

**SUPREME COURT OF NIGERIA**  
17TH DECEMBER, 1999. SC. 227/1993  
**CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,**  
**O. ACHIKE, U. A. KALGO, E. O. AYoola, JJSC**

1. NIGERIAN BANK FOR COMMERCE  
AND INDUSTRY ..... APPELLANTS  
2. FRANCIS OLUBAMIJI AREMU  
AND  
ALFIJIR (MINING) NIGERIA LTD. .... RESPONDENT

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***APPEALS** - Concurrent findings - Circumstances exist - That entitle the Supreme Court to interfere therewith - In this case.*

***COMPANY LAW** - Appeals - Receiver manager - 1st appellant was entitled to appoint a receiver - To manage respondent's business - And the issue of this appointment - Is not academic - As erroneously held by the Court of Appeal.*

***COMPANY LAW** - Receiver Manager - Must be impartial - And subjected to terms and conditions of his appointment.*

***COMPANY LAW** - Receiver manager - Being the agent of the borrower - Was authorized to do all that his principal could lawfully do - Which includes repayment of the loan extended to respondent.*

***COMPANY LAW** - Receiver - Hurried appointment of - Towards a creditor recovering a debt - Is not wrong - Provided fraud or serious irregularity is not committed.*

***COMPANY LAW** - Receiver - Irregularity - In the issue of receipt - Can be waived - In view of the circumstances of this case.*

***COMPANY LAW** - Receiver - Receipt and retention of N1.3 million*

*cheque - By the 1st respondent vide the appointed receiver - Is not wrongful - As to warrant liability in damages.*

**CONTRACTS** - *Loan - Lending agreement - Occurrence of events stated in the mortgage agreement - Makes the whole loan granted to respondent become payable - Amount due need not be proved in this case.*

**PRACTICE & PROCEDURE** - *Costs - Amount to be awarded - Where agreed upon by the parties - The court's discretion will be fettered.*

**PRACTICE & PROCEDURE** - *Costs - Discretion of Court to award - Must be exercised judicially and judiciously - And costs are not meant to be a bonus to the successful party.*

### **FACTS**

Vide an Investment and mortgage Agreement (Exhibit 14) executed by the parties, the 1st appellant/defendant loaned the sum of N1.1 million to the respondent for the purchase of a stone crushing machine for use in its stone crushing business. The loan was repayable in ten consecutive equal half yearly installments of N110,000.00 after a two year moratorium. First repayment should be due on 31-7-84. On the 16-2-84, respondent paid the sum of N15,000 on the interest and not on the principal sum. In 1984, the respondent hired out the stone crushing machine to another Company called Guffanti Nig. Ltd. with the knowledge of the 1st appellant for a period of 15 months-Guffanti refused to pay the sum of N975,000.00 agreed upon to the respondent at the end of the period and it damaged the crushing machine substantially. Respondent sued Guffanti and secured judgment in the sum of N2.3 million. In February, 1988, Guffanti was to pay the sum of N1.3 to respondent vide Court order towards securing a conditional stay of execution pending appeal.

By this time respondent has been in default and was in arrears of 8 installments of N110,000.00 payment to 1st appellant. By this breach the whole loan became due for repayment vide Exhibit 14. 1st appellant

hurriedly appointed the 2nd appellant as a receiver manager under the provisions of Exhibit 14 and then received the cheque of N1.3 million paid by Guffanti through the receiver manager. By various actions instituted by respondent and Guffanti, the Supreme Court ordered Guffanti to pay the N1.3 million to respondent which led to the return of the cheque by 1st appellant to the respondent. The period of 5 months had elapsed before the return of the cheque. Respondent filed an action before the Jos High Court against the appellants claiming inter alia, an order nullifying the purported appointment of the 2nd appellant as receiver/manager, declaration that 1st appellant's receipt and retention of the sum of N1.3 million belonging to respondent is wrongful and N2,275,000.00 as special damages.

The trial court entered judgment in favour of the respondent. Appellants' appeal to the court of Appeal was dismissed. Being aggrieved, appellants have further appealed to the Supreme Court.

#### **ISSUES FOR DETERMINATION**

*1. Whether the court below was right in holding, as it did, that the consideration of the nullity or otherwise of the appointment of the 2nd appellant by the 1st appellant as the Receiver/manager of the respondent company was an academic exercise which would serve no useful purpose in the determination of the appeal and thereby declined to deal with the same.*

*(2) Whether having presumed and/or conceded, as the court below did, that the appointment of the 2nd appellant by the 1st appellant as receiver/Manager of the respondent was valid, it was still open to the court below to hold, as it did, that the receipt and retention by the 1st defendant mortgagee of the cheque for N1.3m payable to respondent company in receivership was wrongful and that the defendants were liable in damages.*

*(3) Whether the award by the trial court of the sum of N5,521.00 as costs against the appellants was based on right principles.*

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

***Loan - Lending agreement***

1. Therefore the events in paragraphs (a) and (g) of clause 31 of Exhibit B 14 have happened in this case and I am of the view that the whole loan granted to the respondent by the 1st appellant had become due and payable. I am strengthened in this view by the findings of the learned trial Chief Judge when he said on page 155 of the record thus:-

C *"From the contents of Exhibit 3, 3A the repayment of the loan secured under Exhibit 14 have become due".*

It is pertinent to observe that throughout the trial there was no evidence to show that any payment was made by the respondent pursuant to Exhibit 14 except the payment of N15,00.00 on 26/2/88 as interest D on the loan. There was therefore no need for the 1st appellant to prove or show what amount was then due and payable following default by the respondent, since the whole amount fell due and payable under clause 31 of Exhibit 14. (p. 3165 B)

E

***1st appellant was entitled to appoint a receiver***

2. Therefore by clause 32 of Exhibit 14 as soon as the money secured by Exhibit 14 become immediately payable as happened in this case, the 1st F appellant as lender becomes empowered to appoint any person or persons as receiver or receivers or receiver manager of the respondent as Borrower. And by the said clause of Exhibit 14 the receiver or receiver manager so appointed has the power to manage the business and affairs of the respondent as agent of the respondent. By paragraph 7 of clause G 32, the receiver or receiver manager as the case may be, can apply any money received in the course of his duties as such, towards the satisfaction of all or any part thereof of the moneys secured by Exhibit 14. There is no doubt in my mind therefore that the appointment of the 2nd H appellant as receiver manager is very important to the 1st appellant in this case and the consideration of the validity or otherwise of the appointment would have greatly influenced the decision of the Court of Appeal in this matter. Therefore I am of the view that the consideration of the validity

or otherwise of the appointment of the 2nd appellant as receiver manager is of great importance in this appeal and it was wrong for the court of Appeal to refuse to do so referring to it as an academic exercise. (p. 3166 F)

B

***Receiver Manager - Must be impartial***

3. A receiver manager whether appointed by a court or under a deed of debenture as in this case, must be impartial and subjected to the terms and conditions of his appointment. And under the companies Act 1968 S.92 which is applicable to this case, secured creditors like the 1st appellant enjoy priority of the payment of their debts. See Jannasons Co. Ltd. v Uzor (1991) 4 NWLR (pt. 183) 1; Omojasola v Plison fisko (Nig) Ltd. (1990)5 NWLR (pt. 151) 434. It has not been shown by any evidence at the trial that the 2nd appellant has demonstrated any act of bias in favour of the 1st appellant or did anything in contravention of the duties assigned to him under clause 32. (p. 3171 E)

E

***Receiver manager - Being the agent of the borrower***

4. By being the agent of the respondent who was the borrower, the 2nd appellant by his appointment was authorized to do all what his principal the respondent could lawfully do. There is no dispute here that uptill the time of the appointment of the 2nd appellant as receiver manager, the respondent made no payment of any installments specified in Exhibit 14 by way of repayment of the loan, except N15,000.00 on accrued interest. Therefore the payment of the cheque in question, which was collected from Guffanti and belonging to the respondent, to the 1st appellant was proper and did not affect his relationship with or position as agent of, the respondent. (p. 3172 A)

G

***Receiver - Hurried appointment***

5. The learned trial Chief judge also observed on page 157 of the record that the appointment of the 2nd appellant as receiver manager "was hurriedly done for the sole purpose of justifying the receipt of the money in Exhibit C". From exhibit 11D, and the evidence of the 2nd appellant, his

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appointment as receiver manager was completed before the 4/2/88 when the cheque in question was demanded and collected by him. Exhibit 15 was the instrument of his appointment. It was dated 3rd February 1988 and registered in the Companies Registry on 4/2/88. There was nothing in my view, in a creditor making hurried arrangement to collect money from a debtor in settlement of a debt provided that there is no fraud or serious irregularity involved or committed. There is none here. (p.3172D)

***Receiver - Irregularity***

6. There is no doubt that the issue of the receipt Exhibit 11B by the 1st appellant to Guffanti for the receipt of the cheque may be termed irregular because normally, it was the receiver manager who should issue such receipt but looking at the nature and the circumstances of the whole case, the fact that the whole amount of the loan plus interest was still owing by the respondent and the cheque received was made in favour of the respondent, the apparent irregularity can be waived. (p. 3172 G)

***Receiver - Receipt and retention of N1.3 million cheque***

7. On the whole I do not think there is anything serious that could have adversely affected the validity of the appointment of the 2nd appellant as receiver manager, and therefore the receipt and retention of the cheque of N1.3million by the 1st appellant could not be wrongful, and I so hold. The Court of Appeal was wrong in my judgment, to affirm the decision of the trial court and found the 1st appellant liable in damages. I also answer issue 2 in the negative. (p. 3173 B)

***Costs - Discretion of court to award***

8. It is trite law that a court has an absolute and unfettered discretion to award or refuse costs in any particular case but that discretion must be exercised judicially and judiciously. Usually costs follow the events and are not awarded as a punitive measure nor are they designed or meant to be a bonus to the successful party. And although granted by way of an indemnity to a successful party, an unsuccessful party ought not to be damnified for no good reasons. See Adenaiya v Governor in Council

Western Region (1962) 1 SCNR 442. (p. 3173 E)

***Costs - Amount to be awarded***

9. However, even though a court has a discretion to award costs, the discretion of the court will be fettered and restrained where the parties themselves agree on the amount of costs to be awarded. In this case, it is abundantly clear from page 167 of the record that the person who represented the 1st appellant on 23/3/90 when the costs were awarded, Alhaji Lamus, raised no objection to the total amount of costs asked for by the respondent's counsel. The trial court accordingly granted the award as it is bound to do thereby awarding the N5,521.00 asked for. The learned trial Chief Judge was perfectly right to do so and the 1st appellant cannot be heard to complain. (p. 3173 G)

D

***Concurrent findings***

10. The consideration of this appeal turns out on the facts and evidence adduced at the trial and the interpretation placed on the relevant provisions of the Investment and Management Agreement entered into by the parties (Exhibit 14). I find therefore that there are circumstances in this appeal which entitles this court to interfere with the concurrent findings of fact of the trial court and Court of Appeal. Finally from all what I have said above, I find that there is merit in this appeal and I allow it. (p. 3174 E)

F

**NOTABLE POINTS OF INTEREST**

**KALGOJSC**

***1. Counter Claim - Ought to have been filed***

On the whole, it is my considered opinion that this was a proper case for the 1st appellant to file a counter-claim and if he did, the result might have been different, but he did not. (p. 3174 B)

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**OGWUEGBUJSC**

***2. Company in receivership - Has no right to deal with its assets***

In so far as the plaintiff's company was in receivership, the plaintiff

could not carry on any business. It ceased to have any right to deal with its assets from the very time the 2nd appellant became its Receiver/Manager. The power of the plaintiff to deal with its assets were suspended during that period and only the 2nd appellant could lawfully do so. It was disabled and could only act through the 2nd appellant and with that disability, the plaintiff could not count its gains or losses which would entitle him to institute an action for damages. (p. 3177 C)

### **REPRESENTATION**

Chief T.A. Ezeobi for the appellants.

Respondent absent - not represented.

### **CASES REFERRED TO**

- D Jannasons Co. Ltd. v Uzor (1991) 4 NWLR (pt. 183) 1  
Omojasola v Plison fisko (Nig) Ltd. (1990)5 NWLR (pt. 151) 434  
Adenaiya v Governor in Council Western Region (1962) 1 SCNR 442  
Rewane v Okotie-Eboh (1960) WRNLR 155 at 159  
E U.B.N. Ltd v Nwokolo (1995) 6 NWLR (pt. 400) 127 at 151-152

### **LEAD JUDGMENT KALGO JSC**

This is an appeal against the decision of the Court of Appeal, Jos Division, delivered on 23rd day of March, 1993. The respondents herein were the plaintiffs and the appellants were the defendants in the High Court of Justice, Jos.

The respondents, in their writ of summons and the further amended statement of claim claimed against the appellants, the following reliefs:-

- "(a) An order nullifying the purported appointment of the 2nd defendant as the Receiver/Manager of the plaintiff; AND in addition or alternatively.
- H (b) An order declaring that the receipt and retention of the sum of N1.3m belonging to the plaintiff by the 1st defendant is wrongful.
- (c) N2,275,000.00 as special damages;
- (d) N125,000.00 as general damages;

*(e) cost of this action".*

Pleading were then ordered, filed and exchanged between the parties. Thereafter the case proceeded to trial at the end of which the case was adjourned for judgement. In a fairly lengthy considered judgment, the learned chief Judge of Plateau State, Uloko C. J, delivered on 23rd of March, 1993, entered judgment in favour of the plaintiff/respondent in the following terms:-

*" 1 The appointment of the 2nd defendant as Receiver /Manager of the plaintiff is hereby nullified;*

*2. The receipt and retention by the 1st defendant of the sum of N1.3m belonging to the plaintiff is hereby declared to be wrongful.*

*3. The defendants shall pay the sum of N2,275,000.00 to the plaintiff as special damages.*

*4. Costs of N5,521.00 against the defendants in favour of the plaintiff".*

Dissatisfied with the judgement of the trial court, the appellants appealed to the court of Appeal in Jos, which heard the appeal and dismissed it with N800.00 costs in favour of the respondent. The appellants have now appealed to this court.

In this court, the parties filed and exchanged briefs of argument. The appellant in his brief formulated 4 issues for determination of the court in the appeal. They are:-

*"(1) Whether having regard to*

*(a) the plaintiff's claims in the writ of summons and the further amended statement of claim,*

*(b) the grounds on which the trial court based his judgment, and*

*(c) the issues in contest in the appeal; whether the court below was right in holding, as it did, that the consideration of the nullity or otherwise of the appointment of the 2nd appellant by the 1st appellant as the Receiver/manager of the respondent company was an academic exercise which would serve no useful purpose in the determination of the appeal and thereby declined to deal with the same.*

*(2) Whether having presumed and/or conceded, as the court below did, that the appointment of the 2nd appellant by the 1st appellant as*

receiver/Manager of the respondent was valid, it was still open to the court below to hold, as it did, that the receipt and retention by the 1st defendant mortgagee of the cheque for N1.3m payable to respondent company in receivership was wrongful and that the defendants were liable in damages.

B (3) Assuming, without at all conceding, that the 1st appellant wrongly received the said cheque for N1.3m and held the same for five (5) months whether the anticipatory and prospective loss of profits awarded in full by the trial proved according to law.

C (4) Whether the award by the trial court of the sum of N5,521.00 as costs against the appellants was based on right principles.

The respondent also set out 4 issues for determination in the brief as follows:-

D "1. Was the court of Appeal right in holding as it did that the consideration of the validity or otherwise of the appointment of the 2nd appellant by the 1st appellant as the Receiver/Manager of the Respondent company would serve no useful purpose in the determination of the appeal.

E 2. If the answer to issue No.1 above is in the negative, has the failure of the court of Appeal to consider that occasioned any miscarriage of justice to warrant setting aside its judgement?

F 3. Has the appellant shown any exceptional circumstances why this Honourable court should disturb the concurrent findings of facts of the two lower courts.

4. Was the court of Appeal right in affirming the judgement of the lower court in its entirety"

G The appellants filed 8 grounds of appeal against the decision of the court of Appeal and formulated only 4 issues for determination. I have carefully examined the grounds of appeal and I am satisfied that the issues are very much related to the said grounds. I also prefer the issues H formulated by the appellants to those of the respondent for the determination of this appeal.

Before going into the consideration of issues I think it is appropriate for the clear understanding of the issues involved to set out, albeit

briefly, the facts giving rise to this appeal.

The respondent a limited liability company engaged in stone crushing business at km 2 Nassarawa road, Keffi in Plateau State of Nigeria, sought and obtained loan facilities from the 1st appellant in 1982 for the purchase of a stone crushing machine. In march 1982, the 1st appellant approved a loan of N1,100.000 but actually granted the respondent the sum of N1.036 million for the purchase of the stone crushing machine from the united African company limited (U.A.C) Jos. The 1st appellant paid the money directly to the U.A.C. which then supplied the machine to the respondent.

The said loan was secured by an investment and Mortgage Agreement dated 21/3/85 admitted in evidence as Exhibit 14. By Exhibit 14, clause 8 (1) the loan was repayable in ten consecutive and equal half-yearly instalments of N110.000.00 each after a two year moratorium with the 1st instalment due and payable on 31st July, 1984. On the 16th of February 1984, the respondent paid the sum of N15,000.00 on the interest and not on the principal sum.

In 1984, the respondent hired out the stone crushing machine to another company called Guffanti (Nig.) Ltd with the knowledge of the 1st appellant. Under the hire agreement Guffanti was to use the machine for 15 months and pay to the respondent the sum of N975,000.00. At the end of the period, Guffanti refused to pay the said sum and substantially damaged the crushing machine. The respondent, sued Guffanti in the Jos High Court on the hire agreement and got judgement in the sum of N2.3 million against Guffanti. The 1st appellant was kept aware of the development in the case uptill Judgment by the respondent. Guffanti appealed to the court of Appeal against the said judgment and procured a conditional stay of execution of the judgment to the effect that they should pay N1.3 million out of judgment debt to the respondent by 4th February 1988.

By February 1988, not a single instalment or part thereof was paid by the respondent to the 1st appellant on the principal pursuant to Exhibit 14, even though they were then in arrears of 8 instalments of N110,000.00 each. And by Clause 31 of Exhibit 14 the whole loan be-

came immediately re-payable once there is default of payment of an instalment by 28 days. And by clause 32 thereof the 1st appellant was clothed with the power to appoint a receiver/manager to manage the business of the respondent including making payments to the creditors

B pursuant to Exhibit 14.

Therefore, as the loan granted to the respondent became due and payable, the 1st appellant exercised its powers under Exhibit 14 and appointed the 2nd appellant as receiver/manager of the respondent. The 2nd appellant, as receiver/manager, collected the cheque of N1.3m (which the court of Appeal ordered to be given to the respondent as a condition for stay) on 4th of February 1988 and handed it over to the 1st appellant who acknowledged the receipt by issuing a receipt to Guffanti. The respondent was naturally unhappy with this situation. It demanded the return of the cheque to them through its counsel but the 1st appellant refused. The respondent applied to the court of Appeal to discharge the conditional stay which that court granted. Guffanti then appealed to the Supreme Court and applied for the restoration of the conditional stay earlier granted to it by the court of Appeal. The Supreme Court granted the application, restored the conditional stay but ordered that Guffanti must pay the N1.3 million over to the respondent within 7 days. The 1st appellant returned the cheque it received to Guffanti who then paid it over to the respondent on 15/7/88 within the time stipulated by the order of the Supreme Court.

It is very clear that from the 4/2/88 when Guffanti should have paid the said cheque for N1.3 million to the respondent as ordered by the Court of Appeal, to the 15/7/88 when the Supreme court order to pay back the cheque was complied with, a period of over five months had elapsed. The respondent alleged that during this period, they had suffered heavy financial losses due to the action of the 1st appellant in depriving them of the use of the N1.3 million due to them from Guffanti. That is why they sued the appellants in the High Court claiming Special and general damages for the losses they said they suffered and the trial court granted all their claims.

At the hearing of this appeal in this court only the learned coun-

sel for the appellants appeared. He adopted and relied upon his brief and urged the court to allow the appeal. In his oral arguments, he submitted that the real issue in controversy between the parties was whether or not the 2nd appellant was duly appointed as receiver/manager of the respondent, and whether or not it was necessary for the court of Appeal to deal with that issue, not being an academic exercise. Learned Counsel referred the court to the investment and management agreement Exhibit 14 clause 32(7) and submitted that it was well within the powers of the 2nd appellant as receiver/ Manager to collect and pay the N1.3 million cheque to the 1st appellant. On damages, he submitted that the respondent had not proved any special damages suffered by them and are not entitled to any. As for general damages he said that they should be reconsidered and adjusted appropriately.

Neither the respondent nor their counsel was present in court at the hearing, and in accordance with the rules of this court, their brief was deemed argued for the purpose of this appeal.

I shall now consider the issues framed by the appellants. Let me start with issue No.1. That issue was whether having regard to the whole case, the court of Appeal was right to refuse to consider the validity or otherwise of the appointment of the 2nd appellant by the 1st appellant as receiver/Manager of the respondent regarding it as academic exercise which would serve no useful purpose in the determination of the appeal.

From the evidence adduced in the trial Court there is no dispute that the respondent sought for and obtained a loan of N1,100,000.00 to buy stone crushing machine. There was also no dispute that the loan was secured by an investment and management Agreement admitted in evidence as Exhibit 14. Both parties executed Exhibit 14 and are therefore bound by its contents absolutely. Clause 8(1) of Exhibit 14 provides inter alia that:-

*"Subject to the terms and conditions in this Agreement the Borrower shall repay to the lender the loan in Nigerian currency in 10 (ten) consecutive equal half - yearly instalments, the first instalment being payable 2 years after the loan or part thereof as the case may be is paid*

*by the lender to the Borrower, that is to say on the 31st day of July, 1984 and thereafter on the due dates until the loan has been repaid in full"*

By this clause, after two years moratorium, the respondent was to commence the repayment of N110,000.00 on the 31st of July 1984 to be followed consecutively every six months thereafter by 9 equal instalments. It is also not in dispute that up till the filing of this action in the trial court, in 1993, the respondent had not paid any instalment by way of repayment of the loan in compliance with Exhibit 14. The only payment made was for the sum of N15,000.00 on 26th February 1988 on the accumulated interest and not on the principal loan. Clause 31 of Exhibit 14 provides as follows:-

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

(a) *If the borrower makes default for a period of 28 (twenty eight) days in payment of any instalment or interest of the loan which may have become due under this agreement.*

(b) *If any extra-ordinary situation shall have arisen the continuance of which in the opinion of the lender shall make it improbable that the Borrower will be able to perform its obligations under the agreement.*

(c) *If an order be made or an effective resolution is passed for the winding up of the Borrower,*

(d) *If an execution or distress be levied or enforced upon or against any of the chattels or properties of the Borrower.*

(e) *If the Borrower shall stop payment or shall cease or threaten not to carry on the project.*

(f) *If any encumbrancer takes possession of or a Receiver be appointed for the undertaking, property or assets of the Borrower or any part thereof.*

(g) *If the borrower shall commit any breach of the provisions contained in or implied in this agreement.*

(h) *If any report data or material information given by the Borrower to the lender is found to have been knowingly falsely made or if there has been any substantial change in such report data or material*

information so as to affect the basis of the sanction of the loan or may affect the successful completion of the project.

It is abundantly clear from the evidence at the trial that the respondent defaulted in payment of the instalments stipulated in Exhibit 14 long before the appointment or purported appointment of the 2nd appellant as receiver/manager of the respondent. There was also no proof of any extra-ordinary situation which has arisen and which in the opinion of the 1st appellant made it improbable for the respondent to comply with Exhibit 14. **Therefore the events in paragraphs (a) and (g) of clause 31 of Exhibit 14 have happened in this case and I am of the view that the whole loan granted to the respondent by the 1st appellant had become due and payable. I am strengthened in this view by the findings of the learned trial Chief Judge when he said on page 155 of the record thus:-**

*"From the contents of Exhibit 3, 3A the repayment of the loan secured under Exhibit 14 have become due".*

It is pertinent to observe that throughout the trial there was no evidence to show that any payment was made by the respondent pursuant to Exhibit 14 except the payment of N15,00.00 on 26/2/88 as interest on the loan. There was therefore no need for the 1st appellant to prove or show what amount was then due and payable following default by the respondent, since the whole amount fell due and payable under clause 31 of Exhibit 14.

Clause 32 of Exhibit 14 also provides for the appointment of a receiver/Manager of the respondent by the 1st appellant as Lender. It states:-

*"At anytime after the moneys or liabilities hereby secured become payable, the lender may by writing under the hand of any Director or Manager or Officer for the time being of the lender appoint any person or persons to act as a Receiver or Receivers or Receiver/Manager of the property or other assets hereby charged or any part thereof and remove any Receiver or Receivers so appointed and appoint another or others in his or their place....." (underlining mine)*

Clause 32 also set out the duties and responsibilities of the re-

ceiver or receiver/Manager once appointed which included the power to:-

"(1) Take possession of, collect and enter the property and for that purpose to take any proceedings in the name of the Borrower or otherwise as may seem expedient,

(2) carry on manage or concur in carrying on and managing the business of the Borrower or any part thereof and for any of those purposes to raise or borrow any money that may be required upon the security of the whole or any part of the property.

(3) .....  
(4) To make any arrangement or compromise which the Receiver or Receivers or Receiver manager shall think expedient.

(5) .....  
(6) .....

(7) To do all such other acts and things as may be considered by the lender to be incidental or conducive to any of the matters or powers aforesaid which he or they lawfully may or can do as agent for the Borrower. All moneys received by such Receiver or Receivers or Receiver manager shall be applied firstly in payment of his or their remuneration and the cost of realization; secondly in discharging all rents taxes and outgoings whatsoever in respect of any property including the property for the time being subject to this legal mortgage or charge, and thirdly in or towards satisfaction of all moneys hereby secured ..... " (underlining mine)

Therefore by clause 32 of Exhibit 14 as soon as the money secured by Exhibit 14 become immediately payable as happened in this case, the 1st appellant as lender becomes empowered to appoint any person or persons as receiver or receivers or receiver manager of the respondent as Borrower. And by the said clause of Exhibit 14 the receiver or receiver manager so appointed has the power to manage the business and affairs of the respondent as agent of the respondent. By paragraph 7 of clause 32, the receiver or receiver manager as the case may be, can apply any money received in the course of his duties as such, towards the satisfaction of all or any part thereof of the moneys secured by Exhibit 14.

**There is no doubt in my mind therefore that the appointment of the 2nd appellant as receiver manager is very important to the 1st appellant in this case and the consideration of the validity or otherwise of the appointment would have greatly influenced the decision of the Court of Appeal in this matter.** It must also be realized that, the main plank of the respondents' action was based on the alleged retention of the draft cheque for N1.3m which the 2nd appellant as receiver manager collected from them and handed it over to 1st appellant. If the 2nd appellant was validly appointed and exercised his powers in accordance with clause 32(7) of Exhibit 14, then the receipt and retention of the draft cheque of N1.3m could not be wrongful. **Therefore I am of the view that the consideration of the validity or otherwise of the appointment of the 2nd appellant as receiver manager is of great importance in this appeal and it was wrong for the court of Appeal to refuse to do so referring to it as an academic exercise.**

The court of Appeal per Katsina-Alu JCA (as he then was) in the leading judgement on page 283 of the record said:-

*"So much energy and time had been dissipated on the legality of the appointment of the 2nd appellant who was plainly not allowed to perform his duties. As I have already indicated, a consideration of the appointment of the 2nd Appellant is an academic exercise which does not enhance the fortunes of the 1st Appellant in this appeal. In view of this, I do not intend to and will not deal with the submission on whether or not the appointment of the 2nd Appellant was null and void. It serves no useful purpose in the determination of this appeal".*

As I said earlier, the whole case will turn on whether the appointment of the 2nd appellant as receiver manager was valid or not and that is why in my view "so much energy and time had been dissipated on the legality of the appointment".

It is also my view that the court of Appeal's decision on this point was influenced by the finding of the learned trial Chief judge that the 2nd Appellant even though appointed receiver/Manager was not allowed to perform his duties as such receiver/Manager. It was not clear from the evidence at the trial or from Exhibit 11A or 11C that the 1st appellant

collected the cheque for N1.3 million directly from the respondent. It is true that the 1st appellant admitted receiving the said cheque and even issued a receipt to the respondent for same, but nothing to show that Guffanti gave the cheque to 1st appellant. But the evidence of the 2nd appellant in his cross - examination and re-examination on pages 97 and 104 clearly showed that Guffanti handed over the cheque to the 2nd appellant or he took it away from them after writing Exhibit 11D to them. Therefore, I agree with learned counsel for the appellants that it will be very useful to consider the validity or the legality of the appointment of the 2nd appellant as receiver manager in this appeal. I answer issue one in the negative.

The second issue is to me speculative to a large extent. It is formulated on the understanding rightly or wrongly that the court of Appeal agreed that the appointment of the 2nd appellant was valid and legal. No such finding was specifically made by the court of Appeal in its judgment. This is so, because it decided that to do so would amount to an academic exercise which was unnecessary. But it is true that the findings of the court of Appeal in respect of the collection of the cheque for N1.3 million from Guffanti did not appear to challenge the appointment of the receiver manager but laid more emphasis on the fact that the 1st appellant having appointed the 2nd appellant as receiver/Manager, collected the cheque itself and did not allow the receiver manager to carry out his duties. The court of Appeal on page 281 of the record held that:-

*"Clause 32 of Exhibit 14 which governs the relation of the 1st Appellant and the Respondent vests the right to receive the money only in the Receiver/Manager who has a duty to dispose of it in the manner prescribed by the clause 32 (7). The 1st Appellant, in the circumstances, was nothing but a busy body. It should have left the Receiver/manager to carry out his duties. It did not. Rather it chose to collect the cheque from Guffanti itself. It was in grave error. That error occasioned loss to the Respondent. The receipt and retention by the Appellant of the sum of N1.3m from Guffanti was wrongful".*

And proceeded on page 283 to say:-

*"Having appointed the 2nd appellant as Receiver/manager, the 1st Appellant proceeded to perform the duties legally assigned to the receiver/manager. The 1st Appellant did not possess such power. It clearly usurped the powers of the Receiver/Manager".*

It would appear therefore that the court of Appeal assumed that the appointment of the 2nd appellant as receiver manager was alright but that he was not allowed to perform his functions as provided in clause 32 of Exhibit 14 or according to law. It however found that the 1st appellant was in grave error to do what it did and such error occasioned loss to the respondent. It also found the retention of the said cheque by the 1st appellant to be wrongful.

Let me now examine the evidence on record regarding the collection of the cheque for N1.3 million from Guffanti (Nig) Ltd. The respondent, pleaded in paragraph 15 of their Amended statement of claim that:-

*"The 1st def. (defendant) acting in concert with Guffanti (Nig.) Limited to vindicate latter's application for stay of execution and also to deprive the plaintiff of the sum due to it , collected the sum of N1.3 million in draft cheque and 1st def. (defendant) issued its receipt No. 006380 of 4/2/88 to Guffanti (Nigeria) Limited. Plaintiff shall rely on the said receipt at the trial.....".*

In paragraph 3 of their Amended statement of Defence, the appellants denied paragraph 15 of the Amended statement of claim and put the respondent to strictest proof thereof. Paragraphs 12 and 12A of the amended statement of Defence, also state:-

*"12. Thereafter and upon being informed of the order of the court of Appeal Jos ordering GUFFANTI (NIGERIA) LIMITED to pay the plaintiff the sum of N1.300, 0000.00 (one million three hundred thousand naira only) the 2nd in the exercise of his duties as Receiver / Manager of the plaintiff company wrote to counsel for GUFFANTI (NIGERIA) LIMITED, ..... informing him of the appointment of a Receiver/ Manager and requested that the sum aforesaid be paid to 2nd deft as Receiver/Manager.*

*12A Pursuant to the letter aforesaid Guffanti (Nigeria) limited*

*paid the sum of N1.3m to the 2nd deft as Receiver/Manager of the plaintiff".*

P.W.1 in his evidence in chief said on page of the record:-

B *"Guffanti Nigeria limited, prepared a cheque for N1.3 million (sic) the name of the plaintiff the 1st defendant collected the cheque from Guffantis' Nigeria Limited. The 1st defendant issued a receipt to Guffanti Nigeria Limited for the amount".*

On page 69 he added:-

C *"The 1st defendant received this money on 4/2/88 and kept it".*  
In his cross-examination, the 2nd appellant said on page 104 of the record:-

*"I did not seize any cheque from Guffanti-  
D Guffanti delivered the cheque voluntarily to me as the Receiver Manager of the plaintiff company".* (Underlining mine)

Earlier on page 101 of the record, the 2nd appellant in his cross-examination said:-

E *"I am not sure that if I had not seized the N1.3million it would have assisted the plaintiff to come out of its problems....."*

*It is not true that by seizing the cheque of N1.3million, I was out to destroy the plaintiff. I was performing my duty as a receiver of the company. Cash is one of the assets of the plaintiff company".*

F P.W.1 in his testimony made a general and wide statement that the 1st appellant collected the cheque in question from Guffanti on 4/2/88 and issued a receipt therefor. The 1st appellant denied collecting the cheque from Guffanti but it agreed that it issued a receipt for it. Guffanti was not called to say when and how it handed over the cheque to the 1st G appellant.

The 2nd appellant as DW2, confirmed that the cheque was voluntarily handed over to him as Receiver manager by Guffanti; and the fact that he was cross-examined on whether he had seized the cheque or H not proved that the cheque was infact in his hand before it got to the 1st appellant.

The appointment of the 2nd appellant as receiver manager was made pursuant to clause 32 of Exhibit 14 and it complied fully with the

requirement of that clause as can be seen in Exhibit 15. And he has full powers under paragraph 7 of clause 32 above mentioned to collect the said cheque and pay it to 1st appellant towards the satisfaction of the loan secured by Exhibit 14. Also shortly after his appointment, the 2nd appellant wrote a letter to the respondent through its counsel informing it of his appointment and demanding the payment of the cheque in question to him. See Exhibit 11D

The learned trial Chief Judge nullified the appointment of the 2nd appellant on the grounds that it:- (page 159 of record)

- (a) *is in conflict with the spirit and general intendment of the provisions of paragraph (7) of clause 32 of Exhibit 14,*
- (b) *is not at all in the interest of the borrower, i.e. the plaintiff,*
- (c) *destroys the basis of a fiduciary relationship between the agent and the principal. i.e the plaintiff.*

Paragraph (7) of clause 32 of Exhibit 14 is one of the duties of the receiver manager appointed thereunder particularly on how the moneys received by him in course of his duties must be spent or used, including applying them towards satisfying the loan secured by or under Exhibit 14. Under the paragraph, the 1st appellant cannot force the 2nd appellant to do something outside his powers as receiver manager or agent of the respondent. **A receiver manager whether appointed by a court or under a deed of debenture as in this case, must be impartial and subjected to the terms and conditions of his appointment. And under the companies Act 1968 S.92 which is applicable to this case, secured creditors like the 1st appellant enjoy priority of the payment of their debts. See Jannasons Co. Ltd v Uzor (1991) 4 NWLR (pt. 183) 1; Omojasola v Plison fisko (Nig) Ltd (1990) 5 NWLR (pt. 151) 434. It has not been shown by any evidence at the trial that the 2nd appellant has demonstrated any act of bias in favour of the 1st appellant or did anything in contravention of the duties assigned to him under clause 32.** The fact that he was an employee of the 1st appellant before his appointment as receiver-manager did not derogate from the way in which he was to perform his functions. The opening words of clause 32 provide that the 1st appellant as the lender may

appoint any person or persons as Receiver/Manager to receive and manage the assets of the respondent. The fact that it appointed the 2nd appellant its own employee was not in conflict with the provision of Exhibit 14 or shown to be against the interest of the respondent. By being the agent of the respondent who was the borrower, the 2nd appellant by his appointment was authorized to do all what his principal the respondent could lawfully do. There is no dispute here that uptill the time of the appointment of the 2nd appellant as receiver manager, the respondent made no payment of any instalments specified in Exhibit 14 by way of repayment of the loan, except N15,000.00 on accrued interest. Therefore the payment of the cheque in question, which was collected from Guffanti and belonging to the respondent, to the 1st appellant was proper and did not affect his relationship with or position as agent of the respondent.

The learned trial Chief judge also observed on page 157 of the record that the appointment of the 2nd appellant as receiver manager "was hurriedly done for the sole purpose of justifying the receipt of the money in Exhibit C". From exhibit 11D, and the evidence of the 2nd appellant, his appointment as receiver manager was completed before the 4/2/88 when the cheque in question was demanded and collected by him. Exhibit 15 was the instrument of his appointment. It was dated 3rd February 1988 and registered in the Companies Registry on 4/2/88. There was nothing in my view, in a creditor making hurried arrangement to collect money from a debtor in settlement of a debt provided that there is no fraud or serious irregularity involved or committed. There is none here. There is no doubt that the issue of the receipt Exhibit 11B by the 1st appellant to Guffanti for the receipt of the cheque may be termed irregular because normally, it was the receiver manager who should issue such receipt but looking at the nature and the circumstances of the whole case, the fact that the whole amount of the loan plus interest was still owing by the respondent and the cheque received was made in favour of the respondent, the apparent irregularity can be waived. It is also signifi-

cant to observe that (i) the counsel's letter informing the respondent that the cheque was paid to the 1st appellant (ii) the letter of the 2nd appellant to Guffanti demanding the payment of the Cheque to him as receiver manager and (iii) the receipt acknowledging the receipt of the cheque in question, were all dated 4/2/88. There was nothing in the evidence to suggest that this was not what has happened. It could have been hurried up to meet the situation at hand. **On the whole I do not think there is anything serious that could have adversely affected the validity of the appointment of the 2nd appellant as receiver manager, and therefore the receipt and retention of the cheque of N1.3million by the 1st appellant could not be wrongful, and I so hold. The Court of Appeal was wrong in my judgment, to affirm the decision of the trial court and found the 1st appellant liable in damages. I also answer issue 2 in the negative.**

Issue 3, is based on speculations and assumptions and would appear to be unnecessary in view of my findings in issue 2. If the cheque in question is not wrongly received and retained, then the question of claiming anything as a result of the retention of the cheque does not arise. I therefore do not consider it necessary to consider issue 3 in this appeal.

Issue 4 concerns the costs awarded by the trial court. **It is trite law that a court has an absolute and unfettered discretion to award or refuse costs in any particular case but that discretion must be exercised judicially and judiciously. Usually costs follow the events and are not awarded as a punitive measure nor are they designed or meant to be a bonus to the successful party. And although granted by way of an indemnity to a successful party, an unsuccessful party ought not to be damnified for no good reasons. See Adenaiya v Governor in Council Western Region (1962) 1 SCNR 442; Rewane v Okotie-Eboh (1960) WRNLR 155 at 159; U.B.N. Ltd v Nwokolo (1995) 6 NWLR (pt. 400) 127 at 151-152. However, even though a court has a discretion to award costs, the discretion of the court will be fettered and restrained where the parties themselves agree on the amount of costs to be awarded.**

In this case, it is abundantly clear from page 167 of the

**record that the person who represented the 1st appellant on 23/3/90 when the costs were awarded, Alhaji Lamus, raised no objection to the total amount of costs asked for by the respondent's counsel. The trial court accordingly granted the award as it is bound to do thereby awarding the N5,521.00 asked for. The learned trial Chief Judge was perfectly right to do so and the 1st appellant cannot be heard to complain.** Issue 4 therefore fails and I answer it in the affirmative.

On the whole, it is my considered opinion that this was and a proper case for the 1st appellant to file a counter-claim and if he did, the result might have been different, but he did not. Be that as it may, I find in the final analysis that the court of Appeal was wrong in refusing to consider the validity or otherwise of the appointment of the 2nd appellant as receiver manager of the respondent. I also find that the said appointment was valid and that by collecting or seizing the cheque in question from Guffanti, the 2nd appellant was performing his duties as receiver manager of the respondent.

**The consideration of this appeal turns out on the facts and evidence adduced at the trial and the interpretation placed on the relevant provisions of the Investment and Management Agreement entered into by the parties (Exhibit 14). I find therefore that there are circumstances in this appeal which entitles this court to interfere with the concurrent findings of fact of the trial court and Court of Appeal.**

**Finally from all what I have said above, I find that there is merit in this appeal and I allow it.** Accordingly, I set aside the decision of the Court of Appeal affirming that of the trial court and dismiss the action of the respondent in the trial court including the order of costs made therein. I award the appellants the costs of this appeal against the respondent, which I assess at N10,000.00

H

**BELGORE JSC**

I had the opportunity of discussing in full during conference and of reading well in advance the judgment of my learned brother, Kalgo, JSC., with which I am in full agreement. For the reasons fully adumbrated in the said judgment, which I adopt as mine, I also allow this appeal and make the same orders as to costs.

**OGWUEGBU JSC**

I have had the advantage of reading in draft the judgment of my learned brother Kalgo, J.S.C. and I agree with him that the appeal should be allowed for the reasons set out in the said judgment.

On the question of the validity of the appointment of the 2nd appellant as Receiver/Manager of the respondent by the 1st appellant, the learned trial judge held that it was null and void. Having so found, the learned trial judge proceeded to grant the reliefs claimed by the plaintiff/respondent. The defendants were dissatisfied with the judgment and appealed to the court below. The first question submitted in the appellants' brief for determination by the court below was:

*"Whether on the facts and circumstances of the case the Judge was right in holding that the appointment of the 2nd appellant by the 1st appellant an unpaid mortgagee, as the Receiver/Manager of the plaintiff/mortgagor, is null and void."*

The court below made no effort to resolve the above vital issue and tagged it an academic exercise. It held as follows:

*"Having held, as I did, that it was the 1st appellant who wrongfully received and retained the cheque for N1.3m from Guffanti (Nig.) Ltd., the issue of whether or not the 2nd Appellant's appointment as Receiver/Manager is null and void, becomes purely academic exercise. There is abundant evidence on record to show that the 1st Appellant received the said cheque directly from Guffanti (Nig) ltd. thereby usurping the functions of the Receiver/Manager set out in Clause 32 (7) of Exhibit 14."*

The court below did not also consider the averments of the ap-

pellants in paragraphs 12 and 12A of the further amended statement of defence of the appellants as well as the evidence of the 2nd appellant to the effect that he received the cheque for N1.3m. naira from Guffanti (Nigeria) Ltd.

B The validity of the appointment of the 2nd appellant as Receiver/  
 Manager of the plaintiff by the 1st appellant was a live issue throughout  
 the proceedings and not an academic exercise. If the 2nd appellant was  
 validly appointed as Receiver/Manager and he collected the cheque for  
 the sum of N1.3 m. in the exercise of his powers under Exhibit 14 from  
 C Guffanti (Nigeria) Ltd. that would be the end of the matter. I have no  
 doubt in my mind that the 2nd appellant was validly appointed as Re-  
 ceiver/Manager under Clause 32 of Exhibit 14 and his duties were clearly  
 spelt out in that clause. Paragraph 7 of Clause 32 is more assets of the  
 D plaintiff company. The handing over of the cheque to the 1st appellant  
 by the 2nd appellant is another matter. He was doing so in satisfaction of  
 the loan secured in Exhibit 14 and Clause 32 (7) of Exhibit 14 authorized  
 him to do so.

E The 2nd appellant by his appointment was required to manage  
 the plaintiff's company with a view to the beneficial realization of the  
 security of the 1st appellant on whose behalf he was appointed, and, in  
 the performance of his duties, he owed a duty of care and good faith.  
 F See section 393 (2) of the Companies and Allied Matters Act, Cap. 59, of  
 laws of the Federation of Nigeria, 1990, which provides:

"393(2) A person appointed manager of the whole or any part  
 of the undertaking of a company shall manage the same with a view to  
 the beneficial realization of the security of those on whose behalf he is  
 G appointed."

Having been appointed Receiver/Manager, he is deemed to stand  
 in a fiduciary relationship to the company. It was not shown that he was  
 in breach of his duties under Clause 32 (7) of Exhibit 14.

H The court below appeared to acknowledge the validity of the  
 appointment of the 2nd appellant as Receiver/Manager but abdicated from  
 pronouncing him to be so. Since I am satisfied that the 2nd appellant  
 was validly appointed Receiver/Manager of the plaintiff/respondent and

he acted within the powers conferred on him in Clause 32 (7) of Exhibit 14, he could not have been found liable in damages for collecting the cheque for N1,300,000.00 from Guffanti (Nigeria) Ltd. and paying the same over to the 1st appellant - the Lender. He did so in the exercise of his powers under Exhibit 14.

The court below was in error when it held that the 1st appellant usurped the powers of the 2nd appellant and prevented the latter from performing his duties. This conclusion was not borne out by evidence and the courts below failed to evaluate the evidence properly. Based on the above conclusions reached by me, the 1st appellant was not liable to the plaintiff.

In so far as the plaintiff's company was in receivership, the plaintiff could not carry on any business. It ceased to have any right to deal with its assets from the very time the 2nd appellant became its Receiver/ Manager. The power of the plaintiff to deal with its assets were suspended during that period and only the 2nd appellant could lawfully do so. It was disabled and could only act through the 2nd appellant and with that disability, the plaintiff could not count its gains or losses which would entitle him to institute an action for damages. I do not consider it necessary to consider the other issues.

The claim is frivolous and speculative and should have been dismissed by the learned trial Chief judge. For the above reasons and the fuller reasons contained in the judgment of my learned brother Kalgo, J.S.C., I too will allow the appeal. The judgment of the court below is set aside. In the result the action of the plaintiff is hereby dismissed with N10,000.00 costs in favour of the appellants.

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### ACHIKE JSC

I have had the benefit of the preview of the leading judgment just delivered by my learned brother, Kalgo, JSC and I entirely agree with him that the appeal has merit and the same succeeds.

Each party in its brief identified four issues for determination. It is the first issue respectively formulated by each party that forms the fulcrum of this appeal, and this is, whether the court below was right

when it held that the consideration of the nullity or otherwise of the appointment of the 2nd appellant by the 1st appellant, as the Receiver/Manager of the respondent company, was an academic exercise which would serve no useful purpose in the determination of the appeal and B would justify the lower court's refusal to deal with it.

The detailed facts of this case have been painstakingly set out in the leading judgment and no useful purpose would be served to repeat this exercise, although I shall set out the bearest facts in order to make the appreciation of the treatment of the issues herein reasonably intelligible. Suffice it to state that the respondent, a limited liability company C operating a stone crushing business in plateau state obtained loan facilities from the 1st appellant for its business valued N1m, but in fact it was granted the sum of N1.036m for the purchase of machinery for its D aforesaid business wherein the 1st appellant paid the said sum of N1.03 directly to the U.A.C. which in turn supplied the equipment to the respondent. The loan was secured by an investment and Mortgage Agreement, Exhibit 14, wherein its clause 8 (1) stipulated that the loan was E refundable in 10 consecutive equal half-yearly instalments of N110,000.00, making an allowance of a two year moratorium, and fixed the payment of the first instalment on 31/7/84. Respondent paid the sum of N15,000.00 on the interest (not on the principal sum) on 16/2/84. Respondent hired F out the equipment to Guffanti (Nig) Ltd., with knowledge of the 1st appellant, and under a hire agreement for 15 months for the sum of N975,000.00. Guffanti failed to pay the agreed sum for the hire of the equipment which it substantially damaged. Respondent successfully sued and obtained judgment for the sum of N2.3m and Guffanti obtained a G conditional stay of execution of this judgment if only they paid N1.3m and of the judgment dated to the respondent on of before 4/2/88.

The respondent neglected to pay any of the instalments due on the principal, and fell in arrears of eight instalments and by clause 31 of H Exhibit 14 the entire loan became repayable after 28 days of default of payment of an instalment. By clause 32 of Exhibit 14, 1st appellant was empowered to appoint a receiver/manager to manage the respondent's business, including paying respondent's creditors. In exercise of its powers

under clause 32, 1st appellant appointed 2nd appellant, one of its employees, as receiver/manager to the respondent. Acting in this capacity, 2nd appellant collected the cheque of N1.3m ordered by the lower court in furtherance of the order for a conditional stay and handed same over to the 1st appellant, having acknowledged the receipt of the cheque to B Guffanti. Angered by the 2nd appellant's action, respondent demanded the return of the cheque but the 1st appellant declined to do so whereupon respondent prevailed on the lower court to discharge the order for conditional stay. Guffanti appealed to this Court for the restoration of the order for conditional stay. The Supreme Court ordered the restoration of order of conditional stay but order that Guffanti to pay the N1.3m over to the respondent within 7 days. The 1st appellant returned the cheque it received to Guffanti who in turn paid it over to the respondent on 15/7/88. The respondent predicated its claim for special and general damages D in its suit against the 1st appellant at the High Court on the losses it suffered consequent to the 1st defendant denying it the use of the N1.3m due to it from Guffanti during the period of five months that the 1st appellant wrongfully held back the cheque of N1.3m due to it. The E learned trial Judge acceded to all their claims.

At the oral hearing before us, only appellants's learned counsel appeared. On the 1st issue, he submitted that the 2nd appellant was duly appointed by 1st appellant as receiver/manager to the respondent within F the purview of clause 32 (7) of Exhibit 14, and accordingly 2nd appellant in his capacity as receiver/manager was empowered to collect the cheque of N1.3m. due to the 1st appellant and pay same over to it. Counsel further submitted that the award of special damages was not sustainable, there being no proof in respect thereof but conceded that the claim under G the head of general damages ought to be reconsidered and adjusted appropriately.

As earlier stated, there was no appearance or representation for the respondent but his brief of argument was deemed argued. H

It was Issue No.1 in the parties respective briefs that seriously called for discussion i.e. whether the lower court was right in glossing over the appointment of 2nd appellant as receiver/manager upon the view

that its consideration would serve no useful purpose, being an academic exercise. It is indisputable that the loan agreement between the parties was embodied in Exhibit 14 executed by them. The cumulative effect of clauses 8(1), 31 and 32 of Exhibit 14 amply provided for the consequences of breaching the terms of the loan agreement between the parties and further, in the clearest terms, provided for the appointment of a receiver/manager as well as stipulated the elaborate duties and responsibilities of a receiver/manager.

C After a calm consideration of the parties' briefs on Issue No.1, and my close examination of clauses 8(1), 31 and 32 of Exhibit 14, and more particularly paragraph 7 of clause 32, it is abundantly clear to me that the appointment of a receiver/manager was expressly provided for under Exhibit 14. I therefore make bold to say that the appointment of D 2nd appellant as receiver/manager has not been faulted in any way whatsoever by either the respondent or the court of Appeal which dismissed the consideration of appointment of the 2nd appellant as receiver/manager as an academic exercise, because according to the lower court, the E legality or otherwise of such appointment could "not enhance the fortunes of the 1st appellant in this appeal." With due respect to Katsina-Alu, JSC, (as he then was) who delivered the leading judgment of the lower court, nothing can be further from the truth with regard to his above F assertion. On the contrary, I am bound to say that the legality or validity or otherwise of 2nd appellant's appointment as receiver/manager is so fundamental and crucial to the determination of this appeal and had it been properly put in focus I am clearly of the view that the court of Appeal would have reached a completely different decision with regard G to the action of the 2nd appellant vis-a-vis the cheque for the sum of N1.3m. When it is recalled that it was the retention of, and subsequent payment of the N1.3m cheque by the 2nd appellant to the 1st appellant that triggered off the respondent's action against the appellants at the H High Court.

I am to say that it was the dealing with the cheque for N1.3m by the appellants that irked the respondent and precipitated his action for breach of the contract between the parties. There being express provi-

sions for the appointment of a receiver/manager under Exhibit 14 and having regard to the 2nd appellant's dealing with the cheque for N1.3m, I am satisfied that the determination of the legality or validity of 2nd appellant's appointment as receiver/manager, as submitted by appellants' learned counsel, was well-founded. In the circumstances, I would unreservedly resolve issue No.1 as respectively set out in the parties' briefs in favour of the appellants.

Like my brother, Kalgo, JSC I am of the view that issues Nos 2 and 3 are speculative. Nevertheless, he gave detailed consideration to Issue No.2, but unlike him, I shall only briefly comment on Issue No.2.

While I am not prepared to go into any full-length consideration of Issue No.2 as earlier stated above, it is enough to say that by the answer turned in by me with regard to Issue No.1 in favour of the appellants, it follows sequentially that the receipt of the cheque for N1.3m by the 2nd appellant as receiver/manager which is within the provisions of Exhibits 14 clause 32, falls within the duties and responsibilities of 2nd appellant as receiver/manager (see sub-sections (1), (2), (4), and (7) of clause 32). In other words, the 2nd appellant's appointment was valid and legal.

Finally, this brings me to the last and 4th Issue which complained of the quantum of the costs of N5,521.00 awarded by the learned Chief Judge. The award of costs or refusal to award costs is a matter in the discretion of the court, subject to the only qualification that the court's discretion must be seen to have been judicially and judiciously exercised in this regard. It is a popular saying that costs follow the events in the sense that although every litigant has a right to obtain an order as to costs, nevertheless he may waive it. Assessment of the amount allowed in terms of an award of costs is the responsibility of the Court who determines what is reasonable costs in the circumstances. And when the court in exercise of its discretion orders the costs payable and does so without being capricious, i.e. in the sense that it is ordered in honest exercise of his discretion. The court's discretion to order the costs payable may be circumscribed by both parties by making extra-judicial arrangement as regards costs of the litigation.

It is pertinent to recapitulate that in this case when respondents's counsel asked for N5,521.00 as costs, appellant's counsel, who were present did not register any objection, whereupon the learned trial Chief Judge awarded the amount asked by the respondent's counsel, i.e. N5,521.00. Clearly, it is not fair nor acceptable for appellant's counsel to subsequently complain of the amount awarded by the trial Chief Judge when no opposition was raised by the appellant's counsel when the order was made in open court. Indeed, in my judgment, the amount of costs asked for and awarded cannot be said to be exceptionally high or punitive as to hold that the court's discretion was capriciously exercised. Indeed, in our adversary system of jurisprudence, it would have been quite uneasy and unfair for the trial court, to as it were, enter into the arena and make a case for the reduction of costs payable while the opponent who was physically present remained indifferent and muted. It will therefore not be in interest of justice to interfere with the amount of costs awarded by the trial court, if this point were to be pursued to its logical conclusion.

Notwithstanding the concurrence of the two lower courts on the interpretation of the scope of the provisions of Exhibit 14, I am clearly of the view that the circumstances of this appeal justify that this court should interfere with the concurrent findings of fact of these two lower courts.

Accordingly, I set aside the decision of the lower court which affirmed the judgment of the trial court. In other words, I dismiss the respondent's claim in the trial court including the order of costs made therein. I award the appellants N10,000 costs of this appeal against the respondent.

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### AYOOLA JSC

I have had the privilege of reading in draft the judgment delivered by my learned brother, Kalgo, JSC. I agree that the appeal be allowed. For the reasons he gives, I too would allow the appeal. I abide by the orders he makes consequent on allowing the appeal and with the order he makes as to costs.