

sued the defendant/respondent for breach of contract claiming a total of N429,869.00 comprising special and general damages. The said breach of contract has arisen from defendant's failure to honour its loan agreement of N116,500.00 entered into with the plaintiff. The loan of N116,500.00 was subsumed under the Agricultural Credit Scheme Fund Act 1977 whereby the defendant was to grant the said loan to the plaintiff and which was to be guaranteed by the Central Bank of Nigeria. The loan was to be advanced in two instalments of N60,000.00 and 56,500.00. The first instalment had been fully disbursed while the second was only partially disbursed. The defendant withheld N30,000.00 of the N56,500.00 to off-set the previous overdraft granted to the plaintiff. The defendant averred that there was a collateral agreement between the parties whereby the defendant was to off-set the previous overdraft of N30,000.00 from the second instalment of the loan. The plaintiff denied that there was such an arrangement between the parties.

At the conclusion of the trial, the learned trial judge found that the parties agreed to divert part of the loan agreement to settle the plaintiff's previous overdraft. Judgment was entered for the plaintiff for breach of contract. The defendant appealed against the judgment while the plaintiff cross-appealed to the Court of Appeal, holden at Benin-City. In a unanimous judgment the Court of Appeal found that by the illegality of contravening the Agricultural Guarantee Credit Scheme Fund Act 1977 of which both parties were wrong doers, the plaintiff's claim must fail. The appeal was allowed and the cross-appeal dismissed. The plaintiff has now appealed to the Supreme Court raising five issues but the appeal was determined based on a single issue.

ISSUE FOR DETERMINATION

1. Whether the diversion of fund under the contract of loan between the parties subsumed under Agricultural Guarantee Credit Scheme Fund Act 1977 rendered the said contract illegal and void to the extent that neither the appellant nor the respondent can enforce the said loan contract.

HELD (Unanimously dismissing the appeal per lead judg-

ment of **ACHIKE JSC**)

Contracts - Illegal contract

1. Without getting unduly enmeshed in the controversy regarding the definition or classification of that term, it will be enough to say that contracts which are prohibited by statute or at common law, coupled with provisions for sanction (such as fine or imprisonment) in the event of its contravention are said to be illegal. (p. 31 D)

Void and illegal contracts

2. There is however the need to make a distinction between contracts that are merely declared void and those declared illegal. For instance, if the provisions of the law require certain formalities to be performed as conditions precedent for the validity of the transaction, without however imposing any penalty for non-compliance, the result of failure to comply with the formalities merely renders the transaction void, but if a penalty is imposed, the transaction is not only void but illegal, unless the circumstances are such that the provisions of the statute stipulate otherwise. See Solanke v Abed & anor (1962) NRNL 92. (p. 31 E)

Illegality - Collateral agreement

3. It is clear that section 13(1) of the 1977 Act did not only prohibit the application of the loan granted under the 1977 Act to any purpose other than that for which the loan was granted, sub-sections 13(2) and 13(3) provide sanctions for fine or imprisonment. In other words, the collateral agreement between the parties herein was void and illegal because its aim was to divert funds under the contract of loan to a purpose other than the purpose for which it was meant (i.e. poultry farming) and punishable, as shown hereinbefore, by fine or imprisonment. (p. 31 H)

Illegality - Consequences of

4. Generally, the consequence of illegality in relation to the parties contract is that the court will not come to the assistance of any party to an illegal contract who wishes to enforce it. This position of the law is founded on the principle of public policy and is expressed in the maxim

ex turpi causa non oritur actio meaning that an action does not arise from a base cause. (p. 34 A)

Illegal contract - Innocent party

- B 5. Whether or not a party can recover under an illegal contract may depend on whether that party was aware or privy to the illegality because it is unfair, in equity, for the guilty party to hold the innocent party bound by an act of illegality that he is wholly unaware of. See Cowan v Milbourn (1867) L.R. 2 Ex 230. (p. 34 C)

Maxims - In pari delicto potior est conditio defendentis

6. Generally, money paid or property transferred under illegal contract is irrecoverable where both parties are equally guilty of the fact of illegality.
- D This is also buttressed by the maxim in pari delicto potior est conditio defendentis and means that where the parties are both at fault, the condition of the defendant is better. See Fashina v Odedina (1957) WR NLR 45 and Abesin & anor v Iyaegbe (1958) WR NLR 67. (p. 34 E)

Pleadings - Unpleaded facts

7. It is crystal clear and beyond peradventure that the parties unpleaded facts go to no issue; similarly, evidence led at trial not anchored on the parties' pleadings must be discountenanced. See Adimora v Ajufo (1989) 3 NWLR (pt.221) 33. Having held the view that the parties never made an issue of the question of undue influence - either in their pleadings or evidence - there would be no jurisdiction whatsoever for the learned trial judge to make any purported finding on undue influence, more so as the appellant had taken the posture of a total denial of the collateral agreement, the defence of undue influence was not open to it. (pp. 35/36 D)

Contracts - Illegal contracts

- H 8. I would like to emphasize the point that an assertion that a party to an illegal contract acted under pressure or undue influence is a further extension of the exception that if the parties to an illegal contract are not in pari delicto so that the party on whom superior power or influence was

operated may well recover money or property exchanged in such circumstances. Reliance on the exception of undue influence must be established by positive evidence or strong inference that can be drawn from the surrounding circumstance. As I had stated earlier, neither did the appellant plead to this crucial fact nor was any evidence led in respect thereof. (p. 35 H) B

NOTABLE POINTS OF INTEREST

ACHIKE JSC

1. Variation of contract brought about by illegality

Even if the collateral agreement could, in any sense, of which I have my grave doubt, amount to a valid variational agreement, surely, such variation which is brought about by an act expressly prohibited by provisions of the law, must itself be illegal and unenforceable. (p. 35 B) D

OGWUEGBU JSC

2. How to prove undue influence

Where undue influence is alleged, the onus lay on the party seeking to enforce the contract to show that undue means had been used to obtain the contract. The plaintiff could not have given evidence on the undue influence because it was not pleaded and a party who intends to rely on illegality as a result of undue influence must specially plead the illegality. (p. 38 H) F

3. Circumstances when the court will take notice of the illegality of a contract

The court will itself, however, take notice of the illegality of a contract on which a plaintiff is suing, if it appears on the face of the contract or from the evidence brought before it by either party even though the plaintiff has not pleaded it. See Clarke v Callow (1876) L.J.Q.B. 53 and Harmer v. Rowe (1817) 6 R & S, 146; 105 E.R.1197. (p. 39 A) G H

AYOOLA JSC

4. *What a breach of contract connotes*

A breach of contract connotes that the party in breach had acted contrary to the terms of the contract either by non-performance, or by performing the contract not in accordance with its terms or by a wrongful
 B repudiation of the contract. A party who had performed the contract in consonance with its terms cannot be said to have been in breach thereof.
 (p. 43 C)

C 5. *Performance of an illegal contract - Consequences thereof*

The appellant who alleged a breach of contract must in any event fail in the face of the facts as found and the legal consequences arising therefrom: (1) that a loan was granted it by the respondent; (2) that, notwithstanding that the parties may have agreed to a term in contravention of
 D the Act, it was their mutual agreement that part of the loan would be utilized in offsetting the appellant's overdraft: (3) that what the respondent did in that regard was therefore in consonance with the agreement of the parties; and (4) that the consequence of the parties' agreement to
 E act in contravention of the Act was to discharge the Central Bank from its obligations as a guarantor. In short, in so far as the basis of the action of the appellant was a breach of the contract of loan there was no such breach. Where parties to a contract have agreed to terms of a contract,
 F performance of the contract by one of the parties in line with what the parties have agreed to, does not become a breach merely because the terms agreed to by the parties had in the first place been illegal. (p. 44 C)

REPRESENTATION

G Benjamin Enemeri, Esq. for the appellant
 O. A. Omonwa Esq. for the respondent

CASES REFERRED TO

H Solanke v Abed & anor (1962) NRNLR 92
 Fashina v Odedina (1957) WR NLR 45
 Abesin v Iyaegbe (1958) WR NLR 67.
 Adimora v Ajufo (1989) 3 NWLR (pt.221) 33

Clarke v Callow (1876) L.J.Q.B. 53

Harmer v. Rowe (1817) 6 R & S, 146; 105 E.R.1197

STATUTE REFERRED TO

Agricultural Guarantee Credit Scheme Fund Act 1977, s. 13

B

LEAD JUDGMENT BY ACHIKE JSC

The appellant, as plaintiff, sued the respondent, as defendant, for breach of contract claiming a total of N429,869.00 comprising special and general damages; the said breach of contract had arisen from defendant's failure to honour its loan agreement of N116,500.00 entered into with the plaintiff. The said loan of N116,500.00 was subsumed under the Agricultural Guarantee Credit Scheme Fund Act 1977 whereby the defendant was to grant the said loan to the plaintiff and which was to be guaranteed by the Central Bank of Nigeria. The loan was to be advanced in two instalments of N60,000.00 and N56,500.00. The first instalment had been fully disbursed while the second was only partially disbursed. The defendant withheld N30,000.00 of the N56,000.00 to off-set the previous overdraft granted to the plaintiff. Despite the plaintiff's denial of the arrangement between the parties whereby the defendant was to off-set the previous overdraft of N30,000.00 from the second instalment of the loan, the learned trial judge, Oni-Okpaku, J. rejected the defendant's denial and found that the parties agreed to divert part of the loan agreement to settle the plaintiff's previous outstanding overdraft.

After due trial, the trial court found and upheld the breach of contract and awarded to the plaintiff a total sum of N58,429.00 special damages with N600.00. costs.

The defendant filed an appeal against the said judgment while the plaintiff cross-appealed at the Court of Appeal, holden at Benin. In its unanimous judgment, the lower court found that by the illegality of contravening the Agricultural Guarantee Credit Scheme Fund Act 1977 of which both parties were wrongdoers, the plaintiff's claim must fail. According to the lower court by the provisions of section 13(1) of the aforesaid Act, the loan agreement was vitiated. In the leading judgment

rendered by Salami, JCA, to which Uche Omo and Ejiwunmi, JJCA (as they were then) concurred, his Lordships stressed, inter alia, as follows:

"The implication of the voidance is that neither party can seek the benefit of the guarantee provided by Central Bank of Nigeria under Act 20 of 1977 because the illegality of either party estoppel it from enforcing the guarantee agreement It is the guarantee agreement which is void and unenforceable because of the deceit of the two principal debtor and creditor which has resulted in an illegal contract."

Accordingly, the lower court allowed the appeal and set aside the decision of the trial court including the order as to costs without giving any consideration whatsoever to the merits or demerits of the issue of quantum of damages. Finally, the lower court also dismissed the cross-appeal, with total costs of N500.00.

It is against this decision that the appellant has filed an appeal to this Court predicated on seven grounds of appeal, praying the court to restore the judgment of the trial court.

Learned counsel for the appellant, Dr. S.S.G. Enemeru formulated the following five issues for determination, namely,

"(1) Whether the Court of Appeal was right in giving effect to the bilateral agreement to divert funds under the loan for a purpose outside its ostensible object which by the finding of the learned trial judge which the Court of Appeal did not disturb was illegal under Statute?

(2) Whether the Court of Appeal was right as to the effect of the resultant illegality or in relation to the agreement of loan?

(3) Whether the Appellant was precluded from seeking to enforce the agreement of loan in its original tenor by reason of the collateral illegality or of his being privy to it?

(4) Whether the Court of Appeal was right to have upset the alternative ground of liability for which the learned trial judge also found when there was no appeal or complaint against it?

(5) Whether the Court of Appeal was right to have dismissed the appellant's Cross-Appeal in the Court below on all the heads of complaint as a matter of course?

Y. Itua, Esq. learned counsel for the respondents also postulated

five issues for determination:

" (1) *Whether the Court of Appeal was right in giving effect to the collateral agreement by which the N30,000.00 from the enhancement loan was used to upset (sic) the overdraft previously owed by the Appellant.*

(2) *Whether the parties are bound by the collateral agreement.* B

(3) *Whether the Appellant was entitled to rescind the collateral agreement.*

(4) *Whether the Court of Appeal was right in setting aside the damages awarded by the High Court.*

(5) *Whether the Court of appeal was right in dismissing the Appellant's cross appeal on quantum of damages."* C

A close examination of the two sets of issues for determination easily shows that at the Court of Appeal while the appellant herein contested the quantum of damages awarded it at the trial court, on the one hand, the respondent contested its liability coupled with the quantum of damages awarded against it, on the other. Now from the judgment of the Court of Appeal dismissing the appellant's claim as well as the ground of appeal, the cross-appeal, and the Issues formulated by both parties for determination, from the grounds of appeal, it seems to me that the following two issues may well be sufficient to address the main problems raised in this appeal. These are:

1. *Whether the diversion of fund under the contract of loan between the parties subsumed under Agricultural Guarantee Credit Scheme Fund Act 1977 rendered the said contract illegal and void to the extent that neither the appellant nor the respondent can enforce the said loan contract.* F

2. *Whether the Court of Appeal was right to have dismissed the appellant's cross-appeal on all the heads of complaint as a matter of course.* G

We shall take the issues in the above order because it seems to me that if Issue No. 1 is answered in the affirmative that would be sufficient to determine the appeal in its entirety in the sense that Issue No 2 would cease to be a live issue.

Issue No 1.

Whether the diversion of fund under the contract of loan between parties subsumed under Agricultural Guarantee Credit-Scheme Fund Act 1977 rendered the said contract illegal and void to the extent that neither the appellant nor the respondent can enforce the said loan contract.

B This appeal raises a point of considerable judicial interest and importance involving the effect of an act prohibited by statute coupled with penal provisions for fine or imprisonment in the event of its contravention. We had earlier stated the facts of this case and the bulk of it are not seriously contested. It is important to underline the point that although C the respondent readily admitted that it had diverted part of the loan to repay the pre-existing overdraft of the appellant, strangely, the appellant denied consenting to the diversion of part of the loan. Be that as it may, the learned trial judge found as a fact that the appellant was privy to the D diversion of the loan. There is no appeal against this finding. It may be recalled that the loan to the appellant, a person engaged in poultry farming, was guaranteed by the Central Bank of Nigeria under the Agricultural Credit Guarantee Scheme Fund, 1977 (hereinafter referred to as the 1977 E Act). Section 13 of the 1977 Act stipulates as follows:

" 13(1) No loan granted pursuant to this Decree, shall be applied to any purpose other than that for which the loan was granted.

(2) Any person who applied any loan granted pursuant to this Decree in contravention of subsection (1) of this section shall be guilty F of an offence and shall be liable on conviction to a fine of an amount of the loan in respect of which the offence was committed or to imprisonment for not less than five years.

(3) Where an offence under the section committed by a body corporate is proved to have been committed with the consent connivance of, or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate (or any person purporting to act in any such capacity) he as well as the body corporate G H shall be deemed to be guilty of the offence and may be proceeded against and punished accordingly."

It is clear that the bilateral agreement between the parties to withhold part of the sum due to appellant under the agreement of loan for the purpose

of off-setting the overdraft of N30,000.00 was outside the scope and purpose for which the loan was granted and amounted to a diversion of funds thereunder. Such diversion of funds granted under the 1977 Act is positively forbidden under section 13(1).

Permit me to digress generally on illegality. It is common ground that illegality and voidness of the loan contract between the parties is the main subject-matter of controversy in this appeal. Definition of the term illegal contract has been elusive. The production of clarity of the classification of illegality appears to be almost confounded and rendered intractable primarily because text-writers and the judges have continued to use the terms 'void' and 'illegal' interchangeably. Halsbury's laws of England (3rd ed. vol 8 p126 para 218 states that

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

Without getting unduly enmeshed in the controversy regarding the definition or classification of that term, it will be enough to say that contracts which are prohibited by statute or at common law, coupled with provisions for sanction (such as fine or imprisonment) in the event of its contravention are said to be illegal. There is however the need to make a distinction between contracts that are merely declared void and those declared illegal. For instance, if the provisions of the law require certain formalities to be performed as conditions precedent for the validity of the transaction, without however imposing any penalty for non-compliance, the result of failure to comply with the formalities merely renders the transaction void, but if a penalty is imposed, the transaction is not only void but illegal, unless the circumstances are such that the provisions of the statute stipulate otherwise. See Solanke v Abed & anor (1962) NRNLR 92, and P. Kasumu & ors v Baba-Egbe 14 WACA 444.

The effect or illegality of contract

Now let us return to the case in hand. It is clear that section 13(1) of the 1977 Act did not only prohibit the application of the loan granted under the 1977 Act to any purpose other than that for which the loan was granted, sub-sections 13(2) and 13(3) provide

sanctions for fine or imprisonment. In other words, the collateral agreement between the parties herein was void and illegal because its aim was to divert funds under the contract of loan to a purpose other than the purpose for which it was meant (i.e. poultry farming) and punishable, as shown hereinbefore, by fine or imprisonment.

The arrangement to divert part of the loan granted to the plaintiff/appellant was explicitly averred in paragraph 10 of appellant's statement of claim:

"10. In or about March, 1980, when the plaintiff realized that the farm project cannot sufficiently pay its way or become a viable proposition with its then limited stock of birds and that money will also be required for some improvements in the structure of the said farm, the plaintiff applied for an enhancement of the loan of N60,000.00 earlier granted to it by the defendant by a margin of N82,000.00 divided according to the purposes for which same was required into N49,000.00 for improvements and running costs of the farm and N33,000.00 for re-stocking the farm with new birds. After a series of correspondence between the parties upon which the plaintiff will found at the hearing of this action, the defendant finally approved for the plaintiff in connection with the farm project aforesaid an additional facility of N56,500.00 on the same terms and conditions as before except that of the said amount of N56,500.00, N26,500.00 was granted by way of loan (making a total loan of N86,500.00 and N30,000.00 by way of overdraft. The said transaction was equally guaranteed by the Central Bank of Nigeria as before backed by a guarantee certificate which is in the possession and control of the defendants. The plaintiff will found upon the said document. All told the total facility approved for the poultry farm project aforesaid and guaranteed by the Central Bank of Nigeria was a sum of N116,500.00".

The defendant/respondent responded to the above paragraph in its paragraph 8 of the statement of defence; it ran as follows:

"8. As to paragraph 10 of the statement of claim the defendant admits that the plaintiff applied for an enhancement of the loan by asking the defendant for an additional N82,000.00 but the defendant ap-

proved for the plaintiff an additional loan of N56,500.00 on the understanding that part of the additional loan would go to defray the outstanding overdraft in the plaintiff's current account which overdraft stood at N30,00.00 at the time."

After a review of the evidence and the parties' pleadings, the learned trial judge found no difficulty when she concluded:

" I, therefore, believe that both parties had agreed that the N30,000.00 of the N56,000.00 enhancement loan was for the overdraft of the plaintiff."

Further on in her judgment, her ladyship said,

" Accordingly, I hold that the variation is a breach of the essential condition of the loan agreement since section 13(1) of Decree 20 of 1977 the statutory provision governing it forbids it and it is mandatory and therefore the contract of guarantee with Central Bank is thereby vitiated."

The Court of Appeal, speaking in the same vein in relation to the diversion of the funds under the loan agreement that was expressly prohibited by the 1977 Act, through Salami, JCA in his leading judgment had this to say:

" The implication of the voidance is that neither party can seek the benefit of the guarantee provided by Central Bank of Nigeria under Act 20 of 1977 because the illegality of either party estoppel it from enforcing the guarantee agreement."

There is concurrence by the two lower courts that the contravention of the act prohibited by the 1977 Act was such, according to the trial judge, to vitiate the guaranteed contract of loan, and according to the Court of Appeal, the illegality arising therefrom would estop either party from enforcing the guarantee agreement. I am clearly of the view that the contract of loan subsumed by the parties under the 1977 Act and guaranteed by the Central Bank of Nigeria was tainted with illegality by the parties' joint agreement to divert the fund under the loan agreement to a purpose other than that for which the loan was granted. **Generally, the consequence of illegality in relation to the parties contract is that the court will not come to the assistance of any party to an**

illegal contract who wishes to enforce it. This position of the law is founded on the principle of public policy and is expressed in the maxim ex turpi causa non oritur action meaning that an action does not arise from a base cause. Therefore, it goes without saying
 B that the promise or consideration exchanged by the parties herein, i.e. to divert part of the loan contract guaranteed by the Central Bank of Nigeria to off-set the appellant's overdraft is illegal and the reason by the parties in making the agreement to divert some of the funds to liquidate the
 C **overdraft was to promote an act expressly prohibited by statute. But whether or not a party can recover under an illegal contract may depend on whether that party was aware or privy to the illegality because it is unfair, in equity, for the guilty party to hold the innocent party bound by an act of illegality that he is wholly unaware of.**
 D **See Cowan v Milbourn (1867) L.R. 2 Ex 230. The result is that generally, money paid or property transferred under illegal contract is irrecoverable where both parties are equally guilty of the fact of illegality. This is also buttressed by the maxim in pari delicto**
 E **potior est conditio defendentis and means that where the parties are both at fault, the condition of the defendant is better. See Fashina v Odedina (1957) WR NLR 45 and Abesin & anor v Iyaegbe (1958) WR NLR 67.**

F Be it noted that it was expressly submitted on behalf of the appellant by this learned counsel that "the Appellant being privy to the bilateral or collateral agreement to divert funds under the loan does not preclude it from seeking to enforce the contract of loan." Learned counsel further
 G submitted that the parties in relation to the agreement to divert funds under the loan were not in pari delicto and that the learned trial judge must be taken to have so found when she made reference to undue influence of a Banker over its customer.

H On behalf of the respondent, their learned counsel submitted that the collateral agreement to divert the loan granted under the guarantee was building on both parties and also submitted that it was a form of variation of the original agreement which is permissible under the law of contract.

I must confess that the submission that the collateral agreement to divert part of the loan granted under the guarantee agreement is valid, subsisting and binding on the parties is, to say the least, startling, having regard to the express statutory prohibition under the 1977 Act. Even if the collateral agreement could, in any sense, of which I have my grave doubt, amount to a valid variational agreement, surely, such variation which is brought about by an act expressly prohibited by provisions of the law, must itself be illegal and unenforceable. B

Again, the submission that the parties in relation to divert the funds under the loan agreement were not in pari delicto is unattractive; it was raised impromptu. Neither did the parties contest that issue in their pleadings nor did they lead any evidence to support such assertion. **It is crystal clear and beyond peradventure that the parties unpleaded facts go to no issue; similarly, evidence led at trial not anchored on the parties' pleadings must be discountenanced.** See Adimora v Ajufo (1989) 3 NWLR (pt.221) 33. Emegokwue v Okadigbo (1973) NMLR 192 and Onwuka v Omogui (1992) 3 NWLR (Pt.230) 393. As I had stated earlier, the point regarding whether undue influence was brought to bear on the appellant by the respondent was impromptu in the parties' briefs. The learned trial judge harped on the issue of undue influence that a banker may have on his customer. The trial judge went further to say that the respondent was wrong to have used undue influence on the appellant when, as we have earlier shown, it was not open to the learned trial judge to so hold in the absence of evidence in support of any undue influence based on leading. It was clearly speculative to harp on undue influence which was not canvassed by the parties. Undoubtedly, a party who is a victim of undue influence, or even fraud, can recover back money or property transferred under such circumstances. See Smith v Cuff (1817) 105 ER 1203, Atkinson v Derby 6 H & N 778 and Hughes v Liverpool Society (1916) 2 K B 482. E F G

I would like to emphasize the point that an assertion that a party to an illegal contract acted under pressure or undue influence is a further extension of the exception that if the parties to an illegal contract are not in pari delicto so that the party on whom

superior power or influence was operated may well recover money or property exchanged in such circumstances. Reliance on the exception of undue influence must be established by positive evidence or strong inference that can be drawn from the surrounding circumstance. As I had stated earlier, neither did the appellant plead to this crucial fact nor was any evidence led in respect thereof. Learned appellant's counsel submitted that the parties were not in pari delicto as the "learned trial judge must be taken to have so found when she attributed that agreement to the usual undue influence of a Banker over its customer which she of course deprecated". It is necessary to put the record straight as it relates to the point now being contested seeing that it is far-reaching and sufficient to determine the fortunes of the parties in this appeal. **Having held the view that the parties never made an issue of the question of undue influence - either in their pleadings or evidence - there would be no jurisdiction whatsoever for the learned trial judge to make any purported finding on undue influence, more so as the appellant had taken the posture of a total denial of the collateral agreement, the defence of undue influence was not open to it.**

The inevitable conclusion that I am bound to reach from the foregoing is that the collateral agreement between the parties for diverting the sum of N30,000.00, part of the fund granted to the appellant under the 1977 Act was tainted with illegality. The contravention of said 1977 Act rendered the contract between the parties void and illegal. Since the foundation of the said agreement is void and illegal it cannot, in law, support any binding and enforceable contract. See Herman v Jeuchner (1985) 15 QBD 561 and Parkinson v Collage of Ambulance (1925) K.B. 1. In the result, I turn in an affirmative answer to Issue No. 1.

As pointed out from the outset in this appeal, the ultimate decision that will be arrived at herein would be predicated on the outcome of Issue No. 1 Having characterized the collateral agreement between the parties as void and tainted with illegality, it is clear that it is not needful to give any further consideration to Issue No. 2. No useful purpose will be served to embark on such exercise save to say that the Court of Appeal

was right to have summarily dismissed the appellant's cross-appeal on all the heads of complaint as a matter of course.

In the result, this appeal deserves to fail and is dismissed. Costs are assessed at N10,000.00 in favour of the respondent.

WALI JSC

I have had a preview of the lead judgment of my learned brother Achike, JSC and I agree with the reasoning and conclusion reached therein for dismissing the appeal.

For these same reasons contained in the lead judgment which I hereby adopt, I too find no merit in the appeal and I accordingly dismiss it. The judgment of the Court of Appeal is hereby affirmed. I adopt the consequential orders made in the lead judgment, that of costs inclusive.

OGWUEGBU JSC

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

The facts of the case and the issues for determination in the appeal having been fully set out in the said judgment of my learned brother Achike, J.S.C., It is not necessary for me to repeat them here. The kernel of the contentions of both parties to this appeal is the effect of the illegality of the collateral agreement between the parties to divert the sum of N30,000.00 part of the fund granted to the appellant by the respondent and guaranteed by the Central Bank of Nigeria under the Agricultural Credit Guarantee Scheme Fund Act, 1977.

Section 13 of 1977 Act provides as follows:

"13(1) No loan granted pursuant to this Decree shall be applied to any purpose other than that for which the loan was granted.

(2) Any person who applied any loan granted pursuant to this Decree in contravention of subsection (1) of this section shall be guilty of an offence and shall be liable on conviction to a fine of an amount of the loan in respect of which the offence was committed or to imprisonment for not less than five years.

(3)....."

The learned trial judge held that the variation is a breach of the essential condition of the agreement which is forbidden by section 13(1) of the 1977 Act and that the contract of guarantee with the Central Bank of Nigeria is thereby vitiated. The court below agreed with this conclusion

B of the learned trial judge and went further to hold that:

"the implication of the voidance is that neither party can seek the benefit of the guarantee provided by the Central Bank of Nigeria under Act No. 20 of 1977 because the illegality of either party estopped it from enforcing the guarantee agreement....."

C *It is a guarantee agreement which is void and unenforceable because of the deceit of the principal debtor and creditor which has resulted in an illegal contract."*

D I agree with the above conclusion of the court below. The general principle which is founded on public policy, is that any transaction that is tainted by illegality in which both parties are equally involved is beyond the face of the law as no person can claim any right or remedy whatsoever under an illegal transaction in which he has participated. No court E will lend its aid to a man who founds his cause of action upon an immoral or illegal act. See Holman v. Johnson (1775) 7 Cowp. 341; 98 E.R. 1120, Gordon v. Metropolitan Commissioner (1910)2 K.B. 1080 at 1098 and Onyiuke v. Okeke (1976) 3 S.C. 1 at 7.

F The learned trial judge in her bid to exculpate the plaintiff from the consequences of a positive transgression of section 13(1) of the 1977 Act, wrongly imported the maxim "in pari delicto, portio est conditio possidentis," an exception to the general rule and held that the parties were not in pari delicto because the defendant stood in a fiduciary position towards the plaintiff and abused it by undue influence. Undue influence G was neither pleaded nor evidence led on it. Where undue influence is alleged, the onus lay on the party seeking to enforce the contract to show that undue means had been used to obtain the contract. The plaintiff H could not have given evidence on the undue influence because it was not pleaded and a party who intends to rely on illegality as a result of undue influence must specially plead the illegality. The court will itself, however, take notice of the illegality of a contract on which a plaintiff is

suing, if it appears on the face of the contract or from the evidence brought before it by either party even though the plaintiff has not pleaded it. See Clarke v Callow (1876) L.J.Q.B. 53 and Harmer v. Rowe (1817) 6 R & S, 146; 105 E.R.1197. The plaintiff made no attempt to exculpate himself from participation in the illegality and I will go further to hold that he was using the process of the court to establish a claim which ought not be enforced. B

For the above reasons and the more detailed reasons contained in the judgment of my learned brother Achike, J.S.C., I hold that the collateral agreement of the parties to divert N30,000.00 part of the agricultural credit loan granted to the plaintiff was illegal and void being in contravention of section 13(1) of the 1977 Act. The plaintiff's cross-appeal was rightly dismissed by the court below since the plaintiff broke the law when he entered into the collateral, contract and "ex turpi causa non oritur actio." (no right of action arises from a base cause. D

The appeal fails and it is accordingly dismissed by me with N10,000.00 costs to the respondent.

KALGO JSC

I have read in advance the judgment just delivered by my learned brother Achike, JSC and I am in complete agreement with the reasoning and conclusions reached therein. I adopt them as mine and find that there is no merit in the appeal. As a result, I also dismiss the appeal. I abide by the consequential orders made in the judgment including the order as to costs. F

AYOOLA JSC

This is an appeal from the decision of the Court of Appeal allowing the appeal of the present respondent from the decision of the High Court of Bendel State (as it then was) and setting aside the judgment entered for the plaintiff, which is now the appellant in this appeal, against the defendant, which is now the respondent, in the sum of N57,429 being special damages for breach of contract. H

In the High Court the appellant sued the respondent claiming dam-

ages for breach of contract of loan of money to the appellant, damages for "negligence or breach of duty under the contract/agreement afore-said" and several declaratory reliefs and injunction. The High Court entered judgment as earlier mentioned for the appellant for damages for breach of contract. Nothing was said about the other reliefs sought by the appellant. The respondent appealed to the Court of Appeal from that decision. The appellant also cross-appealed from that part of the decision of the High Court relating to damages and a finding of fact concerning the agreement of the parties to divert part of the loan to the settlement of the appellant's indebtedness to it made by the trial judge. It is to be noted that no issue was made at the Court of Appeal of the failure of the high Court to pronounce on the other reliefs claimed by the appellant. The Court of Appeal allowed the respondent's appeal and dismissed the appellant's claim. Being of the view that since the question of liability had been resolved against the appellant the issue of quantum of damages did not arise, the court below dismissed the cross-appeal without much ado. The appellant appealed to his court from the whole decision of the Court of Appeal....

The background facts have been stated in the judgment of my learned brother, Achike, , which I have had the privilege of reading in draft. The appellant's case in the High Court, put in a nutshell, was that it and the respondent entered into an agreement whereby the respondent would lend to the appellant a sum of N56,500 in addition to an agricultural loan of N60,000 which it had already obtained from the respondent. The original loan of N60,000 and the additional loan of N56,000 were both granted under the Agricultural Credit Guarantee Scheme Fund Act, 1977 ("the Act"). The loans were guaranteed by the Central Bank of Nigeria pursuant to the Act.

The action in the High Court came about because the respondent had utilized N30,000 out of the additional loan of N56,000 for the purpose of offsetting the indebtedness of the appellant to it in respect of a prior overdraft transaction which was unrelated to agriculture or any project within the Act. Notwithstanding that the respondent had utilized that sum to pay off the indebtedness of the appellant to itself, the appel-

lants contends that it was, nevertheless, entitled to have the balance of the additional loan. The respondent averred, and the trial judge found, that both parties had agreed that the sum of N30,000 of the N56,000 was to offset the overdraft of the appellant. The consequence of this finding is necessarily that the total sum of the additional loan had been put to the benefit of the appellant, notwithstanding that part of it was utilized in contravention of the Act.

Apparently impressed by the evidence of the appellant's witness, an official of the Central Bank, that the "N30,000 withheld by the Defendant was contrary to the Agricultural Scheme.....", the trial judge came to the conclusion that "the failure of the Defendant bank to place the remaining N30,000 guaranteed loan amount to the plaintiff's credit, was a breach of their loan agreement." And found the respondent liable to the appellant in damages.

For their part, their Lordships of the Court of Appeal were of the opinion, per Salami, JCA, (Omo and Ejiwunmi, JJ.C.A. (as they then were) concurring), that although the diversion of the sum of N30,000 vitiated the guarantee agreement with the Central Bank, and had the effect of releasing the guarantor, the Central Bank, from its obligation under the contract of guarantee, it did not have the effect of rendering the contract as a whole unenforceable. Of particular relevance to the issues on this appeal is the view held by Salami, JCA, that:

"The learned trial judge having vitiated the guarantee agreement and released the surety from its obligations thereof the principal debtor and creditor return to status quo in the regulation of their relationship."

It is well to observe that the Court of Appeal, having referred to the provisions of section 13(1) of the Act went on to say, per Salami, JCA,,

"The implication of the voidance is that neither party can seek the benefit of the guarantee provided by the Central Bank of Nigeria under Act 20 of 1997 because the illegality of either party (sic) estopped it from enforcing the guarantee agreement It is the guarantee agreement which is void and unenforceable because of the deceit of the two, principal debtor and creditor which has resulted in an illegal contract."

None of the letters tendered in evidence showed that the appellant had at any time requested for an enhancement of its agricultural loan beyond a sum of N33,000. (See exhibits E,F,F2,G.) The mention of N56,500 enhancement first appeared in the body of the respondent's letter, exhibit G, and later in the endorsement to guarantee certificate, exhibit H. In these circumstances, the probability is strong that, as found by the trial judge, the addition of N30,000 to the enhancement requested by the appellant was to enable the parties to utilize that sum to offset the existing overdraft of the appellant. In my view, the Court of Appeal was right in its view that both parties colluded in deceiving the Central Bank that the sum of N30,000 was to be used for purposes of the Agricultural Scheme or that it was, in fact, a loan granted pursuant to the Act.

Section 13(1) of the Act provided as follows:

"No loan granted pursuant to this Decree, shall be applied to any purpose other than that for which the loan was granted."

Although subsection 2 of section 13 proceeded to make it an offence punishable with imprisonment or fine to divert such loan to other purposes, there is no provision of the Act stipulating a return of a loan so diverted to the purpose of the loan. But, perhaps, what is more important is that as the parties have been shown not to have intended to use a substantial part of the loan for any purpose within the objective of the Act, But had falsely concealed that fact from the Central Bank and had represented to it that the entire loan was granted pursuant to the Act, it is right to hold that the loan was not granted pursuant to the Act.

Approach to this appeal from the perspective of an alleged illegality of the transaction is fraught with considerable difficulties. This is why I am content to venture to consider the matter from a rather different perspective which does not emphasize the application of the principles relating to illegality. The appellant had sued for a breach of a contract of loan. The evidence had established that he had in fact been granted a loan. To that extent, there cannot be said to have been a breach of the contract to grant the appellant a loan. Any implied term of the loan agreement that the loan will be utilized entirely for the purpose of the agricultural project is negated by the express agreement of the parties,

as found by the trial judge and confirmed by the court below, that the agreement and intention of the parties was that N30,00 of the loan should be utilized in offsetting the appellant's overdraft. The appellant cannot therefore continue to maintain that by reason of so utilizing that part of the loan a breach of contract had been occasioned. A breach of contract B connotes that the party in breach had acted contrary to the terms of the contract either by non-performance, or by performing the contract not in accordance with its terms or by a wrongful repudiation of the contract. A party who had performed the contract in consonance with its C terms cannot be said to have been in breach thereof.

It appears to me that the subterfuge by which the respondent, with the complicity of the appellant, had attempted to substitute a Central Bank guaranteed debt for a prior one which was without such a security, D has failed in view of the clear statement of the law by the Court below that the Central Bank would be discharged from its obligations as a guarantor. The appellant who apparently would be substituting one indebtedness for another did not seem to have lost anything. If one may speculate, it probably would be have gained by having an older debt wiped out. E

In my view, which ever way one looks at it, the appellant's case was bound to fail. If the entire loan agreement is held to be tainted with illegality in that the agreement and intention of the parties was that part of it would be utilized in contravention of the Act, the appellant cannot be F seen to be asking that the contract be now varied and enforced as if that was not their agreement. The court will not re-write the contract for the parties. Even if it were possible to sever the illegal part of the loan transaction from the rest of the contract, the consequence would be to deny G the appellant of any right under the illegal part and not to hold the respondent to a performance of the illegal part in a manner not agreed to by the parties. Whatever the consequence of the taint of illegality, it does not, in this instance , include the type of cause of action brought by the appellant. If the term that part of the loan be utilized in contravention of the Act H can be severed from the rest of the agreement and taint of illegality attached to that term, the appellant having been equally at fault cannot now ask that money already paid, ultimately to its benefit, in performance of

the agreement, be refunded to it.

My learned brother, Achike, JSC, has dealt fully with the issue of illegality and the rest of the issues in the appeal in the leading judgment which I have had the privilege of reading in draft. Entirely agree with him that the appeal should be dismissed. I have only made this short contribution from an alternative perspective to show that, in the final analysis, the appellant who alleged a breach of contract must in any event fail in the face of the facts as found and the legal consequences arising therefrom: (1) that a loan was granted it by the respondent; (2) that, notwithstanding that the parties may have agreed to a term in contravention of the Act, it was their mutual agreement that part of the loan would be utilized in offsetting the appellant's overdraft; (3) that what the respondent did in that regard was therefore in consonance with the agreement of the parties; and (4) that the consequence of the parties' agreement to act in contravention of the Act was to discharge the Central Bank from its obligations as a guarantor. In short, in so far as the basis of the action of the appellant was a breach of the contract of loan there was no such breach. Where parties to a contract have agreed to terms of a contract, performance of the contract by one of the parties in line with what the parties have agreed to, does not become a breach merely because the terms agreed to by the parties had in the first place been illegal.

In the result, for these reasons and the fuller reasons in the judgment of my learned brother, Achike JSC, I too would dismiss the appeal with N10,000 costs to the respondent.

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