

SUPREME COURT OF NIGERIA
27TH FEBRUARY, 1998. SC. 14/1995
CORAM:- M. L. UWAIJ CJN, I. L. KUTIGI,
E. O. OGWUEGBU, S. U. ONU, A. I. IGUH, JJSC.

ALHAJI TAOFIK ALAO PLAINTIFF/APPELLANT
AND
AFRICAN CONTINENTAL
BANK LTD DEFENDANT/RESPONDENT

CONTRACTS - *Illegality - When will a contract be declared illegal - An illegal contract is void - And cannot be the foundation of any legal right.*

BANKING - *Proceeds of bank drafts - From an illegal transaction - Need for court to order that the proceeds be returned to the Central Bank.*

FOREIGN EXCHANGE - *Illegal transactions - That offend against the provisions of the Exchange Control Act - Will not be enforced by the law courts.*

FACTS

The plaintiff/appellant was at all material times a businessman and a citizen of and resident in the Republic of Benin. Between 1980 - 1981, some of his Nigerian business associates approached him in Benin Republic and Europe. They sought his help in providing funds abroad for the education of their wards and children through his country's local currency the CFA Francs which is freely convertible in the world currency market. Plaintiff first granted seven requests of his Nigerian customers who eventually obtained Foreign Exchange approvals from the CBN. Bank drafts covering the amount in Pound Sterling were issued and handed over to them by the defendant at its Nigeria headquarters to be drawn on its London Branch. These drafts were in turn passed to plaintiff in settlement and reimbursement of the sums earlier advanced by him. The plaintiff paid them in through his own bank in Benin Republic to

the defendant's London branch which honoured the drafts and accordingly had the plaintiff repaid.

Following the success of the first transaction, the plaintiff granted similar requests to his other 45 (forty five) Nigerian business associates under the same arrangement. He received a total of 45 drafts for the total sum of ₦212,310.00 (Two hundred and twelve thousand, three hundred and ten pounds sterling). This time, the defendant's London Branch dishonoured the drafts on the first and second presentations. After fruitless efforts to get the defendant to honour the drafts, plaintiff filed an action before the Lagos High Court claiming inter alia, an order of court compelling the defendant to direct its London branch to honour the drafts. The defendant raised a plea of illegality. The trial court found in favour of the plaintiff and granted all the reliefs sought. Defendant's appeal to the Court of Appeal was allowed. The plaintiff being dissatisfied has now appealed to the Supreme Court raising 7 issues which was narrowed down to a single issue.

ISSUE FOR DETERMINATION

"Whether the facts relied upon by the plaintiff in his statement of claim disclose ex facie contravention of sections 3(1) and 7(c) of the Exchange Control Act, 1962 thereby rendering the loan agreements illegal and unenforceable and disentitling him to the proceeds of the 45 bank drafts Exhibits A - A44."

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

When will a contract be declared illegal

1. The law is very clear on the effect of illegality on a transaction or contract. It is the law that a contract is illegal if the consideration or the promise involves doing something illegal or contrary to public policy or if the intention of the parties in making the contract is thereby to promote something which is illegal or contrary to public policy. An illegal contract is a void contract and it cannot be the foundation of any legal right. In other words when the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and

cannot be enforced (see HERMAN v. JEUCHNER (1885) 15 QBD. 561, WILLIAM HILL (PARK LANE) LTD. v. HOFMAN (1950) 1 all ER. 1013 (p. 325 A))

Foreign exchange - Illegal transactions

2. Uwaifo, JCA., must therefore be right when he observed later in the lead judgment that:-

"I believe it must be clear beyond doubt that the plaintiff upon the combined effect of sections 3(1) and 7 (c) of the Exchange Control Act, cannot seek the aid of the Court to have the reliefs he has sought. The entire transaction from the pleading and evidence of the plaintiff is illegal and the so called obligations arising out of the procurement of the banker's drafts are equally illegal and unenforceable."

Clearly, the transactions herein show that offences have been committed against sections 3 (1), 7(c) and 8 of the Exchange Control Act. They are therefore illegal transactions which law courts will not enforce. (p. 325 E)

Proceeds of bank drafts

3. Before I conclude, I must refer to one useful point which the plaintiff made. It was that the Court of Appeal ought to have in its consequential order, after allowing the appeal, directed that the proceeds of the drafts, that is £212,310.00 be returned to the Central Bank of Nigeria, in keeping with the practice where students' beneficiaries could not be traced. He said by failing to make this order, the Court of Appeal has made the defendant to benefit from illegal transactions by retaining the foreign exchange allocation for its own purpose. I think he is right here. Even though it is not for his own exclusive benefit, the point is nevertheless valid. (p. 326 G)

NOTABLE POINTS OF INTEREST

KUTIGIJSC

1. Contravention of provisions of the Foreign Exchange Act

Delivering the lead judgment (with which the other Justices agreed),

Uwaifo, JCA., said:

"It is without dispute clear that the plaintiff's action is founded on the loan transactions he said he entered into with some (unnamed) Nigerians by which he loaned them according to him, CFA Francs in B Cotonou to the value of ₦212,310.00 and the promise by those Nigerians to repay him in pounds sterling. The said promise, according to him, was sought to be fulfilled by the procurement of 45 bank drafts issued in the names of various persons and institutions but the proceeds of which he C had been unable to realize. These matters involve foreign exchange control. I must therefore turn to the Foreign Exchange Act From the facts relied on by the plaintiff, some Nigerians resident in Nigeria took loans of CFA. Francs (i.e. borrowed foreign currency) from him in Cotonou. That clearly contravenes section 3 (1) of the Exchange Control Act with- D out the Minister's permission, he not being an authorized dealer. Later those Nigerians made payment in respect of the said loans outside Nigeria by procuring 45 bank drafts in the UK. This contravenes section 7(c) being without the Minister's permission. The first act which contravenes E section 3(1) and the second act which contravenes section 7(c) apart from being illegal are now criminal offences under sections 1 (1) (e) and 1(1) (d) (iii) respectively of the Exchange Control (Anti-Sabotage) Act, 1984 now in Cap 114, Vol. 11 Laws of the Federation of Nigeria, 1990 F and severely punishable."

I entirely agree. (p. 324 B)

2. Need to always clarify omissions that arise in a case

G It is interesting to note as well that apart from failure to obtain Minister's approval or permission for the transactions as required by the Exchange Control Act, the omissions and or commission mentioned hereunder were never explained:

H (1) The plaintiff did not tender a statement of account or any document at all for that matter, to show how the alleged remittances passed through his bank account to the beneficiaries in UK.

(2) The plaintiff did not name, let alone call as a witness any of his Nigerian business associates who borrowed the foreign currency from

him.... . (p. 325 G)

OGWUEGBU JSC

3. Forgery - Need to make culprits face the wrath of the law

Another aspect of the case is the unrestrained subterfuge employed by the appellant in his desperate effort to collect the proceeds of the forty five bank drafts. They were made in the names of non-existent educational institutions or students in the United Kingdom. Exhibits "E", "F", "F1", "F2", "F3" and "F4" are some correspondences between the defendant's London branch and the alleged institutions or student beneficiaries. They were non-existent. Persons of the like of the appellant and his faceless Nigerian collaborators have contributed in no small measure to the economic adversities of this country. This is a proper case which should be thoroughly investigated and the culprits made to face the wrath of the law. (p. 333 D)

IGUH JSC

4. Pleadings - Reply - When to be filed out of prudence

This is because where no counter-claim is filed, all the material facts in a Statement of Defence including any new facts therein alleged, are put in issue even in the absence of a Reply. A reply merely "joining issue" is therefore unnecessary, and will be disallowed on taxation of costs in the trial courts. Where, however, because of the nature of the averments in the Statement of Defence filed, the plaintiff proposes to lead evidence in rebuttal or to set up some affirmative case of his own in answer to the facts alleged by the defendant or raise issues of fact not arising out of the two previous pleadings, the plaintiff, as a matter of prudence and general practice shall put in a Reply. See Bakare and Another v. Ibrahim (1973) 6 S.C. 205. (p. 346 C)

5. Illegality - Failure to plead will not defeat its effect

Accordingly where a statute makes a particular contract or class of contracts illegal or invalid, the court will refuse to allow an action to be maintained thereon, even though the illegality is not pleaded by the defen-

dant and the parties do not desire to rely on it. See Royal Exchange Assurance Corporation v. Vega (1902) 2 KB. 384. But once illegality is brought to the attention of the court, it overrides all questions of pleadings, including any admissions made therein. See Belvoir Finance Co. Ltd. v. Harold G. Cole and Co. Ltd. (1969) 1 W.L.R. 1877. (p. 346 H)

6. *Pleadings - Though no reply was filed, issue was joined*

Although the plaintiff, in the absence of a Counter-Claim, filed no Reply to this material averment of fact, it cannot, on the state of the law, be disputed that the parties were deemed to have joined issue on the point. As a general rule, evidence must be directed and confined to the proof or disproof of the issues as settled by the pleadings. See J.O. Idahosa and Another v. D. N. Oronsaye (1959) 4 F.S.C. 166, etc. The plaintiff neither testified nor led any evidence in proof of the fact that the Minister's permission was infact obtained with regard to the transactions in issue. (p. 347 D)

7. *Exchange Control - Onus of proving permission of the appropriate authority*

Section 1(3) of the Exchange Control (Anti - Sabotage) Act, 1984 specifically deals with the question of onus of proof on the issue of whether or not anything done pursuant to the Exchange Control Act is with the permission of the appropriate authority. It provides as follows -

"1 (3) The onus of proving that any payment was made or anything done with the permission of the appropriate authority shall be on the person charged". (Underlining supplied)

It seems to me crystal clear that the above provision of the law casts the onus of establishing that any act or thing done pursuant to the Act was with the permission of the Minister on the person alleged to have done the act for which the Minister's consent is a conditio sine qua non for its validity. In other words the express provision of the Act is to the effect that the burden of proving that any act or thing requiring the Minister's permission under the Exchange Control Act was done with such permission shall be on the person against whom the illegality is

raised or charged. (p. 348 F)

REPRESENTATION

F. Nwadialo SAN, with O. Okunloye for the plaintiff/appellant
Chief B. I. D. Ezeogu with Emmanuel Sukore for the defendant/respon- B
dent

CASES REFERRED TO

Akeredolu v. Akinremi (1981) 3 N.W.L.R. (part 108) 164 at 172 C
William Hill (part Lane) Ltd. v. Hofman (1950) 1 ALL ER. 1013
Bakare v. Ibrahim (1973) 6 S.C. 205
Boissevain v. Weil (1950) A.C. 327
Shaw v. Shaw (1965) 1 W.L.R. 537 C.A.
Gedge v. Royal Exchange Assurance Corporation (1900) 2 Q.B. 214 at D
220
Sodipo v. Lemminkainen (1985) 2 N.W.L.R. (Part 8) 547 at 557-558
Idahosa v. Oronsaye (1959) 4 F.S.C. 166
Esso Petroleum Co. Ltd. v. Southport Corporation (1956) A.C. 218 E
Cope v. Rowland (4) (1936) 2 M & W

STATUTES REFERRED TO

Exchange Control Act 1962 ss. 3, 7, 8 F
Exchange Control (Anti-Sabotage) Act 1984 Cap. 114 vol II LFN 1990
ss. 1 (i) (e), 1 (1) (d) (iii)
Exchange Control (Repeal) Decree No. 8 of 1995

LEAD JUDGMENT BY KUTIGI JSC

The plaintiff is and was at all material times a businessman and a
citizen of the Republic of Benin living in the town of Porto Novo in that
Republic. He has and had Nigerian customers and business associates
going to that country to purchase goods from him. During the period H
1980 - 1981 some of his Nigerian business associates approached him in
Benin Republic and Europe to help them settle the bills of children and
wards in various educational institutions in Europe and America by pro-

viding funds abroad to these children through his country's local currency the CFA Francs, freely convertible currency in the world market. He said the request was made in order to obviate the hardship and inconveniences caused to many Nigeria students abroad due to long delay in obtaining approval of the Central Bank of Nigeria (hereinafter called the CBN) for Foreign Exchange applications, thus making timely remittance of funds difficult. He first granted seven requests of his Nigerian customers by providing the needed funds for their children and wards in England in CFA Francs from his own account. When the Nigerians eventually obtained Foreign Exchange approvals from the CBN, Bank drafts covering the amount in Pound Sterling were issued and handed over to them by the defendant bank at its headquarters here in Nigeria to be drawn on its branch in London. These drafts were in turn passed to the plaintiff in settlement and reimbursement of the sums earlier advanced by him. Thereafter the plaintiff paid them in through his own bank in Benin Republic to the defendant's London branch which honoured the drafts and accordingly had the plaintiff repaid.

Following the success of the first transaction, the plaintiff granted further and similar requests to his other 45 (Forty five) Nigerian business associates under the same arrangement. He provided funds abroad to their children and wards through his country's local currency - the CFA Franc. When the Nigerians eventually obtained approvals from the CBN, the drafts issued by the defendant bank to the Nigerians in relation to the school fees and maintenance allowances for their children, were passed to the plaintiff in settlement and reimbursement of the sums earlier advanced by him. The plaintiff received altogether 45 drafts from the Nigerians, the total value of which was ₦212,310.00 (Two hundred and twelve thousand, three hundred and ten pounds sterling). The drafts were admitted in evidence as Exhibits A to A44.

The plaintiff paid in all the 45 drafts through his bankers in Benin Republic to the defendant's London Branch. But this time the defendant's London Branch office dishonoured the drafts on the first and second presentations. The plaintiff then made enquiries from the Manager of the defendant's London Branch through his solicitor and got an explanation

that as the total amount covered by the drafts was very large, the Manager wanted confirmation from the defendant's Head Office in Lagos that the drafts were actually issued by them and because additionally the drafts were each marked thus, "Endorsement Requires Drawer's confirmation". Accordingly the drafts were sent by the London Manager to the Lagos Head Office for confirmation. B

After fruitless efforts to get the defendant bank to honour the drafts, the plaintiff sued the defendant bank in the Lagos High Court claiming as follows:-

"1. A declaration that the 45 Drafts amounting to f212,310 (Two hundred and twelve thousand three hundred and ten Pounds Sterling) drawn by the defendant in Lagos on its London Branch Office and presented to the said London Branch Office by the plaintiff through his various bankers are valid, properly and regularly negotiated drafts. C D

2. A declaration that the said Drafts have not expired and are still negotiable.

3. A declaration that the plaintiff is entitled to have the drafts honoured by the London branch of the defendant. E

4. An order of the Court compelling the defendant to direct its London branch to honour the drafts."

Pleadings were filed and exchanged. The case then proceeded to trial. At the trial the plaintiff testified on his own behalf and called one other witness. Four witnesses testified on behalf of the defendant bank. F In a reserved judgment, the learned trial judge granted all the four reliefs claimed by the plaintiff above. He said:-

"The evidence shows clearly that the plaintiff and the said citizens of this country discussed the transaction in Cotonou, Republic of Benin and came to the terms whereby the bank drafts were handed over to the plaintiff in that country. The offer was, presumably, made without dissimulation, in a quixotic attempt to help business associates in need. The plaintiff in my opinion has an enforceable right against the defendants who issued the drafts to their London branch asking that branch to pay the amounts stated therein. This action therefore succeeds. There will therefore be judgment against the defendants -----". G H

He thereafter granted all the four reliefs claimed as I said before.

Dissatisfied with the judgment of the trial High Court, the defendant bank appealed to the Court of Appeal, Lagos Judicial Division. In the Court of Appeal, four issues were submitted for resolution by the defendant. Those issues were conveniently and quite properly too in my view reduced into two by the Court of Appeal thus:-

"(a) Whether there was apparent or proved illegality affecting the plaintiff's cause of action; and

(b) Whether apart from illegality, the evidence justified the plaintiff's claim to the proceeds of the 45 bank drafts."

The Court of Appeal in a considered judgment allowed the appeal and set aside the judgment of the High Court together with the order for costs.

Aggrieved by the decision of the Court of Appeal, the plaintiff has now further appealed to this Court. Eight grounds of appeal were filed.

Counsel filed and exchanged briefs of argument in accordance with our Rules of Court. These were adopted at the hearing during which additional oral submissions were made by counsel. Learned counsel for the plaintiff, Mr. Nwadialo, SAN., has in his brief submitted seven issues as arising for determination in the appeal. But having regard to the two issues considered by the Court of Appeal above in arriving at its decision now appealed, I think the only issue which really arises for consideration in this appeal is the plaintiff/appellant's issue (1). It reads thus:-

"Whether the facts relied upon by the plaintiff in his statement of claim disclose ex facie contravention of sections 3(1) and 7(c) of the Exchange Control Act, 1962 thereby rendering the loan agreements illegal and unenforceable and disentitling him to the proceeds of the 45 bank drafts Exhibits A - A44."

I have endeavoured to summarize the facts of the case above already. In his Statement of Claim the plaintiff amongst others pleaded as follows:-

"4. Between 1980 and 1981 some of these Nigerians in the ordi-

nary course of business, approached the plaintiff in Benin or/and in Europe to enable them settle various schools and universities bills of their children and defendants in Europe and America thus sparing such children and defendants hardship and inconveniences which late settlement of schools and other bills might entail.

5. The Nigerian friends who approached the plaintiff to accommodate them as stated in the foregoing paragraph did so because of the long delay in their getting the Central Bank of Nigeria's approval for Foreign Exchange applications to enable them remit funds to their children and defendants abroad.

6. The Plaintiff granted the requests of his Nigeria friends in this regard and provided funds abroad to them through his country's local currency, the C.F.A. Francs which is fully and freely convertible in the world currency market being aligned to French Francs.

7. When the Nigerians eventually obtained the foreign exchange approvals from the Central Bank of Nigeria, the drafts issued by the defendant to the Nigerians in relation to the School Fees and maintenance allowance of their children and other defendants were passed to the plaintiff in settlement and reimbursement of the sums earlier advance by him.

8. The Plaintiff and the said Nigerians also agreed on how to meet any shortfall or surplus as the case might be, should there be any such shortfall or surplus after the plaintiff would have collected the proceeds of the drafts.

9. The Plaintiff received altogether 45 drafts from the Nigerians pursuant to this arrangement the total value of which was ₦212,310. The particulars of the drafts are set out in the schedule to this Statement of Claim.

11. The plaintiff paid the 45 drafts mentioned in paragraph 9 above through his bankers in Cotonou, Benin Republic but the defendants London branch office dishonoured the drafts on the first and second presentations."

In his evidence in chief the plaintiff as pleaded testified as follows:-

"After this transaction, other customers of mine came seeking

for my help in the same way. This was between December, 1980/January, 1981. The customers were all from Nigeria and I decided to help them like the first one. I loaned them the money and transferred the money to their children through my bank and they came back with their bank drafts
 B and remittance slips. The drafts were endorsed at the back for me by them and paid into my account. In all 45 bank drafts were brought drawn by the defendants in Lagos on its London Branch Office. These are the Bank drafts. Tendered, as no objection, admitted and marked
 C Exhibits A to A44. I took the drafts to my bank and it took the Bank sometime and they adopted the same procedure as before. My bank later wrote to me to say that the drafts were returned unpaid with an endorsement on each draft. My bank also endorsed the back of the drafts as
 D guarantee for payment and sent them back again. The bank drafts were returned again and my bank informed me. I was advised to travel to London to enquire why the drafts were not paid. I went to A.C.B. London Branch but before this I met one Dr. Williams in London, a Solicitor. I gave the drafts (Exhibits A-A44) to Dr. Williams and the other receipts.
 E The total value of the bank drafts is ₦212,310.00 (Two hundred and twelve thousand, three hundred and ten Pounds Sterling). Dr. Williams then informed me that they have refused to pay and advised me to sue the A.C.B. I want the court to help me recover the money from the bank as
 F interest is being charged on my account monthly. I am now in a big debt. I have only helped parents whose children were suffering in English schools."

The defendant on the other hand pleaded in its Amended Statement of Defence specifically that the alleged transactions or agreements
 G are illegal amongst others. Paragraph 4, 5, 6 & 7 of the Amended Statement of Defence read thus:-

"4. As to paragraph 4 of the Statement of Claim, the Defendant will contend that the alleged transactions or agreements between the Plaintiff and "the Nigerians" in Benin Republic and/or in Europe offend the provisions of Exchange Control Act No. 16 of 1962 Laws of the Federal Republic of Nigeria, in particular Sections 3, 7 and 8 thereof as well as Decree No. 7 of 1984 and therefore illegal, null and void.

5. *In further answer to paragraph 4 of the Statement of Claim, the Defendant avers that the Plaintiff is unknown to the Defendant.*

6. *Facts pleaded in paragraphs 5, 6, 7 and 8 of the Statement of Claim are unknown to the Defendant. In any event the Defendant repeats its contention in paragraph 4 hereof.* B

7. *In answer to paragraph 9 of the Statement of Claim, the Defendant avers that the Plaintiff is not a lawful holder of the said drafts in that they were not duly endorsed to the plaintiff by the payee/beneficiaries whose particulars are set out in schedule to the Statement of Defence annex hereto. In the Alternative, the Defendant contends that the endorsements (if any) are bad in Law in that each of the 45 Bank Drafts were crossed and marked "Not Negotiable A/C Payee only."* C

The relevant provisions of sections 3, 7 & 8 of the Exchange Control Act No. 16 of 1962 pleaded above are as follows:- D

"3. (1) Except with the permission of the Minister, no person other than an authorized dealer, shall, in Nigeria, and no person resident in Nigeria other than an authorized dealer, shall, outside Nigeria, buy or borrow any gold or foreign currency from or sell or lend any gold or foreign currency to any person other than an authorized dealer. E

7. Except with the permission of the Minister, no person shall do any of the following things in Nigeria, that is to say:-

(a) make any payment to or for the credit of a person resident outside Nigeria; or F

(b) make any payment to or for the credit of a person resident in Nigeria by order or on behalf of a person who is resident outside Nigeria; or

(c) make any payment whatsoever in respect of any loan, bank overdraft or other credit facilities outside Nigeria; or G

(d) place any sum to the credit of any person resident outside Nigeria:

Provided that where a person resident outside Nigeria has paid a sum in or towards the satisfaction of a debt due from him, paragraph (c) or (d) of this section shall not prohibit the acknowledgment or recording of the payment. H

8. (1) *Subject to the provisions of this section, no person resident in Nigeria shall, without the permission of the Minister, make any payment outside Nigeria to or for the credit of a person resident outside Nigeria, or take or accept any loan, bank overdraft or other credit facilities."*

Delivering the lead judgment (with which the other Justices agreed), Uwaifo, JCA., said:

"It is without dispute clear that the plaintiff's action is founded on the loan transactions he said he entered into with some (unnamed) Nigerians by which he loaned them according to him, CFA Francs in Cotonou to the value of ₦212,310.00 and the promise by those Nigerians to repay him in pounds sterling. The said promise, according to him, was sought to be fulfilled by the procurement of 45 bank drafts issued in the names of various persons and institutions but the proceeds of which he had been unable to realize. These matters involve foreign exchange control. I must therefore turn to the Foreign Exchange Act From the facts relied on by the plaintiff, some Nigerians resident in Nigeria took loans of CFA. Francs (i.e. borrowed foreign currency) from him in Cotonou. That clearly contravenes section 3 (1) of the Exchange Control Act without the Minister's permission, he not being an authorized dealer. Later those Nigerians made payment in respect of the said loans outside Nigeria by procuring 45 bank drafts in the UK. This contravenes section 7(c) being without the Minister's permission. The first act which contravenes section 3(1) and the second act which contravenes section 7(c) apart from being illegal are now criminal offences under sections 1 (1) (e) and 1(1) (d) (iii) respectively of the Exchange Control (Anti-Sabotage) Act, 1984 now in Cap 114, Vol. 11 Laws of the Federation of Nigeria, 1990 and severely punishable."

I entirely agree.

The illegality involved in this matter has been the pith and substance of the defence both in the trial High Court and in the Court of Appeal as well as in this Court. The Exchange Control Act applies to Nigerians and non-Nigerians alike vide section 2(2) of the Act which reads:-

"The obligations and prohibitions imposed by this Act shall, unless otherwise prescribed, apply to all persons notwithstanding that they are not in Nigeria and are not Nigerian citizens."

The law is very clear on the effect of illegality on a transaction or contract. It is the law that a contract is illegal if the consideration or the promise involves doing something illegal or contrary to public policy or if the intention of the parties in making the contract is thereby to promote something which is illegal or contrary to public policy. An illegal contract is a void contract and it cannot be the foundation of any legal right. In other words when the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced (see HERMAN v. JEUCHNER (1885) 15 QBD. 561, WILLIAM HILL (PARK LANE) LTD. v. HOFMAN (1950) 1 all ER. 1013; CHIEF ONYIUKÉ III v. OKEKE (1976) 1 ALL NLR (Pt. 1) 181; SODIPO v. LEMMINKAINEN OY NO. 2 (1986) 1 NWLR (Pt. 15) 220.

Uwaifo, JCA., must therefore be right when he observed later in the lead judgment that:-

"I believe it must be clear beyond doubt that the plaintiff upon the combined effect of sections 3(1) and 7 (c) of the Exchange Control Act, cannot seek the aid of the Court to have the reliefs he has sought. The entire transaction from the pleading and evidence of the plaintiff is illegal and the so called obligations arising out of the procurement of the banker's drafts are equally illegal and unenforceable."

Clearly, the transactions herein show that offences have been committed against sections 3 (1), 7(c) and 8 of the Exchange Control Act. They are therefore illegal transactions which law courts will not enforce.

It is interesting to note as well that apart from failure to obtain Minister's approval or permission for the transactions as required by the Exchange Control Act, the omissions and or commission mentioned hereunder were never explained:

- (1) The plaintiff did not tender a statement of account or any

document at all for that matter, to show how the alleged remittances passed through his bank account to the beneficiaries in UK.

(2) The plaintiff did not name, let alone call as a witness any of his Nigerian business associates who borrowed the foreign currency from him....

(3) The plaintiff did not tender any agreement between him and any of his so called business associates.

(4) The 45 bank drafts were issued in the names of various institutions in Britain, and each draft was especially and restrictively crossed and marked "Account Payee Only Not Negotiable", but nevertheless the drafts were each endorsed by the business associates to the plaintiff. How come?

In fact at the hearing of the appeal, this Court showed some concern about the alleged transactions particularly the requirement of the permission of the Minister above. In open court we asked the learned counsel for the plaintiff Mr. Nwadialo, SAN., to produce for us the permission of the Minister if in fact there was one. The Court even went further to tell counsel that it was prepared to adjourn hearing to another date, if counsel would produce the Minister's approval or permission for the transactions. Regrettably, Mr. Nwadialo's reply was simply that he was before us to argue the appeal only and that the transactions took place a long time ago. When the court again told counsel that the records of the transactions would still be there, counsel was not keen in buying that idea. He is probably right. You cannot produce any approval if none was granted or obtained. I shall leave it at that. It is obvious that the business transactions were shrouded in secrecy and they were without doubt *ex facie* illegal.

Before I conclude, I must refer to one useful point which the plaintiff made. It was that the Court of Appeal ought to have in its consequential order, after allowing the appeal, directed that the proceeds of the drafts, that is ₦212,310.00 be returned to the Central Bank of Nigeria, in keeping with the practice where students' beneficiaries could not be traced. He said by failing to make this order, the Court of Appeal has made the defendant to benefit from

illegal transactions by retaining the foreign exchange allocation for its own purpose. I think he is right here. Even though it is not for his own exclusive benefit, the point is nevertheless valid.

From all I have said above, the conclusion is that this appeal lacks merit and ought to be dismissed. It is accordingly dismissed. The judgment of the Court of Appeal is confirmed. The consequential order made by the Court of Appeal is, however, amended by the addition of the following order:-

"The proceeds of the 45 bank drafts, that is, ₦212,310.00 shall be returned by the defendant to the Central Bank of Nigeria (the CBN)."

I must say here now that the Exchange Control Act No. 16 of 1962, has since been repealed by the Exchange Control (Repeal) Decree No. 8 of 1995.

The defendant/respondent is awarded costs assessed at ten thousand (10,000.00) naira against the plaintiff/appellant.

UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother Kutigi, J.S.C. I quite agree with him that this appeal lacks merit.

It is manifest from the transaction between the Appellant and his undisclosed Nigerian business associates, that the financial assistance he allegedly rendered to them contravened the provisions of Section 3 subsection (1) of the Exchange Control Act, Cap. 113 of the Laws of the Federation of Nigeria, 1990, which provides as follows:-

"3. (1) Except with the permission of the Minister, no person other than an authorized dealer, shall, in Nigeria, and no person resident in Nigeria other than an authorized dealer, shall, outside Nigeria, buy or borrow any gold, or foreign currency from or sell or lend any gold or foreign currency to any person other than an authorized dealer."

The Act defines an "authorized dealer" to mean" in relation to gold and any foreign currency, a person for the time being authorized under this Act by Minister (of Finance) by notice in the Federal Gazette

as dealer in gold or, as the case may be, that foreign currency."

At no time material to this case, whether in the lower courts or in this Court, did the Appellant attempt to show that he was an authorized dealer. In the absence of such evidence, which should be contained in a Federal Gazette and, therefore, easy to produce, the Appellant committed an illegality in providing some 46 Nigerian citizens with loan or so-called assistance in foreign currency to pay school fees for their children who were schooling abroad.

Again the actions of the Nigerian citizens to repay the loan through their bank - the Respondent, without the permission of the Minister of Finance contravened the provisions of Section 7 of the Exchange Control Act, Cap. 113. The Section, without the proviso thereof, provides as follows:-

"7. Except with the permission of the Minister, no person shall do any of the following things in Nigeria, that is to say -

(a) make any payment to or for the credit of a person resident outside Nigeria; or

(b) make any payment to or for the credit of a person resident in Nigeria by order or on behalf of a person who is resident outside Nigeria; or

(c) make any payment whatsoever in respect of any loan, bank overdraft or any other credit facilities outside Nigeria; or

(d) place any sum to the credit of any person resident outside Nigeria."

Furthermore, Section 8 of the Exchange Control Act, Cap. 113, pleaded by the Respondents as a defence, provides in subsection (1) thereof as follows:-

"8. (1) Subject to the provisions of this Section, no person resident in Nigeria shall, without the permission of the Minister, make any payment outside Nigeria to or for the credit of a person resident outside Nigeria, or take or accept any loan, bank overdraft or other credit facilities."

By requesting the Respondent to effect payments to the Appellant through its London branch, the Nigerian debtors of the Appellant

contravened the provisions of Section 7 and 8. These acts again rendered the transaction between them and the Appellant illegal since there is no evidence to show that the Minister of Finance had given permission to the Nigeria citizens to repay the loans to the Appellant, who was resident outside Nigeria in Benin Republic.

The burden to prove the transaction between the Appellant and the Nigerian citizens who were debtors to him rests with the Appellant. Throughout the journey of this case from the High Court to this Court the Appellant has failed to show that the necessary permission of the Minister had been obtained for the transaction either by him or his creditors - the 46 faceless Nigerian citizens.

Since the illegality in the transactions had been pleaded by the Respondents and had not been disproved by the Appellant, the Court of Appeal (Kalgo, Uwaifo and Pats-Acholonu JJ.C.A.) was right to have declared the transactions illegal. Consequently the Appellant's action is unenforceable having been tainted with illegality - see Alowonle v. Bello, (1972) 1 S.C. 20 at p. 25 where it was held that a court will not enforce an illegal transaction. In the case of Onyiuke v Okeke, (1976) 3 S.C. 1, Alexander CJN observed as follows on p. 7 thereof -

"It is the law that a contract is illegal if the consideration or the promise involves doing something illegal or contrary to public policy if the intention of the parties in making the contract is thereby to promote something which is illegal or contrary to public policy; and an illegal contract is void and cannot be the foundation of any legal right. This proposition of law was clearly enunciated by Brett M.P. in Harman v Feuchner, (1885) 15 Q.B.D 561 at page 561 as -

'When the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced.'

In Halsbury's Laws of England, 3rd Edition Volume 8, page 126 para. 218, the law on the point is also succinctly stated as follows -

'A contract is illegal where the subject-matter of the contract is illegal or where the consideration or any part of it is illegal.'

Finally see also Sodipo v Lemminkainen OY & Anor (No. 2),

(1986) 1 N.W.L.R. (Part 15) 220, where this Court, per Eso J.S.C. observed thus at p. 232 thereof -

"I have already set out what Nnaemeka-Agu, J.C.A. said in the Court of Appeal as regards the principle which emerges from the authorities he had examined on the subject. It is that when a contract is ex-facie illegal, whether illegality has been pleaded or not the Court would not close its eyes against that illegality, as it is the duty of every court to refuse to enforce such a transaction even where illegality has not been pleaded."

It is for these and the reasons contained in the judgment read by my learned brother Kutigi, J.S.C. that I too hereby dismiss this appeal with N10,000.00 costs to the Respondents.

OGWUEGBU JSC

I had a preview of the judgment just delivered by my learned brother Kutigi, J.S.C. I agree entirely with his reasoning and conclusion.

There is no doubt that the dealings of the appellant in foreign currency namely, the CFA Francs with the faceless Nigerians in Cotonou, Benin Republic between 1980 and 1981 involving a total sum of ₦212,310.00 clearly infringed the mandatory provisions of sections 3, 7 (c) and 8 of the Exchange Control Act and section 1(i)(a) (ii) - (iv), b(e) and 1 (3) of the Exchange Control (Anti-Sabotage) Act Caps 113 and 114 respectively of the Laws of the Federation of Nigeria, 1990,. The two enactments provide as follows in the aforementioned sections:

Exchange Control Act

"3. Except with the permission of the Minister, no person other than an authorized dealer, shall, in Nigeria and no person resident in Nigeria other than an authorized dealer, shall, outside Nigeria, buy or borrow any gold or foreign currency from or sell or lend any gold or foreign currency to any person other than an authorized dealer."

"7. Except with the permission of the Minister, no person shall do any of the following things in Nigeria, that is to say -

(a)

(b)

(c) *make any payment to or for the credit of a person resident in Nigeria by order or on behalf of a person who is resident outside Nigeria*

(d) *Provided that not applicable."*

B

"8(i) Subject to the provisions of this section, no person resident in Nigeria shall, without the permission of the Minister, make any payment outside Nigeria to or for the credit of a person resident outside Nigeria, or take or accept any loan, bank overdraft or other credit facilities."

C

Foreign Exchange Control (Anti-Sabotage) Act

"1(i) Any person who, whether or not before the commencement of this Act but not earlier than 1st October, 1979 does any of the following things, that is to say -

D

(a) *without the permission of the appropriate authority -*

(i) *makes any payment to or for the credit of a person resident outside Nigeria, or*

(ii) *makes any payment to or for the credit of any person resident in Nigeria by order or on behalf of a person who is resident outside Nigeria, or*

(iii) *makes any payment whatsoever in respect of any loan, bank overdraft or other credit facilities outside Nigeria, or*

F

(iv) *places any sum to the credit of any person outside Nigeria;*

(b) *without the permission of the appropriate authority, and being a person resident in Nigeria, makes any payment outside Nigeria to or for the credit of a person resident outside Nigeria, or takes or accepts any loan, bank overdraft or other credit facilities*

G

(c)

(d)

(e) *without the permission of the appropriate authority, and not being an authorized dealer, while resident in Nigeria buys or borrows any foreign currency outside Nigeria from or sells or lends any foreign currency to any person other than an authorized dealer;*

(f)

H

- (g)
- (h)
- (i)
- (j)
- (k)

B *shall, notwithstanding anything to the contrary in any law, be guilty of an offence under this Act.*

- (2)

C *(3) The onus of proving that any payment was made or anything done was with the permission of the appropriate authority shall be on the person charged."*

From the facts which were fully set out in the lead judgment of my learned brother Kutigi, J.S.C., the unknown Nigerians obtained loans of CFA Francs from the appellant in Cotonou, Benin Republic without the permission of the Minister of Finance. The appellant is not an authorized dealer. The transaction is clearly in contravention of section 3(i) of the Exchange Control Act. The said Nigerians made payments in the United Kingdom in liquidation of the said loans and again without the permission of the Minister of Finance. This is in breach of section 7(c) of the Exchange Control Act. The two sets of transactions are also in breach of sections 1(1) (a) (i)-(iv), (b), (e) and (2) of the Exchange Control (Anti-Sabotage) Act.

The purported transactions with the alleged Nigerians involving Exhibits "A" - "A44" are illegal. The obligations or prohibitions imposed by the Exchange Control Act, unless otherwise prescribed apply to all persons notwithstanding that they are not in Nigeria and are not Nigerian citizens. The appellant in the circumstances is as much guilty as his Nigerian collaborators.

Where at the trial of an action, the plaintiff's case discloses that the transaction which is the basis of the claim is illegal, the Court cannot properly ignore the illegality or give effect to the claim, even if the illegality was not pleaded or relied on by the defendant. In the instant case, the defendant/respondent in paragraph 4 of its amended statement of defence unequivocally pleaded as follows:

"4. As to paragraph 4 of the Statement of Claim, the Defendant will contend that the alleged transactions or agreements between the plaintiff and "the Nigerians" in Benin Republic and/or in Europe offend the provisions of Exchange Control Act No. 16 of 1962, Laws of The Federal Republic of Nigeria, in particular, Sections 3, 7 and 8 thereof as well as Decree No. 7 of 1984 and therefore illegal, null and void." B

The transactions or agreements being illegal and contrary to the direction of the enactments, will not be countenanced by the law. No court ought to enforce an illegal contract or allow itself to be made an instrument for enforcing obligations alleged to arise from it. The learned trial judge allowed himself to be used as such an instrument instead of enforcing and protecting the law of the land. The judgment is perverse and the court below was quick to correct it. See Gedge & Ors. v. Royal Exchange Assurance Corporation (1900) 2 Q.B. 214, Arkins v. Jupe 2 C.P.D. 375 and Sodipo v. Lemmin Kainen Oy (1985) 2 N.W.L.R. (Pt. 8) 547. D

Another aspect of the case is the unrestrained subterfuge employed by the appellant in his desperate effort to collect the proceeds of the forty five bank drafts. They were made in the names of non-existent educational institutions or students in the United Kingdom. Exhibits "E", "F", "F1", "F2", "F3" and "F4" are some correspondences between the defendant's London branch and the alleged institutions or student beneficiaries. They were non-existent. Persons of the like of the appellant and his faceless Nigerian collaborators have contributed in no small measure to the economic adversities of this country. This is a proper case which should be thoroughly investigated and the culprits made to face the wrath of the law. F

I would also dismiss the appeal and endorse all the orders in the judgment of my learned brother Kutigi, J.S.C. G

ONU JSC

Having had a preview of the judgment of my learned brother Kutigi, JSC just delivered, I too find no merit in the appeal and have no hesitation in dismissing it. H

By way of emphasis, I wish to add my contribution thereto, as follows:-

The facts and background of the case have been adequately stated in the lead judgment to need any more restating.

B When by his judgment dated 31st May, 1988 the learned trial Judge (Coram: Segun, J.), after carefully listening to plaintiff, a Benonois citizen's case and hearing the defence put forward by the defendant which was at all times material to the duration of the case on appeal herein, a Nigerian registered banking institution with a branch in London, United
C Kingdom, held inter alia -

(i) That the plaintiff was not guilty of anything which was prohibited in respect of his claims against the defendant among others for a declaration that the 45 Drafts (vide Exhibits A-A44) amounting to
D 212,310.00 (Two hundred and twelve thousand, three hundred and ten pounds Sterling) drawn by the defendant in Lagos in its London Branch Office by the Plaintiff through his various bankers are invalid, improperly and irregularly negotiated drafts.

E (ii) that the plaintiff's action was not founded upon any contract or business about which he was guilty of anything which was prohibited by the law of this country and

(iii) that the drafts (Exhibits A-A44) as issued, were only promissory notes under the Bill of Exchange Act (Cap.21 of the laws Federation, 1990) not covered by the provisions of the Exchange Control Act, and so were validly issued and in consequently finding for him by granting him all the reliefs he asked for, he was, in my firm view, patently wrong.
F

G For purposes of my consideration of the appeal the defendant lodged in the Court of Appeal, Lagos Division (hereinafter referred to as the court below) against the decision of the learned trial Judge and from thence to this Court, I shall concentrate on its (defendant's) main complaint, to wit: whether the illegality of the transaction was pleaded and
H proved.

I wish to commence by setting out the plaintiff's pleading in paragraphs 4,5,6,7,8,9, and 11 of the Statement of claim as follows:-

"4 Between 1980 and 1981 some of these Nigerians in the ordinary course of business, approached the plaintiff in Benin or/and in Europe to enable them settle various schools and Universities bills of their children and dependents in Europe and America thus sparing such children and dependents hardship and inconveniences which late settlement of schools and other bills might entail.

5 The Nigerian friends who approached the plaintiff to accommodate them as stated in the foregoing paragraph did so because of the long delay in their getting the Central Bank of Nigeria's approval for Foreign Exchange applications to enable them remit funds to their children and dependents abroad

6. The Plaintiff granted the requests of his Nigerian friends in this regard and provided funds abroad to them through his country's local currency, the C.F.A. Francs which is fully and freely convertible in the world currency market being aligned to French Francs.

7. When the Nigerians eventually obtained the foreign exchange approvals from the Central Bank of Nigeria, the drafts issued by the Defendant to the Nigerians in relation to the school Fees and maintenance allowance of their children and other dependents were passed to the Plaintiff in settlement and reimbursement of the sums earlier advanced by him.

8. The Plaintiff and the said Nigerians also agreed on how to meet any shortfall or surplus as the case might be, should there be any such shortfall or surplus after the Plaintiff would have collected the proceeds of the drafts.

9. The Plaintiff received altogether 45 drafts from the Nigerians pursuant to this arrangement the total value of which was ₦212,310. The particulars of the drafts are set out in the schedule to this Statement of Claim.

11 The Plaintiff paid the 45 drafts mentioned in paragraph 9 above through his bankers in Cotonou, Benin Republic but the Defendants London branch office dishonoured the draft on the first and second presentations. (Underlining is mine)

Part of the evidence proffered by the plaintiff in support of the above averments was to the following effect:-

"I am a trader, I sell clothes (lace materials), I know the Defendant/ Company. In 1980, two of my customers purchased some goods from me. The two customers are from Nigeria and they told me they had some difficulty in remitting money to their children in England. This discussion took place in Cotonou. They said I should follow them to my bank in Cotonou to see if the bank could help transfer some money to their children in England. I told them I would make enquiries from my Bank if this was possible. My bank told me they could not lend them such money as they kept no account with them. They advised me to lend them money or do the transaction with my money..... I took them to the bank and loaned them the amount. A week later they came back with the remittance slip from Nigeria and bank drafts. The transaction took place around October, 1980. I took them back to my bank and the bank told them to endorse the back of the drafts. There were seven bank drafts in all. The bank drafts were from the defendant/Company - The African Continental Bank Ltd. Later, my bank wrote to me to say that the drafts have been honoured. After this transaction, other customers of mine came seeking my help in the same way. This was between December, 1980/January, 1981. The customers were all from Nigeria and I decided to help them like the first one. I loaned them the money and transferred the money to their children through my bank and they came back with their bank drafts and remittance slips. The drafts were endorsed at the back for me by them and paid from my account. In all 45 bank drafts were brought drawn by the defendants in Lagos on its London Branch Office. Here are the Bank Drafts. Tendered, No objection, admitted and marked Exhibits A to A44. I took the 45 Bank Drafts to my bank and it took the Bank sometime and they adopted the same procedure as before. My bank later wrote to me to say that the drafts were returned unpaid with an endorsement on each draft..... I was advised to travel to London to enquire why the drafts were not paid. I went to A.C.B. London Branch but before this I met one Dr. Williams in London, a solicitor, I gave the drafts (Exhibits A-A44) to Dr. Williams and the other receipts. The total value of the bank drafts is £212,310.00 (Two hundred and twelve thousand three hundred and ten Pounds Sterling).

Dr. Williams then informed me they had refused to pay and advised me to sue the A.C.B. I want the court to help me recover the money from the bank as interest is being charged on my account monthly. I am now in a big debt. I have only helped parents whose children were suffering in English schools."

By paragraphs 4,5,6,7, and 8 of its Amended Statement of Defence the defendant pleaded thus:

"4, As to paragraph 4 of the Statement of Claim, the Defendant will contend that the alleged transactions agreements between the plaintiff and "the Nigerians" in Benin Republic and/or in Europe offend the provisions of Exchange Control Act No. 16 of 1962 Laws of the Federal Republic of Nigeria, in particular Sections 3,7 and 8 thereof as well as Decree No.7 of 1984 and therefore illegal, null and void.

5. In further answer to paragraph 4 of the Statement of Claim, the Defendant avers that the Plaintiff is unknown to the Defendant.

6. Facts pleaded in paragraphs 5,6,7, and 8 of the Statement of Claim are unknown to the Defendant. In any event the Defendant repeats its contention in paragraph 4 hereof.

7. In answer to paragraph 9 of the Statement of Claim, the Defendant avers that the Plaintiff is not a lawful holder of the said drafts in that they were not duly endorsed to the Plaintiff by the payee/beneficiaries whose particulars are set out in schedule to the Statement of Defence annexed hereto. In the alternative, the Defendant contends that the endorsements (if any) are bad in Law in that one of the 45 Bank Drafts were crossed and marked "Not Negotiable A/C Payee only".

8. The Defendant denies paragraph 10 of the Statement of Claim. In further answer to paragraph 10 of the Statement of Claim the Defendant avers that the alleged previous payments to Bank Drafts, if at all made by the Defendant to the Plaintiff do not entitle the Defendant to reliefs sought in this action".. (Underlining above is also mine for emphasis).

The learned trial Judge in his judgment , while dealing specifically with the illegality aspect of the case herein, held inter alia as follows:-

"I have carefully gone through all the provisions of the Exchange Con-

trol Act 1962 and could not find any provision which prevents a Nigerian from borrowing money when outside this country as long as the law is complied with. No court will be friendly with or countenance illegality. Indeed, the law needs no restatement. Section 3 of the exchange Control Act, 1962 is the law that governs the operation of currency other than Nigerian Currency. It provides:

(1) Except with the permission of the Minister, no person other than an authorized dealer shall, in Nigeria, and no person resident in Nigeria other than an authorized dealer, shall outside Nigeria buy or borrow any gold or foreign currency from or sell or lend any gold or foreign currency to any person other than an authorized dealer.

(2) Where a person buys or borrows any gold or foreign currency in Nigeria, or, being a person resident in Nigeria, buys or borrows gold or foreign currency outside Nigeria, he shall comply with such conditions as to the use to which it may be retained as may be notified by the Minister before, or at the time of such purchase or borrowing, or at any time thereafter.

The above provision certainly makes the law applicable to Nigerians and non-Nigerians in Nigeria. The essence of the 1962 Exchange Control Act is to guard against a breach of its provisions by persons carrying on foreign exchange transactions in or outside Nigeria - Chief Harold Sodipo V. Lemminkainen Oy and Anor. (1986) 1 SC. 197 at 210."

Continuing, the learned trial Judge held:

"If the Plaintiff and the people who gave him the bank drafts transacted the agreement that has led to this litigation in Nigeria, then it would be illegal except the Exchange Control Act applies to Nigerians wherever they may be if the parents who gave the bank drafts to the Plaintiff took a loan from his (sic) outside Nigeria, the Act would apply to them, while the plaintiff who was the lender, if there is no approval by the Minister, would be aiding illegality. Except the Act has been complied with therefore, the case as it stands on the face of it savours of illegality. "Exturpi causa oritur non actio." It is trite that a contract that is expressly or implicitly prohibited by statute is illegal where the contract made by the

parties is expressly forbidden by statute, its illegality is undoubted. It is open to the parties to show whether the subject matter of the transaction has no foreign exchange element or if there is a compliance with the mandatory provisions of the Exchange Control Act, 1962 and is therefore tainted with illegality." (Underlining is supplied by me) B

The learned trial Judge said in conclusion inter alia as follows:-

"I am satisfied after a careful consideration that the plaintiff was all out to help parents whose children were in various colleges and Universities in Great Britain and whose school fees and maintenance allowances were delayed by the Central Bank of Nigeria. He honestly believed that everything was in order, particularly after he had helped seven of such parents whose drafts were subsequently honoured by the same defendant/bank. This perhaps encouraged him to accept the 45 drafts, the subject matter of this action from other parents..... The evidence shows clearly that the plaintiff and the said citizens of this country discussed the transaction in Cotonou, Republic of Benin and came to terms whereby the bankdrafts were handed over to the plaintiff in that country. The offer was presumably, made without dissimulation, in a quixotic attempt to help business associates in need. The Plaintiff in my opinion has an enforceable right against the defendants who issued the drafts to their London branch asking that branch to pay the amount stated therein." The above findings of the learned trial Judge are, in my firm view, as erroneous as they are perverse. This is in view of the fact that upon a dispassionate consideration of the totality of evidence adduced at the trial and the applicable legislation, the inescapable conclusion for him to have arrived at in the transaction giving rise to the action on appeal herein, amounted to patent illegality and was clearly tainted with fraud. It is therefore not surprising that the court below upon being seized of the appeal to it noted, inter alia, as follows:-

"It must be clear beyond doubt that the Plaintiff upon a combined effect of Section 3(1) and 7(c) of the Exchange Control Act, cannot seek the aid of the Court to have the reliefs he has sought. The entire transaction from the pleading and evidence of the Plaintiff is illegal and the so-called obligations arising out of the procurement of the bankers drafts are equally

illegal and unenforceable."

I cannot therefore agree more with the court below when it held in this regard that -

"The decision of the learned trial Judge in this case is entirely perverse and cannot be allowed to stand. He unfortunately overlooked patent illegality and fraud." Commenting further on the transaction the court below observed:

"The transactions involved in this appeal are no doubt tainted with illegality and cannot therefore under our law be enforced or allowed to stand. The whole arrangement constituted an infringement and contravention of the Exchange Control (Anti-Sabotage) Act, 1984 and this Act applied irrespective of the fact that a Non-Nigerian was involved, as the transaction involved the movement of Nigerian currency from Nigeria to another country without the relevant permission first had and obtained. And since the court cannot overlook any illegality once disclosed in the evidence even if not pleaded, the decision of the learned trial Judge cannot be allowed to stand."

On the faceless Nigerians who dealt with the plaintiff but whose names and identities were not only undisclosed but discreetly shrouded in mystery in this transaction borne of illegality, the court below observed thus:

"It is interesting and I dare say instructive that the names of those who the Plaintiff helped in the past and those he had now helped are not known as their names were not stated. What was he running away from? Was the transaction whereby the moneys were passed or transferred to London lawfully (sic), having regard to Sections 3 and 7 of the Exchange Control Act, which rendered the transaction the like of which the Plaintiff/Respondent seeks to enforce illegality, yet he seeks to enforce those obviously illegal transactions through these courts - High Court and the Court of Appeal. It is a trite law that a party cannot rely on a transaction bemirshed with illegality to enforce a right he claims. See Sodipo v. Lemminkainen Oy (1986)1 NWLR (Part 15) page 220." See also Cope v. Rowland (4) (1936)2 M&W.

Be it noted also that from the facts relied on by the Plaintiff,

some "faceless" Nigerians resident in Nigeria took loans of C. F. A. Frances (i.e. borrowed foreign currency) from him in Cotonou. That clearly contravenes Section 3(1) of the Exchange Control Act without the Minister's permission, he not being an authorized dealer. As evidence disclosed that latter those Nigerians made payment in respect of the loan B outside Nigeria by procuring 45 bank drafts encashable in the U.K. this contravenes Section 7(c). The act contravenes Section 7 (c) being without the Minister's permission. Both acts are consequently illegal. The first act which contravenes Section 3(1) and the second act which C contravenes Section 7(c), apart from being illegal are now offences under Section 1 (1)(e) and 1(1) (d) & (iii) respectively of Exchange Control (Anti-Sabotage) Act, 1984 - Cap. 114 L. F. N. 1990.

One of the principles decided in the case of Sodipo V. Lemminkainen Oy. (Supra) freely referred to in the instant case is that D where a contract is ex-facie illegal and the question of illegality depends on the surrounding circumstances, then as a general rule the court will not entertain the question of its illegality unless it is raised in the pleading; in such circumstances, evidence adduced in support of the unpleaded E illegality clearly goes to no issue. The case in hand is, in my firm view, distinguishable from the Sodipo case (supra) in the sense that here, not only was the illegality pleaded, vide the joint and cumulative purports of paragraphs 4,5,6,7,8,9, and 11 of the Plaintiff's Statement of Claim on F which issues were joined on paragraphs 4,5,6, and 7 of the defendant's Amended Statement of Defence, evidence oral and documentary adduced through the plaintiff and P.W. 1. Dr. L. E. Williams from which illegality was manifest or could be inferred.

This court has since laid down the principle of law that illegality G must be raised on the pleadings. See Ekwunife V. Wayne (W.A.) Ltd. (1989) 5 NWLR (Part 22) 422. In the instant case it appears to me apparent that the plaintiff in the underlined portions of his Statement of Claim raised the question of illegality and with which issues were joined H by the defendant's Amended Statement of Defence. See J. E. Ehimare & Anor. v. Okaka Emhonyon (1985)1 NWLR (Part 2) 183. Had issues not been joined, this court has also laid it down that the question (of illegality)

may indeed be taken up suo motu. See Ekwunife v. Wayne (supra) and Sodipo case (supra). Besides, the plaintiff filed no reply to countermand the serious averments made by the defendant in its pleading.

In the light of the foregoing issue (issue number one) which asks whether the facts relied upon by the plaintiff in his statement of claim disclosed ex facie contravention of section 3 (1) and 7(c) of the Exchange Control Act of 1962 thereby rendering the loan agreements illegal and unenforceable and disentitling him to the proceeds of the 45 bank drafts, Exhibits A - A44, is answered in the affirmative by me and thus resolved against the appellant.

For the reasons I have given and the more detailed ones contained in the judgment of my learned brother Kutigi, JSC I too dismiss this appeal and make similar consequential orders inclusive of those as to costs.

IGUH JSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Kutigi, J.S.C. and I am in entire agreement that this appeal is without substance and ought to be dismissed.

The facts of the case are fully set out in the leading judgment and no useful purpose will be served by my recounting them all over again. It suffices to state that the case concerns forty-five bank drafts with proceeds of a total of ₦212,310.00 to which the plaintiff/appellant, a citizen of the Republic of Benin residing in the city of Porto Novo, claims to be entitled to. Dealing with the plaintiff's claim, the Court of Appeal, per Uwaifo, J.C.A., quite rightly in my view, described the same thus -

"The said claim is based on some loans of some amount of unspecified CFA Francs which he allegedly gave to some unnamed Nigerian traders for the payment of their children's school fees in the United Kingdom (U.K.) when they met in Cotonou between December, 1980 and January 1981. The forty-five bank drafts which were said to be in repayment were made payable in the U.K. They were issued by the defendant

bank in Lagos, on the application of whom no evidence was led. They were all dated between December, 1980 and January, 1981. The honouring of the drafts ran into difficulty in London. The plaintiff wanted them credited into his account in London. The drafts were not however in his name and were crossed and endorsed "A/C payee only. Not negotiable." B The defendant bank in London turned down all efforts by the plaintiff to get the proceeds of the bank drafts."

The two main issues that arise for consideration in this appeal are, firstly, whether there was apparent illegality affecting the plaintiff's cause of action and, secondly, whether the plaintiff led sufficient evidence to justify his entitlement to the proceeds of the said bank drafts. I propose, in this contribution, to say a few words of my own by way of amplification only with regard to the first issue. C

On this question of illegality, the defendant in paragraph 4 of its amended Statement of Defence specifically pleaded the same as follows D

"As to paragraph 4 of the Statement of Claim, the Defendant will contend that the alleged transactions or agreements between the plaintiff and "the Nigerians" in Benin Republic and/or in Europe offend the provisions of Exchange Control Act. No. 16 of 1962, Laws of the Federal Republic of Nigeria, in particular, Sections 3, 7 and 8 thereof as well as Decree No. 7 of 1984 and therefore illegal, null and void." E F

In this regard, it ought to be stressed that the plaintiff's case is founded on alleged loan transactions he entered into with unnamed Nigerians in the Republic of Benin by which he purportedly loaned them CFA Francs in Cotonou to the value of ₦212,310.00 and the promise by the undisclosed Nigerians to repay him in British pounds sterling. It was in an attempt to fulfil the said promise that 45 bank drafts were raised in Nigeria in the names of various persons and institutions in the United Kingdom; transactions which without doubt involved foreign exchange element or control. Accordingly the vital issue must be whether there was compliance with the mandatory provisions of the Exchange Control Act, 1962, Cap. 113, Laws of the Federation of Nigeria, 1990 and whether therefore the transactions were or were not tainted with illegality. G H

I think it ought to be stated that it is the findings of both courts below that forgeries in connection with some of the aforementioned forty-five bank drafts were established at the hearing. It is unnecessary in this judgment to go into any details in respect of the alleged forgeries. I propose to proceed straight away with a consideration of the relevant provisions of the Exchange Control Act, 1962 in issue.

Section 2(2) of the Exchange Control Act, 1962 provides as follows -

"The obligations and prohibitions imposed by this act shall, unless otherwise prescribed, apply to all persons notwithstanding that they are not in Nigeria or are not Nigerian citizens."

It cannot be in doubt, from the above provisions, that the Exchange Control Act, 1962 not only applies to Nigerians but to non-Nigerians alike and it would not matter that such persons are not resident in Nigeria. In my view, the Exchange Control Act, 1962 unquestionably applied to the plaintiff on the facts of the case as pleaded in his Statement of Claim.

The defendant per paragraph 4 of its amended Statement of Defence specifically pleaded that the transactions in issue as alleged by the plaintiff between himself and the undisclosed Nigerians in Benin Republic offended, inter alia, the provisions of sections 3(1) and 7 of the said Exchange Control Act, 1962 and that they were therefore illegal. Both sections of the Act prohibit all persons other than an authorized dealer from doing certain acts therein stipulated except with the permission of the Minister of Finance. I think it is convenient at this stage and for ease of reference to reproduce these sections of the Exchange Control Act, 1962.

Section 3(1) of the Exchange Control Act, 1962 provides as follows -

"3. (1) Except with the permission of the Minister, no person other than an authorized dealer, shall, in Nigeria, and no person resident in Nigeria other than an authorized dealer, shall, outside Nigeria, buy or borrow any gold or foreign currency from or sell or lend any gold or foreign currency to any person other than an authorized dealer." (Underlining supplied for emphasis)

There is next Section 7(c) of the Act which stipulates thus -

"7. Except with the permission of the Minister, no persons shall do any of the following things in Nigeria, that is to say -

(a)

(b) B

(c) make any payment whatsoever in respect of any loan, bank overdraft or other credit facilities outside Nigeria; or

(d) Provided" (not relevant) (Underlining supplied for emphasis) C

It is clear from section 3(1) of the Exchange Control Act that except with the permission of the Minister of Finance, no person other than an authorized dealer, shall in Nigeria, and no person resident in Nigeria other than an authorized dealer, shall outside Nigeria, inter alia, buy, borrow from, sell or lend foreign currency to any person other than an authorized dealer. In the same vein, except with the permission of the Minister no person pursuant to section 7(c) of the Act shall in Nigeria make any payment whatsoever in respect of any loan or other credit facilities outside Nigeria. D E

From the facts of the case as presented by the plaintiff, unnamed, Nigerians resident in Nigeria, obtained loans of CFA Francs from him, that is to say, borrowed foreign currency from the said plaintiff outside Nigeria in the Republic of Benin. These transactions, without the Minister's permission, are contraventions of Section 3(1) of the Exchange Control Act, the plaintiff not being an authorized dealer as therein defined. It is also the case of the plaintiff that the undisclosed Nigerians allegedly made payments in respect of the said loans or credit facilities by procuring various bank drafts in Nigeria which drafts were encashable in the United Kingdom. Again, these transactions, without the permission of the Minister, would appear to be contraventions of Section 7(c) of the said Act. Indeed, both sets of transactions which are contraventions of section 3(1) and 7(c) of the Act respectively, apart from being illegal, are offences under Sections 1(1) (e) and 1(1) (a) (iii) respectively of the Exchange Control (Anti-Sabotage) Act, 1984, Cap. 114, Laws of the Federation of Nigeria, 1990. F G H

I think I should point out that following the averments in paragraph 4 of the defendant's amended Statement of Defence, the plaintiff neither sought for an amendment of his Statement of Claim nor did he file a Reply in answer to the fresh issue of illegality raised in the defendant's pleadings to the effect that the Minister's permission was not obtained before the alleged transactions were entered into. This, however, was not any matter of great moment for where, as in the present case, no counter-claim is filed, further pleadings by way of a reply to a Statement of Defence is generally unnecessary if the sole purpose is to deny the averments contained in the defendant's Statement of Defence. See Aziz Akeredolu and others v. Lasisi Akinremi and others (1981) 3 N.W.L.R. (Part 108) 164 at 172. This is because where no counter-claim is filed, all the material facts in a Statement of Defence including any new facts therein alleged, are put in issue even in the absence of a Reply. A reply merely "joining issue" is therefore unnecessary, and will be disallowed on taxation of costs in the trial courts. Where, however, because of the nature of the averments in the Statement of Defence filed, the plaintiff proposes to lead evidence in rebuttal or to set up some affirmative case of his own in answer to the facts alleged by the defendant or raise issues of fact not arising out of the two previous pleadings, the plaintiff, as a matter of prudence and general practice shall put in a Reply. See Bakare and Another v. Ibrahim (1973) 6 S.C. 205.

It is trite that a transaction or contract, the making or performance of which is expressly or impliedly prohibited by Statute is illegal and unenforceable. Where a contract made by the parties is expressly forbidden by Statute, its illegality is undoubted and no court ought to enforce it or allow itself to be used for the enforcement of alleged obligations arising thereunder if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court, as in the present case, is himself implicated in the illegality. So, a contract, the making or performance of which is prohibited by the Exchange Control Act, 1947 of the United Kingdom was held illegal and unenforceable. See Boissevain v. Weil (1950) A.C. 327 and Shaw v. Shaw (1965) 1 W.L.R. 537 C.A.

Accordingly where a statute makes a particular contract or class

of contracts illegal or invalid, the court will refuse to allow an action to be maintained thereon, even though the illegality is not pleaded by the defendant and the parties do not desire to rely on it. See Royal Exchange Assurance Corporation v. Vega (1902) 2 KB. 384, Gedge v. Royal Exchange Assurance Corporation (1990) 2 Q.B. 214 at 220, Sodipo v. Lemminkainen Oy and Another (1985) 2 N.W.L.R. (Part 8) 547 at 557-558, Sodipo v. Lemminkainen Oy (No. 2) (1986) 1 N.W.L.R. (Part 15) 200 or (1986) 1 S.C. 197, Onyiuke v. Okeke (1976) 10 N.S.C.C. 146 at 150 etc. But once illegality is brought to the attention of the court, it overrides all questions of pleadings, including any admissions made therein. See Belvoir Finance Co. Ltd. v. Harold G. Cole and Co. Ltd. (1969) 1 W.L.R. 1877.

In the present case, however, the defence of illegality was expressly pleaded by the defendant when it averred contraventions of sections 3 and 7 of the Exchange Control Act, 1962. Although the plaintiff, in the absence of a Counter-Claim, filed no Reply to this material averment of fact, it cannot, on the state of the law, be disputed that the parties were deemed to have joined issue on the point. As a general rule, evidence must be directed and confined to the proof or disproof of the issues as settled by the pleadings. See J.O. Idahosa and Another v. D. N. Oronsaye (1959) 4 F.S.C. 166, Esso Petroleum Co. Ltd. v. Southport Corporation (1956) A.C. 218 etc. The plaintiff neither testified nor led any evidence in proof of the fact that the Minister's permission was infact obtained with regard to the transactions in issue. Indeed, before us, during the hearing of this appeal, learned counsel for the plaintiff/appellant, F. Nwadialo, Esq. S.A.N. was, in the overall interest of justice, offered an adjournment by this court to enable the plaintiff produce the relevant Minister's permission in issue. This offer was not accepted by learned counsel.

The Court of Appeal on this question of proof of illegality had this to say -

"The illegality involved in this matter has been the pith and substance of the defence in the court below and the defendant/appellant's argument in this appeal. I do not think, with due respect, that Mr.

Nwadialo, for the respondent, has any reply to that contention. He says in the respondent's brief: "It was for the Nigerians who borrowed the moneys from the respondent in Benin Republic to obtain any necessary permission required for such external loans under the law of their country. This was certainly not the concern of the respondent." As already shown, the Exchange Control Act applies to both Nigerians and non-Nigerians. Once illegality is committed, a transaction under the Act is not spared simply because the plaintiff who relies on it is not a Nigerian, or that the person who normally should ensure that the Minister's permission was obtained did not do so. The transactions are simply tainted with illegality and no action is available to any of the parties." (Underlining supplied)

I agree entirely with the court below on the above observations.

There is finally the question of on whom the onus lies in proof of whether or not the transactions in issue were made with the permission of the appropriate Minister, that is to say, the Minister of Finance. In this regard, attention must be drawn to the provisions of the Exchange Control (Anti-Sabotage) Act, 1984, Cap. 114, Laws of the Federation of Nigeria, 1990. This Act made special provisions with respect to contraventions or acts, such as those in question in the present case, subversive of the parent Act, 1962, Cap. 113, Laws of the Federation of Nigeria, 1990.

Section 1(3) of the Exchange Control (Anti - Sabotage) Act, 1984 specifically deals with the question of onus of proof on the issue of whether or not anything done pursuant to the Exchange Control Act is with the permission of the appropriate authority. It provides as follows -

"I (3) The onus of proving that any payment was made or anything done with the permission of the appropriate authority shall be on the person charged". (Underlining supplied)

It seems to me crystal clear that the above provision of the law casts the onus of establishing that any act or thing done pursuant to the Act was with the permission of the Minister on the person alleged to have done the act for which the Minister's consent is a conditio sine qua non for its validity. In other words the express provision of the Act is to the effect that the burden of proving that any act or thing requiring the

Minister's permission under the Exchange Control Act was done with such permission shall be on the person against whom the illegality is raised or charged.

In the present case, the alleged transactions in issue were expressly averred in the defendant's Statement of Defence as illegal and unenforceable in that they were entered into by the plaintiff without the permission of the appropriate authority, that is to say, the Minister of Finance. I think, on the state of the pleadings in the present case, the onus was on the plaintiff and not on the defendant to establish that the transactions in issue were entered into with the permission of the Minister. Not only did the plaintiff fail to discharge this onus placed on him by the law, his learned counsel declined to accept the offer of this court, in the interest of justice, to oblige the plaintiff with an adjournment of the appeal to enable him produce evidence of the Minister's permission in issue. In the circumstances, I can see no other conclusion open to the court than to hold that the transactions in issue were not established to have been entered into with the permission of the Minister. Accordingly I agree entirely with the findings of the court below that they were therefore unenforceable.

Concluding its judgment, the Court of Appeal, per Uwaifo, J.C.A., made bold to state as follows -

"I will add that from the nature of the evidence in this case, particularly having regard to exhibits E, E1 to E3, it would appear that the plaintiff in collaboration with others had contrived to benefit unlawfully from the foreign exchange reserve of this country. It seems to me that no part of the ₦212,310.00 was intended to meet educational fees. I cannot forbear to draw attention to the implication of what had happened. The plaintiff had resorted to subterfuge to deplete for personal and diabolical ends the foreign reserves of this country. He flouted the law of the land. He is an alien but some Nigerians collaborated with him. This instance might, must be, is, a tip of the iceberg. In the prevailing world economic order, it is no exaggeration to say that a buoyant foreign reserve is the life-blood of our development. It ought not to be allowed to be misused. It appears in this case to have been attempted to

be done with much ease just by presenting fake documents. All that is frightening enough. But what I find extremely worrying is that in the face of the clear illegality and fraud shown, the effort nearly received judicial approval. I think it is necessary to advise that trial courts should
B *take a firm stand against illegality (and fraud) properly brought to their attention, and proved, for, as said by Bairamian F.J. in George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117 at 121, "..... the Courts administer the law of the land and will not help a plaintiff who breaks it."*

C I am afraid I find myself in total agreement with the above observations of the court below and fully endorse the same. In my opinion, the plaintiff's claim is tainted with illegality and was therefore rightly dismissed by the Court of Appeal.

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

E

F

G

H