would appear that the plaintiff sued the defendant in the Kano High Court on the contract agreement.

On the 8th day of October, 1979, parties appeared by counsel. The defendant's counsel applied for an order of pleadings and the court ordered pleadings to be filed, giving the plaintiff a period of 21 days and the defendant a period of 40 days after service as requested by counsel. On the 22nd day of January, 1980, after the plaintiff had filed its statement of claim as ordered by the court on 6/10/79, the learned counsel for the plaintiff informed the court that he had written to the defendant's counsel notifying him of the fact that he had written to the defendants giving them notice of the existence of a dispute between the parties and that their reply was that as an inquiry was in progress, they could not appoint an arbitrator. He then applied to or moved the High Court under the provision of Clause 31 of their agreement for the court to appoint the arbitrator. The learned counsel for the defendant opposed the application contending that the application F was premature as the non-payment of certificates Nos. 30 and 31 was stopped by the 'act of the state by means of an enquiry set up by the state with the aim of stopping all works and necessary payments.'

The learned trial Judge was of the view that the matter must be referred to an arbitrator and as the appointment of an arbitrator was within G the competence of the Chief Judge, he transferred the case to the Chief Judge for the necessary order.

Subsequently, the defendant filed a motion to strike out the case but later withdrew it and it was struck out. He still on that day 4/2/80 maintained his objection to the matter being referred to an arbitrator. The plaintiff had on 30/10/79 filed its statement of claim. However, he still pressed his application to refer the matter to arbitration. The parties agreed on an arbitrator and on 11/12/81, learned counsel for the plaintiff informed the court that they had started the arbitration proceedings. Counsel for the H

defendant confirmed the statement and said:

'That is so, we want the matter stayed.'

The court then made the order staying the proceedings as follows:

'The matter is hereby stayed, pending the decision of the arbitrator.

Case is adjourned sine die'.

B The arbitrator concluded the arbitration proceedings and made his award in favour of the plaintiff. The plaintiff moved the court for leave to enforce the award while the defendant moved the court to set aside the award. The High Court dismissed the application to set aside the award and granted the plaintiff leave to enforce the award. The defendant was dissatisfied and appealed unsuccessfully to the Court of Appeal. He subsequently appealed to the Supreme Court.

The following provisions of the Arbitration Law, Cap. 7, Laws of Northern Nigeria, 1963 applicable in Kano State came up for consideration in the appeal:-

D Section 5: 'If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any other person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration the court may make an order staying proceedings.

Section 12(2):

'Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside.'

G Section 13: 'An award on a submission may, by leave of the court or a Judge, be enforced in the same manner as a judgment or order to the same effect.'

Section 15: 'Any arbitrator or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or a Judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference.'

Paragraph (h) of the schedule to the Arbitration Law also states:-

'(h) The award to be made by the Arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively'."

This Court in allowing defendant's appeal made pronouncements on many issues relating to arbitration such as effect of an arbitral award, grounds for setting aside such award, misconduct of the arbitrator or umpire etc. - issues we are not here concerned with. But none touch upon the issue when a limitation period begins to run. There is nothing said in that case that can be said to be in conflict with Murmansk. Indeed, Obembe was referred to and B followed. It is, with respect, a misconception of the facts and issues decided in these three cases to say that they are in conflict. And of the three, the only one that is relevant and directly decided the issue on hand in this appeal is Murmansk.

In Murmansk, this Court per Elias CJN, decided that limitation C period runs from the date of the accrual of the cause of action in the arbitration agreement and not from the date of the arbitral award. This decision is binding on this court unless we have any reason to depart from it. I am not convinced that any cause has been shown to inform me to depart from that decision. The decision accords with the weight of judicial opinion and text- D book writers on the subject and has statutory backing.

In Russell on Arbitration (20th edition) pages 5-6, the following passage occurs:

1. Timeous commencement of arbitration. The period of limitation the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued: 'just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the claim accrued' - Pegler v Rly Executive (1948) 1 ALL ER 559 at 502; (1948) AC 332 at 338. Even if the arbitration clause is in the 'Scott v. Avery' form (see (1856) 5 HL Cas 811, F (1843 - 60) All E.R. Rep. 11, that is, there is provision that no cause of action shall accrue in respect of any matter agreed to be referred until an award is made, time still runs from the normal date when the cause of action would have accrued if there has been no arbitration clause. (That is provided by s. 34(2) of the Limitation Act 1980)' G

See also paragraphs 514-525 of Volume 2 Halsbury's Laws of England (4th edition). A number of the English cases has been discussed by Elias CJN in Murmansk; I need not go over them again. Suffice it to say that in Pegler v. Railway Executive (1948) AC 332, 338 the House of Lords, per Lord Uthwatt, accepted Atkinson J's view to the effect that - H

"the proper interpretation of s. 27 is to apply to limitation Act treating a cause of arbitration in the same way as a cause of action would be treated if the proceedings were in a court of law."

Much reliance is placed in the Appellant's supplementary brief on

passages in 2 volume Halsbury's Laws of England (4th edition) and some decided cases in England which deal with the effect of an arbitral award. In paragraph 611 of volume 2 Halsbury's Laws of England, for instance, it is written:

Effect of award. The Effect of award is such as the agreement of B reference expressly or by implication prescribes. Where no contrary intention is expressed and where such a provision is applicable, every arbitration agreement is deemed to contain a provision that the award is to be final and binding on the parties and any persons claiming under them respectively The publication of the award thus extinguished any right of C action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement."

These authorities, in my respectful view, do not decide when the statutory period of limitation begins to run. This topic is dealt with in paragraphs 514-D 515 of 2 Halsbury's.

I am not unaware that there is a divergence of opinion among academic writers in England about the meaning of the expression "cause of action" as used in section 2(1) of the Limitation Act 1939 in relation to arbitral award (see now section 7 of the Limitation Act 1980). An exhaustive review of E the distinguished publications was made by Otton J. in Agromet Motoimport v. Maulden Engineering (1985) 2 All E.R. 436. The learned Judge made reference not only to Russell on Arbitration (20th edition) but also to Mustill and Boyd: Commercial Arbitration (1982) p. 162 where the learned authors, relying on Turner v. Midland Rly Co. (1911) 1 KB 832, postulate that

F "..... when an action is brought upon an award, the six-year period of limitation runs from the date of the award and not from the moment when the claim arose, for the award itself gives rise to a new cause of action."

As Otto J. rightly observed, Turner v. Midland Rly Co. did not decide that proposition of law for in that case, no cause of action arose at all until an G award was made, and therefore, the cause of action arose on the award. What happened in that case was that an owner of certain freehold houses whose houses were injuriously affected within the meaning of s. 68 of the Land Clauses Act, 1845, by work, authorized by statute, carried out by the defendants in 1903, applied for compensation in 1909 when she became aware of her H rights. The defendants refused to pay and the matter went to arbitration. An award in favour of the plaintiff was made in 1910 by the arbitrator. An action was brought in the county court to enforce the award. The defendants set up a defence that the action was barred by the Statute of Limitations. The judge held that the cause of action arose upon the presentation of the claim for

compensation, and that the action was consequently brought in time. He was upheld on appeal. Ridley, J. held at pages 834-835:

"The effect of work being done under the authority of a statute is that any cause of action in respect of damage caused by the execution of the work is prevented from accruing, the work being made lawful. And even though the statute may incorporate s. 68 of the Lands Clauses Act, that will give no cause of action for a wrong, but compensation for damage by a lawful act. At the date, therefore, of the execution of the work, and down to the time of the arbitrator's award, there is no cause of action at all to which the Statute of Limitations can apply. But on the making of the award a cause of action, in my opinion, for the first time arises. The action is founded on the award and on the award alone, and it is from the date of the award that the statute runs."

Avory, J had this to say at p. 835

"All that s.68 gave was a right to compensation, which is a very different thing from a cause of action. But until the amount of that compensation was ascertained by the award no action could be brought."

The learned authors of Commercial Arbitration went on, however, on pages 367-369 to argue the "parties to an arbitration agreement impliedly promise to perform a valid award. If the award is not performed the successful claimant can proceed by action in the ordinary courts for breach of this implied promise and obtain a judgment giving effect to the award. The court may give judgment for the amount of the award, or damages for failure to perform the award". They conclude:

"Thus, for the purpose of the Limitation Act 1980, it is necessary to classify an action on an award either as 'an action to enforce an award, where the submission is not action upon a specialty', for which the limitation period is twelve years. But we submit that time begins to run from the date on which the implied promise to perform the award is broken, not from the date of the award."

With profound respect to the learned authors, a distinction must be drawn between an action to enforce an arbitral award - this is provided for in the arbitration law itself, and the relief that can be granted in such an action is an order enforcing the award as if it were a judgment of the Court. And an action for damages for breach of an implied promise to perform a valid award where it is open to the court to order damages for failure to perform the award or decree, in appropriate cases, specific performance of the award or grant an injunction restraining the losing party from disobeying the award or grant a declaratory relief. In my respectful view, the statutory period of limitation in respect of the former form of action runs from the breach that

gave rise to the arbitration. The action leading to the appeal before us belongs to that category of action. In respect of the latter category of action, limitation period runs from the date the losing party refuses to obey the arbitral award. In either case, the date of the award does not apply. To the extent, therefore, that Otton, J in Agromet Motoimport adopted the approach of Mustill and Boyd on Commercial Arbitration, I find myself, with respect, unable to go along with him.

Learned counsel for the Appellant has drawn our attention to a passage in Prime and Scanlan: The Modern Law of Limitation (1993) p. 246 under the heading "Suing on the Award". After reading this passage, it has not changed my view that the statutory period of limitation in the case on hand ran, like was decided in Murmansk, from the breach by the Respondent on 12/12/80 of the arbitration agreement.

The only other point left for me to comment on is the reference in Murmansk to Scott v. Avery. The common law rule that in an arbitration agreement where there is a Scott v. Avery arbitration clause, limitation period runs from the date of an arbitral award, no longer applies. For section 63 of the Limitation Law of Lagos State which provides:

"63. Notwithstanding any term in a submission to the effect that no cause of action shall accrue in respect of any matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purposes of this Law and of any other limitation enactment (whether in their application to arbitrations or to other proceedings) be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the submission."

F has swept away this rule of law. I venture to mention that this also is now the position in England - see Section 34(2) of the Limitation Act, 1980.

The conclusion I reach is that Question (2) is resolved against the Appellant. The statutory period of limitation of six years began to run from 12/12/80 and Appellant's application to enforce the award was statute-barred when it was brought in 1988. The Appellant has itself to blame for the catastrophe that has befallen it. Notwithstanding that there was some delay in the arbitration proceedings arising from various applications made by both sides, the Arbitrator gave his award in November 1985, a date still within the statutory period of limitation. For unexplained reasons, the Appellant waited another three years before applying to enforce the award in its favour, by which time limitation period had set in.

In view of my decision on Question (2) I do not consider it necessary to go into the other questions put before us except to say that, on the issue of interest, I agree entirely with Sulu-Gambari J.C.A. where in his lead judgment

he said:

"In the circumstances, I find it very difficult as no sufficient informations and materials are placed before this court to enable me to phantom (sic) the correct interest to be fixed for the arbitration award. It is perhaps safer for me to say that the matter would not be further delved into as it is not an issue properly raised before this court."

B

This appeal fails and it is hereby dismissed. I affirm the judgments of the two Courts below dismissing Appellant's application to enforce the arbitral award made in November 1985 by Architect Akinwande Olumide Craig.

I award N1,000.00 costs of this appeal to the Respondent.

C

UWAIS CJN

I have had the opportunity of reading in advance the judgment read by my learned brother Ogundare, J.S.C. I entirely agree with the judgment.

This appeal was at first heard by a panel of five (Uwais CJN, Belgore, Wali, Ogwuegbu and Adio JJ.S.C.). After it was adjourned for judgment, we observed that there was seemingly inconsistency between the decisions of this Court in the cases of Murmansk State Streamship Line v. Kano Oil Millers Ltd., (1974) 12 SC 1 at pp. 4-9 and Obi Obembe v. Wemabod Estates Ltd., (1977) 5 S.C. 115 at pp. 129-130 on one hand and the case of Kano State Urban Development Board v. Fanz Construction Co. Ltd., (1990) 4 N.W.L.R. (Part 142) E 1 at p. 37 on the other hand. As a result, the panel was reconstituted into a full court pursuant to rule 4 of the Supreme Court (Bench and Divisions) Rules, Cap. 62 of the Laws of the Federation of Nigeria, 1990, which provides:

"4. Where in any matter an important point of law arises which the Chief Justice (whether or not a member of the bench which took the matter) F thinks should be considered by a larger bench, he may direct the matter to be heard or reheard before a larger bench, which shall include, if the matter was heard in part or in fully, the Justices who had heard the matter or as many of them as can be had:

Provided that no such direction shall be given after judgment on G the matter has been delivered."

Counsel for the parties were directed to file supplementary briefs arguing the issue whether there was inconsistency in the judgment of this Court in respect of the two sets of cases aforementioned. This they did and the appeal was heard de novo on the Appellant's and Respondent's briefs of H argument already filed and their respective supplementary briefs of argument.

The issue - "when does the limitation of time apply to an award following arbitration: is it from when the cause of action arose (i.e. at the time of committing breach of the contract that gives rise to arbitration) or after the

arbitration award is made?" has been settled by the decision of this court in Murmansk's case (supra). The observance by Agbaje, J.S.C. in Kano Urban Development Board's case (supra) on p. 37 thereof, which learned counsel for the Appellant relied upon to argue that the limitation of time begins to run from the date of award in an arbitration, is based on a quotation from Halsbury's B Laws of England, 4th Edition, paragraph 611 at p. 323. It reads:

"611. *Effect of award: The effect of the award is such as the agreement of reference expressly or by implication prescribes. Where no contrary intention is expressed and where such a provision is applicable, every arbitration agreement is deemed to contain a provision that the award is to be* C *final and binding on the parties and any person claiming under them respectively*

The application of the award thus extinguishes right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award D *which is implied in every arbitration agreement."* (emphasis mine).

It will be observed that nowhere in the quotation is any statement made about the limitation of time applicable. It is, therefore, a misconception on the part of learned counsel for the Appellant to contend that because the award creates a new cause of action then the limitation of time begins to run E from the date of the award. Thus there is no conflict whatsoever between the decisions in Murmansk case and Obembe's case on one hand and the decision in Kano Urban Development Board's case on the other.

Murmansk's case states on p. 7 thereof, per Elias, CJN, as follows:-
"We have underlined the portions in the passage just quoted in F order to emphasize the fact that the period of limitation is deemed to run after the date of the award only when a party has by his own contract expressly waived his right to sue as soon as the cause of action has occurred. If there is no such Scott v. Avery clause, the limitation period begins to run immediately."

G While Obembe's case merely referred to arbitration clause and their classification without making any reference to limitation of time in enforcing arbitral award. To this extent Obembe's case is not relevant to the matter in dispute in the case in hand and could not rightly be said to be in conflict with the decision in Kano Urban Development Board's case.

H It is significant to mention that Scott v. Avery clauses, which provide in agreements that no action or proceedings in court in a dispute should be taken until the dispute had been referred to arbitration and an award had been made, have been rendered ineffective in Lagos State by the provisions of Section 63 of the Limitation Law Cap. 70 of the Laws of Lagos State, 1973

which read -

"63. Notwithstanding any term in a submission to the effect that no cause of action shall accrue in respect of any matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purposes of this Law and of any other limitation enactment (whether in their application to arbitrations or to other proceedings) be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the submission."

It is for these and the fuller reasons contained in the judgment of my learned brother Ogundare, J.S.C. that I too will dismiss this appeal. Accordingly the appeal is hereby dismissed with N1,000.00 costs to the Respondent. C

BELGORE.JSC

When parties, by their contractual agreement, provide resort to arbitration first and only after failure of agreement on arbitral award, can a party pursue a cause of action in court, time starts running, for purpose of limitation, from the date of the award. This is not to say the parties by their agreement oust the Court's jurisdiction; far from it. It only postpones resort to litigation before the Court. In these type of cases, the clause to stay access to the Court commonly referred to as "Scott v. Avery Clause" defers the application of statute of limitation to the date of arbitral award. In the absence of such a clause the time starts to run, for the purpose of limitation statute, from the date of the breach of contract. This is based on common sense of respecting the intention of the parties as contained in the contract signed by them. Nothing should be read into a contract other than what its clear and plain words indicate. In the instant case the parties though agreed to arbitration but never precluded a party pursuing his remedy in the Court of law. Had there been Scott v. Avery Clause, the story might have been different. However, by virtue of Limitation Law (Lagos State Laws 1973, Cap 70, in S. 63 thereof), Scott v. Avery Clause has ceased to apply to Lagos State. But the clear words of the contract, as set out in the judgment of my learned brother, Ogundare, J.S.C., is devoid of any clause precluding resort to the Court of law on breach and in any case it is no more the law in Lagos State. I find no merit in this appeal and I uphold the judgment of the Court of Appeal which affirmed the decision of the trial High Court. I award N1,000.00 as costs of this appeal against the appellant. H

WALI.JSC

I have read in advance a copy of the lead judgment of my learned brother Ogundare JSC and I agree with his exhaustive reasoning and conclu-

sion for dismissing the appeal.

The contract between the appellant and the respondent was not under seal and so the 12 year limitation contract period would not apply. The contract agreement did not contain the Scott v. Avery Clause to prevent the time to start running from the date of the breach. The fact that the award made B by arbitrator (in a situation like the one at hand) created a new cause of action did not alter the time limit provided in the Limitation Law, Cap. 10 of Laws of Lagos State, 1973, which is 6 years from the date of the breach. See Murmansk State Steamship Line v. Kano Oil Millers Ltd. (1974) 12 SC. 1.

Both the High Court and the Court of Appeal were right in their C decisions that the time within which to enforce the award made by the arbitrator had ran out. I agree with Learned Chief Judge when he said in his Ruling on the application to enforce the award:-

"The cause of Arbitration arose from 12/12/80. It is also the cause of action. The time limit as agreed by both counsel is 6 years under section D 6 of the Limitation Law of Lagos State. The time from 1980 to 1988 is 8 years. On this issue, I agree that time ran out 6 years after 12/12/80."

In affirming the trial court's decision above, the Court of Appeal (per Sule-Gambari JCA) said:-

"On the whole I agree that the learned trial judge was perfectly right in holding that the action was statute barred on two grounds namely, (i) that six years had elapsed before the action to enforce the arbitration award was instituted, and (ii) the arbitration proceedings exceeded beyond three months before completion when the arbitrator did not extend it in writing signed by him."

F The appeal lacks merit and for this and the fuller reasons in the lead judgment of my learned brother Ogundare JSC, I also hereby dismiss the appeal with N1,000.00 costs to the Respondent.

G KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Ogundare, JSC. I agree with it. I think both the trial High Court and the Court of Appeal rightly came to the conclusion when they held that the clause in the agreement of the parties for reference to arbitration, did not contain the SCOTT H v. AVERY (1856) 5 HL CAS 811 type of condition to the effect that arbitration shall be a condition precedent to the commencement of legal proceedings. The arbitration clause in the agreement of the parties herein reads -

"30(1) Provided always that in case any dispute or difference shall arise between the employer or his representative on his behalf and the con-

tractor, either during the progress or after completion or abandonment of the Works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising hereunder or in connection therewith (including any matter or anything left by this contract to the discretion of the Employer or the deferment or adjustment by the Employer of any such appointment to which the contractor may claim to be entitled) then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator, a person to be appointed on the request of either party by the President of the Nigerian Institute of Architects.

(4) The award of such Arbitrator shall be final and binding on the parties."

The statutory period of limitation of six (6) years therefore began to run from 12/12/80 when the agreement between the parties was unilaterally terminated by the respondent and not from November, 1988 when the applicant/appellant filed a motion in the High Court for the enforcement of the award as judgment of the court. The action was therefore clearly statute barred by the time the appellant went to court.

It may be noted that even if arbitration provision in the agreement was of the SCOTT v. AVERY type, section 63 of the Limitation Law of Lagos State Cap. 118 Laws of Lagos State of Nigeria 1994 would now appear to have wiped out its effect. The section reads -

"63. Notwithstanding any term in a submission to the effect that no cause of action shall accrue in respect of any matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purposes of this Law and of any other limitation enactment (whether in their application to arbitrations or to other proceedings) be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the submission."

The appeal is therefore dismissed with costs as assessed.

OGWUEGBUJSC

I had the advantage of reading in draft the judgment delivered by my learned brother Ogundare, J.S.C. I agree with his reasoning and conclusions.

The main issue for determination in the appeal is this:

Where an award has been made in an arbitration proceedings, when does the period of limitation begin to run for the enforcement of the award: is it from the

time when the cause of action arose or is it on the date of making of the arbitration award?

The courts below held that since the cause of action must be deemed and agreed by both parties to have arisen from 12th December, 1980, the application for the enforcement of the arbitration award in 1988 was barred by section B 63 of the Limitation Law, Cap. 118, Laws of Lagos State, 1973.

The written agreement between the parties to the proceedings contained in its Clause 30(1) and (4) that in case any dispute or difference in relation to the execution of the building contract shall arise then such a dispute or difference shall be submitted to arbitration and that the award of the C arbitrator shall be final and binding on the parties.

As to the time when the cause of action arose, the learned trial judge found as follows:

"It is clearly shown in the above clause that Scott v. Avery clauses were not incorporated. It follows that the case in hand is one where the D applicant ought to sue immediately the breach occurred in 1980. It was left then for the Respondent to stay proceedings pending the outcome of the arbitration. The cause of arbitration arose from 12:12:80. It is also the cause of action. The time limit as agreed by both counsel is 6 years under section 6 to (sic) the Limitation Law of Lagos State. The time from 1980 to E 1988 is 8 years. On this issue, I agree that time ran out 6 years after 12:12:80." The Court of Appeal affirmed the finding of the trial court in the following passage of its judgment:

"The present case is one of a single reference of any dispute to arbitration and contains no clause making an arbitration award a condition precedent to the bringing of an action." F

I think it is obvious that the Act cannot apply to a cause of action which the person entitled to it cannot, because of his own contract, enforce against any one. I therefore agree with the decision of the learned trial judge that the time limit as agreed by both parties is six years under Order 6 G (sic) of Limitation Law of Lagos State and the time has ran (sic) out."

The courts below were right in view of the fact that the agreement did not contain that class of clause where arbitration followed by an award is a condition precedent to any other proceedings being taken and any further proceedings, strictly speaking, will not be upon the original contract but upon the H award made under the arbitration clause. See Scott v. Avery (1856) 5 H.L. Cas. 811,

In Kano State Urban Development Board v. Fanz Construction Company (1990) 4 N.W.L.R. (Pt. 142) 1, this court considered the application of sections 5 and 13 of the Arbitration Law, Cap. 7, Laws of Northern Nigeria,

1963 which provide:

"5. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any other person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying proceedings."

"13. An award on a submission may, by leave of the court or a Judge, be enforced in the same manner as a judgment or order to the same effect."

The issue of limitation of actions did not arise for determination in FANZ case (supra). The validity of the award was unsuccessfully challenged because there was nothing to show absence of or want of jurisdiction on the part of the arbitrator.

In view of section 63 of the Limitation Law, Laws of Lagos State, 1973, the Scott v. Avery class of arbitration clauses has become academic in Lagos State. The section provides:

"63. Notwithstanding any term in a submission to the effect that no cause of action shall accrue in respect of any matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purposes of this enactment (whether in their application to arbitrations or to other proceedings) be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the submission."

For the above reasons and the fuller reasons contained in the lead judgment of my learned brother Ogundare, J.S.C. I too will dismiss the appeal with N1,000.00 costs to the respondent.

ONUJSC

Having been privileged to read the lead judgment of my learned brother Ogundare, JSC just delivered, I am in entire agreement with his reasoning and conclusion that this appeal ought to fail and I accordingly dismiss it.

My learned brother, Ogundare, JSC has so ably and comprehensively stated the facts and the law involved in this appeal that I need only

proceed to comment briefly on Issue No. 2 of the four issues submitted as arising for determination, to wit:

"2. In arbitration proceedings where an award has been made when does the period of limitation begin to run for the enforcement of the award -

Is it when the cause of action accrued or at the time of making an award?"

It is apparent from the record of appeal in the instant case that the arbitrator appointed for the purpose giving rise to the suit herein, Mr. Akinwande Olumide Craig, after going through the preliminaries commenced arbitration vide arbitration agreement in clause 31(1) and (4), in earnest on 12/12/80 and the time limit agreed by both parties was six years under section 6 of the Limitation Law. The time when the cause of action therefore arose (1980 upon completion) to the date of enforcement of the award after its completion i.e 1988 spanned 8 years in all. Consequently, the time for purposes of computation of limitation had thereby run out. The ruling of the learned trial Chief Judge was that since the cause of action must be deemed as agreed by both parties to have arisen from the former date, the application for enforcement of the arbitration award made from the later date was barred by the statute of Limitation (i.e Limitation Act of 1966) which requires that a civil action must be commenced within six years of the cause of action. As to whether the learned trial Chief Judge was therefore right in holding that the action was statute barred, I am of the firm view that he was on two valid and unassailable grounds, viz:-

(i) that 6 years had elapsed from the inception of arbitration proceedings before the action to enforce the arbitration award was instituted; the present case being a simple reference that contains no clause making an arbitration award a condition precedent to the bringing of an action.

(ii) the arbitration proceedings exceeded beyond 3 months before completion when the arbitrator did not extend the life of the arbitration in writing signed by him as required by law.

The duty imposed by the Arbitration Law stated above is on the arbitrator and not on the parties to the arbitration to carry out such duties.

Thus, I am of the opinion that the court below was justified when it arrived at the following view:-

"I think there is force in the submission of the learned counsel for the respondent. The present case is one of a simple reference of any dispute to arbitration and contains no clause making an arbitration award a condition precedent to the bringing of an action. The whole purpose of this Limitation Act, is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after having lain by for the number of years respectively and

omitted to enforce same, they are thus deprived of the remedy which they have omitted to use."

Later down in its judgment the court below further held:

"I thin it is obvious that the Act cannot apply to a cause of action which the person entitled to it cannot, because of his own contract, enforce against any one. I therefore agree with the decision of the learned trial Judge that the time Limit as agreed by both parties is six years under Order 6 of Limitation Law of Lagos State and the time has ran (sic) out.

I consider the issue of limitation under the Limitation Law of Lagos State raised by the respondent a matter of paramount importance since no useful purpose would be served in dealing with other issues in the appeal if the action was, indeed, statute-barred. If an action is barred by statute, no amount of resort to the merit of the appellant's contention will serve to keep the action in being. See EGBE V. HON. JUSTICE J. A. ADEFARASIN (1987) 1 SC. 114."

In the light of the foregoing, the distinction sought to be made in D calling for a resolution of the two earlier cases of this court, to wit: Obembe v. Wemabod Estates (1977) 5 SC. 115 at 129 - 130; and Murmansk State Steamship Line v. Kano Oil Millers (1974) 12 SC. 1 at 4-9 vis a vis its latest decision in Kano State Urban Development Board v. Fanz Construction (1990) 4 NWLR (Part 142) at 37 and which necessitated the call for filing of supplementary E briefs by both parties, would appear ineffective, in my opinion, in conferring on appellant's case (doomed through effluxion of time) to have a new lease of life. Each of the above cases was decided on its own facts and applicable law. There is no conflict between them, in my opinion.

The sum total of all I have been saying is that the statutory period of F limitation in the case herein dated from the breach by the respondent of the arbitration agreement vide Murmansk State Steamship Line case (supra) and time having been allowed to flow by without an attempt at enforcing the award through neglect and or lethargy, they cannot be heard to complain. Besides, the old common law rule that in an arbitration agreement where there is a Scott v. Avery arbitration clause, limitation period runs from the date of the arbitral award, having been effaced by legislation vide section 63 Limitation Law of Lagos State, Cap. 70 of 1973. I have no hesitation in resolving this issue like my learned brother Ogundare, JSC has done, against the appellant. G

For these and the fuller reasons contained in the lead judgment of my H learned brother Ogundare, JSC I also dismiss this appeal with the same consequential orders including costs awarded therein.