

**SUPREME COURT OF NIGERIA**  
17TH APRIL, 1998. SC. 44/1993  
**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, U.**  
**MOHAMMED, S. U. ONU, A. I. IGUH, JJSC.**

GABRIEL OLATUNDE ..... PLAINTIFF/JUDGMENT  
CREDITOR/APPELLANT  
  
AND

1. OBAFEMI AWOLOWO UNIVERSITY ..... CLAIMANT/  
D. E. SIMONE (NIG.) LTD ..... RESPONDENT DEFENDANT/  
JUDGMENT DEBTOR/RESPONDENT

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***APPEALS** - Judgments - The test to be applied in deciding whether an order is final or interlocutory - Is the one which looks at the order made and not at the nature of the proceedings - And the determinant factor is whether the rights of the parties are finally disposed of by the order appealed against.*

***APPEALS** - Interpleader proceedings - Jurisdiction of Court of Appeal - Where the interpleader decision is final - And the appeal was lodged within the statutory period - The Court of Appeal has jurisdiction.*

***CONTRACTS** - Interpretation - It is not the duty of any court to make contracts for the parties - And where the language and intent of an enactment or contract is apparent - A trial court must not distort their meaning.*

***CONTRACTS** - Interpretation - Conditions for a valid determination of the contract - The Court of Appeal was in error - When it invoked a distinction as to the applicability of the conditions.*

***CONTRACTS** - Breaches - Where the breaches complained of were not incapable of remedy - It would be wrong to suggest that there was no*

*obligation to serve the prescribed notice upon the contractor - Requiring it to remedy the alleged breaches pursuant to the provisions of the contract.*

**CONTRACTS** - *Right of lien - Where the agreement in issue was not validly determined in accordance with the terms of the contract - The claimant's claim to lien was premature - And had not accrued as provided for under the contract.*

**INTERPLEADER PROCEEDINGS** - *Decision - Which conclusively disposed of the rights of the parties to the vehicle in issue - And as to whether the same could be attached or not - Is a final decision.*

**WAIVER** - *Notice of determination of a contract - Mere acceptance or receipt of it - Is not per se conclusive evidence of waiver of any irregularity in the notice.*

**WAIVER** - *Unequivocal act - The receipt or acceptance of notice of determination - Did not establish the doing of any unequivocal act by the contractor accepting or endorsing the situation as immaterial.*

**WORDS & PHRASES** - *"Waiver" - Definition of - To amount to waiver express or implied - Two elements must co-exist.*

### **FACTS**

The issue in controversy between the parties arose from an interpleader proceeding. The plaintiff/judgment creditor/appellant had on the 24th September, 1984 obtained judgment against the defendant/judgment debtor/respondent in the sum of N7,875.00 in suit No. HIF/66/83. The failure to pay this judgment debt led to the issuance of a writ of fieri facias at the instance of the judgment creditor for execution against the moveable property of the judgment debtor. Pursuant to the said writ of fieri facias, the manchetta piacenza - Italy vehicle of the judgment debtor, the subject matter of this proceeding, was duly attached on the 15th day

of October, 1984. The said vehicle was parked on the claimant's Ile-Ife construction site at the time of its attachment. It was at this stage that the claimant initiated an interpleader proceeding at the Ile-Ife Judicial Division of the High Court of Justice, of former Oyo State asserting its right to the ownership of the vehicle. The claimant's assertion of title to this vehicle was based on the fact that by virtue of an agreement, Exhibit A, it engaged the judgment debtor, to erect to completion an accelerator building at its permanent site in Ile Ife. It was also an express term of Exhibit A that the project would be completed within 85 weeks. The judgment debtor did not proceed diligently and timeously with the execution of the contract, prompting the claimant based on the provisions of the agreement to determine the contract by a letter dated the 28th December, 1983, some three weeks after the project ought to have been completed. The claimant further contended that by virtue of another clause of Exhibit A, it was entitled upon its lawful determination of the contract to retain all the building equipment and plants, including the vehicle in issue, deposited on the building site by the judgment debtor.

The judgment creditor for his own part deposed that the judgment debtor was at all material times the bona fide owner of the attached property. He submitted that he had every legal right pursuant to the provisions of S. 13(1) of the Sheriffs and Civil process law, cap. 117, Vol. VI., Laws of Oyo State, to recover his judgment debt by levying execution on the moveable property of the said judgment debtor as he lawfully did in the present case. At the conclusion of hearing, the learned trial judge in a considered judgment dismissed the case of the claimant, holding that the judgment creditor has a better title to the vehicle than the claimant. He also held that the claimants' determination of the contract was not in accordance with Exhibit A and that as such, it's right over the vehicle in dispute had not vested in it. Dissatisfied with this decision the claimant appealed to the Court of Appeal, Ibadan Division, which allowed the appeal. The judgment creditor being aggrieved, has now appealed to the Supreme Court against the said decision of the Court of Appeal, raising 4 questions.

**ISSUES FOR DETERMINATION**

"(1) *Whether the Court of Appeal was right in holding in effect that sub-clause 25(i) (d) does not govern the whole of clause 25(i) of Exhibit 'A'.*

B (2) *Whether from the circumstances of this case it could be said that the claimant/respondent had a lien in the vehicle, the subject matter of these proceedings.*

C (3) *Whether it could be said that the judgment/debtor had waived any defect in the way the contract was determined and if so whether any such waiver could bind the plaintiff/appellant*

(4) *Whether the Court of Appeal had jurisdiction to entertain the appeal of the claimant/respondent."*

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

***Appeals - Judgments***

1. It cannot be over emphasized that in deciding whether an order is final  
E or interlocutory, the test to be applied is one which looks at the decision  
or order made and not at the nature of the proceedings. See Blay v. Solomon 12 W.A.C.A. 175, Ude and others v. Agu and others (1961)  
F ALL N.L.R. 65 at 66 etc. The determinant factor is whether the rights of  
the parties are finally determined or disposed of by the decision or order  
appealed against. See Ojora and others v. Odunsi (1964) N.S.C.C. 34 at  
36. If it does, then it ought to be treated as a final decision, but if it does  
not, it is an interlocutory decision or order. See Bozson v. Altrincham  
G U.D.C. (1903) 1 K.B. 547 at 548, Ayu v. Madugo (1991) 2 N.W.L.R.  
(Part 171) 92 at 100 etc. (p. 752 G)

***Decision - Which conclusively disposed of the rights***

2. There can be no doubt that this decision conclusively disposed of the  
H rights of the parties to the vehicle in issue. It was a decision which on  
the merits, effectively concluded the dispute between the parties as to the  
ownership of or entitlement to the said vehicle and as to whether the  
same could be attached or not. It was a final decision and time to appeal

against it would be three months. (p. 753 G)

### ***Appeals - Jurisdiction of Court of Appeal***

3. In the Ojora v. Odunsi case, the proceedings before the trial court did not seek the determination of new rights but simply the enforcement of the rights already established. This is unlike the facts in the present interpleader proceedings which involved the determination of a completely new right. It concerned the determination as to title to and/or ownership of the vehicle in question, an issue which whether directly or indirectly, did not arise for consideration in the substantive suit. I therefore entertain no doubt that learned counsel for the appellant was entirely right when he conceded that the decision in the interpleader proceeding in issue was final. In my view, the Court of Appeal had jurisdiction to entertain the appeal, the appeal having been lodged within the statutory period. (p. 754 B)

### ***Contracts - Interpretation***

4. With the greatest respect to the Court of Appeal, I am unable to accept that the interpretation it placed on clause 25 (1) (a) - (d) of Exhibit A is well founded. The first point that ought to be stressed is the basic principle of law that it is not the duty of any court to make contracts for the parties. See Fakorede and others v. A.G. of Western State (1972) 1 ALL N.L.R. 178 at 189. Contracts, as a rule, are made by the parties thereto who are bound by the terms thereof and the courts are always reluctant to read into a contract, terms on which there is no agreement. See Baba v. N.C.A.T.C. (1991) 5 N.W.L.R. (Part 192) 388 at 413, O. H. M. B. v. Apugo and Sons Ltd (1990) 1 N.W.L.R. (Part 129) 652 at 627 and 656. Where however the language, terms, intent or words of any part or section of a written contract, document or enactment are clear and unambiguous, they must be given their ordinary and actual meaning as such terms or words used best declare the intention of the parties unless, of course, this would lead to absurdity or be in conflict with some other provisions thereof. See Chief D. O. Ifezue v. Livinus Mbadugha and Another (1984) 5 S.C. 79 at 101, Awolowo v. Shehu Shagari (1979) 6 -

**746** Olatunde v. Obafemi Awolowo University (1998) 4 KLR 9 S.C. 51. Where the language and intent of an enactment or contract is apparent, a trial court must not distort their meaning. See Osadebay v. A.G. Bendel State (1991) 1 N.W.L.R. (Part 169) 525 at 574. (p. 760 B)

**B** *Conditions for a valid determination of the contract*

5. I entertain no doubt that the Court of Appeal, with very great respect, was clearly in error when it held that the above two conditions only governed sub-paragraph (d) of Clause 25 (1) but did not concern sub-paragraphs (a), (b) and (c) thereof. In my view, this distinction invoked by the court below as between the defaults adumbrated in sub-paragraphs (a) - (c) of the one part and those indicated in sub-paragraph (d) of Clause 25 (1) is, with respect, unsupportable and without any justification whatever. The learned trial Judge was, in my opinion entirely right when he held that the two conditions above-set out governed sub-paragraphs (a) - (d) of Clauses 25 (1) of Exhibit A. (p. 761 F)

*Contracts - Breaches*

6. In the circumstances of the present case and in view of the fact that the particular breaches complained of were not incapable of remedy, it would be therefore wrong to suggest that there was no obligation on the University to serve the prescribed notice upon the contractor requiring it to remedy the alleged breaches pursuant to the provisions of Clause 25 (1) of Exhibit A. Parties are bound by their agreement and a determination of the contract without complying with the provisions of Clause 25 (1) of Exhibit A cannot be said to be valid. (p. 764 D)

**G** *Contracts - Right of lien*

7. Having found that the agreement in issue was not validly determined in terms of Exhibit A, it is clear to me that having regard to the circumstances of this case, the claimant's claim to lien was premature and had not accrued as provided for under the contract. In this regard it ought to be borne in mind that contract supersedes lien and limits the right of the person claiming under a contract to those for which provisions have been made in such contract. See Fister v. Smith (1874) 4 A.C. 1. Ac-

cordingly the right of the University to the lien it claimed must be governed by the provisions of the contract, Exhibit A and not by the incidents of a common law lien. Under the said provisions the relevant contract was not validly determined hence the University's right to lien did not arise. I therefore entertain no doubt that the claimant under Exhibit A had no lien on the vehicle in issue which at all material times was the property of the defendant/judgment debtor/respondent and that consequently the vehicle was liable to attachment by the appellant. (p. 765 C)

### ***Waiver - Notice of determination of a contract***

8. I am unable to accept that mere acceptance or receipt of the notice of determination of the contract by the defendant/judgment debtor/respondent is per se conclusive evidence of waiver of any irregularity in the notice. (p.765 H)

### ***Waiver - Definition***

9. Put simply, waiver is defined as the abandonment of a right. To amount to waiver, express or implied, two elements must co-exist, namely -

(i) *The party against whom the doctrine is raised must have knowledge or be aware of the act or omission which constitutes the waiver and*

(ii) *He must do some unequivocal act adopting or recognising the act or omission.* (p. 766 A)

### ***Waiver - Unequivocal act***

10. The receipt or acceptance of the notice of determination of the contract by the contractor, although remotely indicative, at best, of the fact that it was probably aware of the irregularity, did not establish the doing of any unequivocal act by the said contractor accepting or endorsing the situation as immaterial. I am therefore of the opinion that no waiver applied against the plaintiff/appellant or the said defendant/judgment debtor/respondent in this case and that the basis of the case of the plaintiff/appellant before the two courts below had infact always been that the contract, Exhibit A, was not validly determined. (p. 766 E)

**NOTABLE POINT OF INTEREST**

**IGUH JSC**

*1. Interpleader proceedings - The onus is the claimant to establish title*

It cannot be disputed that in interpleader proceedings, the claimant as a  
B rule is deemed to be the plaintiff and the judgment creditor, the defendant. Accordingly, the onus is generally on the claimant, as the plaintiff  
in the proceedings, to establish title to the property he claims. However,  
where the title he claims is not absolute, he must prove the precise interest  
C or title of the nature he has claimed. (p. 755 G)

**REPRESENTATION**

J. A. Olanipekun Esq. with Mr. Olanitori for the appellant

M. J. Onigbanjo Esq. for the Claimant/respondent

D Defendant/Respondent absent - unrepresented.

**CASES REFERRED TO**

Blay v. Solomon 12 W.A.C.A. 175,

E Ude v. Agu (1961) ALL N.L.R. 65 at 66

Olora v. Odunsi (1964) N.S.C.C. 34 at 36

Bozson v. Altrincham U.D.C. (1903) 1 K.B. 547 at 548

Ayu v. Madugo (1991) 2 N.W.L.R. (Part 171) 92 at 100

F Fakorede v. A.G. of Western State (1972) 1 ALL N.L.R. 178 at 189

Baba v. N.C.A.T.C. (1991) 5 N.W.L.R. (Part 192) 388 at 413,

Ifezue v.Mbadugha (1984) 5 S.C. 79 at 101

Awolowo v. Shagari (1979) 6 - 9 S.C. 51

Adigun v. Governor of Oyo State (1987) 1 N.W.L.R. (Part 53) 678.

G Osadebay v. A.G. Bendel State (1991) 1 N.W.L.R. (Part 169) 525 at 574

U.B.N. Ltd. v. Ozigi (1991) 2 N.W.L.R. (Part 176) 677 at 696.

**STATUTES REFERRED TO**

H Sheriffs and Civil Process Law, Cap. 117, Vol VI, Laws of Oyo State, s  
13 (1)

Law of Property Act, 1925, of the United Kingdom, s. 146 (1)



**LEAD JUDGMENT BY IGUHSJC**

This is an appeal against the judgment of the Court of Appeal, Ibadan Division, which had on the 23rd day of November, 1989 allowed the appeal by the claimant/respondent from the decision of Lajide, J., sitting at Ile-ife in the Ife Judicial Division of the High Court of Justice, B Oyo State.

The issue in controversy between the parties arose from an interpleader proceeding. This was a result of the attachment by the plaintiff/judgment creditor/appellant of a 25 ton Manchetta Piacenza Italy plant/vehicle, one of a number of chattels which, at all material times, were owned by the defendant/judgment debtor/respondent. It was the case of the claimant/respondent, relying on a provision of the building contract, Exhibit A, between it and the defendant/judgment debtor/respondent, otherwise also referred to as the contractor, that it had a special legal interest in the said plant/vehicle and that it was entitled to retain possession and the use thereof until the completion of the building project in issue. C D

I think it will be necessary at this stage to summarise briefly the salient facts of this case as presented before the trial court. The judgment creditor had on the 24th September, 1984 obtained judgment against the judgment debtor in the sum of N7,875.00 in suit No. HIF/66/83. The non-satisfaction of this judgment debt led to the issuance of a writ of fieri facias at the instance of the judgment creditor for execution against the moveable property of the judgment debtor. E F

Pursuant to the said writ of fieri facias, the Manchetta Piacenza - Italy vehicle of the judgment debtor, the subject matter of this proceeding, was duly attached on the 15th day of October, 1984. The said vehicle was parked on the claimant's Ile - Ife construction site at the time of its attachment. It was at this stage that the claimant initiated an interpleader proceeding asserting its right of ownership to the vehicle. G

The claimant's assertion of title to this vehicle was based on the fact that by virtue of the agreement, Exhibit A, made on the 21st April, 1982, it engaged the judgment debtor, to erect to completion an accelerator building at its permanent site at Ile-Ife at a cost of N4.8 million. Pursuant to this agreement, the claimant paid the judgment debtor an H

advance mobilisation fee of N480,000.00. It was also an express term of Exhibit A that the project would be completed within 85 weeks.

The claimant's case was that the judgment debtor did not proceed diligently and timeously with the execution of the project as it was required to do under the agreement. As a result, the claimant, relying on a provision of the agreement, determined the contract by a letter dated the 28th December, 1983, some three weeks after the project ought to have been completed. The claimant then contended that by virtue of another clause of Exhibit A, it was entitled upon its lawful determination of the contract to retain all the building equipments and plants, including the vehicle in issue, deposited on the building site by the judgment debtor. It was its case that the judgment debtor was given due notice of the determination of the contract as provided for in Exhibit A. The claimant thus asserted a special property in the vehicle under the provisions of the said Exhibit A.

The judgment creditor, for his own part, deposed that the judgment debtor was at all material times the bona fide owner of the attached property. He submitted that he had every legal right pursuant to the provisions of Section 13 (1) of the Sheriffs and Civil Process Law, Cap. 117, Vol. VI, Laws of Oyo State, to recover his judgment debt by levying execution on the moveable property of the said judgment debtor as he lawfully did in the present case. He claimed that he had a better right at law and in equity to the vehicle in issue than the claimant and that the burden of proof was on the claimant to establish better title to the attached property. He also submitted that the contract, Exhibit A, was not lawfully determined by the claimant in accordance with its terms and that in the circumstance, the right to lien claimed under the contract was premature as the same had not accrued.

At the conclusion of hearing, the learned trial Judge, Lajide, J., in a considered judgment delivered on the 26th September, 1985 dismissed the case of the claimant, holding that the judgment creditor had a better title to the vehicle than the claimant. He also held that the claimant's determination of the contract was not in accordance with Exhibit A and that as such, its right over the vehicle in dispute had not vested in it.

Dissatisfied with this decision of the trial court, the claimant appealed to the Court of Appeal, Ibadan Division, which on the 23rd day of November, 1989 allowed the appeal and upheld its interest over the property in issue. The judgment creditor, hereinafter also simply called the plaintiff/appellant has now appealed to this court against the said decision of the Court of Appeal. B

Pursuant to the Rules of this court, the claimant, hereinafter also referred to as the University and the plaintiff/appellant, through their respective counsel, filed and exchanged their written briefs of argument. In the plaintiff/appellant's brief of argument, the following four issues are set out as arising for determination in this appeal, namely - C

*"(1) Whether the Court of Appeal was right in holding in effect that sub-clause 25(i) (d) does not govern the whole of clause 25(i) of Exhibit 'A'.* D

*(2) Whether from the circumstances of this case it could be said that the claimant/respondent had a lien in the vehicle, the subject matter of these proceedings.*

*(3) Whether it could be said that the judgment/debtor had waived any defect in the way the contract was determined and if so whether any such waiver could bind the plaintiff/appellant* E

*(4) Whether the Court of Appeal had jurisdiction to entertain the appeal of the claimant/respondent."*

The claimant, for its own part, submitted three issues in its brief of argument as arising in this appeal for the determination of the court. These are - F

*"(i) Whether the provisions of Sub-Clauses (a) - (d) of Clause 25 (1) of Exhibit A are to be interpreted disjunctively and not conjunctively.* G

*(ii) Who between the Judgment Creditor/Appellant and the Claimant/Respondent had a better right to the vehicle subject matter of this proceedings.* H

*(iii) Is the decision by a court of first instance determining an interpleader proceedings a final or interlocutory judgment."*

I have closely examined the questions set out by the parties in

their respective briefs of argument. In my view the issues formulated by the plaintiff/appellant practically cover those identified by the claimant and are sufficient for my determination of this appeal.

At the oral hearing of the appeal, learned counsel for the plaintiff/appellant, J. A. Olanipekun Esq. in arguing his fourth issue for determination which corresponds with the respondent's 3rd issue raised a preliminary point. It was his contention that the court below had no jurisdiction to entertain the appeal before it since the same was incompetent in that it was brought out of time. He pointed out that the trial court delivered its judgment in the case on the 26th September, 1985 but that the claimant did not file its notice of appeal until the 16th October, 1985, twenty days after the delivery of the judgment. He submitted that the judgment appealed against was an interlocutory decision of the High Court and that the appeal ought to have been filed within 14 days of the delivery of judgment. Relying on the decision in Ojora and others v. Odunsi (1964) N.W.L.R. 12 at 14, learned counsel submitted that so long as the proceedings before the High Court were not seeking the determination of new rights but the enforcement of rights already established, the decision was an interlocutory one in respect of which the leave of the court was required before an appeal to the court below could be entertained. The said leave, not having been obtained, he argued that the Court of Appeal had no jurisdiction to entertain the appeal. However, in answer to a question from the court, learned counsel frankly conceded that the judgment in this particular interpleader proceeding would appear to be final. He agreed that it determined the issue of ownership of the vehicle in dispute, an issue which neither arose nor concerned the issue in controversy between the parties in the main suit.

I think Mr. Olanipekun was clearly right in his concession that the judgment in the present interpleader proceedings could not be interlocutory but final. **It cannot be over emphasized that in deciding whether an order is final or interlocutory, the test to be applied is one which looks at the decision or order made and not at the nature of the proceedings.** See Blay v. Solomon 12 W.A.C.A. 175, Ude and others v. Agu and others (1961) ALL N.L.R. 65 at 66 etc. The de-

**terminant factor is whether the rights of the parties are finally determined or disposed of by the decision or order appealed against. See Ojora and others v. Odunsi (1964) N.S.C.C. 34 at 36. If it does, then it ought to be treated as a final decision, but if it does not, it is an interlocutory decision or order. See Bozson v. Altrincham U.D.C. (1903) 1 K.B. 547 AT 548, Ayu v. Madugo (1991) 2 N.W.L.R. (Part 171) 92 at 100 etc.**

Now, in the main action, the simple issue in controversy between the parties was the sum of N7,875.00 claimed by the plaintiff/appellant as balance of the cost of planks he supplied to the defendant/judgment debtor/respondent. The trial court on the 24th day of September, 1984 entered judgment in favour of the plaintiff/judgment creditor/appellant against the said defendant/judgment debtor/respondent as claimed. Without doubt, that judgment was a final decision.

The plaintiff/appellant, in satisfaction of the judgment debt, levied execution against the Manchetta Piacenza - Italy vehicle of the defendant/judgment debtor/respondent. It was at this juncture that the claimant filed the interpleader proceedings in issue asserting its special interest or title to the attached vehicle. What was therefore in controversy between the parties in the interpleader proceedings was a determination as to title to and/or ownership of the vehicle in issue. It concerned whether or not the claimant had established special interest in or ownership of the vehicle, a relief totally distinct from the claim in the main action.

The trial court at the conclusion of hearing dismissed the interpleader proceedings as I have already indicated. It declared that the claimant had no right, title to or any interest whatever in the vehicle in issue to warrant it from being excluded from attachment. **There can be no doubt that this decision conclusively disposed of the rights of the parties to the vehicle in issue. It was a decision which on the merits, effectively concluded the dispute between the parties as to the ownership of or entitlement to the said vehicle and as to whether the same could be attached or not. It was a final decision and time to appeal against it would be three months.**

True enough, this court in Ojora v. Odunsi, supra, relied on by

learned counsel for the appellant, observed thus -

*"The application before the High Court was not seeking the determination of new rights, but the enforcement of the rights already established. In our view and for these reasons, the judgment or order was an interlocutory one in respect of which the leave of the court is required before an appeal to this court can be entertained."*

But the facts of that case are clearly distinguishable from those of the present case. **In the Ojora v. Odunsi case, the proceedings before the trial court did not seek the determination of new rights but simply the enforcement of the rights already established.** This is unlike the facts in the present interpleader proceedings which involved the determination of a completely new right. It concerned the determination as to title to and/or ownership of the vehicle in question, an issue which whether directly or indirectly, did not arise for consideration in the substantive suit. I therefore entertain no doubt that learned counsel for the appellant was entirely right when he conceded that the decision in the interpleader proceeding in issue was final. In my view, the Court of Appeal had jurisdiction to entertain the appeal, the appeal having been lodged within the statutory period. I will now proceed to consider the rest of the issues. I think it is convenient to consider issues 1 and 2 together.

Learned counsel for the plaintiff/appellant, again in his usual candour, conceded that if the contract, Exhibit A, was properly or lawfully determined under Clause 25(1), the claimant would clearly have a lien over the vehicle in dispute and may retain and use the same for carrying out the construction in issue to completion. He however contended that Exhibit A was wrongfully determined by the claimant and that in the circumstance, the claim of lien under the contract on the part of the claimant could not arise. He submitted that the interpretation placed on Clause 25(1) of Exhibit A by the Court below could not be sustained, that the mode for the determination of the contract stipulated in the said Clause 25 (1) governed all the defaults therein stated in sub-paragraphs (a) - (d), that the prescribed mode not having been complied with, the determination of the contract was plainly wrongful hence the claimant's

right to lien under Exhibit A was premature and had not vested in the claimant. He argued that no question of waiver on the part of the defendant/judgment debtor/respondent on the issue of the irregular or improper mode its contract with the claimant was determined arose in this case. He submitted, at all events, that any waiver by the defendant/respondent could not enure to the plaintiff/appellant as the concept of waiver is always personal to the person who exercised such right of waiver. B

Learned counsel for the claimant, in his reply, submitted that the contract, Exhibit A, was properly and validly determined in accordance with the provisions of Clause 25 (1) (a) and (b) thereof. He argued that as at the 28th December, 1983 when the contract was determined under the said Clause 25 (1) (a) and (b), it was no longer capable of performance. Citing the case of Governors of Rugby School v. Tannahill (1934) ALL E. R. 187 he argued that the non-service of the prescribed notice before the determination of the contract complained of by the plaintiff/appellant was infact a matter of no consequence in the present case as the breach relied on could not be remedied. He pointed out that the plaintiff/appellant was a stranger to Exhibit A and could not therefore rely on it. He urged the court to dismiss the appeal. C D E

The vital issue that calls for determination in this appeal is whether, as contended by the plaintiff/appellant, the contract Exhibit A was improperly or invalidly determined or whether, as argued by the claimant; it was lawfully done in accordance with the terms of Exhibit A. The issue is of tremendous importance for if the contract was properly or validly determined, then the claimant's right of lien over the disputed property would have accrued to it pursuant to the terms of Exhibit A. But if it was unlawfully determined, no question of lien under the contract would arise. F G

It cannot be disputed that in interpleader proceedings, the claimant as a rule is deemed to be the plaintiff and the judgment creditor, the defendant. Accordingly, the onus is generally on the claimant, as the plaintiff in the proceedings, to establish title to the property he claims. H However, where the title he claims is not absolute, he must prove the precise interest or title of the nature he has claimed. It seems to me necessary at this stage to set out Clause 25 (1) (a) - (d) and 25 (4) (a) of

Exhibit A pursuant to which the claimant purported to determined the contract between it and the defendant/judgment debtor/respondent and under which the University claimed to have acquired special interest or title to the vehicle in issue.

B Clause 25 (1) (a) - (d) provides as follows -

*"25. Determination by the Employer*

*(1) If the Contractor shall make default in any one or more of the following respects, that is to say:-*

C *(a) If he without reasonable cause wholly suspends the carrying out of the works before completion thereof, or*

*(b) If he fails to proceed regularly and diligently with the Works, or*

D *(c) If he refuses or persistently neglects to comply with a written notice from the Architect/Supervising Officer requiring him to remove defective works or improper materials or goods and by such refusal or neglect the Works are materially affected; or*

E *(d) if he fails to comply with the provisions of clause 17 or clause 17A of these conditions.*

F *then the Architect/Supervising Officer may give to him a notice by registered post or recorded delivery specifying the default, and if the contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the Employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the employment of the Contractor under this contract, provided*  
G *that such notice shall not be given unreasonably or vexatiously."*

The next relevant provisions is clause 25 (4) (a) of Exhibit A which runs thus -

H *"25 (4) In the event of the employment of the Contractor being determined as aforesaid and so long as it has not been reinstated and continued, the following shall be the respective rights and duties of the Employer and Contractor:-*

*(a) The Employer may employ and pay other persons to carry*



*out and complete the Works and he or they may enter upon the Works and use all temporary buildings, plant, tools, equipment, goods and materials intended for, delivered to and placed on or adjacent to the Works, and may purchase all materials and goods necessary for the carrying out and completion of the Works."*

B

There is then Exhibit E which is the letter of determination of the contract, Exhibit A, by the claimant. This goes as follows:

"R/DCA/T/87

28TH December, 1983

Messrs De-Simone (Nig.) Ltd.

Plot No. 5, Block E

Matori Scheme Oshodi

P. O. Box 87, LAGOS

Sir,

Re: Contract on the construction of Accelerator Building, University of Ife: Failure to carry out performance within time limit

C

*I refer to the contract agreement between your company and the University of Ife on the construction of Accelerator Building for the University of Ife. The agreement came into operation on 21st April, 1982, and the performance of the contract had to be carried out within 85 (eighty-five) weeks of that date.*

*The time fixed for the completion of the contract is an essential condition of the contract agreement. Now that you have failed to complete the building within the time limit stipulated in the agreement, please take notice that the University has treated the contract as having come to end.*

F

*You should also take notice that with immediate effect the University will invoke the provisions of clause (25 (4) (a) of the contract agreement which reads as follows:-*

G

*"The Employer may employ and pay other persons to carry out and complete the works and he or they may enter upon the Works and use all temporary buildings, plant, tools, equipment, goods and materials intended for, delivered to and placed on or adjacent to the Works, and may purchase all materials and goods necessary for the carrying out and completion of the Works."*

H

*Further communication on this matter will be addressed to you in due course.*

*Yours faithfully,*

*E. O. Adetunji*

*Registrar and Secretary to Council."*

B

The learned trial Judge, in a well considered judgment, commented as follows:-

*"It is clear from the last mentioned term of the contract that if the contract is properly terminated under clause 25 (1) above, the employer which is the University in this case may retain the plants and materials placed at the site of the project and use them for carrying out the Works to completion. The attached vehicle was one of the plants or materials put on the site by the judgment debtor so that the University could retain it once she validly determines the contract. The University thus has a special interest in the vehicle in such circumstances. The question arises whether the University properly terminated the contract, i.e. whether she determined the contractual relationship in accordance with clause 25 (1)."*

E

He then referred to the letter, Exhibit E, and proceeded to answer the question he posed thus:-

*"This Exhibit does not disclose that the last two conditions required for a proper determination of the contract have been fulfilled by the University. No other material before me has shown compliance either. At the risk of repetition the conditions are (1) the service of notice by the Architect/Supervising Officer containing the defaults being complained of on the judgment debtor and (2) continuation of the default for fourteen days after such service or repetition thereafter. I accordingly hold that the contract has not been terminated in accordance with the procedure laid down in Exhibit A. The University has therefore no special interest in the vehicle."*

G

H He concluded -

*"I declare that the University has no special interest in the vehicle to warrant it from being excluded from attachment. These interpleader proceedings are accordingly dismissed."*

The Court of appeal, for its own part, was of a different view. That court per the leading judgment of Ogwuegbu, J.C.A., as he then was, found as follows -

*"Considering clause 25 (1) (a), (b) and (c) together, whereas notice by the Architect/Supervising Officer is required in sub-clause (c), it is not required in sub-clause (a) and (b). Coming to clause 25(1) (d), it specifically provides for non-compliance with the provisions of the said clause 17(a) when the Architect/Supervising Officer may give the contractor notice by registered post or recorded delivery specifying the default etc.*

*After considering each of the sub-clauses (a) to (d) of clause 25(1), it is my considered opinion that they are disjunctive and not conjunctive. Exhibit "E" is the letter written by claimant terminating the contract (see p. 19 from line 35 to p. 29 lines 1 to 20 of the record of appeal.) The claimant stated that the time for the performance of the contract has expired and that it was an essential condition. The breach here is the failure to perform and I am unable to see the effect a notice from the Architect/Supervising Officer would have had when the time for performance had expired.*

*Having failed to perform the contract within the eighty-five weeks, I agree with the learned counsel for the appellant that this is a substantial breach which gave the appellant the right to automatic termination of the contract and treating the same as discharged. I too agree that courts take common sense view of "notices" and superfluities even though express or statutory requirements could be disregarded (see Rugby School (Governors) v. Tannahill (1935) 1 K.B. 87.*

*Having come to the conclusion that the contract was validly terminated, the claimant clearly in Exhibit "E" invoked the provisions of clause 25 (4). As the learned trial Judge found, the appellant acquires special interest in the vehicle if the contract is validly determined (sic) and I have so held."*

It then concluded -

*"As to the subsidiary issue raised in issue (e) of the questions for determination, there is no doubt that the judgment debtor accepted the*

*notice of termination. Having not challenged the irregularity in the notice terminating the contract by the appellant if at all, the judgment debtor has expressly or by conduct waived any defect and the claimant is entitled to rely on the waiver .....*

B *From the foregoing reasons the claimant/appellant's interest over the property takes precedence over that of the judgment creditor who cannot in any case levy execution over the said property. Accordingly, I allow the appeal. The judgment of the lower court is reversed."*

C **With the greatest respect to the Court of Appeal, I am unable to accept that the interpretation it placed on clause 25 (1) (a) - (d) of Exhibit A is well founded. The first point that ought to be stressed is the basic principle of law that it is not the duty of any court to make contracts for the parties. See Fakorede and others**  
D **v. A.G. of Western State (1972) 1 ALL N.L.R. 178 at 189. Contracts, as a rule, are made by the parties thereto who are bound by the terms thereof and the courts are always reluctant to read into a contract, terms on which there is no agreement. See Baba v.**  
E **N.C.A.T.C. (1991) 5 N.W.L.R. (Part 192) 388 at 413, O. H. M. B. v. Apugo and Sons Ltd (1990) 1 N.W.L.R. (Part 129) 652 at 627 and 656. Where however the language, terms, intent or words of any part or section of a written contract, document or enactment are**  
F **clear and unambiguous, they must be given their ordinary and actual meaning as such terms or words used best declare the intention of the parties unless, of course, this would lead to absurdity or be in conflict with some other provisions thereof. See Chief D. O. Ifezue v. Livinus Mbadugha and Another (1984) 5 S.C. 79 at 101,**  
G **Awolowo v. Shehu Shagari (1979) 6 - 9 S.C. 51, 1 B.W.A. v. Imaon Nig. Ltd and Another (1988) 3 N.W.L.R. 633, Adigun v. Governor or Oyo State (1987) 1 N.W.L.R. (Part 53) 678. Where the language and intent of an enactment or contract is apparent, a trial court must**  
H **not distort their meaning. See Osadebay v. A.G. Bendel State (1991) 1 N.W.L.R. (Part 169) 525 at 574, U.B.N. Ltd. v. Ozigi (1991) 2 N.W.L.R. (Part 176) 677 at 696. I will now examine Clause 25 (1) (a) - (d) of Exhibit A to determine whether the claimant properly determined the con-**

tractual relationship between it and the defendant/respondent.

It is plain to me that for the claimant to determine Exhibit A validly and lawfully, it must firstly establish that the defendant/judgment debtor/respondent committed one or more of the four defaults stipulated in Clause 25 (1) (a) - (d) thereof. Thereafter, it must, next proceed to B establish the two under-mentioned conditions, namely -

(1) That the Architect/Supervising Officer served the contractor/judgment debtor notice specifying the default and

(2) That the contrator/judgment debtor continued the default for fourteen days after the receipt of such notice or that it repeated the default at any other time thereafter, C

in which case the claimant may within ten days after such continuance or repetition, by notice forthwith determine the contract. This cannot be otherwise for the said Clause 25 (1) having clearly provided that if the contractor shall make default in any one or more of the four specific areas specified under sub-paragraphs (a) - (d), proceeded to state that in such event, the Architect may serve the prescribed notice on the contractor and that if the contractor either shall continue such default for 14 D days after the receipt of such notice or shall at any time thereafter repeat such default, then the employer may within 10 days after such continuance or repetition, by notice, determine the contract. E

The above preconditions laid down in Exhibit A for a valid determination of the contract are clear and unambiguous and ought not present any difficulty whatever. F **I entertain no doubt that the Court of Appeal, with very great respect, was clearly in error when it held that the above two conditions only governed sub-paragraph (d) of Clause 25 (1) but did not concern sub-paragraphs (a), (b) and (c) thereof.** G **In my view, this distinction invoked by the court below as between the defaults adumbrated in sub-paragraphs (a) - (c) of the one part and those indicated in sub-paragraph (d) of Clause 25 (1) is, with respect, unsupportable and without any justification whatever. The H learned trial Judge was, in my opinion entirely right when he held that the two conditions above-set out governed sub-paragraphs (a) - (d) of Clauses 25 (1) of Exhibit A.**

Neither the contents of Exhibit E nor any other evidence before the trial court disclosed that any of the said two conditions required for a proper determination of Exhibit A was complied with by the claimant. I entertain no doubt that Exhibit A was not validly determined in accordance with the procedure therein stipulated. In the circumstance, it seems to me that the claimant had no right of lien over the vehicle in issue at all material times under the contract, Exhibit A.

Learned counsel for the claimant then submitted, relying on the decision in Governors of Rugby School v. Tannahill, supra, that where the breach alleged is not capable of being remedied, it would be unnecessary to serve the notice stipulated in Exhibit A. According to learned counsel, the breach in this case was non-performance of the contract within eighty-five weeks as stipulated in Exhibit A for the completion of the building. The eighty-five weeks having run out, he submitted that nothing could be remedied by the service of any notice.

The above submission would appear to have found favour with the Court of Appeal when it observed thus -

*"Having failed to perform the contract within the eighty-five weeks, I agree with the learned counsel for the appellant that this is a substantial breach which gave the appellant the right to automatic termination of the contract and treating the same as discharged. I too agree that courts take common sense view of "notice" and superfluities even though express or statutory requirements could be disregarded (See Rugby School (Governors) v. Tannahill (1935) 1 K.B. 87."*

In this regard, a distinction must be drawn between the facts of the present case and those of the Governors of Rugby School. The latter case concerned a Landlord and Tenant claim. The relevant lease contained a covenant by the tenant not to use the demised premises for an immoral purpose and conferred on the landlord a right of re-entry for breach of the covenant by the tenant. The tenant was convicted of permitting the premises to be used as a brothel whereupon the landlord served her with a notice pursuant to Section 146 (1) (a) of the Law of Property Act, 1925 of the United Kingdom complaining of this offence as a breach of covenant and giving her notice to quit in exercise of his

right of re-entry. The notice did not, inter alia, call on the tenant to remedy the breach as stipulated by section 146 (1) of the Act. Since the date of her conviction, however, the tenant had not used the premises for any immoral purpose. It was held, and quite rightly in my view, that the particular breach in issue in that case was incapable of remedy and there was, therefore, no obligation upon the landlord to require the tenant to remedy it as prescribed by that Act. Said Greer, L. J. on the issue -

*"The first question is whether the particular breach complained of is capable of remedy. .... In my judgment, the learned Judge was quite right in coming to the conclusion that the particular breach in question was incapable of remedy. There is a great deal to be said for the view that there may be cases in which it would be right to say that the immediate ceasing of that which is complained of for a reasonable time, together with an undertaking that there will be no future breaches, might be a sufficient remedy, and therefore that of such cases it might be said that the breach is capable of remedy. This particular breach, however, namely, permitting the house to be conducted as a house of ill-fame, or, in otherwords, as a brothel - is a breach which, in my judgment was not remedied merely by ceasing so to conduct the house. The complaint about the breach was of something which had taken place in the past, and the mere fact that for the future, after receiving the notice, the tenant did not commit any further breaches of the same kind is not a remedy within the meaning of sub-section (1) (b) I cannot conceive how a breach of this sort could be remedied, because the result of it is that for a considerable period a house which was the property of a very respectable body, the Governors of Rugby School, has been used by the tenant as a brothel, and the unpleasantness and the effect on the property, and, possibly, on property that the landlords might have in the neighbourhood, was such that even a money payment, together with ceasing of the improper conduct of the house could not be a remedy for the breach of which complaint was made. I think that the breach in this particular case was incapable of remedy, and therefore that it was unnecessary to comply with sub-section (1) (b) of Section 146 by requiring in the notice the lessee to remedy the breach."*

In the present case, however, it is the case for the claimant that the contract was validly determined following breaches in contravention of the provisions of Clauses 25 (1) (a) and (b) of Exhibit A. These clauses concern defaults on the part of the contractor in the following

B circumstances, namely -

(a) *If without reasonable cause it wholly suspends the carrying out of the works before completion thereof, or*

(b) *If he fails to proceed regularly and diligently with the works.*

C Clearly any breaches committed under the said clauses can by no stretch of the imagination be described as incapable of remedy. Where without reasonable cause, work on the project was wholly suspended or the contractor failed to proceed regularly and diligently with the works, such a breach, without doubt, was easily capable of remedy by the im-

D mediate resumption of works at the site by the contractor. **In the circumstances of the present case and in view of the fact that the particular breaches complained of were not incapable of remedy, it would be therefore wrong to suggest that there was no obligation**

E **on the University to serve the prescribed notice upon the contractor requiring it to remedy the alleged breaches pursuant to the provisions of Clause 25 (1) of Exhibit A. Parties are bound by their agreement and a determination of the contract without complying**

F **with the provisions of Clause 25 (1) of Exhibit A cannot be said to be valid.**

There is also the finding by the Court of Appeal that the breach in the present case was failure by the contractor to complete the project within 85 weeks provided in Exhibit A. Said the court -

G "*The claimant stated that the time for the performance of the contract had expired and that it was an essential condition. The breach here is the failure to perform and I am unable to see the effect a notice from the Architect/Supervising Officer would have had when the time for*

H *performance had expired.*"

With profound respect to the Court of Appeal, the case for the University was not that the breach complained of consisted in the failure by the contractor to execute the project to completion within the 85



weeks stipulated in Exhibit A. It was not that the contract was determined because the contractor failed to complete the job within 85 weeks. Its case was clear and precise, namely, that the University "on the 28th December, 1983 determined the agreement under Clause 25 (1) (a) and/or (b)" of Exhibit A and "relying on Clause 25 (4) of Exhibit A, seized all the plants, machines and/or equipment found on the site, in order to use them in completing the project". This was clearly stated in paragraph O:01 of the claimant's brief of argument. And as I have already indicated, Clause 25 (1) (a) and/or (b) are clearly capable of remedy and it was erroneous on the part of the University to have failed to serve the required notice prescribed in Exhibit A on the contractor.

**Having found that the agreement in issue was not validly determined in terms of Exhibit A, it is clear to me that having regard to the circumstances of this case, the claimant's claim to lien was premature and had not accrued as provided for under the contract. In this regard it ought to be borne in mind that contract supercedes lien and limits the right of the person claiming under a contract to those for which provisions have been made in such contract. See Fister v. Smith (1874) 4 A.C. 1. Accordingly the right of the University to the lien it claimed must be governed by the provisions of the contract, Exhibit A and not by the incidents of a common law lien. Under the said provisions the relevant contract was not validly determined hence the University's right to lien did not arise. I therefore entertain no doubt that the claimant under Exhibit A had no lien on the vehicle in issue which at all material times was the property of the defendant/judgment debtor/respondent and that consequently the vehicle was liable to attachment by the appellant.** Issues 2 and 3 are therefore resolved against the respondent.

There is finally the issue of waiver. The Court of Appeal had held that the acceptance or receipt by the defendant/judgment debtor/respondent of the notice of determination of the contract without challenging its irregularity amounted in law to a waiver of any defect in such determination. Again, with respect, **I am unable to accept that mere**

acceptance or receipt of the notice of determination of the contract by the defendant/judgment debtor/respondent is per se conclusive evidence of waiver of any irregularity in the notice. Put simply, waiver is defined as the abandonment of a right. To amount to waiver, express or implied, two elements must co-exist, namely -

(i) *The party against whom the doctrine is raised must have knowledge or be aware of the act or omission which constitutes the waiver and*

(ii) *He must do some unequivocal act adopting or recognising the act or omission.*

So, in Matthews v. Smallwood (1910) 1 Ch. 777 at 786 it was held that a right to re-enter under a lease is not waived by the lessor unless, knowing the facts on which the right arises, he does something unequivocal which recognises the continuance of the lease. See too Fuller's Theatre and Vaudeville Co. Ltd. v. Rofo (1923) A.C. 435 (P. C.) and Ariori and others v. Elemo and others (1983) 14 N.S.C.C. 1 at 20. And I ask myself whether these two elements were established in this case by the claimant against the defendant/judgment debtor/respondent. I think not. In my view, the receipt or acceptance of the notice of determination of the contract by the contractor, although remotely indicative, at best, of the fact that it was probably aware of the irregularity, did not establish the doing of any unequivocal act by the said contractor accepting or endorsing the situation as immaterial. I am therefore of the opinion that no waiver applied against the plaintiff/appellant or the said defendant/judgment debtor/respondent in this case and that the basis of the case of the plaintiff/appellant before the two courts below had infact always been that the contract, Exhibit A, was not validly determined. Issue three must therefore be resolved in favour of the plaintiff/appellant.

In the final result, this appeal succeeds and it is hereby allowed. The judgment and orders of the court below are set aside and the decision of the trial court is hereby restored. There will be costs to the plaintiff/appellant against the claimant/respondent which I assess and fix at N300.00 in the court below and N10,000.00 in this court.

**BELGORE JSC**

I read in advance the judgment of my learned brother Iguh, JSC. I agree with his conclusion and the reasons upon which it is based that this appeal has merit. For the same reasons I also allow the appeal and make the same order as to costs.

B

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**OGUNDARE JSC**

I agree entirely with the reasonings and conclusion reached by my learned brother Iguh JSC in his judgment just delivered. He has, in his characteristic lucidity, dealt with all the issues arising in this appeal. No useful purpose will be gained by my going over these issues again.

I too allow this appeal, set aside the judgment of the Court below and restore that of the trial High Court. I abide by the order for costs made in the judgment of my brother Iguh JSC.

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**MOHAMMED JSC**

I have had the privilege of reading the judgment just read by my learned brother, Iguh, JSC, in draft and for the reasons given in that judgment I agree to allow the appeal. I have nothing more to add.

The appeal is allowed. The judgment of the Court of Appeal is hereby set aside and the judgment of the trial High Court is hereby restored. I also award N10,000.00 costs in favour of the appellant.

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**ONU JSC**

I was privileged to read before now the judgment just delivered by my learned brother Iguh, JSC. I am in entire agreement with him that this appeal succeeds and it is allowed by me.

I have nothing further to add thereto except to adopt the same as mine. I subscribe to the consequential orders made therein including the costs awarded.

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