

SUPREME COURT OF NIGERIA
13TH MARCH, 1998. SC. 27/1997
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, E. O.
OGWUEGBU, U. MOHAMMED, S. U. ONU, JJSC

ARTRA INDUSTRIES NIGERIA LTD PLAINTIFF/APPELLANT
AND
THE NIGERIAN BANK FOR DEFENDANT/
COMMERCE AND INDUSTRY RESPONDENT

***APPEALS** - Retrial - Issue that was given full treatment - And what was decided cannot be said to amount to a substantial miscarriage of justice - No retrial is necessary.*

***BANKING** - Loan - Where parties joined issues as to the principal sum owed - But defendant led evidence to prove same which was admitted by the plaintiff - Court was right to find for the defendant.*

***COMPANY LAW** - Directors - Discretionary power - Which falls within the management power in section 63 (3) Companies and Allied Matters Act, 1990 - Must be exercised with the interest of the company as paramount.*

***CONTRACTS** - Terms of a contract - Where by it the defendant had no contractual obligation - It cannot be penalized.*

***COURTS** - Pronouncement - Made by the court on its own - On an issue which could not have arisen in so far as the matter was concerned - Was erroneous - But miscarriage of justice was not occasioned.*

***DAMAGES** - Special damages - Award on anticipated profit based on speculation - Cannot be allowed to stand.*

***DAMAGES** - Remoteness - Where alleged loss was caused by the failure*

of the plaintiff - To meet its contractual obligation - Award against defendant - Will be set aside as being too remote.

DAMAGES - *Double compensation - General damages awarded to the plaintiff who had been adequately compensated - Constitutes double compensation.*

EVIDENCE - *Document - Where the basis of its projections - Was not explained by credible evidence - There is no obligation to cross-examine on it - As it is self defeating and unacceptable.*

JUDGMENTS - *Reversal - Setting aside the decision of the trial court - Which was not the result of a proper appraisal and evaluation of the evidence - Was correct.*

MORTGAGES - *Exemption clause - Interpretation - Provision bereft of any ambiguity - The duty of the court is to interpret it - In enforceable terms without more.*

MORTGAGES - *Proviso - Requiring prior consent for any further mortgage or charge - Confers a discretionary power on the lender.*

MORTGAGES - *Discretion - Conferred by a proviso - The essence of it will be defeated if the option to pick and choose is absent.*

PLEADINGS - *Joining of issue - Reply - Ought to controvert fact in the statement of defence - For the issues raised thereon to be joined.*

RULES OF COURT - *Court of Appeal Rules 1981 - Order 3 rule 23 - Court of Appeal is empowered to give any judgment or make any order that ought to be made - Although such decision was not appealed against.*

WORDS AND PHRASES - *"Include" - How properly construed in an enactment.*

FACTS

The plaintiff/appellant instituted an action in the Federal High Court, Jos claiming against the defendant inter alia, a declaration that the defendant is bound by the Investment and Mortgage Agreement made between the plaintiff and the defendant; a declaration that the defendant's letter Ref. No LEG72/Vol 1 dated 14/1/94 and addressed to the Managing Director of the plaintiff violates the terms of the Investment and Mortgage Agreement aforesaid; and damages. The fact is that the plaintiff was granted a term loan on the World bank credit line to finance a project for the production of medicated cotton wool and bandages in Bukuru, near Jos, Plateau State. Unhappy about the losses it had sustained which was allegedly caused by the defendant in the draw-down of the loan and the execution of the Project the plaintiff filed the action.

At the conclusion of the trial, the learned trial judge gave judgment against the defendant and in favour of the plaintiff. But with respect to damages, the plaintiff was awarded only 70% of loss of anticipated turnover/earning. Dissatisfied with this part of the judgment, the plaintiff appealed against it. The defendant on its part, appealed against the whole decision by way of a cross-appeal. The Court of Appeal dismissed the appeal while the cross-appeal was allowed and the judgment of the trial Federal High Court was set aside in its entirety. Aggrieved, the Plaintiff has further appealed to the Supreme Court, raising thirteen issues.

ISSUES FOR DETERMINATION

(i) *Whether the Court of Appeal was right when it held that the principal loan advanced to the Appellant was N6,120,207.00 as per Exhibit 'NN'.*

(ii) *Whether the Court of Appeal was right when it held that the loan granted to the Plaintiff was provided by the World Bank and that the said Bank was the principal of the Respondent as well as Midland Bank;*

(iii) *Whether the Court of Appeal was right when it held that even if the Midland Bank was the agent of the Respondent the Respondent cannot be vicariously liable for the negligent act of the Midland*

Bank without the latter being joined as a party.

- (iv) *Whether, having regards to the facts and circumstances of this case, the Court of Appeal was right when it held that the exemption clause of clause 11 (iii) of the Investment and Mortgage Agreement (i.e. Exhibit 'C') provided a complete exemption to the Respondent for the consequences of the failure to confirm the 1st letter of Credit.* Etc. p. 598

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

"Include" - How properly construed

1. In interpreting a document, due regard must be given to the entire document so as to find out the correct meaning of the word in relation to the agreement. See Schroder & Co. v. Major & Co. (Nig.) Ltd. (1989)2 NWLR (Part 101)1. The court below was therefore perfectly right, in my opinion when it held, inter alia, that -

"The word "include" in an enactment must be construed as comprehending, not only such things as they signify, according to their natural import but also those things the interpretation clause declares that they shall include. See Nafiu Rabiu v. The State (1980) 8-11 SC. 130; Mandara v. A.G of Federation of Nigeria (1984) 1 SC311 and Nwobosi v. The State (1995) 6 NWLR (Part 404) 658 at 683."

- F Clearly therefore Clause 6(1) of Exhibit 'C' is subject to Clause 7. The loan shall include such sums paid by the Lender for and on behalf of the Borrower on any Letter of Credit etc. (p. 603 F)

Loan - Where parties joined issues

- G 2. The court below was therefore right, in my view, to hold that the principal loan was N6,120,207.00 which sum incorporated N5,850,267.97 and interest of N270,000.00 during construction. The plaintiff's attack in its brief on the pleading being at variance as to the principal sum owed in the court below ought therefore to be discountenanced or ignored. See Kolawole v. Alberto (1989) 1 NWLR (Part 98) 382 at 399 and Okonji v. Njokanma (1991) 7 NWLR (Part 202) 131 at 153. This is the moreso in the instant case that issues were joined by the parties that N2.9 Million

is not the principal loan on the establishment of Letter of Credit. The Defendant led evidence to prove that the principal loan was over N5,326,200.19, an account also admitted by the Plaintiff. By the agreement of the parties, the interest during construction put at N270,000.00 vide Exhibit OO is also capitalised to form part of the loan. Although the Defendant did not file a counterclaim nor was judgment given in its favour upon any claim, the correct amount owed as principal sum was an issue before the trial court as well as in the court below. It would appear therefore that the court below had a duty to decide on the issue, as indeed it did, rightly in my view, that the principal sum was N6,120,207.00 as per Exhibit NN. (p. 605 F)

Pleadings - Joining of issue

3. From the pleadings above, it is clear that the Plaintiff never joined issue that the facility granted them was a World Bank Credit. In other words, the fact was never controverted by the Reply as the Plaintiff ought to do for the issue raised thereon to have been joined. See Ehimare v. Emhonyon (1985) 1 NWLR 177 at 188; and Overseas Construction Co. (Nig.) Ltd. v. Creek Enterprises (Nig.) Ltd (1985) 3 NWLR 407 at 409. (p. 607 A)

Pronouncement on an issue which could not have arisen

4. However, when on its own it held that "the loan in question was provided by the World Bank which was the principal of the Defendant and the Midland Bank." I think it fell into a serious error. This is because the question of principal/agent relationship between the World Bank on the one hand and the Defendant and Midland Bank on the other hand, could not have arisen in so far as the transaction was concerned. Be that as it may, no miscarriage of justice could be said to have been occasioned on the point. See Far East Mercantile Co. Ltd. v. Jackie Philips Photos Ltd (1974) 11 SC 225 at 231-232 and Eme v. The State (1964) 1 ALL NLR H 416. (p. 609 F)

Provision bereft of any ambiguity

5. The above provision is bereft of any ambiguity. Its clear purport, in my judgment, is to exonerate the defendant from all risks of foreign exchange, and more especially, that which arises from fluctuations in the exchange rate. The reason for such fluctuations, it would appear, is not important. The duty of the court is to interpret the agreement in enforceable terms without more. See National Salt Co. of Nigeria Ltd v. Mrs. M. J. Inns Palmer (1992) 1 NWLR (Part 218) 422. (p. 610 D)

Proviso - Requiring prior consent

6. The court below, in my opinion, had therefore rightly construed this proviso as conferring a discretionary power on the Defendant to decide whether or not to grant consent for any further mortgage or charge above the specified amount to be effected on the Plaintiff's assets already mortgaged or charged with the Defendant. It certainly cannot be, as contended by the Plaintiff, a requirement of mere notice without more, of the Plaintiff's intention or desire to effect further mortgage or charge on its assets already mortgaged with the Defendant. (p. 612 G)

Discretion - Conferred by a proviso

7. If it is thus accepted that the above proviso conferred a discretion, upon what terms one may ask, should it be exercised? It is the Plaintiff's argument that once a demand is made the Defendant must grant its consent. With due respect, this cannot be so as the essence of discretion will be defeated if that essence of option to pick and choose is absent. Discretion means equitable decision of what is just and proper under the circumstance or a liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar case guided by the principles of law. See Blacks Dictionary of Law, 5th Edition page 419; Ejiamike v. Ejiamike (1972) E.C.S.L.R. Vol. II (part 1) 11 and Doherty v. Doherty (1964) 1 ALL NLR 299; (1964) NMLR 144. (p. 613 B)

Directors - Discretionary power

8. There is no doubt that the exercise of discretionary power such as in

this case, falls within the management power which is by Section 63(3) of the Companies and Allied Matters Act (supra) conferred on the directors. In exercise of such power, the directors must adhere strictly to the statutory provision which enjoins them to consider the interest of the company as paramount. In the case in hand, the directors of the Defendant bank being therefore alert to their responsibilities, could not have exercised their discretion in favour of the Plaintiff, the proper effect of which would be to further dilute the Defendant's security, when the Plaintiff is already in breach of its previous undertaking. (p. 614 C)

Issue that was given full treatment

9. That the court below (per Edozie, JCA) showed no sign of oversightedness or obliviousness of the above piece of evidence as contained in one of the issues raised by the Plaintiff, it undertook a meticulous review of same at page 236 and 237 of the record. That the court below gave full treatment to the issue relating to the matter and adequately so, can be deciphered from page 246 of the record .And granted that what in my view is considered as an exhaustive treatment of the issue raised and considered falls short of anything adequate (which is not conceded) I am of the view that what the court below decided cannot be said to amount to a substantial miscarriage of justice. See Far East Mercantile Co. Ltd. v. Jackie Philips Photos Ltd (1974) 11 SC. 225, 231 - 232 and Eme v. State (1964) 1 ALL NLR 416. No retrial is called for in a matter such as this. See Dantumbu v. Adene (1987) 4 NWLR (Part 65) 314. And I so hold. (p. 616 H & 617 E)

Where the defendant had no contractual obligation

10. Thus, the reasoning and conclusion of the court below is in my opinion, justified by the term of contract between the parties and the Defendant, in my view, cannot be penalised for failure of the Plaintiff to abide by the terms of the contract. And since the Defendant had no contractual obligation to provide working capital it cannot be penalised for holding its consent. This is only just and equitable. (p. 619 C)

Documents - Where the basis of its projections

11. The Plaintiff's contention therefore that as Exhibit 'X' was jointly prepared by both parties and was unchallenged, the court below was in error to hold that the document has no weight, is in my view, unsustainable.

B This is because both parties here are abstract entities. Credible evidence must be given e.g. that of a staff who prepared the document and who could explain the basis of its projections. In the present case neither P.W.1 nor P.W.2 explained the basis of its projections. The evidence itself is self defeating and in that light, the Defendant had no obligation to cross-examine on worthless evidence. In proper cases, unchallenged oral evidence of a party establishing his claim has been held to be sufficient proof vide Nwabuoku v. Otti (1961) ANLR 507 at 508. Where, as in the instant case the evidence is self defeating and unacceptable, the court is not obliged to act on it. See Jalingo v. Nyame (1992) 3 NWLR (Part 231) 538 at 545. See also Sommer v. F.H.A. (1992) 1 NWLR (part 219) 548 at 560-561. (p. 620 D)

E Award on anticipated profit

12. Since damages are not awarded for the gross income but rather for net income or profit where as in the case in hand, the cost of production is not known an award on net income or anticipated profit based on speculation cannot be allowed to stand. Thus, the court below was justified, in my opinion, in setting aside the award as not having been established. See Odulaja v. Haddad (1973) NSCC 357. (p. 621 B)

D Damages - Remoteness

G 13. On the grouse wherein the Plaintiff indicts the award of N1,000,000.00 being the difference in the cost of raw materials, equipments and spare parts between April, 1993 and January, 1994 as wrongly made, I can do no better than to adopt in its entirety what the learned Justices of the Court below said in disallowing the award. Said the writer of the lead judgment, Edozie, JCA and concurred by Oguntade and Muntaka-Coomasie, JJ.CA:

"As earlier postulated, by the Investment and Mortgage Agree-

ment Exhibit C, the responsibility for the procurement of raw materials and spare parts as listed in Exhibits DD1 and DD2 rested squarely on the plaintiff and it was failure to make adequate arrangement as it had been contracted and not the refusal of the defendant to give consent for loan that led to the alleged loss resulting from the fluctuation in prices of raw materials. I will also set aside the award as being too remote." B

This is a valid and an impeccable conclusion with which I am not prepared to interfere or disturb. (p. 621 D)

Damages - Double compensation C

14. The Plaintiff had been adequately compensated. See West African Shipping Agency v. Kalla (1978) 11 NSCC 114 where this court took the view that the award of general damages is another way of compensating the Plaintiff for the loss of expected profit and the freight on the goods. D Thus, the court below was justified in setting aside the award of N50,000.00 general damages purported to have been awarded to the Plaintiff on the ground that such an award constitutes double compensation. See Nigerian Arab Bank Ltd. v. Shuaibu (1991) 4 NWLR 186, 450 at E 456; Imo Concord Hotel Ltd. v. Anya (1992) 2 NWLR (Part 234) 210 and Mercantile bank v. Adalma (1990) 5 NWLR (Part 153) 747 at 751-752. (p. 622 D)

Rules of court - Court of Appeal Rules 1981 F

15. In thus setting aside this award the court below, in my view, among other reasons took into consideration the fact that the Plaintiff was in default of loan repayment and therefore could not be seen as asking for more money. Besides, by Order 3 Rule 23 Court of Appeal Rules, 1981 G as amended, the court below is empowered to give any judgment or make any order that ought to be made although the party against whom the judgment or order was made may not have appealed against such decision. The court below, in my opinion, was in consequence right to H have set aside the judgment of the trial court awarding N121,000.00 to the Plaintiff as the purported balance of the undisbursed loan. (p. 623 B)

Judgments - Reversal

16. It is enough for me to say here that having regard to all the submissions made in respect of all the other issues hereinbefore considered, the court below was, in my opinion correct to have set aside the decision of the trial court which, in my judgment was not the result of a proper appraisal and evaluation of the evidence adduced thereat. See Fashanu v. Adekoya (1974) 6 SC. 83 at 91; Chief Woluchem v. Chief Gudi (1981) 5 SC. 319 at 326 and Balogun v. Agboola (1974) 10 SC. 111. (p. 623 F)

C NOTABLE POINTS OF INTEREST

ONU JSC

1. Entitlement to nominal damages

In the absence of any proof, a plaintiff would only be entitled to nominal damages, it being agreed that the plaintiff did not prove loss or damages under the head of general damages. See Ogbechie v. Onochie (1988) 1 NWLR (Part 70) 370 at 396. (p. 622 F)

E OGUNDARE JSC

2. Banking - Mere provision of funds does not make World Bank the lender

As regards the first leg of the passage, that is, the role of the World Bank in the transaction between the parties I need to say, once again, that the Plaintiff knew all along that it was the World Bank that provided the line of credit that enabled payment to be made to GATCO in foreign currency. That, of course, would not make the World Bank the Lender of the loan to the Plaintiff. The lender remains the Defendant. To this extent, therefore, I do not share the view of the Court below that "the loan in question was provided by the World Bank which was the principal of the Defendant and the Midland Bank." There is no question of principal/agency relationship existing between the World Bank, on the one hand and the Defendant and Midland Bank, on the other hand, in respect of this transaction. (p. 637 A)

3. Inconsistency in pleadings

It is patent that there is some inconsistency in Plaintiff's pleadings. In the statement of claim and paragraph 1 of the Reply it was the Defendant that was said to be negligent. In paragraph 7(d) however it was the Defendant's corresponding bank that failed to confirm the 1st L/C. Having regard to the state of the pleadings it cannot be said that Plaintiff alleged negligence against Midland Bank for which Defendant was vicariously liable. It is unnecessary for me, therefore, to determine whether the action was incompetent for failure to join the Midland Bank. The conclusion I reach is that whatever defect there might be in the passage of the judgment of the Court below under attack no miscarriage of justice is occasioned thereby. (p. 641 C)

4. Loan - Plaintiff is not entitled to cash refund - For loan not utilized

I think the Plaintiff was confused about the loan granted him by the Defendant. Although the World Bank approved for him a line of credit in the sum of US\$750,000, it does not mean he was entitled to cash refund for the unutilised part of this credit line. The facility having expired, he was no longer entitled to the use of US\$14,530 credit line unutilised by him. (p. 646 G)

REPRESENTATION

O.B James Esq. for the Appellant

G. Ofodile Okafor (S.A.N) with R.C. Ogu Esq. for the Respondent

CASES REFERRED TO

Adelaja v. Fanoik (1990) 2 NWLR (Part 131) 137 at page 148

Agu v. Ikewibe (1991) 3 NWLR (Part 180) 385 at page 401

Olumolu v. Islamic Trust of Nigeria (1996) 2 NWLR (Part 430) 253

Union Bank of Nigeria Ltd v. Nnoli (1990) 4 NWLR (Part 145) 530

Benson v. Otubor (1975) 3 SC. 9 (1975) NSCC 49

The Queen v. Wilcox (1961) ALL NLR (Part 4) 631 at 634

Duriminiya v. Commissioner of Police (1961) NRNLR 70

Schroder & Co. v. Major & Co. (Nig.) Ltd (1989) 2 NWLR (Part 101)1

Baba v. Nigerian Civil Aviation Centre Ltd (1991) 5 NWLR (Part 192) 388

UBA Limited v. Umeh (1996) 3 NWLR (Part 426 at 565

SCOA Nigeria Ltd. v. Bourdex Ltd (1990) 3 NWLR (Part 139) 380 at 389

B

Kolawole v. Alberto (1989) 1 NWLR (Part 98) 382 at 399

Okonji v. Njokanma (1991) 7 NWLR (Part 202) 131 at 153

Ehimare v. Embonyon (1985) 1 NWLR 177 at 188

Ejiamike v. Ejiamike (1972) E.C.S.L.R. Vol. 11 (Part 1) 11

C

Sanusi v. Ameyogun (1992) 4 NWLR (Part 237) 257 at 540

Eme v. State (1964) 1 ALL NLR 416

Barau v. Cubits (Nig.) Ltd (1990) 5 NWLR (Part 152) 630 at page 648

Osuji v. Isiocha (1989) 3 NWLR (Part 111) 623 at 638

D

STATUTES AND RULES REFERRED TO

Companies Decree No 51 of 1968

Act No. 22 of 1973 (now cap. 296 Laws of the Federation 1990)

E Companies and Allied Matters Act, Cap. 51 Laws of the Federation 1990,

SS. 63 (3); 279 (3)

Court of Appeal Rules 1981 as amended, Order 3 r. 23

F

LEAD JUDGMENT BY ONU JSC

This is an appeal against the decision of the Court of Appeal, Jos Division (Coram: Oguntade, Edozie and Muntaka Coomassie, JJ.CA) sitting in Jos which on 11th November, 1996 allowed the appeal of the Defendant (herein Respondent) and dismissed Plaintiff's case in an action founded in contract involving foreign exchange transaction entered into between the Plaintiff (herein Appellant) and the Defendant. The Court of Appeal (hereinafter referred to as the court below) in addition, allowed the Defendant's cross-appeal thus culminating in the judgment of the trial Federal High Court in Suit No. FHC/J/10/93 appealed against being set aside in its entirety.

G

H

Briefly stated, the appeal herein began like this:-

The Plaintiff was granted a loan by the Defendant to finance a

project for the production of medicated cotton wool and bandages in Bukuru near Jos, Plateau State of Nigeria. Unhappy about the losses it had sustained and allegedly caused by the Defendant in the draw-down of the loan and the execution of the project, the plaintiff filed the action hereinbefore referred to which led to the filing and exchange by the parties of pleadings with subsequent amendments thereto. In its Amended Statement of Claim, the reliefs sought by the Plaintiff in paragraphs 28 and 29 thereof against the Defendant ran thus:

"28. Whereof the Plaintiff claims against the Defendant as follows:-

(i) A Declaration that by virtue of the provisions of Part II1 of the Companies Decree No. 51 of 1968 the Defendant is bound by the Investment and Mortgage Agreement dated 12/4/88 and made between the Plaintiff and the Defendant that the Defendant cannot vary the amount secured by the said Agreement.

(ii) A Declaration that the Defendant's letter Ref. No. LEG 72/ Vol.1 dated 14/1/94 and addressed to the Managing Director of the Plaintiff violates the terms of the Investment and Mortgage Agreement aforesaid as they relate to the repayment of the amount secured thereunder.

(iii) A Declaration that since the difference in the exchange rate at which the loan was disbursed to the Plaintiff was occasioned as a result of the Defendant's negligence, the Plaintiff cannot be held liable for the payment of same.

(iv) The sum of (fourteen Million four hundred and eighty thousand Naira only) (sic) being special and general damages suffered by the Plaintiff as a result of the Defendant's refusal to grant consent to the Plaintiff to obtain the working capital granted by Savannah Bank of Nigeria PLC.

PARTICULARS OF DAMAGES

1. SPECIAL DAMAGES.

(a) Loss of anticipated turn-over/earnings per month on the utilization of the working capital beginning from 1/8/93 to 31/3/94.....N10,080,000.00

(b) Difference between the cost price of raw materials, equipment spare

parts as at April, 1993 and January, 1994. N1,000,000.00

(c) The equivalent of 14,530 U.S. Dollars still held by the Defendant being balance of the undisbursed term loan as per Defendant's letter of 31/5/90..... N121,000.00

B Sub
total.....N11,201,000.00

2 GENERAL DAMAGES 3,279,000.00

N14,480,000.00

C 29. Interest at the rate of 10% per annum on the total judgment sum beginning from the date of judgement until the total amount is paid."

D Each party called two witnesses who gave oral evidence to compliment the documentary exhibits received by consent to prove its case. As can be gathered from the pleadings and evidence in support thereof, the salient facts which gave rise to the controversy between the parties may be briefly stated as follows:-

E While the plaintiff is a limited liability Company incorporated in Nigeria and carries on the business of production of medicated cotton wool and bandages, the Defendant is a Development Bank established under Act No. 22 of 1973, (now Cap.296 Laws of Federation 1990). The Defendant's principal function is to provide equity capital and funds by way of loans to indigenous medium and long term investment in industry and commerce, at such rates and upon such terms as may be determined by the Board in accordance with the policy directed by the National Council Of Ministers.

G Sometime in 1986, the Defendant placed advertisement for the promotion of small and medium size industries. In response thereto, the plaintiff applied for loan from the Defendant. Pursuant to the application aforesaid, in 1987 a letter of intent vide Exhibit B was received from the Defendant granting the Plaintiff the sum of N2.9 Million as term loan on the World Bank Credit Line, which sum was meant for the purchase of H only plant and equipment. Following the grant of the loan, an Investment and Mortgage Agreement, to wit: Exhibit 'C' was executed by the parties on 12/4/88. The Term Loan aforesaid was to be paid by the Defendant directly to Alfa-matex S.A. of Barcelona, Spain as the manufacturers of

the required plants and equipment. The Defendant then opened a letter of credit in favour of Alfa-matex, but the said letter of credit (Exhibit EE) was never confirmed until it expired on the 23/2/89. In consequence whereof Alfa-matex could not commence the manufacturing of the plants and equipment. The Plaintiff wrote a protest letter - see Exhibits 'D' & 'E' B to the Defendant informing them that Alfa-matex had indicated that it would not start manufacturing of the plants and equipment until the letter of credit was confirmed in their favour and that time was running out with the fear of increase in the cost of the plants and equipments. The Defendant by their letters to the Plaintiff dated 2/5/89 and 30/6/89 (Ex- C hibits EE & H respectively) intimated the Plaintiff of the problem and requested for another proforma invoice and other related documents for re-establishment of another letter of credit on the approved World Bank credit line but warned the Plaintiff that in accordance with Uniform Custom and Practice for Documentary Credit (1983) and the International D Chamber of Commerce, publication No..400, the establishment and cancellation charges will be debited to the Plaintiff. The plaintiff in response to Exhibits EE and H, by their letter dated 29/6/89 (Exhibit MM), for- E forwarded a new proforma invoice (Exhibit G), from GATCO Trading GMBH of Hamburg in Germany, to the Defendant. The value of the new proforma invoice was USD 735,470. The Defendant on 4th July, 1989 opened letter of Credit No. L/C 890244/WB for USD 735,470 the Naira equivalent was N5,326,200.19. See Exhibits L, GG, HH, and LL. By Exhibit 1 F dated 24/10/89, Messrs. GATCO of Hamburg confirmed the receipt of the letter of credit. To enable them erect, instal and commission the factory, the Plaintiff sent another proforma invoice to the Defendant for the sum of USD 31,355. By their letter to the Plaintiff dated 30/5/90, the G Defendant reminded the Plaintiff that they had disbursed N5,326,200.19 being the value of USD 735,470 which sum is USD 33,100 higher than the approved loan. The Plaintiff was requested to pay USD 16,805 to enable the Defendant remit this sum as well as USD 14,550 in their cus- H tody to the erectors in Germany. The Plaintiff did not respond until 23/10/90 when they paid N121,000.00 to the Defendant to cover USD 16,805. See Exhibits M and N. Between May and October 1990, the Exchange

rate had shot up and the N121,000.00 could not purchase 16,805 USD. The Defendant could not therefore disburse this sum to the erectors and the account of the Plaintiff was never debited with the undisbursed part of the Term loan. By their letter dated 25/6/92 the Defendant granted
B consent to the Plaintiff to enable them obtain a Working Capital of N1.7 Million from commerce Bank PLC. The Plaintiff secured another approval by a letter dated 25/3/93 - Exhibit ZZ; the Defendant refused to grant consent to create further charge in favour of Savannah Bank of
C Nigeria PLC. The Plaintiff went to the Federal High Court, Jos to compel the Defendant to give their consent. On 2/12/93 the Federal High Court, Jos ordered the Defendant to grant the requisite consent within 7 days. Sequel to the above, the Plaintiff on 31/1/94 proceeded to the Federal High Court Jos to claim the several reliefs I have hereinbefore set out.

D After taking the evidence of each of the two witnesses called by the parties and considering the submissions of counsel, the learned trial Judge of the Federal High Court (Kasim, J.), on 20th July, 1995 gave judgment against the Defendant and in favour of the Plaintiff in the following terms:-
E

"In sum, judgment is entered in favour of the plaintiff as follows:-

1. *That there is no variation in the investment and Mortgage
F Agreement dated 12th April, 1988 and made between the plaintiff and Defendant and that none of the parties therein can unilaterally vary the terms of the said Agreement, including the amount secured by the Agreement*

G 2. *That based on the evidence of the 1st Defendant Witness, the loan granted under Exhibit C together with interest thereon, was not due for payment at the time Exhibit 'BB' was written.*

H 3. *That since the difference in the exchange rate at which the loan was disbursed to the plaintiff was occasioned as a result of the defendant's negligence, the plaintiff cannot be held liable for the payment of same.*

4. *The Plaintiff is awarded the following special and general damages:-*

(i) 70% of loss of anticipated turn over/earnings (i.e. N1.26 Million) per month on the utilization of the working capital beginning from 1st August, 1993 to 31st March, 1994.

(ii) The difference between cost price of raw materials, equipments and spare parts as at April, 1993 and January, 1994, which amount to N1,000,000.00

(iii) The equivalent of 14,540 Dollars still held by the defendant, being the balance of the undisbursed term loan, as per Exhibit 'K' which is N121,000.00

(iv) N50,000.00 as general damages.

(v) Interest at the rate of 2 and half per cent per annum on the total judgment sum beginning from the date of this judgment until total amount is paid."

Dissatisfied with that part of the judgment which awarded only 70% of the anticipated turn over/earnings, the Plaintiff appealed against it. The Defendant on its part, appealed against the whole decision by way of a cross-appeal. After briefs were duly filed and exchanged by the parties, the appeal was eventually heard on 25th of September, 1996. In a well considered reserved judgment delivered on 11th November, 1996, the court below as hereinbefore stated dismissed the appeal while the cross-appeal was allowed and the judgment of the trial Federal High Court was set aside in its entirety. The appeal herein premised on thirteen grounds contained in the Notice of Appeal and reflected on pages 257 to 264 of the record of appeal, is against that decision with which the Plaintiff felt aggrieved. The Defendant also filed a Respondent's Notice at pages 265 - 266 of the record.

In accordance with the rules of this court the parties eventually filed and exchanged of briefs of argument in which the Plaintiff submitted thirteen issues as arising for determination. They are:-

(i) Whether the Court of Appeal was right when it held that the principal loan advanced to the Appellant was N6,120,207.00 as per Exhibit 'NN'.

(ii) Whether the Court of Appeal was right when it held that the loan granted to the Plaintiff was provided by the World Bank and that the

said Bank was the principal of the Respondent as well as Midland Bank.

(iii) Whether the Court of Appeal was right when it held that even if the Midland Bank was the agent of the Respondent the Respondent cannot be vicariously liable for the negligent act of the Midland Bank
B without the latter being joined as a party.

(iv) Whether, having regards to the facts and circumstances of this case, the Court of Appeal was right when it held that the exemption clause of clause 11 (iii) of the Investment and Mortgage Agreement (i.e. Exhibit 'C') provided a complete exemption to the Respondent for the
C consequences of the failure to confirm the 1st letter of Credit.

(v) Whether the Court of Appeal was right in holding that the Respondent had absolute discretion to grant or refuse to grant consent to the Appellant to create a further Mortgage or charge on its assets after
D granting the first consent to the Commerce Bank PLC.

(vi) Whether the Court of Appeal was right when it failed to consider the issue as to whether or not the Respondent unreasonably withheld the exercise of its discretion (if any) under clause 28 of Exhibit
E 'C' and if the answer is in the negative, whether the Respondent unreasonably withheld the exercise of discretion under the clause aforesaid.

(vii) Whether the Court of Appeal did not misdirect itself on the facts of this case when it held that the award relating to loss of anticipated earning/turnover made in favour of the Appellant was unjustified
F because it was not within the contemplation of the parties that the Respondent has to provide working capital for the Appellant.

(viii) Whether the Court of Appeal was right when it held that the award in respect of loss of anticipated earnings/turnover made in
G favour of the Appellant was further unjustified because the special damages on which it is predicated were not particularised and that even if the Respondent is precluded from complaining about particulars, Exhibit 'X' (the Cash Flow) tendered in evidence in proof of the claim has no weight
H and further that there was no basis for calculating the claim of N1.26 Million every month.

(ix) Whether the Court of Appeal was right when it held that the Appellant did not prove the loss of anticipated profit it sustained.

(x) Whether the Court of Appeal was right when it held that it was the failure of the Appellant to make adequate arrangement as it had contracted and not the refusal of the Respondent to give consent for loan that led to the loss resulting from fluctuations in prices of raw materials.

(xi) Whether the Court of Appeal was right in setting aside the award of N121,000.00 representing USD 14,530.00 undisbursed balance of term loan as well as the award of N50,000.00 general damages.

(xii) Whether the Court of Appeal was right in holding that the findings of the trial court that the loan granted under Exhibit 'C' together with interest was not due when Exhibit 'BB' was written..

(xiii) Having regard to the totality of evidence adduced at the trial court was the Court of Appeal right in setting aside the decision of the trial court.

The Defendant for his part submitted six issues for this Court's resolution. They are:

(1) Whether the principal loan is N2.9 Million or the actual amount disbursed upon the establishment of the Letter of Credit;

(2) Whether the Appellant was aware that the loan granted them is from the World Bank and if the answer is in the affirmative whether the Respondent is vicariously liable for the negligence of their Agent, Midland Bank, London.

(3) Having regard to the agreement between the parties, who is to bear the risk of or the consequences of foreign exchange fluctuation;

(4) Whether the Respondent has a discretion to grant or to refuse to grant consent to create further charge on the security held by them;

(5) Whether the Court of Appeal was wrong in holding that the loan became repayable from the 4th day of January, 1991 and that the due date for first instalment was June 30, 1991;

(6) Whether the Court of Appeal was wrong in setting aside the various monetary awards or damages made by the trial court and in dismissing the claim of the Appellant.

I take the view that irrespective of the proliferation and prolixity of the Plaintiff's issues I will stick to them in my treatment of them as they fall within and circumscribe the thirteen grounds of appeal filed in the

(Plaintiff's) Notice and Grounds dated the 19th of November, 1996. In this wise, I shall deal with issue No.1 separately; issue numbers two and three together, issue No. 4 separately; issue Numbers 5 and 6 together; issue Numbers 7,8,9,10,11, and 12 together and finally issue Number 13 separately. Before delving into their consideration, however, I wish to re-iterate that as done by this court in a number of cases before now, we strongly deprecate any prolixity or prolixity in issue formulation. Thus, as we had occasion to counsel in Abiodun Adelaja v. Olatunde Fanoik & Anor. (1990)2 NWLR (Part 131) 137 at page 148 paragraphs E-F:

"It is now fairly well settled that the issues for determination in the appeal formulated must of necessity be limited by, circumscribed and fall within the scope of the grounds, of appeal filed. Since they arise from the grounds of appeal, the issues ought to take account of the grounds of appeal and cannot raise issues outside their contemplation. It is therefore not usually envisaged that the issues for determination will be more in number than the grounds of appeal on which they are based. Since the issues for determination are highlights of the grounds of appeal, they usually are framed in terms of related grounds of appeal supporting the same issue. Hence the issues for determination are usually less but never more than the number of the grounds of appeal filed."

In Raphael Agu v. Christian Ozurumba Ikewibe (1991) 3 NWLR (Part 180) 385 at page 401 paragraphs C -E where Karibi-Whyte, JSC stated *inter alia*:

"The issues for determination formulated by both Counsel would seem to me to have ignored the grounds of appeal on which they ought to be based. The Court has counselled counsel formulating issues on several occasions to ensure always that the formulation is not merely consistent with and within the scope and confines of the grounds of appeal relied upon, but also that they should not be so prolix and proliferate as to be more in number than the grounds of appeal on which they are based. This is because whereas an issue to be determined can take into consideration a number of grounds of appeal, it is not desirable to split a ground of appeal into a number of issues. See A.G. Bendel State v. Aideyan (1989) 4 NWLR (Part 118) 646; Ugo v. Obiekwe (1989) 1NWLR (Part

99) 566; Adelaja v.Fanoiki (1990)2 NWLR (Part 131) 137
....."

See also Olumolu v. Islamic Trust of Nigeria (1996)2 NWLR (Part 430) 253.

Having made the above observations, I will now proceed to consider the issues as rationalised by me as follows:-

ISSUE NO. 1

Issue No. 1 poses the question of whether the court below was right when it held that the principal loan advanced to the plaintiff was N6,120,207.00 as per Exhibit 'NN'. The issue has close affinity with the defendant's issue one and in it the plaintiff has contended in answer both orally through counsel and in its brief all in the negative - firstly, that it is not in doubt that the transaction between it (Plaintiff) and the Defendant was governed by the Letters of Intent vide Exhibits 'A' and 'B' respectively as well as the Investment and Mortgage Agreement which is Exhibit 'C' in these proceedings. That as a follow up to Exhibit 'B', the parties executed Exhibit 'C' dated 12/4/88 and in its clauses 6(i) and 7 the words "not exceeding in the aggregate" and 'include' contained at pages 65 and 76 respectively were defined in Blacks Law Dictionary with pronunciations Sixth Edition. We were therefore urged to interpret what the word "include" in clause 7 of Exhibit 'C' connotes and as to whether it is indicative of the fact all those things mentioned therein are confined within the sum of N2.9 Million stated in clause 6(i) of Exhibit 'C'. Further and in addition to the above, it was argued, that it is settled law that parties are bound by their pleadings and that any evidence adduced at the trial which is at variance with those pleadings goes to no issue and should be ignored. Reliance was placed on the cases of Union Bank of Nigeria Ltd. v. Michael Nnoli (1990) 4 NWLR (Part 145) 530 and Benson v. Otubor (1975) 3 SC.9; (1975) NSCC 49. We were next referred to paragraph 3 of the Amended Statement of Claim dated 31st March, 1995 to which answer was proffered in paragraph 3 of the Defendant's Amended Statement of Defence dated 28th February, 1995, adding that it is clear from the latter paragraph reproduced for purposes of clarity, that the contention of the defendant was that the principal loan advance to the

Plaintiff was N5,326,200.19 but that in his evidence in chief, D.W.1 - Mr. Peter Enezi stated as follows:-

"The actual amount disbursed in foreign currency was \$735,470.00 plus 15% interest - that is N270,000,00 during the period of construction, this added to N5.8 Million add up to N6.1 Million."

This, it was argued, contrasts with what the same witness said in his evidence in chief thus:

"The total loan as at 30/10/90 is N6,420,267.97 exclusive of interest."

It was next submitted that these pieces of evidence are completely at variance with the defendant's pleading, particularly paragraph 3 of the Amended Statement of Defence (supra). The effect of this in law, it is argued, is that the defendant had not proved that the actual principal loan granted to the plaintiff is above N2.9 Million as stated in clause 6(i) of Exhibit 'C'. What is more, it is further argued, the defendant did not amend the Amended Statement of Defence so as to bring it in line with the evidence at the trial, namely that of D.W.1 in relation to the principal loan granted to the defendant. We were therefore, urged to set aside the finding of the lower court that the principal loan advanced to the plaintiff was N6,120,207.00 as same is completely at variance with the pleadings. Besides, it is maintained, Exhibit 'NN' on which the lower court relied in arriving at the above finding was made from records kept by the defendant and over which the plaintiff had no access or control. It was therefore, contended that it follows that the defendant ought to have known the actual principal amount advanced to the plaintiff and same should have been pleaded. The case of The Queen v. Gabriel Adaoju Wilcox (1961) All NLR (Part 4) 631 at 634 in which the Federal Supreme Court cited with approval the case of Duriminiya v. Commissioner of Police (1961) NRNLR 70 whereof from the principle decided therein, the contention that the principal loan advanced to the plaintiff was N6,120,207.00 is at variance with both the defendant's pleading as well as the evidence of D.W.1 who contradicted his own evidence as to the amount of principal loan exclusive of interest. Moreover, it was argued, the amount which the Plaintiff had purportedly admitted as being the principal loan in Exhibit

its 'GG', and 'HH' and 'JJ' is equally at variance with the amount stated in Exhibit 'NN' on which the lower Court relied as well as the oral testimony of D.W.1 - Mr. Peter Enesi. We were thus urged to hold that the only evidence left and on which the court rely is Exhibit 'C' on which the amount of the principal loan is stated to be N2.9 Million. B

While it is correct to say from both the letter of intent, Exhibit A2 and the Investment and Mortgage Agreement (Exhibit 'C') that principal loan granted by the defendant to the plaintiff was N2.9 Million, clause 7 of Exhibit 'C' however, provides: C

"It is hereby agreed and understood that the loan shall include any sum owing to the lender by reason of advances made directly to any person at the request of or on behalf of the Borrower on any bonds, letters of credit issued and guarantees or indemnities given by the Lender or its agents on behalf of the Borrower." (Underlining is mine for comments). D

In its brief the plaintiff has interpreted the word "include" underlined above to mean that all these things, namely "advances made directly to any person at the request of or on behalf of the Borrower on any bonds E letters of credit issued and guarantees or indemnities" are included in the aggregate sum of N2.9 Million in clause 4 of Exhibit 'C'. A careful look at clause 4, however, will reveal that the Term Loan of N2.9 Million is meant to cover only building, plants and machinery, both of which total F N2,985 Million. Other items therein provided exclude payments made on bonds, letters of credit, guarantees or indemnities. These items, be it noted, do not form part of the principal loan of N.9 Million. **In interpreting a document, due regard must be given to the entire document so as to find out the correct meaning of the word in relation G to the agreement. See Schroder & Co. v. Major & Co. (Nig.) Ltd. (1989)2 NWLR (Part 101)1. The court below was therefore perfectly right, in my opinion when it held, inter alia, that -**

"The word "include" in an enactment must be construed as H comprehending, not only such things as they signify, according to their natural import but also those things the interpretation clause declares that they shall include. See Nafiu Rabi'u v. The State (1980) 8-11 SC.

130; Mandara v. A.G of Federation of Nigeria (1984) 1 SC311 and Nwobosi v. The State (1995) 6 NWLR (Part 404) 658 at 683."

Clearly therefore Clause 6(1) of Exhibit 'C' is subject to Clause 7. The loan shall include such sums paid by the Lender for and on behalf of the Borrower on any Letter of Credit etc. By their letter dated 29/6/89 Exhibit MM the Plaintiff requested the Defendant to open a new irrevocable and confirmed Letter of Credit in favour of GATCO of Hamburg, Germany. Paragraph 2 of Exhibit MM states:

"We shall be grateful there fore, if a fresh irrevocable and confirmed Letter of Credit could now be opened in favour of GATCO TRADING GMBH of the FEDERAL REPUBLIC OF GERMANY..... in the sum of US \$735,470....."

In Exhibit LL, a letter dated 21/9/93, the Plaintiff admitted at page 3 paragraph XIII and XVI that:

"(XIII) Letter of Intent from the Nigerian Bank for Commerce and Industry and Investment and Mortgage Agreement dated 12th April, 1988 for the principal loan from Nigerian Bank for Commerce and Industry for N2.9 million but L/C opening now N5.33 Million."

"(XVI) Form 'M' for the opening of Letter of Credit for USD 735,470 at N7,2419 = N5,326,200.19 being the cost of Plants and Machinery financed by NBCI."

In Exhibit GG another letter dated 28/1/93 the Plaintiff said:

"We refer to your demand note dated 11th January, 1993 on the above and wish to correct that the principal loan is USD 735,470 at N7,2419 = N5,326,200.19 not N5,850,267.97 as stated in the above note."

In their letter dated 28/1/93 (Exhibit HH) the Plaintiff admitted that:

"We refer to your interest demand note dated 31st December, 1992 on the above and wish to correct that the interest has accrued on the principal sum of N5,326,200.19 at 15% i.e N1,758,045.50 based on a daily N1,404.19 not N2,150,134.92 as stated in the above demand note."

In Exhibit JJ, Statement of Affair of the Plaintiff as at 31st December, 1991, duly authenticated by the Managing Director and another Director, the Plaintiff admitted owing the Defendant N6,570,553.00 made up of principal loan of N5,326,200 and interest of N1,244,153.00. Similarly, in

Exhibit KK, the Plaintiff's Audited Account for the six months period ending 31st December, 1992, in which the Plaintiff admitted owing the Defendant N6,570,353.00. When cross-examined, P.W.1 confirmed the contents of Exhibits II, JJ and KK and admitted that his Company owed the principal sum of N5,326,200.00 and interest of N1,244,155. B

Clause 4 of Exhibit 'C', the Deed of Guarantee provides as follows:

"Any admission or acknowledgment in writing by the Borrower or any person on behalf of the Borrower of the amount of the indebtedness of the Borrower or any statement of account furnished by the Lender the correctness of which is certified by an official of the Lender, shall be conclusive and binding on the Guarantors." C

Exhibits NN and OO are the Statements of Account of the Plaintiff duly certified by D.W.1, an official of the Defendant. Both Exhibits are conclusive that the principal loan was N6,120,267.97 while the interest was N3,761,016.34 as at December, 1994. By virtue of Clause 4 of the Deed of Guarantee above, this figure is conclusive and binding on the Plaintiff. Parties are bound by an agreement they freely entered into. See Baba v. Nigerian Civil Aviation Centre Ltd (1991) 5 NWLR (Part 192) 388; UBA Limited v. Umeh & Sons Ltd (1996) 3 NWLR (Part 426) at 565 and SCOA Nigeria Ltd. v. Bourdex Ltd (1990) 3 NWLR (Part 138) 380 at 389. D

From the foregoing, the court below was therefore right, in my view, to hold that the principal loan was N6,120,207.00 which sum incorporated N5,850,267.97 and interest of N270,000.00 during construction. The plaintiff's attack in its brief on the pleading being at variance as to the principal sum owed in the court below ought therefore to be discountenanced or ignored. See Kolawole v. Alberto (1989) 1 NWLR (Part 98) 382 at 399 and Okonji v. Njokanma (1991) 7 NWLR (Part 202) 131 at 153. This is the moreso in the instant case that issues were joined by the parties that N2.9 Million H is not the principal loan on the establishment of Letter of Credit. The Defendant led evidence to prove that the principal loan was over N5,326,200.19, an account also admitted by the Plaintiff. By F

the agreement of the parties, the interest during construction put at N270,000.00 vide Exhibit OO is also capitalised to form part of the loan. Although the Defendant did not file a counterclaim nor was judgment given in its favour upon any claim, the correct amount owed as principal sum was an issue before the trial court as well as in the court below. It would appear therefore that the court below had a duty to decide on the issue, as indeed it did, rightly in my view, that the principal sum was N6,120,207.00 as per Exhibit NN.

This issue is thus answered in the affirmative.

ISSUES NOS. TWO & THREE

The Plaintiff's grouse here which are focussed on grounds 2 and 3 of the grounds of appeal are whether the court below was right when it held that the loan granted to the Plaintiff was provided by the World Bank and that the said Bank was the principal of the Defendant as well as Midland Bank and whether the court below was right when it held that even if the Midland Bank was the Defendant's agent, the Defendant cannot be vicariously liable for the negligent act of the Midland Bank without the latter being joined as a party.

That the Plaintiff knew or had reason to know that the source of the Term loan was from the World Bank can firstly be gathered from relevant pleadings as follows:-

In paragraph 9 of the Amended Statement of Defence, the Defendant pleaded thus:

"The Defendant denies paragraph 9 of the Statement of Claim and avers that the facility granted the Plaintiff is World Bank Credit Line for Small and Medium scale enterprises (NIE) and had since lapsed. All unutilised loans revert back to the World Bank and the Plaintiff is not being debited for the undisbursed 14,530 U.S. Dollars."

By its paragraph 4 of the Plaintiff's Reply to the Amended Statement of Defence the Plaintiff pleaded as follows:-

"In reply to paragraph 9 of the Statement of Defence the Plaintiff avers that since there was mutual agreement between the parties that the U.S.D. 14,530.00 should be used to offset part of the installation cost, the Defendant was in breach of Clause 5 of the Investment and

Mortgage Agreement when it failed to remit the said sum for the agreed purpose."

Form the pleadings above, it is clear that the Plaintiff never joined issue that the facility granted them was a World Bank Credit. In other words, the fact was never controverted by the Reply as the Plaintiff ought to do for the issue raised thereon to have been joined. See Ehimare v. Emhonyon (1985) 1 NWLR 177 at 188; and Overseas Construction Co. (Nig.) Ltd. v. Creek Enterprises (Nig.) Ltd (1985) 3 NWLR 407 at 409. If the Plaintiff did not deny that the facility granted them was from the World Bank the plethora of documentary evidence adduced indicate beyond dispute that that Bank is the principal whereas the Defendant is their agent for the purpose of meeting the needs of small and medium scale enterprises in Nigeria show as follows:- Exhibits A2, EE and LL speak loudly for themselves. Thus, Exhibit A2 the Letter of Intent states for instance that:

"I am pleased to inform you that after due consideration to your application the Nigerian Bank for Commerce and Industry has approved an Investment in Artra Industries Limited by the way of Term Loan of N2,900,000.00 (Two Million, nine hundred thousand Naira only) in the WORLD BANK LINE CREDIT on the terms and conditions contained in the Investment and Mortgage Agreement." (Underlining supplied by me). In their letter dated 21/9/93 the Plaintiff wrote:

"It is very important to make a recap of the history of this project which NBCI are very much aware of i.e. the fact that the NBCI disbursed the 100% cost of Plants and Machinery on the World Bank Line of Credit for USD 734,470 by means of an irrevocable and confirmed Letter of Credit." (Underlining supplied).

In paragraphs a, b. and c of Exhibit EE, the Defendant notified the Plaintiff of the following facts leading to the cancellation of the first Letter of Credit No. LC 880230/WB:

"(a) Having opened the LC on the 12th August, 1988 we despatched our 'application for special commitment letter' to World Bank on the 11th August,!) ((."

"(b) On the 29th August, 1988, the World Bank forwarded its

Commitment Guarantee 'to Midland Bank to enable the latter add its confirmation to the Letter of Credit."

B *"(c) The World Bank sent a copy of its approved Special Commitment Guarantee to us in this Bank on 13th September, 1988. On the basis of this World Bank Special Commitment, Midland Bank ought to have added its confirmation to the credit, but we did not receive Midland Bank's confirmation advice prior to the expiring of credit."*

C On the viva voce evidence rendered at the trial P.W.1, Mr. Olawale Banwo admitted that:

"By June, 1987 I got a letter of Intent guaranteeing us a sum of N2.9 Million as term loan on the World Bank Credit Line, which is meant for the purchase of only plants and equipment."

When cross-examined, however, P.W.1, said:

D *"I do not know that the loan is from the World Bank."*

The court below after a careful appraisal of the quantum of evidence adduced before the trial court came to the conclusion, rightly in my opinion, that in the disbursement of the loan three banks were involved viz the E Defendant bank, the World Bank and the Midland Bank. As it was the case of the Defendant that the Plaintiff was aware that the source of the fund was the World Bank but the Plaintiff throughout the cross-examination of its Chairman denied the fact the court below resolved the conflict F thus created when it held inter alia:

G *"But whether the trial court was right in its finding that the Plaintiff had no cause to believe that the loan was from the World Bank is a different matter. This is so because the Chairman and Managing Director of the Plaintiff had in examination-in-Chief appeared to indicate that he knew that the loan was from the World Bank but denied that fact in cross-examination. By the contradiction in his evidence, he ought not to have been believed. Besides, the documents tendered bear eloquent testimony that the Plaintiff knew that the source of H the fund was a World Bank Line of Credit. It is well established that where there is oral as well as documentary evidence, documentary evidence should be used as a hanger from which to assess oral testimony: See Kimdey & 11 ors. v. The Military Governor of Gongola State & ors*

(1988) 2 NWLR (Part 77) 449. *I am of the view that based on the pleadings, the contradictory evidence of the Plaintiff's Managing Director and the plethora of documentary evidence tendered the learned trial judge ought to have found that the Plaintiff knew that the loan in question was provided by the World Bank which was the principal of the Defendant and the Midland Bank.*" B

I cannot agree more since the Plaintiff in arguing its brief has sought to limit the court below to only Exhibit 'B' and 'C' in isolation of other exhibits before the Court and trying to establish the fact that the Plaintiff was aware of the source of the fund - the phrase "World Bank Line of Credit" being clear and unambiguous. Besides, the Plaintiff was not misled by this phrase since it had no doubt as to the source of the fund while the denial of its Managing Director in cross-examination made it necessary to refer to other documents to resolve the issue. Be it noted that the position of the World Bank as the provider of the funds and therefore the principal of the Defendant is not derogated from by the fact that it was not a party to the agreement Exhibit 'C'. The problem arose from the finding of the trial court wherein it held inter alia that: D

"Therefore since the Defendant had chosen to perform its duty under Exhibit 'C' through the World Bank and Midland Bank, and during the course of performing that duty, one of the agents (the Midland Bank) neglected in the performance of such duty, it is only fair and equitable that the Defendant be held liable for the negligence of the Midland Bank, one of its agents and I so hold." E

The court below declined to uphold, rightly in my view, the above conclusion by answering same in the negative. **However, when on its own it held that "the loan in question was provided by the World Bank which was the principal of the Defendant and the Midland Bank."** I think it fell into a serious error. This is because the question of principal/agent relationship between the World Bank on the one hand and the Defendant and Midland Bank on the other hand, could not have arisen in so far as the transaction was concerned. Be that as it may, no miscarriage of justice could be said to have been occasioned on the point. See Far East Mercantile Co. Ltd. v. Jackie G H

Philips Photos Ltd (1974) 11 SC 225 at 231-232 and Eme v. The State (1964) 1 ALL NLR 416.

The two issues considered together are accordingly answered in the affirmative.

B ISSUE NO. 4

This issue poses the question whether having regard to the facts and circumstances of this case the court below was right when it held that the exemption clause of clause 11 (iii) of the Investment and Mortgage Agreement (i.e. Exhibit 'C') provided a complete exemption to the Defendant for the consequences of the failure to confirm the 1st letter of Credit.

Now, clause 11 of Exhibit 'C' provides as follows:

D *"II(iii) All risks of foreign exchange including fluctuations howsoever caused shall be borne by the Borrower."* (Underlining supplied by me).

The above provision is bereft of any ambiguity. Its clear purport, in my judgment, is to exonerate the defendant from all risks of foreign exchange, and more especially, that which arises from fluctuations in the exchange rate. The reason for such fluctuations, it would appear, is not important. The duty of the court is to interpret the agreement in enforceable terms without more. See National Salt Co. of Nigeria Ltd v. Mrs. M. J. Inns Palmer (1992) 1 NWLR (Part 218) 422. In the instant case, the only contract is between the Plaintiff as the buyer of the Machinery and the defendant as the issuing house. If there is any liability such must flow from the terms of the contract binding the parties. The contract between the Plaintiff and the Defendant is Form M annexed to Exhibit E - the application to purchase foreign currency. The mode of payment requirement by the Plaintiff is IRREVOCABLE LETTER OF CREDIT in a transaction between the Plaintiff and the Defendant i.e. a contract between the buyer and the issuing bank wherein the duty of the Defendant is to issue to the Plaintiff a letter of credit in strict compliance with the buyer's instruction. See Akinsanya v. U.B.A. Ltd (1986) 4 NWLR (Part 35) 273 at page 303.

In the instant case where although the Plaintiff admitted that the Letter of

Credit was opened on the 20th May, 1988 but that the Defendant was negligent by failing to confirm the same to enable the supplier proceed with the manufacturing of the plant, machinery and equipment, the Defendant having complied with instruction on Form M cannot, in my view, be held liable for the failure of Midland Bank to add their confirmation to the letter of credit - a non-contractual requirement between the parties. On this score alone, the Defendant cannot bear the responsibility or the risk of fluctuation of the foreign exchange by reason of failure to confirm the 1st Letter of Credit. The exclusion clause in this case is quite a reasonable one having regard, for quite some time, to the less than stable value of the naira - its aim being to protect investors in the Defendant - as the person who stands to benefit from a transaction, should also bear the risk arising thereof. See Wallensteiner v. Moir (No. 2) (1975) 1 ALL E.R. 504 at 589. Where Denning M.R. held inter alia:

"It is a well known maxim of the law that he who would take the benefit of a venture if it succeeds, ought also to bear the burden if it fails."

As I take the firm view that the plain construction attributable to the said exclusion clause by the court below is most reasonable in the circumstances, and ought to be sustained, my answer to issue (iv) is also rendered in the affirmative.

ISSUES NO. 5 & 6:

These issues (which is Defendant's issue 4 and are predicated on grounds 5 and 6 of the grounds of appeal) ask whether the court below was right in holding that the Defendant had absolute discretion to grant or refuse to grant consent to the Plaintiff to create a further mortgage or charge on its assets after granting the first consent to the Commerce Bank PLC. Also whether the court below was right when it failed to consider the issue as to whether or not the Defendant unreasonably withheld the exercise of its discretion (if any) under clause 28 of Exhibit 'C' and if the answer is in the negative, whether the Defendant unreasonably withheld its consent under the aforesaid clause. After reference was made to clause 28 of Exhibit 'C' (reproduced in Plaintiff's brief for emphasis) it was contended that notwithstanding the fact that the court

below had rightly held that the clause's object is to enable it (the Defendant) to protect its Investment, its implications is that having charged in favour of the Defendant by way of a second floating charge all its floating assets, the Plaintiff may give a first charge on the said floating assets
 B to enable it obtain working capital from any Commercial Bank up to the maximum of N45,000.00 and that any further right to create any Mortgage or charge on the said floating assets shall only be exercisable subject to the prior consent in writing of the Defendant. It is clear from the above, it is argued, that the grant of the consent under the above clause is
 C not tied to any other factor besides the express demand for consent. In other words, it is not a condition precedent to the grant of consent that the Plaintiff must have commenced the repayment of the loan or interest. The court below, which it is further submitted, was wrong in its reasoning and conclusions in construing the clause, appears to be saying that
 D since the Defendant had earlier granted consent to the Plaintiff in favour of Commerce Bank PLC to finance its fixed assets, the Defendant was no longer under a duty to grant any further consent in favour of any
 E other Bank for its working capital.

With utmost due respect, the above line of argument adopted by the Plaintiff cannot be correct if cognisance is taken of the full purport of Clause 28 of Exhibit 'C' which conferred power on the Plaintiff to execute a first charge on its book debts, stocks-in-trade and work in progress
 F to obtain working capital from a licensed commercial bank up to the maximum of N45,000.00 and then added a proviso, to wit:

*"Any further right to create any mortgage or charge on its book debts, stock-in-trade, work in progress and moveable assets shall only be
 G exercisable subject to prior consent in writing of the lender."*

**The court below, in my opinion, had therefore rightly construed this proviso as conferring a discretionary power on the Defendant to decide whether or not to grant consent for any further mortgage
 H or charge above the specified amount to be effected on the Plaintiff's assets already mortgaged or charged with the Defendant. It certainly cannot be, as contended by the Plaintiff, a requirement of mere notice without more, of the Plaintiff's intention or desire to**

effect further mortgage or charge on its assets already mortgaged with the Defendant. In George v. Khoury (1965) 1 ALL NLR 91, the articles of a private company empowered the directors to refuse to register a transfer to which they had not consented. It was held that this was a discretionary power which must be exercised by a vote of the board ad hoc. See also Metal Construction (W.A.) Ltd v. Migliore (1979) NCLR 462; (1979) 6-9 SC. 163 and Re Hackney Pavillion Ltd (1923) ALL E.R. 524.

If it is thus accepted that the above proviso conferred a discretion, upon what terms one may ask, should it be exercised? It is the Plaintiff's argument that once a demand is made the Defendant must grant its consent. With due respect, this cannot be so as the essence of discretion will be defeated if that essence of option to pick and choose is absent. Discretion means equitable decision of what is just and proper under the circumstance or a liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar case guided by the principles of law. See Blacks Disctionary of Law, 5th Edition page 419; Ejiamike v. Ejiamike (1972) E.C.S.L.R. Vol. II (part 1) 11 and Doherty v. Doherty (1964) 1 ALL NLR 299; (1964) NMLR 144. I am satisfied that in the case in hand this was exactly what the Defendant did when by its letter, Exhibit ZZ addressed to the Plaintiff, it indicated as follows:-

"..... the bank is unable to further dilute the existing pari pasu sharing security arrangement due to the fact that doing so would expose the bank to a very low assets coverage ratio that is unacceptable."

The court below in rightly upholding this exercise of discretion by the Defendant held inter alia (per Edozie, JCA) as follows:

"How can the defendant protect its interest if it has no discretion to refuse the consent to diminish its assets? If the defendant has no discretion there could have been no requirement as to the prior consent in writing. The fact that the defendant called for a revised cash flow projection did not automatically mean that it must grant its consent. It was evident from the record that the Plaintiff made no repayment of the loan since commencement of operation in May, 1992 The second draw

down was the defective date, the 18 months moratorium would expire by January, 1991. Yet by 29/3/93 when the 2nd application to create a further charge was made the plaintiff had paid only N20,000.00."

See also Section 279(3) of the Companies and Allied Matters Act, Cap.51

B Laws of the Federation 1990 which relevantly provides:

"A director shall act at all times in what he believes to e the best interest of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and on such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances."

C In the light of the foregoing, **there is no doubt that the exercise of discretionary power such as in this case, falls within the management power which is by Section 63(3) of the Companies and Allied**
D **Matters Act (supra) conferred on the directors. In exercise of such power, the directors must adhere strictly to the statutory provision which enjoins them to consider the interest of the company as paramount. In the case in hand, the directors of the Defendant bank**
E **being therefore alert to their responsibilities, could not have exercised their direction in favour of the Plaintiff, the proper effect of which would be to further dilute the Defendant's security, when the Plaintiff is already in breach of its previous undertaking.**

F On the second arm in these issues argued together, to wit: issues
5 and 6, the Plaintiff through its counsel has urged us to answer same in the negative and to hold that the Defendant unreasonably withheld its consent under Clause 28 of Exhibit 'C' aforesaid. After we were specifically referred to the holding of the learned trial Judge in his judgment to
G the effect that -

"Again, once the plaintiff has made an application for grant of consent, the Defendant has no discretion under clause 28 to refuse such consent. Assuming the defendant has a discretion in the grant of such
H *consent, I am of the view that the consent was unreasonably withheld in view of the facts and circumstances of this case."*

the above was specifically appealed against by the Defendant in Ground 5 of the Notice and Grounds of Appeal and therefrom an issue to cover

same was formulated in the court below. That notwithstanding, it was contended, the court merely dealt with the aspects which touched the question as to whether or not the Defendant had discretion whether to grant or refuse consent under Exhibit 'C'. Besides, it was further argued, their Lordships of the Court below did not go further to determine the arm of the issue which touched on whether or not the Defendant unreasonably withheld the exercise of its discretion under Clause 28 aforesaid. B

It was next argued that a court of law must consider all issues properly raised before it unless of course the determination of such issue will not materially affect the case. The case of Sanusi v. Ameyogun (1992) 4 NWLR (Part 237) 257 at 540 was cited in support of the proposition. In addition, it was contended on the authority of Madike v. Inspector General of Police (1992) 3 NWLR (Part 227) 70 that it is also settled law that where a court of law fails to consider an issue properly raised before it, an appellate court can resolve same. We were in consequence of the failure of the court below to act in this regard urged to resolve the issue in favour of the Plaintiff. This is so, it is further submitted, because when Savannah Bank of Nigeria PLC approved the sum of N1.5 million for the Plaintiff, the latter applied to the Defendant for consent to enable it create a further mortgage or charge over its assets in favour of the said Bank as required by clause 28 (ibid). After advertng our attention to the application for consent vide Exhibit 'V' in this proceeding dated 29/3/93, it was pointed out how the application was accompanied with a cash flow projection Exhibit 'W' which showed how the money would be utilized and the anticipated earnings. It was further pointed out that when the Defendant received the application, it requested the Plaintiff to carry out certain amendments on the Cash Flow Projection i.e. Exhibit 'W'. Based on the above, it was maintained, an amended Cash Flow Projection which is Exhibit 'X' was jointly prepared by both parties and later submitted to the Defendant in May, 1993. After our attention was drawn to the evidence of P.W. 1 and P.W. 2 in the record of H proceedings it was further argued in the Plaintiff's brief that not only were the above pieces of evidence never challenged by the Defendant, D.W.1 who not only admitted that Exhibit 'X' was received by the Defen- G F

dant, agreed under cross-examination that Exhibit 'X' assumed 50% capacity utilization based on two shifts and that this was feasible and further that by Exhibit 'X' production was to start in August, 1993. The foregoing notwithstanding the Defendant did not grant consent and the position remained the same until the Plaintiff went to court to compel the Defendant to grant consent. The court, it was pointed out, decided the case in favour of the Plaintiff and the court's order is contained in Exhibit 'Y' in this proceeding. It was after the court's judgment in Exhibit 'Y', it was demonstrated, that the Plaintiff received Exhibit 'Z1' which is a letter dated 30/11/93 but dispatched on 8/12/93 as per Exhibit 'Z2' which is the Courier Service Slip showing the date it was dispatched. The three major issues raised in Exhibit 'Z1', i.e. letter dated 30/1/93, it was submitted, were taken care of and reflected in Exhibit 'X' which Exhibit was never faulted by the Defendant. The issue of non-repayment of the loan or interest, the appointment of a Sole Administrator for the Defendant and the attendant problem faced by the said Administrator, it was further argued, were never discussed with the Plaintiff at any meeting or in any correspondence. In view of the above, it was finally submitted, even if the Defendant had a discretion to refuse to grant consent under Clause 28 of Exhibit 'C' (which was not conceded) such discretion was unreasonably withheld in this case.

The short answer to the queries raised here can be found in the testimony of D.W.1, Peter Enesi whose evidence the trial court wrongly indicted but the court below rightly in my view, set aside after evaluating and appraising same. Said D.W.1 at pages 52 and 53 of the record:

"Under Exhibit 'C', it is the duty of the Plaintiff to provide working capital. The Plaintiff took loan of N1.7 million from Commerce Bank as working capital which later rose to N3.06 Million. It is the claim of N1million being the difference in the costs of materials between April, 1993 and January, 1994 this is not only unjustified but unfounded, as we are not the cause for the increase in the prices. We are not obliged to grant more loans or grant further consent to obtain more loans"

That the court below (per Edozie, JCA) showed no sign of

oversightedness or obliviousness of the above piece of evidence as contained in one of the issues raised by the Plaintiff, it undertook a meticulous review of same at page 236 and 237 of the record. That the court below gave full treatment to the issue relating to the matter and adequately so, can be deciphered from page 246 of the record wherein it observed inter alia thus:

"It is submitted in the plaintiff's brief that clause 28 above does not make the right to create further charge or mortgage subject to the repayment of loan to the defendant or any other creditor and that once the plaintiff makes an application for consent pursuant to clause 28 aforesaid, all that the plaintiff can do is to ensure that its own interest is adequately protected and that once that was done it has no discretion to refuse such consent. How can the defendant protect its interest if it has no discretion to refuse the consent to diminish its assets? If the defendant has no discretion, there could be no requirement as to its prior consent in writing. The fact that the defendant called for a revised cash flow projection did not automatically mean that it must grant its consent....."

If the above extract was not an adequate or should I say exhaustive treatment of the matter raised as an issue before the trial court and embodies as defendant's issue 5 in the court below, I cannot imagine any such issue being side-tracked.

And granted that what in my view is considered as an exhaustive treatment of the issue raised and considered falls short of anything adequate (which is not conceded) I am of the view that what the court below decided cannot be said to amount to a substantial miscarriage of justice. See Far East Mercantile Co. Ltd. v. Jackie Philips Photos Ltd (1974) 11 SC. 225, 231 - 232 and Eme v. State (1964) 1 ALL NLR 416. No retrial is called for in a matter such as this. See Dantumbu v. Adene (1987) 4 NWLR (Part 65) 314. And I so hold.

This issue is accordingly resolved against the Plaintiff.

ISSUES 7, 8, 9, 10, 11 AND 12 CONSIDERED TOGETHER

These issues which are distilled from grounds 7, 8, 9, 10, 11 and 12 respectively of the grounds of appeal and symmetrically dove-tail into

the Defendant's issue No. 6, constitute the Plaintiff's complaints relating to the various sums awarded as damages by the trial court but disallowed by the court below. In considering them together, I wish to proceed under the following four headings.

B (a) 70% loss of anticipated turn-over/earnings (i.e. N1.26 Million) per month on the utilization of the working capital beginning from 1st August, 1991 to 31st March, 1994.

C (b) The difference between the cost of raw materials, equipments and spare parts as at April, 1993 and January, 1994 which amounts to N1,000,000.00

(c) N50,000 general damages

D (d) the award of N121,000.00 equivalent of USD14,530 still held by the Defendant being balance of the undisbursed terms loan as per Exhibit K which is N121,000.00.

The first leg of the complaint (a) shortly put, is as to whether the court below was right when it held that the award in respect of loss of anticipated turn over/earnings made in favour of the Plaintiff which was un-
E justified because the special damages on which it is predicated were not particularised and that even if the Defendant is precluded from complaining about particulars, Exhibit 'X' (the Cash Flow) tendered in evidence in proof of the claim, has no weight and further that there was no basis for
F calculating the claim of N1.26 million every month.

Now, when the court below set aside the award of N1.26million for every month, one of the reasons it gave was that:

"It was therefore not within the contemplation of the parties that the defendant has to provide working capital for the plaintiff."

G The court below then went on to consider the provisions of Clause 36(g) (iii) of Exhibit 'C' to the effect that adequate arrangements satisfactory to the lender had been made for provision of working capital for the operation of the project. The gravamen of the Plaintiff's claim for loss of
H anticipated earning is that as a result of the failure of the Defendant to grant consent to enable it obtain a draw down of the working capital granted by the Savannah Bank of Nigeria PLC, it could not commence full production as at August, 1993. It was the Plaintiff's contractual

obligation to have made satisfactory arrangements for procurement of working capital before commencement of operation in May, 1993 but it did not do so. Again, the Plaintiff and the sponsors had agreed that any overrun in project costs or shortfall in the finance shall be met by them without recourse to the Defendant and devoid of qualification. Therefore, requesting the Defendant to grant further consent to create further charges is contrary to Clause 5 of Exhibit A2 which states that -

"5. The company and sponsors shall undertake that any overrun in project cost or shortfall in the source of finance as envisaged shall be met by them without recourse to NBCI."

Thus, the reasoning and conclusion of the court below is in my opinion, justified by the term of contract between the parties and the Defendant, in my view, cannot be penalised for failure of the Plaintiff to abide by the terms of the contract. And since the Defendant had no contractual obligation to provide working capital it cannot be penalised for holding its consent. This is only just and equitable.

(6) Another reason for disallowing the award of N1.26 Million is that the claim was not particularised. Exhibit 'X' upon which the claim was based has no weight, and as a projection in a feasibility report, is not proof of such anticipated profit. What is more, the report was not authenticated by anybody. Exhibit 'X', titled "Realistic projected cash flow for 12 months" was tendered by P.W.1, the Managing Director of the Plaintiff. As there was no explanation as to what the projections connoted and nobody signed it (see Aku Nmecha Transport Services (Nig.) Ltd. v. Atoloye (1993) 6 NWLR (Part 298) 233 at page 254 A-B), the findings and conclusion of the court below are amply supported by authorities. See also A.G of Oyo State v. Fair-Lakes Hotel (No.2) (1989) 5 NWLR (Part 121) 255 at 284. In the former case where the expert was not called to give evidence, Exhibit 3 (a V.I.O's report), had not all the evidential or probative value intact. He was not available in court to be cross-examined, as he did not give evidence. The witness who tendered Exhibit 3 was not competent to answer question on it. As if the above was not enough, to shake the veracity of the Exhibit, the document itself

was in self contradiction.

In the latter case, a feasibility report was tendered as Exhibit B by the P.W.1 who was not the maker of the document. The maker Messrs. Pannel Kerr Foster and Company, a firm of chartered accountants did not give evidence for the Plaintiff and the court did not attach any weight to the document which at best remained a mere projection and was so held by the Court of Appeal. This court on appeal affirmed the judgment of the court below. See also Uwa Printers Ltd v. Investment Trust Ltd. (1988) 5 NWLR (Part 92) 110 at 121-122 where this Court upheld the decision of the Court of Appeal disallowing an award of N645,676.08 as anticipated loss of profit for the reason that the auditors report, Exhibit 29, was based on another document Exhibit 1. Another case in which the award of loss of profit was refused was the case of Barau v. Cubits (Nig.) Ltd. (1990) 5 NWLR (Part 152) 630 at page 648-G-H and page 649 E-F. **The Plaintiff's contention therefore that as Exhibit 'X' was jointly prepared by both parties and was unchallenged, the court below was in error to hold that the document has no weight, is in my view, unsustainable. This is because both parties here are abstract entities. Credible evidence must be given e.g. that of a staff who prepared the document and who could explain the basis of its projections. In the present case neither P.W.1 nor P.W.2 explained the basis of its projections. The evidence itself is self defeating and in that light, the Defendant had no obligation to cross-examine on worthless evidence. In proper cases, unchallenged oral evidence of a party establishing his claim has been held to be sufficient proof vide Nwabuoku v. Otti (1961) ANLR 507 at 508. Where, as in the instant case the evidence is self defeating and unacceptable, the court is not obliged to act on it. See Jalingo v. Nyame (1992) 3 NWLR (Part 231) 538 at 545. See also Sommer v. F.H.A. (1992) 1 NWLR (part 219) 548 at 560-561. The cases of Osujii v. Isiocha (1989) 3 NWLR (Part III) 623 at 638 and Obimiami Bricks & Stone (Nig.) Ltd v. African Continental Bank Ltd (1992) 3 NWLR (Part 229) 260 at 293-294 are inapplicable for the sheer reason that the Plaintiff has the onus of proof of its case as per Section 137 of the Evidence**

Act. However, since there was no credible evidence in proof of the anticipated turnover, it cannot succeed on the strength or weakness of the defence. Moreover, as the basis of the calculation at paragraph 4.38 of the Plaintiff/Appellant's brief does not justify the award of N1.26 Million for 18 months, the various sums quoted therein, in my view, are the total cost of production for each item which includes cost of raw materials, labour and overheads. **Since damages are not awarded for the gross income but rather for net income or profit where as in the case in hand, the cost of production is not known an award on net income or anticipated profit based on speculation cannot be allowed to stand.** Thus, the court below was justified, in my opinion, in setting aside the award as not having been established. See Odulaja v. Haddad (1973) NSCC 357.

(C) On the grouse wherein the Plaintiff indicts the award of N1,000,000.00 being the difference in the cost of raw materials, equipments and spare parts between April, 1993 and January, 1994 as wrongly made, I can do no better than to adopt in its entirety what the learned Justices of the Court below said in disallowing the award. Said the writer of the lead judgment, Edozie, JCA and concurred by Oguntade and Muntaka-Coomasie, JJ.CA:

"As earlier postulated, by the Investment and Mortgage Agreement Exhibit C, the responsibility for the procurement of raw materials and spare parts as listed in Exhibits DD1 and DD2 rested squarely on the plaintiff and it was failure to make adequate arrangement as it had been contracted and not the refusal of the defendant to give consent for loan that led to the alleged loss resulting from the fluctuation in prices of raw materials. I will also set aside the award as being too remote."

This is a valid and an impeccable conclusion with which I am not prepared to interfere or disturb.

On the award of N50,000.99 as general damages, the Plaintiff in its ground of appeal No. 12 attacked the setting aside of this sum, pointing out that the issue distilled therefrom was canvassed by the Plaintiff at paragraph 4.49 of its brief and in disallowing this award the court below

held, rightly in my view, as follows:

"However, by the law against double compensation, a party who has been fully compensated under one head of damage for a particular injury cannot be awarded damages in respect of the same injury under another head." See Ononuju v. Micho & Co. (1961) ANLR 324 at 328."

It is the Plaintiff's contention here that this award as general damages was proper and justified by the conduct of the Defendant who deliberately refused to comply with the order of mandamus (Exhibit Y) made against it on 2/12/93. The award of N1,000,000.00, be it noted, covered the period 1st April, 1993 to January, 1994. The Plaintiff was also awarded N1.26 Million every month from 1st August, 1993 to 31st March, 1994. This is for both anticipated loss of turnover/earning and the difference arising from the price of raw materials, equipments and spare parts. Thus, **the Plaintiff had been adequately compensated.** See West African Shipping Agency v. Kalla (1978) 11 NSCC 114 where this court took the view that the award of general damages is another way of compensating the Plaintiff for the loss of expected profit and the freight on the goods. Thus, the court below was justified in setting aside the award of N50,000.00 general damages purported to have been awarded to the Plaintiff on the ground that such an award constitutes double compensation. See Nigerian Arab Bank Ltd. v. Shuaibu (1991) 4 NWLR 186, 450 at 456; Imo Concord Hotel Ltd. v. Anya (1992) 2 NWLR (Part 234) 210 and Mercantile bank v. Adalma (1990) 5 NWLR (Part 153) 747 at 751-752. In the absence of any proof, a plaintiff would only be entitled to nominal damages, it being agreed that the plaintiff did not prove loss or damages under the head of general damages. See Ogbechie v. Onochie (1988) 1 NWLR (Part 70) 370 at 396.

(b) On the award of N121,000.00 representing USD14,530, this is an issue arising out of Plaintiff's appeal ground No. 11. In its consideration of the issue as to whether the plaintiff deserved to be entitled to the amount the court below held, rightly in my view, thus:

"In the situation where the plaintiff is in default of repaying its accrued debt it cannot be heard to be demanding more money from its

creditor.'

It needs to be pointed out here and now that all arguments canvassed at paragraph 4.48 of the Plaintiff's brief to the effect that the error the court below fell into was it's either going outside the pleadings and evidence when clearly the issue does not emanate or flow from that ground of B appeal, or howsoever, the plaintiff's complaint, goes to no issue. **In thus setting aside this award the court below, in my view, among other reasons took into consideration the fact that the Plaintiff was in default of loan repayment and therefore could not be seen as asking for more money. Besides, by Order 3 Rule 23 Court of Appeal C Rules, 1981 as amended, the court below is empowered to give any judgment or make any order that ought to be made although the party against whom the judgment or order was made may not have appealed against such decision. The court below, in my opinion, D was in consequence right to have set aside the judgment of the trial court awarding N121,000.00 to the Plaintiff as the purported balance of the undisbursed loan.**

All these issues having been duly and fully considered are accordingly resolved against the Plaintiff. E

ISSUE NO. 13

Finally, the Plaintiff's grouse here is whether having regard to the totality of evidence adduced at the trial court, the court below was F right in setting aside the decision of the trial court.

It is enough for me to say here that having regard to all the submissions made in respect of all the other issues hereinbefore considered, the court below was, in my opinion correct to have set G aside the decision of the trial court which, in my judgment was not the result of a proper appraisal and evaluation of the evidence adduced thereat. See Fashanu v. Adekoya (1974) 6 SC. 83 at 91; Chief Woluchem v. Chief Gudi (1981) 5 SC. 319 at 326 and Balogun v. Agboola (1974) 10 SC. 111. H

The result of all I have been saying is that this appeal lacks merit and it is hereby accordingly dismissed with N10,000.00 costs in favour of the Defendant.

BELGORE JSC

There is no doubt the plaintiff got confused about the loan granted it. The facility originally granted it had expired and it was no longer entitled to the unutilised part of the loan e.g. U.S\$14,530.00 I cannot find the rationale, on all the evidence before on record, how the plaintiff can establish its claim. For the reasons contained in the judgment of Onu, J.S.C., which I agree with entirely, I find no merit in this appeal and I also dismiss it with the same order as to costs.

C

OGUNDARE JSC

Sometime in 1987 the ARTRA INDUSTRIES LIMITED (hereinafter is referred to as the Plaintiff) applied to the NIGERIA BANK FOR COMMERCE AND INDUSTRY (hereinafter is referred to as the Defendant) for a loan to set up an industry for the production of medicated cotton wool and bandages. The application was approved by the Defendant and an offer of a term loan of N2,900,000 (two million and nine hundred thousand Naira) was made to the Plaintiff. The offer made in a letter of intent (Exhibits A1 and A2) contained a number of usual and special terms and conditions principal among which were:

"1. Amount: N2,900,000 (two million, nine hundred thousand naira only).

2. Purpose: Production of medicated cotton-wool and bandages

3. Interest Rate: 15% per annum payable half-yearly in June and December each year commencing from the date of initial draw-down. Interest accrued during construction period shall be capitalised and form part of the loan.

4. Draw-Down: Disbursement is to be made from the Head Office after signing the Investment and Mortgage Agreement depending on actual requirements and payable directly to the suppliers or civil contractors or Creditors on production of confirmed invoices or certificates.

5. Period of Loan: 7¹/₂ years including moratorium period of 18 months reckoned from date of first draw-down.

6. Loan Repayment: Payable in 12 equal half yearly instalments

commencing from June 1989 and ending in December 1994.

7. Security: (i) *First charge on fixed assets (present and future) and second charge on all other assets.*

(ii) *Personal guarantee of all the directors (jointly and severally) without NBCI having to take recourse to security."*

B

Among the special terms and conditions can be mentioned:

"3. *The company shall make long term arrangements for procurement of raw materials to the satisfaction of NBCI.*

4. *The company shall make satisfactory arrangement for securing bank borrowing for its working capital requirements before commencement of operations.*

C

5. *The company and the sponsors shall undertake that any overrun in project cost or shortfall in the source of finance as envisaged, shall be met by them without recourse to NBCI.*

D

6. *The sponsor shall guarantee the loan jointly and severally without NBCI having to take recourse to security. No guarantee commission shall be payable to the sponsors for furnishing the said guarantee.*

7. *The company shall not declare dividend without the prior approval of NBCI".*

E

By its letter dated 21st July, 1987, the Plaintiff accepted the terms and conditions contained in the letter of intent. This resulted in the parties entering into an Investment and Mortgage Agreement (Exhibit C) in 1988. By this Agreement the loan sum was put at "N2,900,000 (Nigerian currency) or its equivalent in other currencies". Clause 7 of the Agreement reads:

F

"It is hereby agreed and understood that the Loan shall include any sum owing to the Lender by reason of advances made directly to any person at the request of or on behalf of the Borrower on any bonds, letters of credit issued and guarantees or indemnities given by the Lender or its agents on behalf of the Borrower."

G

Other clauses of the Agreement relevant to these proceedings are:

H

"10. REPAYMENT

(i) *Subject to the terms and conditions contained in this Agreement the Borrower shall repay to the Lender the Loan in Nigerian Cur-*

rency in Twelve (12) consecutive and equal half-Yearly instalments, the first instalment being payable one and a half years after the Loan or part thereof as the case may be is paid by the Lender to the Borrower that is to say on the 31st day of December, 1989 and thereafter on the due dates until the Loan has been repaid in full. *PROVIDED* that nothing in this clause shall prejudice or affect the right of the Lender as hereinafter stipulated, *PROVIDED* also that if for any reason whatsoever (at the sole discretion of the Lender) the total amount paid to the Borrower is less than the Loan the instalments of repayment shall in the absence of any written agreement to the contrary between the Borrower and the Lender abate pro rata, but will be in any case repayable on the due dates as hereinbefore mentioned.

(ii) The Borrower may by giving thirty (30) days notice in writing to the Lender cancel all or any part of the Loan which has not been disbursed provided that the Borrower satisfies the Lender that the Project has been or will be completed without requiring the amount of the Loan intended to be cancelled *PROVIDED* also that the commitment charge on all or any part of the Loan so cancelled shall be payable at the rate agreed to until the expiry of 30 (thirty) days notice period and provided further that the penalty of 1.5% (one point five percent) of the Loan being cancelled shall be payable to the Lender by the Borrower and that such cancellation shall not jeopardise the Lender's level of security and assets coverage.

11. PROVISION FOR FOREIGN CURRENCIES

(i) If all or any part of this Loan is disbursed in foreign currencies all obligation of the Borrower to make repayments under this Agreement shall be computed and stated in several foreign currencies in which the several foreign currencies in which the Loan was disbursed. The amount of Nigeria Naira equivalent to the foreign currency amounts due for payment shall be computed on the basis of the ruling rates of exchange for the respective currencies on the due dates for such payment provided that such payment shall be made on or before maturity.

(ii) If payment under this Agreement is deferred, the amount of Nigerian Naira payment equivalent to the several foreign currencies

amounts due shall be computed on the basis of the highest market rate of foreign exchange quoted for the respective currencies during the period from the date of such payment to the date of actual payment.

(iii) All risks of foreign exchange including fluctuations shall be borne by the Borrower.

B

15. GENERAL COVENANTS AND CONDITIONS

The Borrower hereby covenants with the Lender that while any part of the Loan or any other moneys hereby covenanted to be repaid remains outstanding the Borrower shall:

C

(i) Undertake to obtain any necessary foreign exchange permission from the appropriate Government functionary or Department and bear any foreign exchange risk of any part of the Loan disbursed in foreign currency.

(k) Provide or procure any end finance but the Lender if approached may give sympathetic consideration to a request for such short fall so however, that no additional fund shall be made available to the Borrower without prior investigation of the need for it and the Lender's Board authorisation.

D

E

28. For the consideration aforesaid the Borrower as BENEFICIAL OWNER hereby charges in favour of the Lender by way of second floating charge its undertaking and all its other assets for the time being both present and future wherever situate including its uncalled capital stocks or raw materials goods in process of manufacture and finished goods, with payment of all moneys hereby secured and such charge shall be a floating security but the Borrower may give a first charge on its Books debts, stock-in-trade and work in progress to enable it obtain working capital from a licensed Commercial Bank up to the maximum of N45,000.00 (Forty-five thousand Naira) (Nigerian Currency). Any further right to create any mortgage or charge on its Book debts, stock-in-trade, work in progress and movable assets shall only be exercisable subject to prior consent in writing of the Lender.

F

G

H

"32 The Loan and other moneys hereinbefore covenanted to be paid whether by way of interest or otherwise shall become immediately due and payable on any of the following events:-

(a) If the Borrower makes default for a period of 28 (twenty-eight) days in payment of any instalment or interest of the Loan which may have become due under this Agreement."

I need mention at this stage that there were other Banks involved
 B in the whole arrangement. The term loan was given under a scheme
 whereby the World Bank provided a Line of Credit for the foreign cur-
 rency required rather than the Central Bank of Nigeria which ordinarily
 would be required to sell foreign currency to the local banks to cover
 C approved applications for foreign currency. Then there was the Midland
 Bank Plc, London. It is not clear how Midland Bank came into the Scheme.
 It would appear, however, from Exhibit 'D' (Plaintiff's letter to the De-
 fendant dated 10th June 1990) that the Midland Bank was the Defendant's
 correspondent bank at the relevant time. The working of the scheme
 D would also appear to be that when an industrialist/customer identified his
 industry and produced a pro forma invoice (in foreign currency) for the
 plant, machineries etc, he required, he applied to the local bank for a loan.
 Where the local bank was satisfied with the feasibility of the project an
 E approval was given for a loan in Nigerian currency to cover the foreign
 currency value of the plants, etc. Following this approval, the customer
 would open a letter of credit (L/C for short). The local bank would then
 send this to the World Bank to provide the necessary credit line. When
 F credit line was approved by the World Bank the transaction would then
 be sent to the local bank's overseas correspondent bank who would con-
 firm the irrevocable L/C and then make payment to the foreign supplier
 of the plants, etc. through the latter's Bank under the L/C. The plants
 would then be sent to the customer in Nigeria for him to complete his
 G factory and go into production.

The above would appear to be the procedure adopted in this
 case. Going by the pleadings (particularly paragraph 3 of the Defendant's
 further amended statement of defence) and the evidence in this case, the
 H U.S. dollar equivalent of N2,900,000 at the time the term loan was granted
 to the Plaintiff was US \$.750,000. Following the approval of the term
 loan made to it, the Plaintiff opened an irrevocable L/C in favour of
 ALFAMATEX, S.A. of Barcelona Spain for the supply of various ma-

chineries needed for its factory. The pro-forma invoice of Alfamatex supporting the L/C came to DM 1, 199,850 less cost of spare parts and erection. See Exhibit F. The pro-forma invoice was valid up to 29/02/88. It is the sum on the invoice that was said to amount to U.S. \$750,000 in paragraph 3 of the Defendant's statement of defence. B

This L/C in favour of Alfamatex was processed by the Defendant. The World Bank approved but by the time the Midland Bank would confirm it, it had expired. Alfamatex had raised its price and it became necessary for the Plaintiff to look for another supplier. This was the beginning of the problem arising between the parties and which eventually led to these proceedings. C

The Plaintiff found a new supplier in GATCO TRADING GMBH of Hamburg, Germany whose pro forma invoice came to the total value of US \$735,470 (See Exhibit G). An L/C was opened and processed by the Defendant without a hitch. At the time the L/C was opened the Naira value had deteriorated against the U.S. dollar and the value of the new L/C came to N5,850,267.97 and Plaintiff's account with the Defendant was debited accordingly. There were a few more arguments between the parties which I need not set out here but shall be mentioned, if need be, in the course of this judgment. Suffice it to say, that Plaintiff eventually erected its factory at Bukuru Jos and went into production. Because of further problems it had with the Defendant, Plaintiff instituted in the Federal High Court, Jos the action leading to this appeal claiming, as per paragraphs 28 and 29 of its amended statement of claim - D E F

"28. WHEREFORE the Plaintiff claims against the defendant as follows:-

(i) A Declaration that by virtue of the provisions of part iii of the Companies Decree No. 51 of 1968 the Defendant is bound by the Investment and Mortgage Agreement dated the 12/4/88 and made between the Plaintiff and the Defendant and that the Defendant cannot vary the amount secured by the said agreement. G H

(ii) A Declaration that the Defendant's letter Ref. No. LEG. 72/ Vol. 1 dated 14/1/94 and addressed to the Managing Director of the Plaintiff Violates the terms of the Investment and Mortgage Agreement

aforesaid as they relate to the repayment of the amount secured thereunder.

(iii) *A Declaration that since the difference in the exchange rate at which the loan was disbursed to the Plaintiff was occasioned as a result of the Defendant's negligence, the Plaintiff cannot be held liable for the payment of same.*

(iv) *The sum of (fourteen million four hundred and eighty thousand Naira only) being special and general damages suffered by the Plaintiff as a result of the Defendant's refusal to grant consent to the Plaintiff to obtain the working capital granted by Savannah Bank of Nigeria PLC.*

PARTICULARS OF DAMAGES

1. Special Damages

(a) *Loss of anticipated turn over/earnings per month on the utilisation of the working capital beginning from 1/8/93 to 31/3/94 N10,080,000.00*

(b) *Difference between the cost price of raw materials, equipments and spare parts as at April, 1993 and January, 1994. N1,000,000.00.*

(c) *The equivalent of 14,530 U.S. Dollars still held by the Defendant being balance of the undisbursed term loan as per Defendant's letter of 31/5/90 N121,000.00*

Sub total N11,201,000.00

2. General Damages N 3,279,000 .00

Grand total N14,480,000.00

29. *Interest at the rate of 10% per annum on the total judgment sum beginning from the date of judgment until the total amount is paid."*

Pleadings were filed and exchanged and, with leave of Court, amended. At the conclusion of the trial and after addresses by learned counsel for the parties the learned trial judge, in a well considered judgment, found for the Plaintiff and entered judgment in its favour in the following terms.

"1. That there is no variation in the Investment and Mortgage Agreement dated 12th April, 1988 and made between the plaintiff and

defendant and that none of the parties therein can unilaterally vary the terms of the said Agreement, including the amount secured by the Agreement.

2. *That, based on the evidence of the 1st Defence witness, the loan granted under Exh. C together with the interest thereon, was not due B for payment at the time Exh. BB was written.*

3. *That since the difference in the exchange rate at which the loan was disbursed to the plaintiff was occasioned as a result of the defendant's negligence, the plaintiff cannot be held liable for the pay- C ment of same.*

4. *The plaintiff is awarded the following special and general damages.*

(i) *70% of loss of anticipated turn over/earnings (i.e. N1.26 D million) per month on the utilization of the Working capital beginning from 1st August, 1993 to 31st March, 1994.*

(ii) *The difference between the cost price of raw materials, equipments and spare parts as at April, 1993 and January, 1994, which amounts E to N1,000,000.00.*

(iii) *The equivalent of 14,530 Dollars still held by the defendant, being balance of the undisbursed term loan, as per Exh. K which is N121,000.00*

(iv) *N50,000.00 as general damages.* F

(v) *Interest at the rate of $2\frac{1}{2}$ per annum on the total judgment sum beginning from the date of this judgment until the total amount is paid.*

The plaintiff is to have the costs of this judgment assessed at N1,000.00." G

The Plaintiff was unhappy with that part of the judgment that awarded "only 70% of anticipated turn-over/earnings" and appealed to the Court of Appeal on that point only. It sought from that Court the following relief.

"An Order awarding the total amount claimed as loss of anticipated turn over/earnings. (i.e. to award the balance 30% representing H N3,024,000.00)."

The Defendant, too, was dissatisfied with the whole judgment

and appealed to the Court of Appeal upon 11 grounds of appeal and sought the following relief from that Court.

"To set aside the judgment of the lower court dated 20/7/95 and dismiss the entire claim."

B The Court of Appeal, upon hearing the appeal, made the following findings of fact.

1. That the principal loan advanced to the Plaintiff was N6,120,267 inclusive of interest during construction and which was capitalized as required by Exh. C as shown by Exh NN, the statement of account prepared by the Defendant.

2. That "based on the pleadings, the contradictory evidence of the plaintiff's Managing Director and the plethora of documentary evidence tendered, the learned trial Judge ought to have found that the plaintiff knew that the loan in question was provided by the World Bank which was the principal of the defendant and the Midland Bank."

3. That "the defendant could not be held vicariously liable for the negligent act of the Midland Bank without the latter being joined as a party."

4. "If the learned trial Judge had adverted his mind to the above issues particularly clause 11 (iii) of Exh. C, he would not have held at page 103 lines 2 to 8 that the defendant should bear the difference between the Original exchange rate and the new one brought about by fluctuation."

5. That "the defendant had absolute discretion to grant or refuse to grant consent to the plaintiff to create further mortgage or charge on its assets after granting the first consent to the Commerce Bank PLC."

6. That "the provision of raw material and working capital is the exclusive responsibility of the plaintiff. It was therefore not within the contemplation of the parties that the defendant has to provide working capital for the plaintiff."

7. That there was no basis for calculating the claim of N1.26 million every month.

8. That the feasibility report Exh X which is not authenticated by anybody is not by itself evidence of loss of anticipated profit sustained by

the Plaintiff.

9. "As earlier postulated, by the Investment and Mortgage Agreement Exh C, the responsibility for the procurement of raw materials and spare parts as listed in Exhs. DD1 and DD2 rested squarely on the plaintiff, and it was its failure to make adequate arrangement as it had contracted and not the refusal of the defendant to give consent for loan that led to the alleged loss resulting from fluctuations in prices of raw materials."

10. "The learned trial Judge agreed that the Plaintiff did not prove loss of damage under the head of general damages. I am therefore of the view that the award of N50,000 under the head amounts to double compensation. It is accordingly set aside."

On these findings the Court below dismissed Plaintiff's appeal. It allowed Defendant's appeal, set aside the judgment of the trial High Court and dismissed Plaintiff's claims in their entirety.

It is against this judgment that the Plaintiff with leave of the Court below, has further appealed to this Court upon 13 grounds of appeal. And in its written brief of argument filed on its behalf by learned counsel an equal number of issues have been formulated. As these issues are rather prolix I will not bother to set them out in this judgment. The Defendant, in its own brief, posed 6 questions as calling for determination, to wit:

"(1) Whether the principal loan is N2.9 million or the actual amount disbursed upon the establishment of the Letter of Credit;

(2) Whether the Appellant was aware that the loan granted them is from the World Bank and if the answer is in the affirmative whether the Respondent is vicariously liable for the negligence of their Agent, Midland Bank, London;

(3) Having regard to the agreement between the parties, who is to bear the risk of or the consequences of foreign exchange fluctuation;

(4) Whether the Respondent has a discretion to grant or to refuse to grant consent to create further charge on the security held by them;

(5) Whether the Court of Appeal was wrong in holding that the loan became repayable from the 4th day of January, 1991 and that the

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due date for first instalment was June 30, 1991;

(6) Whether the Court of Appeal was wrong in setting aside the various monetary awards or damages made by the trial Court and in dismissing the Claim of the Appellant."

B I have compared the 2 sets of questions posed in the briefs of the parties and I am satisfied that the 13 questions posed in the Plaintiff's brief are adequately covered by the 6 questions posed in the Defendant's brief which are sufficient to determine all Plaintiff's complaints in this appeal.

Question (1)

C The Court below found that the principal loan was N6,120,267 which is the total of N5,850,267.97 the amount paid by the Defendant on the L/C to GATCO on Plaintiff's behalf and N270,000.00 accrued interest during the period of construction which was capitalized. It is Plaintiff's
D contention that the term loan was N2.9 million as per Exhibits A & C. Exhibit NN supports the finding of the Court below. But is Plaintiff's contention correct?

True enough Exhs A & C put the approved loan at N2.9 million.
E And it is not open to question that Exh C embodied all that the parties agreed. Clauses 6 (i), 7 and 11 provide the answer to the question under consideration. Clause 6(i) states:

*6(i) The Lender hereby agrees to advance to the Borrower for the purposes of financing the Project and the Borrower hereby agrees to
F borrow from the Lender a sum or sums not exceeding in the aggregate the sum of N2,900,000 (Nigeria Currency) or its equivalent in other currencies (hereinafter referred to as 'the Loan') for the aforementioned purposes and the Guarantors hereby undertake with the Lender that the Bor-
G rower will fulfil all the terms, conditions and obligations on its part as herein contained, upon the terms and conditions in this Agreement which guarantee is more particularly set out in Part VI of this Agreement."*

Clauses 7 and 11 have already been set out in the earlier part of this
H judgment.

It is clear from the pleadings and evidence (particularly documentary) that what the loan was all about was to finance the Plaintiff's L/C to ALFAMATEX, S.A. of Barcelona in the sum of DM 1,199,850 which

the parties would appear to agree amounted to US. \$750,000.00. The Naira equivalent of this sum at the time was approximately N2.9million. See page 4 of Exh D where the Plaintiff put the rate at N4.09 to the dollar. As this loan was under the World bank Line of Credit Scheme, the World Bank presumably provided for a credit line for the Plaintiff in the sum of US. \$750,000. This understanding of mine is supported by paragraph 1 of Exh K, a letter written by the Defendant to the Plaintiff. Paragraph 1 reads:

"We refer to your application together with the original of proforma invoice No. 010.1253.10 for US \$31,355.00 requesting for the remittance of the same. A look at your request reveals that the initial loan approved for your project was US \$725,000 (seven hundred and twenty-five thousand dollars) the equivalent of DM1, 126,350 (One million, one hundred and twenty-six thousand, three hundred and fifty Deutsche mark). At the time of purchasing plant and machinery, the invoice value went up to DM1, 148, 500.00 an equivalent of US \$758,100 approximately which is US \$33,100 higher than the approved amount of loan. A special appeal was made and the approved amount was raised to US \$750,000. Out of this amount, US \$735,470 was disbursed (an equivalent of N5,326,200.19) leaving a balance of only US \$14,530. The request for disbursement is, therefore, US \$16,865 higher than the undisbursed balance."

It is, therefore, not surprising that the second L/C to GATCO was paid for under the scheme. And Plaintiff was claiming all along US \$14,530 "still held by the Defendant being balance on the undisbursed term loan as per Defendant's letter of 31/5/90" - see paragraph 1 (c) of Plaintiff's particulars of Damages. Had it been otherwise, the L/C to GATCO which at the time it was presented, though was under US \$750,000 was in Naira terms far in excess of N2.9million, would not have been paid. In my respectful view, it is to take care of a situation as arose in this case where, due to exchange rate fluctuations the stated Naira loan would be insufficient to meet purchases of the foreign content of the proposed industry, that Clause 11 was inserted in Exhibit C. Under the Clause, the burden of foreign exchange fluctuation rested on the Plaintiff. That Plaintiff

understood this to be the true position is borne out by Exh. JJ, Plaintiff's audited accounts for 1991 where under the heading "LONG TERM LOANS (SECURED)" the indebtedness to the Nigerian Bank for Commerce & Industries, Lagos (that is, Defendant) was put at N6,570,353 as at December 1991. See also Exhibit KK, the audited accounts for 1992 where the same figure appeared. See also Exh GG, a letter written by the Plaintiff to the Defendant wherein the Plaintiff wrote -

"We refer to your demand note dated 11th January, 1993 on the above and wish to correct that the principal loan is US \$735,470.00 @ N7.2419 = N5,326,200.19

NOT N5,850,267.97 as stated in the above demand note."

See also Exhibits HH and LL.

In the light of all these plethora of documentary evidence it is rather strange that Plaintiff still contends that the principal loan is only N2.9million. I think the finding of the Court below on the principal sum due is supported by the evidence on record. This conclusion disposes of Question 1.

Question 2:

The Plaintiff contends that it was wrong to say that the World Bank provided the loan given to the Plaintiff by the Defendant and that the Court below was in error to hold that plaintiff could not sue the Defendant for the alleged negligence of the Midland Bank without joining the latter in the action. The Court below found:

"I am of the view that based on the pleadings, the contradictory evidence of the plaintiff's Managing Director and the plethora of documentary evidence tendered, the learned trial Judge ought to have found that the plaintiff knew that the loan in question was provided by the World Bank which was the principal of the defendant and the Midland Bank.

Granting, but without conceding that the trial court was right in holding that the Midland Bank whose negligence was responsible for the non confirmation of the first letter of credit was the agent of the defendant it seems to me on authorities that the defendant could not be held vicariously liable for the negligent act of the Midland Bank without the

latter being joined as a party: See on this CHUKWU V. SOLEL AMEH (NIG.) LTD. (1993) NWLR (Pt. 280), 246 at 251; MANAGEMENT ENTERPRISES LTD. V. JONATHAN OTUSANYA (1987) 2 NWLR (Pt. 55), 179."

It is this passage that has come under attack in this appeal. As regards the first leg of the passage, that is, the role of the World Bank in the transaction between the parties I need to say, once again, that the Plaintiff knew all along that it was the World Bank that provided the line of credit that enabled payment to be made to GATCO in foreign currency. That, of course, would not make the World Bank the Lender of the loan to the Plaintiff. The lender remains the Defendant. To this extent, therefore, I do not share the view of the Court below that "the loan in question was provided by the World Bank which was the principal of the Defendant and the Midland Bank." There is no question of principal/agency relationship existing between the World Bank, on the one hand and the Defendant and Midland Bank, on the other hand, in respect of this transaction. The function of each of the Banks under the scheme was highlighted in paragraph 2 of Exh EE - a letter written by the Defendant to the Plaintiff on 2nd May 1989 wherein it was written:

"Before commenting on your letters under reference, it is necessary to bring to your attention the advanced stage your company's Letter of Credit had reached, as follows:

(a) *Having opened the LC on the 12th August, 1988, we despatched our "Application for Special Commitment Letter" to World Bank on 11th August, 1988.*

(b) *On the 29th August, 1988, the World Bank forwarded it (sic) 'Commitment Guarantee' to Midland Bank to enable the latter add its confirmation to the Letter of Credit.*

(c) *The World Bank sent a copy of its approved Special commitment Guarantee to us and this was received in this Bank on 13th September, 1989. On the basis of this World Bank Special Commitment, Midland Bank ought to have added its confirmation to the credit, but we did not receive Midland Bank's confirmation advice prior to the expiry of the credit.*

We now submit below, in summary, and also for your ease of reference, specific instructions, claims and accusation contained in your letters of 16th March and 6th April, 1989 in respect of the subject Letter of Credit."

B From this letter it can be inferred that the duty of the Defendant when Plaintiff opened its L/C was to forward an application on Plaintiff's behalf to the World Bank for a line of credit to be provided. On the application being approved the World Bank would issue a "Commitment Guarantee" which would be forwarded to the Midland Bank, London, the Defendant's overseas correspondent bank for the L/C to be confirmed. C When Midland Bank had confirmed the L/C, the supplier's bank and the Defendant would be notified. The notification to the supplier's bank amounted to assurance of payment upon which the supplier would proceed to supply the goods covered by the L/C to the Plaintiff. D

In this type of scenario I cannot see how one bank can be said to be the principal or agent of the other. I think the Court below was in error to hold as it did.

E In spite of all I have said above, I think the issues whether any bank was principal or agent of the other and whether the Midland Bank was in any way negligent are, indeed, non-issues; the Court below should not have bothered itself dealing with them.

F I say this because no where in its amended statement of claim did Plaintiff make such averments as to make issues of them. The only allegation of negligence made in Plaintiff's statement of claim is in paragraph 27(b) wherein it pleaded:

G *"27(b) The Plaintiff however avers that the difference if any, in the exchange rate was occasioned as a result of the negligence of the Defendant for which the Plaintiff cannot be held liable.*

Particulars of Negligence

H *Failing to confirm the first or original letter of credit opened in favour of Messrs. Alfamatex S.A. of Spain, Barcelona. In spite of the fact that Plaintiff had fulfilled all conditions or requirements on its own part."*

This was denied by the Defendant in paragraphs 2 and 19 of its further

amended statement of defence and in paragraph 22(c) pleaded thus:

"Adverting generally to the claim, and in particular paragraph 27 of the amended Statement of Claim, the Defendant avers: That the Defendant opened the first irrevocable letter of credit No. LC 880230/WB on the 12/8/88 under the World Bank Credit Line. The defendant despatched its application for Special Commitment Letter to the World Bank. On the 29/8/88 the World Bank forwarded its 'Commitment Guarantee' to Midland Bank London to enable the latter add its confirmation to the letter of credit. The World Bank sent a copy of its approved Special Commitment Guarantee to the Defendant and this was received on the 13/9/88. On the basis of this World Bank Special Commitment, Midland Bank London ought to have added 'its confirmation to the credit', but the Defendant did not receive Midland Bank's confirmation advice prior to the expiry of the LC. These facts were communicated to the plaintiff by Defendant's letter dated 2/5/89. On being satisfied that the Defendant were not delinquent in any manner, the Plaintiff by their letter to the Defendant dated 29/6/89 forwarded a new proforma invoice in favour of GATCO of Germany. The Defendant opened the letter of credit and the machineries were imported and delivered to the Plaintiff. The plaintiff is stopped from making any claim on the expired letter of credit having waived any such right by submitting new proforma invoice."

Plaintiff filed a Reply to the Defendant's statement of defence in which it pleaded -

"1. In reply to paragraph 3 of the Statement of Defence, the plaintiff avers as follows:-

(a) That the loan granted to the Plaintiff was in the sum of N2,900,000.00. The Plaintiff shall rely on the Defendant's letters of intent dated 23/6/87 and 29/6/87 respectively as well as the one dated 10/12/87. For the purpose of disbursing the said loan to the suppliers of machineries and equipment, the Plaintiff was required to open letter of credit and this the Plaintiff did on the 20/5/88 when letter of credit No. 880230 for the sum of DM 1,257,350.00 equivalent to US \$737,058.57 at 4.0978 equals N3,020,318.61. It was then the duty of the Defendant to confirm the letter of credit to enable the suppliers proceed with the

manufacturing of the plant, machineries and equipment.

(b) *In default, the Defendant to confirm the letter of credit aforementioned, and this was met with series of protest from the plaintiff. The Plaintiff shall rely on its letters dated 10/6/89 and 11/6/89 addressed to B the Defendant, together with the Annexures attached thereto and the Defendant is hereby given notice to produce the original copies of the said letters at the hearing of this case. Plaintiff shall also rely on Defendant's letter dated 30/6/89 addressed to the Plaintiff.*

(c) *As a result of the default by the Defendant to confirm the letter of credit aforesaid Plaintiff was again requested to source for another proforma invoice and necessary documents towards the re-establishment of another letter of credit which value should not exceed the amount approved for the Plaintiff project ab initio. In compliance with D this directive the Plaintiff had to source for a fresh proforma invoice and this time around the Plaintiff got one from GATCO Trading GMBH, Hamburg, but in order to ensure that the value did not exceed the amount approved for the project the Plaintiff had to leave out some of the plants E and equipments required which were contained in the first proforma invoice. At the hearing of this case the Plaintiff shall rely on the first proforma invoice from Alfamatex S.A. of Barcelona upon which the first un-confirmed letter of credit was opened and also the proforma invoice F from GATCO Trading GMBH, Hamburg which was the basis for the opening of the new letter of credit. The Defendant is hereby given notice to produce the original copies of the two proforma invoices at the hearing of this case.*

7. *In reply to paragraph 22(c) of the Amended Statement of G Defence, the Plaintiff avers as follows:-*

(d) *The Plaintiff shall contend at the hearing of this case that the change in the exchange rate if any was occasioned as a result of the negligence of the Defendant whose agent i.e. corresponding bank failed H to confirm the 1st letter of credit in favour of the first supplier.*

Particulars

(a) *Before the first letter of credit was opened, the Investment and Agreement had already been signed but this notwithstanding the*

Defendant defaulted either by itself or through its corresponding bank to confirm the said first letter of credit.

(b) Despite the fact that plaintiff had submitted a new proforma invoice whose value agreed with the amount already approved for the plaintiff; the Defendant failed to act as a prudent bank would have done in that it failed to communicate or notify the plaintiff as to his increase in liability with a view to entering into a supplementary agreement. Rather plaintiff was given the impression that there was no change in the transaction particularly as it related to the amount approved." (underlinings are mine)

It is patent that there is some inconsistency in Plaintiff's pleadings. In the statement of claim and paragraph 1 of the Reply it was the Defendant that was said to be negligent. In paragraph 7(d) however it was the Defendant's corresponding bank that failed to confirm the 1st L/C. Having regard to the state of the pleadings it cannot be said that Plaintiff alleged negligence against Midland Bank for which Defendant was vicariously liable. It is unnecessary for me, therefore, to determine whether the action was incompetent for failure to join the Midland Bank.

The conclusion I reach is that whatever defect there might be in the passage of the judgment of the Court below under attack no miscarriage of justice is occasioned thereby.

Question 3

This question has been dealt with by me when I was discussing Question (1). The simple answer to the question is that having regard to Clause 1 (iii) of Exh C, "all risks of foreign exchange including fluctuations shall be borne by the Borrower" that is, the Plaintiff.

Plaintiff appears confused about its real claim. While alleging negligence or default against the defendant, it claimed no damages for negligence but rather a declaration (See: claim (iii)). The only claim in damages was in respect of the refusal by the Defendant to grant its consent for a further mortgage or charge to be made to the Savannah Bank.

Question 4

Plaintiff contends that under Clause 28 of Exhibit C the grant of consent by the Defendant for the Plaintiff to raise a further mortgage or

charge on its floating assets was unconditional. With respect I cannot read such a meaning into Clause 28. I think the only constraint on Defendant's right to give consent is that consent must not be unreasonably withheld. To hold as Plaintiff suggest would render meaningless the B right to grant consent given to the Defendant.

Plaintiff's case is made worse in that although Clause 28 gave it right to raise a 1st charge on its floating assets to the maximum of N45,000 to provide it with working capital, Plaintiff, in fact, raised N2 million from Commerce Bank Plc under this Clause. Under Clause 4 of Exhibit C, working capital was put at N46,000.00. After raising N2 million from Commerce Bank creating a 1st charge on its floating assets which said assets were also security for Defendant's loan of over N6 million, Plaintiff still required unrestricted right to create yet another charge in the sum D of N1,5 million. It would have been reckless disregard of its own interests for Defendant to grant its consent to this further charge having regard to the fact that Plaintiff was already in breach of Clause 28. The purpose of Clause 28 was to enable the Defendant to protect its interests E in the Plaintiff's assets. In the circumstance of Plaintiff's breach, Defendant did not act unreasonably in refusing its consent to the further charge in favour of Savannah Bank.

Question 5

F This question is dealt with by the Plaintiff under its Issue (12). The sum total of Plaintiff's argument is that the loan was not due for repayment when Defendant wrote Exhibit BB its letter to the Plaintiff dated 14th January 1994 giving the Plaintiff 7 days notice to pay the entire loan and interest.

G Clause 10(i) of Exh C provided for repayment of the loan and interest in 12 consecutive and equal half-yearly instalments, "the first instalment being payable One and a half years after the Loan or part thereof as the case may be is paid by the Lender to the Borrower"

H Going by the evidence of PW1, Plaintiff's Managing Director and Exhibit 1 a letter from GATCO to the Plaintiff dated October 24, 1989, it would be right to assume that as at 24/10/89, the loan had been disbursed following the confirmation of the second L/C. Exhibit 1 reads:

"Dear Sir,

RE: L/C 890244/WB FOR US\$735,470, --

COMPLETE COTTON LINE

Your above letter of credit refers.

Since L/C has just been confirmed and first batch of consignment is anticipated in December, 1989, while the second batch is anticipated for March, 1990, Kindly extend letter of credit as well as the form-m to at least:

30.3.90

While we look forward to receiving the requested amendments, we remain,

Yours faithfully

GATCO TRADING GMBH

(Sgd)

G. NEUMANN

Director"

The 1st instalment of at least N500,000 was, under Clause 10(i) of Exh C, due for payment on or before 24/4/91. There is evidence to the effect that no such instalment was paid by Plaintiff. Nor were subsequent instalments paid. Plaintiff paid only N20,000. In such circumstance the loan became immediately due and payable on 22/5/91 - see Clause 32(a) of Exhibit C. The Defendant was, therefore, justified in writing Exh BB on 14/1/94.

Question (6)

I shall now look at Plaintiff's claims to see if any or all are proved. From all I have said under Question (1), Claim (i) was rightly dismissed by the Court below. The conclusion I reach on Question 5 disposes of Claim (ii).

If the Plaintiff had a genuine case in negligence it should have sued in damages and not for a declaration. In any event, on the evidence - both oral and documentary, before the Court the allegation of negligence was not made out.

Exhibit EE shows clearly that the confusion over the first L/C was caused by disagreement between the Plaintiff and ALFAMATEX,

S.A. Exhibit EE reads:

"Before commenting on your letters under reference, it is necessary to bring to your attention the advanced stage your company's Letter of Credit had reached, as follows:

B (a) *Having opened the LC on the 12th August, 1988, we despatched our 'Application for Special Commitment Letter' to World Bank on 11th August, 1988.*

(b) *On the 29th August, 1988, the World Bank forwarded it (sic) 'Commitment Guarantee' to Midland bank to enable the latter add its confirmation to the Letter of Credit.*

(c) *The World Bank sent a copy of its approved Special Commitment Guarantee to us and this was received in this Bank on 13th September, 1988. On the basis of this World Bank Special Commitment Midland Bank ought to have added its confirmation to the credit, but we did not receive Midland Bank's confirmation advice prior to the expiry of the credit. We now submit below, in summary, and also for your ease of reference, specific instruction, claims and accusation contained in your letters of 16th March and 6th April, 1989 in respect of the subject letter of Credit."*

I refer also to Exhibit FF written by the Plaintiff to the Defendant and dated 6th April 1989, which reads in part:

F *"The story goes as follows:-*

(1) *Following the receipt of a copy of telex dated 12th August, 1988 (see Appendix I) under which a Letter of Credit for DM 1,257,350.00 was purportedly opened in favour of Alfamatex S.A. of Spain, we received complaints from the supplier that the Letter of Credit was UN-CONFIRMED. We communicated this complaint to the NBCI and we even visited the Merchant Bank Operations Dept. of the bank on the 20th October, 1988 which informed us that the Letter of credit had been CONFIRMED and that the Special Commitment had been given by the World Bank and the Midland Bank London on the 20th August, 1988 and on 19th August, 1988 respectively. We further communicated this information to our Supplier in Spain yet up till date our Supplier is still claiming that the Letter of Credit is not confirmed (See Appendixes II to*

X) and as such they would start to manufacture (See Appendix IX) and still the M.B.O. Department continues to maintain that it has been confirmed.

Having got tied of this unclear situation over the confirmation and non-confirmation of the Letter of Credit, we decided to send letters dated 3rd B January, 1989 and 16th March, 1989 to the Managing Director of the bank; at least to ensure amicable trend and to safeguard our Company's interest in the financial implication. It is not our wish to do so, but since we can not just understand who or what is/are delaying things, we had no C alternative.

For further clarity purposes, please see Appendixes XI to XIII of the attached photocopied documents.

(2) Issues have now been further compounded with the new matters now being raised by the supplier as a result of his claim to the effect D that the Letter of Credit has not been confirmed up till the 28th of January, 1989 (6 months after the opening of the L/C) when the machineries was due to arrive Nigeria. (See Appendix XIII). These issues are contained in the supplier's telex No. 5798 of 28th Jan., 1989 which led to E our latest letter to the Managing Director dated 16th March 1989. The most important is the suppliers demand for 40% down payment. The issue of partial shipment however is not acceptable to us. Now the supplier is bent on re-pricing since we have been highly delayed for a period F of six months by the bank on the issue of whether confirmation has been done or not to the Letter of Credit.

(3) Right now, the situation of Letter of Credit confirmation is yet to be known. The Supplier is demanding for a renegotiation and 40% G down payment. Other issues raised by the supplier are contained in Appendix XIII. Based on these state of unstable characteristics of the whole transactions, we have therefore decided to refer the whole issue to your department for perusal, investigation and effective clarification on these H issues:-

(i) What exactly is the status of the Letter of Credit in question, as it would appear, the Letter of Credit matter is the core of our current problems.

(ii) *That our further re-pricing or renegotiation with the supplier will surely enhance additional amount to meet the cost of the machineries, which we would like the bank to take care of, as our company is not in a position to meet such additional fund.*

B (iii) *What can your bank do to adhere to the demand or requirements of the supplier in its telex in appendix XIII so as to ease our problems. Note however that the issue of partial shipment is not acceptable to us."*

C Testifying under cross-examination PW1, Olawale Olarewaju Banwo, Plaintiff's Managing Director deposed:

"It is not the duty of Midland bank to confirm the L/C in favour of Alfamatex S.A., on the instructions of World Bank. I do not know that Midland Bank is an agent of the World Bank. it is true that I instructed D the defendant not to pursue the issue of confirmation of L/C in favour of Alfamatex S.A. because the L/C has already expired and the suppliers (Alfamatex) was asking for an increase of 10%. By the time I wrote Exh FF the L/C has expired. The L/C was expected to expire in February, E 1989. I do not know that it was the duty of Midland Bank to confirm the L/C issued in favour of Alfamatex."

I cannot see how I can make a finding of negligence against the Defendant or any other person on the evidence above. Claim (iii), therefore, was rightly dismissed by the Court below.

F My comments and conclusion on Question 4 have resolved the claim (iv) for damages. since there was no duty on the Defendant to give an unconditional consent to the plaintiff to raise a further charge on its floating assets, the claim in damages could not have succeeded. And for G the additional reasons given by the Court below for refusing the items of special damages, I am of the view that claim (iv) was rightly dismissed. The claim for interest equally fails.

H I think the Plaintiff was confused about the loan granted him by the Defendant. Although the World Bank approved for him a line of credit in the sum of US\$750,000, it does not mean he was entitled to cash refund for the unutilised part of this credit line. The facility having expired, he was no longer entitled to the use of US14,530 credit line

unutilised by him.

It is for all the reasons I have given above that I agree with my learned brother, Onu JSC that this appeal be dismissed. I too dismiss it and affirm the judgment of the Court below. I award to the Respondent N10,000.00 (ten thousand Naira) costs of this appeal.

B

OGWUEGBU JSC

I have had a preview in draft of the judgment just delivered by my learned brother, Onu, JSC. I am in complete agreement that the appeal be dismissed.

C

The facts of the case, the issues involved in the appeal and the arguments of counsel have been fully set out by him in the lead judgment and it is needless to repeat them. I will however expatiate on one or two of the issues formulated by the plaintiff/appellant for our determination.

D

As to the exact amount advanced to the plaintiff by the defendant, the former contended that it was N2.9 million while the defendant's contention is that the amount was N6,120,276 inclusive of interest which accrued during the period of construction and later capitalised. The plaintiff argued that the transaction between them was governed by Letters of Intent (Exhibits "A" and "B" as well as the Investment and Mortgage Agreement which is Exhibit "C").

E

The relevant portions of the Letter of Intent - "A2" are:

"LETTER OF INTENT"

I am pleased to inform you that after due consideration of your application, the Nigerian Bank for Commerce and Industry has approved an investment in Artra Industries Limited by way of term loan of N,2,900,000 (Two million, nine hundred thousand naira only) under the World Bank Line of Credit on the terms and conditions stated hereunder and our other usual terms and conditions contained in the Investment and Mortgage Agreement. Amount: N2,900,000 (two million, nine hundred thousand Naira only)."

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By Exhibits "A2" and "C" the principal loan granted to the plaintiff by the defendant was N2.9 million. Clauses 6,7 and 11 of Ex-

hibit "C" provide as follows:

"6 (1) The Lender hereby agrees to advance to the Borrower for the purpose of financing the project and the Borrower hereby agrees to borrow from the Lender a sum not exceeding in the aggregate the sum of N2,900,000 (Nigerian Currency) or its equivalent in other currencies.
..... "

"7. It is hereby agreed and understood that the loan shall include any sum owing to the Lender by reason of advance made directly to any person at the request of or on behalf of the Borrower on any bonds, letters of credit issued and guarantees of indemnities given by the Lender or its agents on behalf of the Borrower."

"11. PROVISION FOR FOREIGN CURRENCIES

(I) If all or any part of this loan is disbursed in foreign currencies all obligation of the borrower to make repayment under this agreement shall be computed and stated in several foreign currencies in which the loan was disbursed. The amount of Nigerian Naira equivalent to the foreign currency amounts due for payment shall be computed on the basis of the ruling rates of exchange for the respective currencies on the due dates for such repayment provided that such payment shall be made on or before maturity.

(ii) If payment under this agreement is deferred, the amount of Nigerian Naira payment equivalent to the several foreign currencies amount due shall be computed on the basis of the highest market rate of foreign exchange quoted for the respective currencies during the period from the date of such payment to the date of actual payment.

(iii) All risks of foreign exchange including fluctuations shall be borne by the borrower" (Underlining is for emphasis).

The actual amount disbursed to the plaintiff upon the opening of letter of credit in favour of GATCO Trading GMBH, Hamburg is USD 735,470.00 as per Exhibit "G". A letter of credit No. LC 89024/WB for USD 735,470 was opened on 4 -7-89. In Exhibit "GG", the plaintiff admitted that the term loan was USD 735,470 at N7.2419 per dollar which yielded N5,326,200.19. In Exhibit "HH", the plaintiff admitted that the principal loan was N5,326,200.19 while the interest was

N1,758,645.20 based on daily interest of N1,404.19. Again in Exhibit "JJ", the plaintiff's audited statement of account for the period ending 30-11-91, the plaintiff admitted owing N6,570.353.00 as at December, 1991. In Exhibit "KK", the audited accounts of the plaintiff company for 1992, the same amount was reflected.

In his evidence under cross-examination, the P.W. 1 who is the Managing Director of the plaintiff company testified as follows:

"In Exhibit "JJ" page 2, I confirm that the company owed the defendant sum of N6,570,353 and at page 3, the conversion is N7.2419. And at page 5, the Principal (sic) 5,326,200 (sic) and interest is N1,244,155 as at December, 1991. In Exhibit "KK" page 7 para.12, shows N6,570,353.....The Company has repaid N20,000 since the loan was given to it."

The plaintiff admitted several correspondences and oral evidence set out above that on opening the credit, the principal amount granted was N5,326,200 plus interest of N1,244,155 as at December, 1991. These admissions are binding on the plaintiff. In addition, Clauses 6(1), 7 and 11 of Exhibit "C" executed by the parties are clear as to the issue now being canvassed by the plaintiff i.e., the amount of principal loan granted to it. The plaintiff as well as the defendant are bound by Exhibit "C" and the court below was right in giving full effect to the said agreement. The term loan from what transpired between the parties could not be limited to N2.9 million.

On the question whether or not the defendant had any discretion to give its consent to the creation of further charges, it was submitted in the appellant's brief that even if the defendant had any discretion which the plaintiff did not concede, such discretion was unreasonably withheld,. Clause 28 of Exhibit "C" conferred power on the plaintiff to execute a first charge on its book debts, stock-in-trade and work in progress to enable it obtain working capital from a licensed commercial bank up to the maximum of N45,000.00 with a proviso that:

"Any further right to create any mortgage or charge on its book debts, stock-in-trade, work in progress and moveable assets shall only be exercisable subject to prior consent in writing of the Lender."

I am satisfied that the Court of Appeal correctly construed the above proviso as conferring a discretionary power on the defendant to decide whether or not to grant consent for any further charge above the specified amount on the assets of the plaintiff already mortgaged. The B court below held as follows:

"How can the defendant protect its interest if it has no discretion to refuse the consent to diminish its assets? If the defendant has no discretion, there could have been no requirement as to its prior consent in C writing. The fact that defendant called for revised cash flow projection did not automatically mean that it must grant its consent. It was evidence from the record that the plaintiff made no repayment of the loan since commencement of operation in May, 1992. Even though Clause 28 D of Exh. C did not make the right to create any further charge or mortgage dependent on repayment of the loan, yet Clause 10(1) provides that the loan repayment shall be by 12 consecutive half-yearly instalments, the first instalment being payable on 31-12-89 or 18 months after the first draw down. The first draw down was in May, 1988 when the first letter E of credit was opened. The second draw down was in July, 1989 when the 2nd letter of credit was opened."

I entirely agree with the court below that the defendant had discretion to grant or refuse to grant its consent to the plaintiff to create, F a further charge on its assets and the only qualification is that such consent should not be unreasonably withheld. The defendant's refusal to grant its consent to the creation of a further charge in favour of Savannah Bank of Nigeria PLC cannot be said to be unreasonable having regard to the fact that by the same Clause 28 of Exhibit "C", the Plaintiff was G permitted to create a first charge on its floating assets to the maximum of N45,000,00 to enable it obtain working capital. This maximum was exceeded when the plaintiff raised N2 million from the Commerce Bank PLC.

H The defendant would not be acting in the interest of its shareholders if it had granted its consent to the further mortgage or charge. It was alive to its responsibility when in its letter Exhibit "ZZ" to the plaintiff, it indicated as follows:

"..... *The Bank is unable to further dilute the existing pari pasuu sharing security arrangement due to the fact that doing so would expose the bank to a very low assets coverage ratio that is unacceptable.*"

Viewed from all angles, I am of the view that the defendant had a discretion to grant or refuse to grant its consent to the creation of the further charge and the discretion was not unreasonably withheld by it.

For the above reasons and the fuller reasons in the lead judgment of my learned brother Onu, J.S.C., I will dismiss the appeal. It is hereby dismissed. The judgment of the Court of Appeal is hereby affirmed. The respondent is entitled to the costs of this appeal which I fix at N10,000.00

MOHAMMED JSC

For the reasons given in the opinion of learned brother, Onu JSC, in the judgment just read, I will also dismiss this appeal.

The Managing Director of the appellant, Mr. Olawale Olarewaju, told the trial Federal High Court during his evidence in chief that the total amount received from the respondent was \$735,470.00 U.S. Dollars. Mr. Olarawaju said that he was aware that the amount had to be computed on the current Exchange Rate. The witness went further and made the following admissions:

"In Exh. JJ. Page 2, I confirm that the company owed the defendant the sum of N6,570.353 and at page 3, the conversion is N7,2419. And at page 5, the principal is N5,326.200 and interest is N1,244.155 as at December, 1991. In Exh. KK page 7, para.12, it shows N6,570.353"

A statement, oral or written made by a party to civil proceedings and which statement is adverse to his case is admissible in the proceedings as evidence against him of the truth of the facts asserted in the statement - Seismograph Service (Nigeria) Limited v. Chief Keke Ogbenekwe Eyuafe (1976) 9 - 10 S.C. 135 at 146. It is trite law that a party's declarations or statements, whether for or against his interest when made may always be taken to be true as against himself.

In the case in hand the appellant had no answer to obvious facts

in the documents which were admitted in evidence during the testimony of the Managing Director of the appellant. In exhibit KK, for example, as at December, 1992, the Managing Director admitted that the appellant's company was owing the respondent the principal sum of N5,326,200.00 B and interest of N1,244,155.00. In clause 4 of the Deed of Guarantee, exhibit C which was signed by both parties it has been agreed thus:

"Any admission or acknowledgment in writing by the Borrower or any person on behalf of the Borrower of the amount of the indebted- C ness of the Borrower..... or any statement of account furnished by the Lender the correctness of which is certified by an official of the Lender, shall be conclusive and binding on the Guarantors".

This appeal has no merit at all and for these reasons and the D fuller reasons given in the lead judgment it is dismissed. The judgment of the Court of Appeal is hereby affirmed. I also award N10,000.00 costs in favour of the respondent.

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