

SUPREME COURT OF NIGERIA
3RD DECEMBER, 1999. SC. 261/1993
CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE, S. U.
ONU, A. I. IGUH, E. O. AYoola, JJSC

SAEBY JERNSTOBERI & MASKINFABRIC A/S APPELLANT
AND
OLAOGUN ENTERPRISES LTD. RESPONDENT

***ACTIONS** - Cause of action - Contract of sale - Payment by instalments - Delivery of the entire goods - Provision that buyer shall pay by instalments - Cause of action for the purchase price - Does not accrue immediately upon delivery.*

***ACTIONS** - Interest - Claim for - Pleadings - How to plead a claim for interest.*

***APPEALS** - Dismissal of claim - For want of proof - Respondent's failure to appeal - When a ground for sustaining lower court's judgment.*

***APPEALS** - Issue - Argument - Where the whole tenor of argument was not directed at the issue formulated - But to an issue which never arose - There is no acceptable argument in support of the issue formulated - To justify interfering with the award of the Court of Appeal.*

***BILLS OF EXCHANGE** - Limitation of a actions - Bill - Drawn in a set - Time begins to run from the maturity of the set treated as one bill.*

***BILLS OF EXCHANGE** - Cause of action - Sale of goods - Action founded on the bills - When a cause of action will accrue.*

***COMPANY LAW** - Actions - Foreign corporation - Duly created according to the laws of a foreign state recognized by Nigeria - May sue or be sued in its corporate name.*

COURTS - *Appeal - Costs - When an appeal is partially successful - What order of costs an appellate court may make.*

JUDGMENTS - *Foreign currency - Award - When courts in Nigeria can make award in foreign currency - And the conversion rate of the foreign currency - For the purposes of the enforcement of the judgment.*

LIMITATION OF ACTIONS - *Sale of goods - Contract - Where the action was founded on a contract of sale - Giving rise to a single breach when the purchase price was unpaid - The principle in Ijale case is not applicable - And it is wrong to conclude that any part of the debt is statute-barred.*

SALE OF GOODS - *Cause of action - Acceleration clause - In a contract of sale - Where the price is to be paid by instalments - When the cause of action accrues.*

SALE OF GOODS - *Cause of action - Contract of sale - Where the Price is to be paid by instalments - And there is no acceleration clause - When a cause of action accrues in respect of each instalment that has fallen into arrears.*

SUPREME COURT - *Concurrent findings of fact - Of two lower courts - Attitude of the Supreme Court to such findings.*

FACTS

The plaintiff/appellant instituted an action in the High Court of Oyo State against the defendant/respondent claiming the sum of N235,145.00 (DRK 470,290.00) being the purchase price of the machine and spare parts supplied to the defendant/respondent and interest thereon at the rate of 18% per annum calculated at compound interest from 1982 till judgment and thereafter at the rate of 6% on the amount of judgment debt until payment. The respondent on the other hand counter-claimed for damages for breach of contract and interest on any amount

awarded as damages. The respondent is a company registered in Nigeria which engaged in large scale agriculture. In 1979 it placed an order for a feed - Mill machine as well as its spare parts with the appellant, a limited liability company with registered office in Copenhagen, Denmark, which at all material times was carrying on the business of manufacturing and marketing of agricultural machines or equipment. The appellant manufactured and delivered to the respondent the machines in accordance with the respondent's order. The total price of the machines and the spare parts was DKR 485, 336.00 payable instalmentally, the first payment of 15% of the purchase price being due and payable on the receipt of the shipping document while the balance of 85% was payable by six consecutive half yearly draft with 8% interest worked into each of the instalments. Upon this arrangement, the machine and spare parts were to be fully paid for within thirty - six months from the date of the shipment. The respondent defaulted in the payment as agreed, alleging that the machine was defective and that the spare parts it had ordered were not delivered. In consequence of the default, the appellant sued the respondent claiming as aforesaid.

At the High Court, counsel on behalf of the respondent contended that the cause of action arose in 1979 and that the action commenced in June, 1987 was statute-barred. The learned trial judge at the conclusion of hearing held that although bills of exchange is the mode of settling money that may be outstanding the transaction is rooted primarily in contract, and that the last of the drafts drawn in payment of the purchase price being due in 1982, the action commenced by a writ issued on 10th June, 1987 was not statute -barred. He therefore entered judgment in favour of the appellant. The respondents dissatisfied appealed to the Court of Appeal. The appeal was partially successful. The Court of Appeal held that four of the drafts were statute-barred and in the result substantially reduced the award made to the appellant by the High Court, while the appeal was dismissed in regard to other aspects thereof. The appellant has now appeal to the Supreme Court while the respondent on the other hand lodged a cross-appeal against the dismissal of the rest of his appeal by the Court of Appeal.

ISSUES FOR DETERMINATION

1. *Whether the Court of Appeal was right in holding that the action was statute-barred except in regard to the amount of the 5th and 6th drafts.*

B 2. *Whether, had the Court of Appeal resolved the limitation question against the respondent, it would have been justified to enter judgment for the appellant in the entire sum claimed.*

C 3. *Whether the appellant, a company registered in Denmark but not in Nigeria, can sue in Nigeria in its corporate name.*

4. *Whether it was right for the Court of Appeal to have denied the appellant of the costs of the appeal.*

D **HELD** (Unanimously dismissing the appeal and the cross-appeal per lead judgment of **AYOOLA JSC**)

Bills of Exchange - Limitation of actions

E 1. One consequence of section 71(1) which provides that: "Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.", is that, normally, and subject to particular rules of limitation that may apply to bills, the set has one date, and not several dates, of maturity and that time begins to run from the maturity of the set treated as one bill.

F (p. 2895 H)

Limitation of actions - Sale of goods - Contract

G 2. The appellant's case in the High Court, as held both by the High Court and the Court of Appeal, being that the claim was founded not on the bills but on a contract, it follows that there was a single contract, namely one of sale of goods giving occasion to a single breach when the purchase price was unpaid, and not like in the Ijale Case where there were several collateral transactions giving rise to several causes of action.

H In my judgment, the Court of Appeal fell into error in the view it held that the principle of the Ijale case applied. Where, as in this case, the action is based on the contract of sale, the pleadings of both parties cannot be sufficiently focused on the bills, to have the issues as would be

relevant to a claim on the bills sufficiently defined or to provide sufficient material to go by to determine the limitation issue in relation to bills. Whichever way one looks at the matter, the Court of Appeal was wrong in its conclusion that any part of the debt was statute-barred.

(pp. 2897 C/2899 B)

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Cause of action - Contract of sale

3. When the terms of a contract of sale provide that the entire quantity of goods is to be delivered to the buyer, but that the buyer shall pay the price of the goods by instalments, a cause of action for the purchase price does not accrue immediately upon delivery of the goods as it would have, had the agreement been silent as to the time of payment of the purchase price, the true legal position has been well put in Benjamin's Sale of Goods (1974 Ed) para 721 thus:

"The terms of the contract of sale may provide that the entire quantity of goods is to be delivered to the buyer, but that the buyer shall pay the price of the goods by instalments. In such a case, credit is granted to the buyer protanto until each instalment falls due." (p. 2897 E)

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Course of action - Acceleration clause

4. It seems evident that where there is acceleration clause, the cause of action for the entire balance for the time being owing, accrues from the expiration of the period of time any instalment is agreed to be in arrears.

(p. 2898 A)

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Contract of sale - Where the price is to be paid by instalments

5. In this case, there is no acceleration clause and the question is whether a cause of action accrues in respect of each instalment that has fallen into arrears and from the date of the falling into arrears? The matter seems capable of two views. One is that upon each instalment falling due, a debt is credited as to that instalment which is enforceable immediately by action. Another is that the amount of the instalment in respect of which a default has been made could be rolled into the next to swell the amount of the next instalment, and subsequently, until at the end of the

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period agreed for the payment of all instalments the seller knows and can sue for the balance of the purchase price then remaining unpaid. In the former case, where, as in the present case, the buyer is permitted to pay the purchase price by six equal instalments six separate obligations to pay are incurred, each accruing at the time each instalment falls due and enforceable by the number of actions as there are defaults. In the latter case, the obligation to pay the purchase price remains a single obligation enforceable, in order not to be caught by the Limitation Law, within six years of the default in paying the whole balance due at the time fixed for the payment of the last instalment. In the latter case, where there is no acceleration clause, the whole balance owing becomes due and payable at the end of the period. The latter position which, for one thing, is tidier and more consistent with the existence of one single obligation to pay the purchase price created by the contract of sale, was, in effect, rightly chosen by the trial judge. Indulgence granted to the buyer, albeit by the agreement of the parties, to pay by instalments should not be used to obliterate the fact that there was that single obligation. (p. 2898 B)

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Action founded on the bills

6. The position would have been different had the action been instituted on the bills. In that case, in respect of each bill, the rule for computation of limitation would have applied and it would have been necessary to find out when in respect of each bill a cause of action first accrued to the holder or drawer of each of the bills against the respondent. (p. 2898 H)

Concurrent findings - Attitude of the Supreme Court

7. This court will not ordinarily disturb concurrent findings of fact of two lower courts unless it is perverse. It is manifest that that proposition of law does not preclude the intervention of this court where it is manifest that the Court of Appeal has misconceived the evidence from which it came to the conclusion of fact as the court of trial had done. In this case, it is not difficult to conclude that the two lower courts did misconceive the evidence. (p. 2900 G)

Appeals - Dismissal of claim

8. While it would have been appropriate to dismiss the appellant's claim in its entirety by reason of its failure to prove the indebtedness of the respondent, the respondent having not appealed against the award of the amount of two instalments, judgment for the appellant in respect of those two instalments would not be disturbed. The result is that the judgment of the Court of Appeal in regard to the liability of the appellant to pay the balance of purchase price of the goods would be affirmed, albeit, for reasons different from those given by the Court of Appeal. (p. 2902 A) C

Appeals - Issue - Argument

9. Although the appellant had formulated the second issue on this appeal thus: "Was the Court of Appeal correct in holding that interest at the rate of 8% per annum in addition to the judgment debt is wrongful.", the whole tenor of the appellant's argument on that issue was not directed at that issue but to an issue which never arose on the appeal to the Court of Appeal. In the result, there was no acceptable argument in support of the second issue formulated by the appellant to justify any conclusion that the Court of Appeal had erred in setting aside the award of interest at 8% per annum on the amount claimed up to the date of judgment. (p. 2903 B) D E

Interest - Claim

10. It may well be observed that pleading requirement in regard to a claim of interest has been stated in several cases. In Jos Steel Rolling Co Ltd v. Bernestieli (Nig) Ltd [1985] 8 NWLR (Part 412) 201 at p.209 it was stated thus by the Court of Appeal: F

"For a claim of interest to properly exist for determination in a court of law, it must be stated in the endorsement of the claims on the Writ of Summons or in the Statement of Claim whether the claim of interest is based on contract or statute and the ground upon which the claim is based." G H

Also, the law is now clear that a claim for interest must be specifically pleaded. Some of the pleading requirements may be summarized as follows: If the claim for interest is under a contract, express or

implied or under mercantile usage, the relevant contractual term or any other relevant facts and matters relied upon for the entitlement must be specifically pleaded. If the plaintiff claims interest under the equitable jurisdiction of the court, he must plead all the relevant facts and matters
B relied upon to support such claim (See Bullen and Leake and Jacobs, (13th Ed.) pp 567-8). It is evident that the appellant had completely ignored these requirements. (p. 2903 D)

Judgments - Foreign currency

C 11. If there was any doubt that judgment can now be entered in foreign currency as the Court of Appeal had done, the opinion of Ogundare, JSC, in Koya v. Untied Bank for Africa Ltd [1997] 1 NWLR (Pt.481) 251,269-289 should, in my opinion, lay such doubt to rest. After a re-
D view of several local and English authorities he said at p.289:

*"It is my respectful view that courts in this country can claim jurisdiction to entertain and determine cases where sums in foreign currencies are claimed. The old rule in England, as well as in Nigeria, are
E judge-made and in the light of present day circumstances of extensive international commercial relationships, that rule should give way to a new rule as now in England so that the difficulties hitherto experienced in enforcing such judgments no longer apply."*

F The English authorities to the effect are now legion. Some of them are: Miliangos v. George Frank (Textiles) Ltd [1975] 3 ALL E.R. 801 (HL); Barclays Bank International Ltd v. Levin Brothers (Bradford) Ltd [1976] 3 ALL ER 900; The Despina R. [1979] 1 ALL ER 421. The
G present practice is that where an award is made in foreign currency, the judgment will be for the payment of the amount in foreign currency or its naira equivalent converted for the purposes of the enforcement of the judgment at the time of the payment. In my judgment, the Court of
H Appeal came to a correct decision when it held that the appellant was bound to settle the debt at the prevailing rate as and when it is convenient to it to do so, and that it would be unjust and inequitable to allow it to resile from its agreement to pay for the goods in Danish Kroner.
(p. 2905 C)

Company law - Actions - Foreign corporation

12. The principle of law that a foreign corporation, duly created according to the laws of a foreign state recognized by Nigeria, may sue or be sued in its corporate name in our courts is part of the common law. The suggestion that a foreign company duly incorporated outside Nigeria should first be registered in Nigeria under the provisions of the Companies Act, 1968 (which was then the applicable statute) dealing with registration of foreign companies, notwithstanding that it does not fall into the category of "foreign company" as defined by that Act, is too preposterous and patently inimical to international trade to merit any prolonged or serious consideration. It suffices to say that the appellant company which was admitted by the respondent to be a limited liability company with its registered office in Copenhagen properly sued in its corporate name. (p. 2906 C) B
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Courts - Appeals - Costs

13. When an appeal is partially successful, it becomes a matter purely at the discretion of the appellate court whether or not to order costs or what order of costs to make. In such a case, the principle that a successful party may not be deprived of his costs unless for good reasons, would have less force because, technically, the two parties could be described as "successful parties". (p. 2907 B) E
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NOTABLE POINT OF INTEREST

AYOOLA JSC

1. Legal practitioners - Comment by court about conduct of counsel G

It is evident that the apparently castigatory remark of the Court of Appeal that the counsel for the respondent had deliberately misled the court was utterly unjustifiable and should not have been made. It needs to be said that while, in appropriate cases, a court may comment on the conduct of counsel in the conduct of a case before it, a comment which impugns the probity of counsel in the conduct of the case should not be lightly made and should not be made unless the probability of such conduct is clear beyond peradventure. (p. 2901 G) H

REPRESENTATION

Chief Kayode Ogunmekan, Esq. with Niyi Omodara, Esq. for appellant
Respondent absent

CASES REFERRED TO

- B Jos Steel Rolling Co Ltd v. Bernestieli (Nig) Ltd [1985] 8 NWLR (Part 412) 201 at p.209
Koya v. Untied Bank for Africa Ltd [1997] 1 NWLR (Pt.481) 251,269-289
- C Miliangos v. George Frank (Textiles) Ltd [1975] 3 ALL E.R. 801 (HL)
Barclays Bank International Ltd v. Levin Brothers (Bradford) Ltd [1976] 3 ALL ER 900
The Despina R. [1979] 1 ALL ER 421
- D Ijale v. A.G Leventis & Co. Ltd (1961) ALL NLR 762, 771

STATUTE REFERRED TO

Bills of Exchange Act (Cap 35) Laws of the Fed of Nigeria 1990; s. 71(1)

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LEAD JUDGMENT BY AYOOLA.JSC

- There are two appeals before us in this matter. One is by Saeby Jernstoberi Maskinfabric A/S. (the plaintiff in the High Court, respondent in the Court of Appeal, and now, the appellant in this appeal) from the
- F decision of the Court of Appeal whereby the appeal of Olaogun Enterprises Ltd. (the defendant in the High Court, appellant in the Court of Appeal and respondent in this appeal,) to that court from the decision of the High Court of Oyo State was partial allowed and the amount in which
- G the respondent was adjudged liable to pay to the respondent was substantially reduced to DKR 159,514.00 from DKR 470,290.00, while the appeal was dismissed in regard to other aspects thereof.. The other is a cross-appeal by the respondent from the dismissal of the rest of his ap-
- H peal.

By the time the appeal and the cross-appeal reached this court, the facts have been fairly settled. It is now possible to state them briefly, drawing largely from the judgment of the Court of Appeal. The respon-

dent is a company registered in Nigeria which engaged in large scale agriculture. In 1979 it placed an order for a feed-mill machine as well as its spare parts with the appellant, a limited liability company with registered office in Copenhagen, Denmark, which at all material times was carrying on the business of manufacturing and marketing of agricultural machines or equipment. The appellant manufactured and delivered to the respondent the machines in accordance with the respondent's order. The total price of the machines and the spare parts was DKR 485,336.00 payable instalmentally, the first payment of 15% of the purchase price being due and payable on the receipt of the shipping document while the balance of 85% was payable by six consecutive half yearly draft with 8% interest worked into each of the installments. Upon this arrangement, the machine and spare parts were to be fully paid for within thirty-six months from the date of the shipment. The respondent defaulted in the payment as agreed, alleging that the machine was defective and that the spare parts it had ordered were not delivered. In consequence of the default, the appellant sued the respondent claiming the purchase price of the machine and spare parts and interest thereon at the rate of 18% per annum calculated at compound interest from 1982 till judgment and thereafter at the rate of 6% on the amount of judgment debt until payment. The respondent, on the other hand, counterclaimed for damages for breach of contract and interest on any amount awarded as damages.

At the High court, counsel on behalf of the respondent contended that the cause of action arose in 1979 and that the action commenced in June 1989 was statute barred. The trial judge (Aderemi, J. as he then was) rightly appreciated that the decisive question was when cause of action accrue? Having held that: "Although bills of exchange is the mode of settling money that they may be outstanding the transaction is rooted primarily in contract," he held that the last of the drafts drawn in payment of the purchase price being due in 1982, the action commenced by a writ issued on 10th June, 1987 was not statute-barred. In the event, the entered judgment in favour of the appellant in the sum of DKR 470,290.00 being the amount of bills of exchange issued by the respondent in favour of the appellant and which were dishonoured. On appeal to

the Court of appeal, it was contended by counsel on behalf of the respondent that the High court was in error.

In the Court of Appeal, counsel for the appellant, placing reliance on section 71(1) of the Bills of Exchange Act (Cap 35 LFN, 1990), repeated the argument that it was only when the last draft became due in 1982 that the cause of action accrued. Counsel for the respondent, for his part, argued that where under the terms of a contract, payment becomes due and payable from time to time, a cause of action in respect of each payment accrues on its due date and as regards that particulars instalment time begins to run from that date against the party entitled to receive it. For that submissions he relied on the case of Ijale v. A.G. Leventis & Co. Ltd (1961) ALL NLR 762, 771. Salami JCA delivering the leading judgment of the Court of Appeal with which Ogwuegbu, JCA (as he then was) and Muhammad JCA agreed, held that section 71(1) of the Bills of Exchange Act applied only if only one bill was involved and not when, as in the present transaction, several bills have been drawn. Having so held, he accepted the proposition of law advanced by counsel for the respondent and held that four of the drafts were caught by the limitation. He put his views clearly thus:

"The claim of the respondent is founded on contract and not on bill of exchange. In other words how much of the respondent's claim is statute bared by Limitation Law Cap 64 of the Laws of Oyo State of Nigeria, 1978. Section 4 of the said law reads as follows:-

4(1) The following action shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

(a) action founded on simple contract or on tort;

The six evenly divided six monthly instalmental payment would be respectively due and payable on or about (a) 4th July, 1979; (b) 4th January, 1980; (c) 4th July, 1980; (d) 4th January; 1981; (e) 4th July, 1981 and (f) 4th January, 1982. The writ of summons commencing the action was taken out on 10th June, 1987. By arithmetical calculation, it seems to me that all six instalments except the 5th and 6th are statute barred. Since the instrument (sic: instruments) are issued for the same

sum of money the respondent is entitled to judgment in the sum of DKR 79,757.00 for which exhibit 11 was drawn multiplied by two instruments which give DKR 159,514.00."

In the result the Court of Appeal varied the judgment of the High Court by entering judgment for the appellant in that sum. B

At the forefront of the appellant's appeal is the question whether the Court of Appeal was right in holding that the action was statute-barred except in regard to the amount of the 5th and 6th drafts. The appellant in a two-pronged approach argued first, that since the bills were drawn in a set, time did not begin to run against the holder of the bill until the last part of the set is presented and dishonoured; and, secondly, that since the respondent was sued a single contract and not on the Bills of Exchange, the respondent was in breach of that contract by failing to pay for the equipment. The respondent's response to these submissions is, somehow, wanting in depth and clarity when it was argued in the respondent's brief of argument that the bills were not drawn in a set and that "the arrangement to settle the cost price of the bad feed-mill machinery or equipment itself is a contract which has its own express terms which must be seriously viewed by the parties in the light of the state of the law". C D E

At first, it appeared that great issues touching on Bills of Exchange would arise on this appeal. However, a closer look at the judgments of the high Court of the Court of Appeal reveals that the two courts were at one in holding that the basis of the appellant's claim was contract and not the drafts. Whatever hesitation I may have about the accuracy of such opinion. I must proceed, as the parties did, on the footing that it was the correct conclusion. Furthermore, the Court of Appeal held, as have been seen, that the drafts were separate bills rather than bills in a set. On this appeal, that view has not been challenged by the appellant. Section 71(1) of the Bills of Exchange Act which the appellant relied on as part of his argument would only be applicable if the bill in question is a bill in a set. **One consequence of section 71(1) which provides that: "Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other** F G H

parts, the whole of the parts constitute one bill.", is that, normally, and subject to particular rules of limitation that may apply to bills, the set has one date, and not several dates, of maturity and that time begins to run from the maturity of the set treated as one bill.

B It is misconceived to try to defeat the judgment of the Court of Appeal on this aspect of the matter by invoking the provisions of section 71(1) of the Act without first challenging the view of the Court below that the bills in question were not one bill but several bills. In the result any argument founded on section 71(1) of the Bill of Exchange Act must fail.

C However, there is an alternative argument proffered by the appellant which is that the claim being founded on contract, the breach would not occur and, therefore, the cause of action would not accrue, until the end of the period permitted by the appellant for the payment of
D the purchase price. The Court of Appeal, impressed by the case of Ijale v. Leventis & Co Ltd (supra) cited to it by learned counsel for the respondent, rejected the appellant's contention and held that a cause of action accrued on each of the instalments as they fell due. In the case of
E Ijele v Leventis & Co (supra), the plaintiff alleging that both by agreement with the defendants and according to the custom of the trade he was entitled throughout the period of his employment inter alia to (a) a monthly salary of \$25; (b) a commission in on each ton of graded produce delivered to the defendants and (c) the refund of storage and grad-
F ing expenses a fixed rates per ton of produce graded claimed balance of commission, balance of salary account and labour grading expenses along with several other claims. The defendant denied the claims and pleaded that the were barred by limitation. In regard to the commission, the
G plaintiff alleged that it was due as soon as the graded cocoa was delivered to the defendant and that he could have sued for it right away. In regard to the salary, he testified that it was due monthly and ought to be credited monthly to his account. The judgment of de Lestang. C.J. of the High
H Court of Lagos, in that case shows that the plaintiff argued that "although he was entitled to his salary monthly and to payment of both commission and for graded produce delivered immediately the deliveries were made and could have sued for those payments right away he did not know that

those payments had not been credited to his account until June 1953 he contends that time did not begin to run against him until the true position was known to him.", and that "the defendant on the other hand contend that the various causes of action arose from time to time as and when the payments were due."

In the Ijale case, it is evident that claims arising from several contracts were lumped together in the writ. Notwithstanding that claims relating to several causes of action could be brought in a single writ, each claim or cause of action remains separate. Care must be taken not to extend the principle in Ijale case beyond what was actually decided and its circumstances. Ijale case is not applicable to this case. **The appellant's case in the High Court, as held both by the High Court and the Court of Appeal, being that the claim was founded not on the bills but on a contract, it follows that there was a single contract, namely one of sale of goods giving occasion to a single breach when the purchase price was unpaid, and not like in the Ijale Case where there were several collateral transactions giving rise to several causes of action.**

What distinguished this case from the ordinary run of claims for purchase price of goods sold and delivered is the fact that the terms of the contract of sale provided that the respondent shall pay the price of the goods by instalments. **When the terms of a contract of sale provide that the entire quantity of goods is to be delivered to the buyer, but that the buyer shall pay the price of the goods by instalments, a cause of action for the purchase price does not accrue immediately upon delivery of the goods as it would have, had the agreement been silent as to the time of payment of the purchase price, the true legal position has been well put in Benjamin's Sale of Goods (1974 Ed) para 721 thus:**

"The terms of the contract of sale may provide that the entire quantity of goods is to be delivered to the buyer, but that the buyer shall pay the price of the goods by instalments. In such a case, credit is granted to the buyer protanto until each instalment falls due."

Also, as noted in note 89 to the same paragraph:

"Some agreements contain acceleration clauses under which, if any instalment is for a certain period of time in arrears the whole balance for the time being owing thereupon becomes due and payable."

It seems evident that where there is acceleration clause,
 B the cause of action for the entire balance for the time being owing, accrues from the expiration of the period of time any instalment is agreed to be in arrears. In this case, there is no acceleration clause and the question is whether a cause of action accrues in respect of
 C each instalment that has fallen into arrears and from the date of the falling into arrears? The matter seems capable of two views. One is that upon each instalment falling due, a debt is credited as to that instalment which is enforceable immediately by action. Another is that the amount of the instalment in respect of which a
 D default has been made could be rolled into the next to swell the amount of the next instalment, and subsequently, until at the end of the period agreed for the payment of all instalments the seller knows and can sue for the balance of the purchase price then re-
 E maining unpaid. In the former case, where, as in the present case, the buyer is permitted to pay the purchase price by six equal instalments six separate obligations to pay are incurred, each accruing at the time each instalment falls due and enforceable by the
 F number of actions as there are defaults. In the latter case, the obligation to pay the purchase price remains a single obligation enforceable, in order not to be caught by the Limitation Law, within six years of the default in paying the whole balance due at the time
 G fixed for the payment of the last instalment. In the latter case, where there is no acceleration clause, the whole balance owing be-
 comes due and payable at the end of the period. The latter position which, for one thing, is tidier and more consistent with the exist-
 H the contract of sale, was, in effect, rightly chosen by the trial judge. Indulgence granted to the buyer, albeit by the agreement of the parties, to pay by instalments should not be used to obliterate the fact that there was that single obligation. The position would have

been different had the action been instituted on the bills. In that case, in respect of each bill, the rule for computation of limitation would have applied and it would have been necessary to find out when in respect of each bill a cause of action first accrued to the holder or drawer of each of the bills against the respondent. B

In my judgment, the Court of Appeal fell into error in the view it held that the principle of the Ijale case applied. Where, as in this case, the action is based on the contract of sale, the pleadings of both parties cannot be sufficiently focused on the bills, to have the issues as would be relevant to a claim on the bills sufficiently defined or to provide sufficient material to go by to determine the limitation issue in relation to bills. Whichever way one looks at the matter, the Court of Appeal was wrong in its conclusion that any part of the debt was statute-barred. C D

The question, however, arises whether, had the Court of Appeal resolved the limitation question against the respondent, it would have been justified to enter judgment for the appellant in the entire sum claimed. At the trial, the respondent contended that the appellant was not entitled to judgment because there was no evidence as to how much the defendant was owing. The trial judge rejected that submission upon the view he held of the evidence that: "The 1st D/W - Mr. Bamgbose, under cross-examination agreed that the defendant made part-payment of 15% of the cost price of the goods ordered and supplied leaving a balance of 85% unpaid to the plaintiff", and that he contradicted himself when he said that to the best of his knowledge all the bills presented were paid in the Court of Appeal, it was contended that there was nothing on record to show that the witness admitted that a balance of 85% was yet unpaid and that the trial judge did not evaluate the evidence before him and came to a wrong conclusion. It was argued that : " The court ought to have considered even faintly the evidence of the plaintiffs only witness that there are 6 bills in all for the sum of DKR 412,536.00 H (see also plaintiff's statement of claim at paragraph (6) and that three bills were already settled by the defendant." Dealing with this submission, the Court of Appeal (per Salami, JCA) described it as misconceived or as

deliberately misleading. That court then proceeded to justify that conclusion thus:

"The finding of the learned trial Judge which the learned counsel for the appellant alleged was not supported by evidence reads as follows-

"The 1st d/w Mr. Bamgbose under cross examination agreed that the defendant made part payment of 15% of the cost price of the goods ordered and supplied leaving a balance of 85% not (sic) unpaid to the plaintiff,"

This piece of finding of the learned trial judge set out above is well founded it is supported by the testimony of the first defence witness under cross-examination. The relevant portion of his evidence is recited immediately hereunder.

" I agree that per exhibit 'A' the defendant made a part-payment of 15% cost price of the goods ordered. The balance of 85% was to be liquidated on bills of exchange - six in number."

Also in exhibit "C", the respondent wrote to the appellant thus-

'5. We have not yet received any instalments on the feed-mill in Sango-otta, and we ask you kindly to send to us copies of receipts for the 3 instalments already paid.

There is no evidence that the appellant produced the receipts requested for in exhibit "C" which was written on 23rd October, 1981."

On the respondent's cross-appeal, it was argued that the conclusions arrived at by the Court of Appeal as above could not supported. Court for the appellant, for his part, repeated the evidence which was quoted by the court below and argued that it justified the conclusion of the court below. He invoked the proposition of law that **this court will not ordinarily disturb concurrent findings of fact of two lower courts unless it is perverse.**

It is manifest that that proposition of law does not preclude the intervention of this court where it is manifest that the Court of Appeal has misconceived the evidence from which it came to the conclusion of fact as the court of trial had done.

In this case, it is not difficult to conclude that the two lower

courts did misconceive the evidence. On any reading of the respondent's witness's evidence wherein he repeated the material term of the contract between the parties as contained in exhibit "A", it cannot be said that he admitted that the term has not been fulfilled. Also it is difficult to accept that absence of evidence whether or not the respondent reacted to the appellant's request in exhibit C that it should send copies of the receipts for 3 instalments already paid, can be interpreted as evidence that the respondent had not paid those instalments. Had the Court of Appeal adverted to the rest of the evidence, it would not have drawn any inference adverse to the respondent from the absence of evidence in regard to those receipts. The clear evidence given on oath by the only witness for the appellant that: "I know that about three instalments have been paid by the defendant to the plaintiff.", totally denudes the request for receipts of any weight and should have led to a reasonable inference that subsequent to the request, the appellant must have been satisfied that payment of three instalment were made. Had the courts below adverted to inconsistency in the evidence adduced by the appellant through its only witness: that he could not remember how much is being owed by the respondent, that three instalments have been paid and that only two instalments have received out of six instalments, they could not have reasonably come to the conclusion, in the absence of any admission by the respondent, that any sum was outstanding and unpaid or that the appellant has proved its claim. I feel no hesitation in agreeing with the respondent that the Court of Appeal was clearly wrong in the view it held that the respondent's counsel misconceived the facts or in any way misled the court. Rather, it was that court which seemed to have, inexplicably, misconceived a rather straightforward piece of evidence and had come to an erroneous conclusion. It is evident that the apparently castigatory remark of the Court of Appeal that the counsel for the respondent had deliberately misled the court was utterly unjustifiable and should not have been made. It needs to be said that while, in appropriate cases, a court may comment on the conduct of counsel in the conduct of a case before it, a comment which impugns the probity of counsel in the conduct of the case should not be lightly made and should not be made unless the probability of such

conduct is clear beyond peradventure.

While it would have been appropriate to dismiss the appellant's claim in its entirety by reason of its failure to prove the indebtedness of the respondent, the respondent having not appealed against the award of the amount of two instalments, judgment for the appellant in respect of those two instalments would not be disturbed. The result is that the judgment of the Court of Appeal in regard to the liability of the appellant to pay the balance of purchase price of the goods would be affirmed, albeit, for reasons different from those given by the Court of Appeal.

Another issue raised by the appellant's appeal related to the rejection by the court of Appeal of the award of interest made by the trial judge. The appellant had claimed interest at the rate of 18% per annum calculated at compound interest rate from 1982 till judgment is given. Nothing that it was 8% interest and not 18% compound interest that the parties agreed to, the trial judge awarded to the appellant interest at the rate of 8% on the judgment sum from 1st July, 1982 to 31st May, 1988. On the appeal to the Court of Appeal, the award was set aside by the Court of Appeal which held that interest at the rate of 8% per cent in addition to the judgment debt was wrongful, as interest at 8% had already been calculated and embodied in the respective outstanding balance of the purchase price. The appellant on its appeal to this court, now argues that the Court of Appeal was in error. It was submitted by counsel for the appellant that the trial judge was in error in that the interest of 18% per annum on the judgment amount claimed was different from the contractual interest of 8% and was interest "that flows directly from failure of the respondent to pay the consideration due under the contract." It was argued that the whole idea of interest was to compensate the successful party who has been kept out of funds which he legitimately owned.

The response of the respondent to this argument, short and to the point, is that the appellant did not appeal to the Court of Appeal against the judgment of the High Court on the award of 8%. The appeal to this court is from the decision of the Court of Appeal. This court cannot lip-

frog the decision of the Court of Appeal and proceed to consider questions arising from an award or decision made by the High Court which the Court of Appeal had never been invited to disturb. The proper place to challenge the decision of the High Court to award 8% interest rather than 18% is the Court of Appeal. Any attempt to challenge that decision of the High Court for the first time in this court is evidently misconceived. **Although the appellant had formulated the second issue on this appeal thus: "Was the Court of Appeal correct in holding that interest at the rate of 8% per annum in addition to the judgment debt is wrongful,"** the whole tenor of the appellant's argument on that issue was not directed at that issue but to an issue which never arose on the appeal to the Court of Appeal. In the result, there was no acceptable argument in support of the second issue formulated by the appellant to justify any conclusion that the Court of Appeal had erred in setting aside the award of interest at 8% per annum on the amount claimed up to the date of judgment.

It may well be observed that pleading requirement in regard to a claim of interest has been stated in several cases. In Jos Steel Rolling Co Ltd v. Bernestieli (Nig) Ltd [1985] 8 NWLR (Part 412) 201 at p.209 it was stated thus by the Court of Appeal:

"For a claim of interest to properly exist for determination in a court of law, it must be stated in the endorsement of the claims on the Writ of Summons or in the Statement of Claim whether the claim of interest is based on contract or statute and the ground upon which the claim is based."

Also, the law is now clear that a claim for interest must be specifically pleaded. Some of the pleading requirements may be summarized as follows: If the claim for interest is under a contract, express or implied or under mercantile usage, the relevant contractual term or any other relevant facts and matters relied upon for the entitlement must be specifically pleaded. If the plaintiff claims interest under the equitable jurisdiction of the court, he must plead all the relevant facts and matters relied upon to support such claim (See Bullen and Leake and Jacobs, (13th Ed.) pp 567-8).

It is evident that the appellant had completely ignored these requirements.

I now turn to the second of the two branches of the respondent's cross appeal which touches on the currency of award and the conversion rate of that currency. The submissions were made in the cross-appellant's brief that the amount of Danish Kroner for which the respondent was found liable should have been calculated, in terms of section 72(d) of the Bills of Exchange Act, "according to the rate of exchange for sight drafts at the place of payment on the bill is payable," that the court below amplified the claim as endorsed on the writ rather than that contained in the statement of claim, and, that the pronouncement of the court below that the calculation should be at the rate of exchange at the time of payment was not canvassed on the appeal to that court and was not supported by the pleadings.

Counsel for the appellant, on the other hand, argued along the line of the leading judgment of the Court of Appeal. He argued that section 72(2) of the Bills of Exchange Act was not applicable since the respondent had defaulted in paying.

In my judgment section 72(2) of the Bill of Exchange Act is not applicable because the action, as held by the High Court and the Court of Appeal, was not founded on the bills. Section 72(2) of the Act is applicable where the liability of the defendant is based on the bill. It is thus not necessary to pronounce on the argument that the calculation of the amount due as prescribed in section 72(2) is applicable to cases of prompt payment only or not.

The appellant's claim as stated in the Statement of Claim is for the sum of "N235,145.00 (DRK 470,290.00) being amount represented on the Bills of Exchange issued by the Defendant....." The trial judge gave judgment on those terms. There was really no evidence as to the exchange rate at the time the action was instituted, but the judgment of the High Court contained an award both in the currency in which the parties contracted and in Naira, notwithstanding that there was no evidence as to the exchange rate of calculation. The Court of Appeal, for its part, without complicating its decision by including an award in Naira

entered judgment for the amount of Danish Kroner found due. It is to be noted that the trial judge had held that "the parties intend that Danish Kroner figures shall be the basis of payment and that the defendant would have to receive the official Naira equivalent exchange rate prevailing here at any time it chooses to pay the Danish Kroner figure agree on." This view of the trial judge had not been challenged on the appeal to the Court of Appeal where the contention of the respondent had been that there was no evidence of the prevailing rate of exchange at the time the action was filed.

If there was any doubt that judgment can now be entered in foreign currency as the Court of Appeal had done, the opinion of Ogunbare, JSC, in Koya v. Untied Bank for Africa Ltd [1997] 1 NWLR (Pt.481) 251,269-289 should, in my opinion, lay such doubt to rest. After a review of several local and English authorities he said at p.289:

"It is my respectful view that courts in this country can claim jurisdiction to entertain and determine cases where sums in foreign currencies are claimed. The old rule in England, as well as in Nigeria, are judge-made and in the light of present day circumstances of extensive international commercial relationships, that rule should give way to a new rule as now in England so that the difficulties hitherto experienced in enforcing such judgments no longer apply."

The English authorities to the effect are now legion. Some of them are: Miliangos v. George Frank (Textiles) Ltd [1975] 3 ALL E.R. 801 (HL); Barclays Bank International Ltd v. Levin Brothers (Bradford) Ltd [1976] 3 ALL ER 900; The Despina R. [1979] 1 ALL ER 421. The present practice is that where an award is made in foreign currency, the judgment will be for the payment of the amount in foreign currency or its naira equivalent converted for the purposes of the enforcement of the judgment at the time of the payment.

In my judgment, the Court of Appeal came to a correct decision when it held that the appellant was bound to settle the debt at the prevailing rate as and when it is convenient to it to do

so, and that it would be unjust and inequitable to allow it to resile from its agreement to pay for the goods in Danish Kroner.

The question whether the appellant, a company registered in Denmark but not in Nigeria, can sue in Nigeria in its corporate name was answered by the Court of Appeal in the affirmative. On this appeal, it was argued by counsel on behalf of the respondent that even though it may be a legal entity in its country of incorporation, it had no artificial personality in Nigeria since the Companies Act is silent on whether a company such as the appellant would be allowed to sue or not. That submission is misconceived. **The principle of law that a foreign corporation, duly created according to the laws of a foreign state recognized by Nigeria, may sue or be sued in its corporate name in our courts is part of the common law. The suggestion that a foreign company duly incorporated outside Nigeria should first be registered in Nigeria under the provisions of the Companies Act, 1968 (which was then the applicable statute) dealing with registration of foreign companies, notwithstanding that it does not fall into the category of "foreign company" as defined by that Act, is too preposterous and patently inimical to international trade to merit any prolonged or serious consideration. It suffices to say that the appellant company which was admitted by the respondent to be a limited liability company with its registered office in Copenhagen properly sued in its corporate name.**

Now that the question of liability has been settled, the question whether it was right for the Court of Appeal to have denied the appellant of the costs of the appeal can now be briefly addressed. In denying both parties of costs the court below noted that the appeal of the present respondents had succeeded partially and that the equity of the case was not on the side of the present respondent which was then appellant. This was why the court ordered that each side was to bear its costs. On this appeal, the appellant proceeded on the misconceived footing that it was the successful party on the appeal to the Court of Appeal, whereas that was not so. The respondent whose appeal to the Court of Appeal resulted in a substantial reduction in the award made to the appellant by the

High Court was the substantial victor. It is a matter of speculation why the court below had stated that the equity of the case was not on its side so as to deprive it of costs. It is probably because the respondent had deprived the appellant of its money for too long. Be that as it may, the respondent is not now complaining that it had been unjustly deprived of costs though it was the successful party in the appeal. **When an appeal is partially successful, it becomes a matter purely at the discretion of the appellate court whether or not to order costs or what order of costs to make. In such a case, the principle that a successful party may not be deprived of his costs unless for good reasons, would have less force because, technically, the two parties could be described as "successful parties".** I feel no hesitation in holding that this aspect of the appellant's appeal is clearly without substance.

For the reasons which I have given the appeal of the appellant and the respondent cross-appeal fail and they are dismissed. Each party should bear the costs of its appeal.

KARIBI-WHYTE JSC

I have read in draft the leading judgment in this appeal of my learned brother E. O. Ayoola JSC. I agree with his reasoning and conclusion. I agree that the Appellant's appeal and the Respondent's cross-appeal fail and should be dismissed. I accordingly hereby also dismiss them.

Each party to the appeal to bear the cost of his appeal.

OGUNDARE JSC

I have read in advance the judgment just delivered by my learned brother Ayoola JSC. I agree with his conclusion and the reasoning given thereto which I adopt as mine. I have nothing more to add. I abide by the order for costs made by him.

ONU JSC

I have had the privilege of a preview of the judgment of my learned brother, Ayoola, JSC. just delivered. I agree with his reasoning and conclusions that the appellant's appeal and the respondent's cross-appeal fail. They are accordingly dismissed with each party to bear the costs of its appeal.

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IGUH JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Ayoola, JSC and I agree entirely with the reasoning and conclusions therein.

D Accordingly, I, too, dismiss the appeal of the appellant and the respondent's cross-appeal. I abide by the order for costs made in the leading judgment.

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