

SUPREME COURT OF NIGERIA
15TH DECEMBER, 2000. SC. 132/1992
CORAM:- A. B. WALI, I. L. KUTIGI, A. I. IGUH,
A. I. KATSINA-ALU, E. O. AYOOOLA, JJSC

AFROTEC TECHNICAL

SERVICES (NIG) LTD. DEFENDANT/APPELLANT
AND

MIA & SONS LTD. PLAINTIFF/RESPONDENT

AFCON ENGINEERING LTD. 3RD PARTY/RESPONDENT

ACTIONS - *Relief not claimed - Was wrongfully awarded by the Court of Appeal.*

SALE OF GOODS - *Conditional sale - Property in the goods did not pass to the buyer - Who failed to pay the outstanding balance - As provided in the parties' agreement Exhibit 1.*

SALE OF GOODS - *Unpaid seller's right of lien - Was rightly exercised by the seller - In seizing the machinery - Though the seller was acting as the buyer's agent.*

SALE OF GOODS - *Appeals - Court of Appeal was wrong - In finding that the conditional sale was converted into an absolute sale - And in its view that the only remedy open to the seller was action for the recovery of the unpaid balance.*

SALE OF GOODS - *Lien - Right of - Was not waived as erroneously found by the Court of Appeal - And plaintiff did not establish any legal right in the property in issue.*

FACTS

The plaintiff/respondent before the Kaduna High Court, filed an action against the defendant/appellant. Plaintiff sought to restrain the

defendant from selling the machinery (goods) in dispute to a 3rd party and also sought specific performance of the parties' agreement for installation of the equipment. The machinery in dispute were originally sold by the defendant to the plaintiff vide a contract of sale Exhibit 1. By Exhibit 1, property in the goods would only pass to the plaintiff upon full payment of the outstanding balance. All the cheques issued by the plaintiff towards paying the said balance were dishonoured. By a later agreement between the parties, the defendant was to move the machinery as agent of the plaintiff to a different location. Defendant used this opportunity to seize the equipment in exercise of their right of lien.

The trial court found that the transaction between the parties was a conditional sale. It dismissed the plaintiff's claim in their entirety as lacking in merit. The plaintiff's appeal to the Court of Appeal was upheld and that Court granted a relief that was not claimed by the plaintiff. Being dissatisfied, the defendant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"(i) Whether the Court of appeal was right in its view that Ownership in the equipment passed to the plaintiff on proper construction of Exhibit 1 merely because the Defendant had delivered the equipments at the site of the plaintiff at Kontagora.

(ii) Whether the Court of Appeal was right in its view that acceptance of negotiable instrument as payment for the equipment had converted the conditional sale of these equipment into an absolute sale.
Etc, see p. 3271

HELD (Allowing the appeal per lead judgment of **KUTIGI JSC**, **AYOOLA JSC** dissenting)

Conditional sale

1. The facts of this case show clearly that the equipments or machinery were sold to the Defendant conditionally. The conditions being that "the Defendant shall have a lien on all the machinery until a time that the Defendant received payment of the full contract amount of N702, 900.00", and that "the Defendant shall take immediate possession of the machin-

ery within one month should the plaintiff fail to pay any of the instalmental payment detailed in Exhibit 1". In other words I am of the view that the property in the equipments or machinery had never passed to the plaintiff when the Defendant effected the seizure which is the subject matter of this action. The parties are clearly bound by the provision in the Sale Agreement (Exhibit 1) without any subtraction or addition. The Court has no power to rewrite the agreement. I have carefully perused the agreement herein and have found nothing illegal in any of its provision. (p. 3277 H)

Unpaid seller's right of lien

2. There is no doubt at all that the Defendant is an unpaid seller under the Act. It was therefore acting within its rights when though acting as an agent of the plaintiff, it seized the machinery which had lawfully come into its possession at the relevant time. The short of it all is that the contract of sale between the parties being conditional, the Defendant was entitled to exercise its right of lien both under the contract agreement (Exhibit 1) and under the Act, the plaintiff having woefully failed to satisfy the condition of sale of paying the 60% balance of the sale price. (p. 3279 E)

Sale of goods - Appeals - Court of Appeal's error

3. I therefore resolve issues 1,2,3, and 4 in favour of the Defendant as follows:-

(1) The Court of Appeal was wrong in its view that ownership in the equipment passed to the plaintiff on proper construction of Exhibit 1.

(2) The Court of Appeal was wrong in its view that acceptance of negotiable instruments or cheques as payment for the equipment had converted the conditional sale into an absolute sale.

(3) The Court of Appeal was wrong in its view that the only remedy open to the Defendant was an action for the recovery of the balance of the sum unpaid.

(4) The Court of Appeal was wrong in holding that the plaintiff

had established a legal right in the equipment as to entitle it to equitable reliefs sought. (p. 3280 C)

Lien - Right of - Was not waived

B 4. I therefore resolve issues (v) and (vi) in favour of the defendant and hold that the court of appeal erred when it held that the defendant had waived its right of lien as contained in exhibit 1 which is the only agreement or contract pleaded and relied upon by the parties. I also hold that
C the plaintiff did not establish any legal right in the equipments as to entitle them to any of the reliefs claimed. (p. 3282 B)

Actions - Relief not claimed

D 5. This issue is directed against the following order made by the court of appeal-

*"That the said equipments be delivered to the plaintiff subject to the plaintiff paying the entire sum outstanding as balance of the total cost of the equipments, taking into account N381,160.00 the plaintiff
E had so far paid to the 1st respondent (defendant)"*

There is no dispute about the fact that this is certainly not one of the reliefs sought by the plaintiff against the defendant in the trial court. The defendant also made no counter-claim in its Statement of defence before
F the high court against the plaintiff. The order made by the court of appeal is therefore clearly gratuitous. It is not the function of a Court of law to make a gratuitous award. Such an award will be incompetent (see for example EKPEYONG VS. NYONG (1975) 2 SC. 71. (p. 3282 D))

G **NOTABLE POINTS OF INTEREST**

WALI JSC

1. Briefs - Formulating two issues from one ground is not elegant

H On the question relating to formulating two issues from a single ground viz issues (i) and (iv) arising from ground 2, it is not against the procedure relating to briefs of argument that one or more issues are formulated out of a ground of appeal, but I agree that it is inelegant to do so and it may at times be incomprehensible and confusing. The purpose of filing

a brief is to state with accuracy, brevity and precision whatever is essential to clear and adequate understanding of the questions which are required to be considered by the court. (p. 3284 B)

2. Counter offer operates as a rejection of the original offer

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The respondent made a proposal to the appellant in that regard which the latter replied by a counter-proposal. A counter-offer by the offeree operates as a rejection of the original offer, thus terminating it. So it is futile for the respondent to claim that Exhibit 1 had been replaced or altered by another agreement which he called novation. The conditions in Exhibit 1 were still binding and enforceable at the time of litigation. There was no waiver by the appellant of his right of lien over the equipment sold and delivered to the respondent's site in Kontagora.

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(p. 3287 D)

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IGUH JSC

3. Contracts - Parties' express agreement negates implied conditions

It ought to be stressed from the onset, however, that a contract of sale reduced into writing, such as Exhibit 1, must be construed and given effect to like any other written contract. See Coddington V Paleologo (1867) L.R. 2 Exch. 193 at 200. So, where any right, duty or liability would arise under a contract of sale by implication of law such right, duty or liability may be negated or varied inter alia by the express agreement of the parties. It is principally the intention of the parties, as shown by the terms of the contract, amongst other considerations, which determines the time when the property in the goods, the subject matter of a contract of sale is transferred or passes to the buyer. (p. 3295 C)

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4. Lien - Seller in possession as buyer's agent can still exercise the right of lien

A lien, broadly speaking, is a right to retain that which is in one's possession belonging to another till certain demands of the person in possession are satisfied. The unpaid seller's lien however, is his entitlement to retain the goods in his possession until the buyer has paid or tendered the whole

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of their price. See Marthindale V. Smith (1841) 1. Q.B 389 at 396. The point that must be emphasized is that the unpaid seller's right of lien depends on his being in possession of the goods at the time he exercises his right of lien. Even where the seller is in possession of the goods as agent or bailee for the buyer, as is the case in the present appeal, he may still exercise right of lien. (p. 3299 C)

5. Right of lien - How extended by the parties' contract

Without doubt, section 43(1) of the Sale of Goods Act, 1893 provides that the unpaid seller of goods loses his right of lien or right of retention when, inter alia, the buyer or his agent lawfully obtains possession of the goods. But it is settled law that although possession of the goods may have passed to the buyer or his agent so as to terminate the unpaid seller's statutory right to a lien, the contract itself between the parties, as is the case in the present appeal, may make express provision for or create a special right in the seller which is analogous to a lien. Where such express provision is agreed to by the parties, it cannot be doubted that it will be binding on the parties. (p. 3301 G)

6. Parties can contract outside the Act provided that such terms are not illegal

In this connection, it ought to be stressed that rights which have been conferred on sellers or buyers under the Sale of Goods Act, 1893 are rights that arise under the contract between the parties by the implication of law. Section 55 of that Act, however, provides that where any right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negatived or varied inter alia by express agreement between the parties. Accordingly, if the contract between the parties expressly create a lien, a right of retention of the goods, repossession thereof or other form of security for the price, such express terms will prevail over, and therefore exclude the statutory implication of a lien etc, at least to the extent of any inconsistency with the express terms. See Re Leith's Estate (1866) L.R. 1 P.C 296 at 307 and 308. This is because parties to a contract enjoy their freedom to contract on their

own terms so long as these are not illegal and/or unlawful. The terms of a contract between parties are therefore clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any document which constitutes the contract are invariable the guide to its interpretation. When parties enter into a contract, they are bound by the terms of that contract and it cannot be anything but unfair to read into such a contract the terms on which there has been no agreement save terms which may arise by implication of law and in respect of which there is nothing in the contract that expressly provides otherwise. (p. 3302 A)

7. Right of lien is not lost where judgment debt has not been paid

The appellant's right to be paid the contract price of the goods is, under the law, quite independent of the existence of a lien; a lien being an additional security given to the seller who has yet to be paid, but he has a right to be paid besides and independently of his lien. See The Elder (1893) P.119 at 131. It is thus settled that the right of the seller to sue for the price of the goods is independent of his other remedies against the goods. Indeed under section 43(2) of the Sale of Goods Act, 1893, the seller does not lose his right to lien merely because he has obtained judgment for the price of the goods unless and until the buyer has fully satisfied the judgment debt by payment of the full contract price to the seller. (p. 3303 C)

8. Acceptance of negotiable instrument - Does not necessarily make a conditional sale absolute

It cannot be disputed that the acceptance of a negotiable instrument is normally treated as conditional payment. Certainly, on the facts of the present transaction, the negotiable instruments issued by the 1st respondent and accepted by the appellant were taken as conditional payment. It is my view that where, as in the present case, a negotiable instrument taken as conditional payment for the price of goods is dishonoured, various remedies for the breach of such contract of sale including but not limited to an action for the unpaid balance are available to the seller

depending on the facts and circumstances of each case. I think the court below was in error to hold that the acceptance of a negotiable instrument in all cases ipso facto converted the conditional sale in issue, as in the present case, into an absolute sale in the absence of any evidence to establish that the parties agreed to such arrangement. (p. 3304 F)

9. *When specific performance will not be granted*

Still on the issue of specific performance of the agreement for the installation of the plant by the appellant at Kaduna, attention must be drawn to a second equally important principle. This pertains to the well established principle that contracts which are personal in nature or which involve the performance of personal service will not be specifically enforced. In the present case, it cannot be disputed that there is an absolute remedy at law for the alleged breach complained of by the 1st respondent in that the 1st respondent would not only be adequately compensated by the common law remedy of damages, it did in fact make a claim for damages for the breach complained of. (p. 3305 G)

10. *Equity - Plaintiff must come with clean hands to be entitled to an injunction*

On the issue of the perpetual injunction claimed, it is another fundamental principle that the court will only grant a perpetual injunction at the suit of a plaintiff in support of a right known to law or equity. The conduct of a plaintiff must also be taken into consideration in determining whether or not to grant an injunction. The plaintiff must come to equity with clean hands and if, therefore, he is in breach of his own obligations, he will not be granted an injunction. In the same vein, he who comes to equity must do equity. Accordingly, a plaintiff will not succeed in his claim for injunction if he is unable or unwilling to carry out his own obligations. (p. 3306 D)

AYOOLA JSC (DISSENTING)

11. That payment of price is instalmental - Does not necessarily make a sale conditional

That payment of price is deferred or agreed to be by installments does not by itself make a contract of sale a conditional sale. In order to determine whether a contract of sale is a conditional sale the totality of the agreement must be considered. Where there is express term as to the passing of property there is no problem. Effect must be given to such term. It is where there is no such express term that resort must be had to a construction of the agreement, if in writing, to deduce the intention of the parties. (p. 3313 G)

12. A lien does not give the holder any property in the goods

It is clear that a lien is merely a right to retain the goods subject to it until the amount of the lien has been paid. The lien does not give to the holder any property in the goods. A legal lien was described in Halsbury's laws of England Vol 28 (4th Edition) paragraph 702 thus;

"In its primary or legal sense 'lien' means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied. In the primary sense it is given by law and not by contract".

Apart from lien which the law give there is lien by contract, which is right to detain goods as security. (p. 3317 E)

13. Immediate passing of property is not altered by seller's right to take possession for non payment of balance

By the agreement of the parties the defendant was given a right to "take immediate possession of those properties in specie that remains unpaid for within the subject of this transaction without hindrance and without recourse" should the plaintiff fail to pay any of the agreed installments within one month of the due date. I do not interpret this right as suggesting an intention to delay passing of property to the plaintiff. (p. 3318 F)

14. *How defendant lost its right of lien*

When the defendant delivered the equipment to the plaintiff it lost its statutory lien as an unpaid seller over the goods. Its possession of the goods as bailee of the plaintiff was possession by the plaintiff through it as bailee. The position is different from the case in which the seller had not at any intervening period been out of physical possession.

In my judgment, the defendant having delivered the equipment to the plaintiff had lost the statutory lien which it had pursuant to section 39(1) of the Act, notwithstanding that it subsequently regained possession, under a separate contract as a bailee of the plaintiff for purpose of transporting the equipment to Kaduna.

Even if the defendant had not lost its lien, it has waived it by its conduct. The law is clear that lien is waived "where the party claims to retain goods on grounds different from those on which he rests his claim for lien and makes no mention of lien." (p. 3323 D)

15. *The real issue in controversy is defendant's right to dispose the equipment*

To put this aspect of the case in proper focus, it is right to note that what is challenged directly in this case, from the relief sought, is the right of the defendant to dispose of the equipment. As rightly noted by the trial judge from the evidence of the only witness for the defence.

"The three equipment are kept by the defendant in its exercise of right of lien stipulated in exhibit 1 and pending the times when the plaintiff would pay the outstanding balance".

Indeed the evidence of that witness read:

"I still have possession of this three equipment. We are ready to release the three equipment if the balance of N635,059.78k is paid to us".

The position thus taken by the defendant appears to me be consistent with the claimed contractual right of the defendant as a holder contractual lien to retain possession pending the payment of sums due. No right of sale attaches to such lien. (p. 3326 G)

REPRESENTATION

J. K. Agbesanwa for Defendant/Appellant

O. A. R. Ogunde for Plaintiff/Respondent

3rd. Party/Respondent absent

B

CASES REFERRED TO

Buraimo vs Adeniyi (1990) 2 NWLR (pt.133) 406

Oduye vs Nigerian Airways (1987) 2 NWLR (PT.55/126

Niger Benue Transport Co. Ltd vs Narunmal & Sons Ltd (1986) 4 NWLR (Pt.33) 117 C

Bookshop House Ltd vs Stanley Consultant Ltd (1986) 2 NWLR (Pt. 26) 87

Ogbonaiya vs Okudo (1979) 6-9 SC.

Hungmann vs Brieseman (1892) 67 L.T. 642 D

Weeks vs Goode (1859) 6 C. B. (N.S.) 367

STATUTE REFERRED TO

Sale of Goods Act 1893 (Received English Statute) ss. 18(1), 19, 17, 38- 41, 62, 48 (2) & (3), 28, 1(2), 43, 55 E

LEAD JUDGMENT BY KUTIGI JSC

In the Kaduna High Court, the plaintiff's claims against the Defendant read as follows: F

"(1) Perpetual injunction restraining the Defendant, its servant, or agents or other officers acting on its behalf from disposing of by sale or otherwise the equipments.

(2) Damages. G

(3) Specific performance of Agreement of installation of equipments i e.

(a) Parker 5245/4 Crushing plant combination

(b) Foden Model Dump Truck H

(c) BD 440 Generating Set.

(d) Spare parts for crushing plant.

at the Kaduna Quarry site of the Plaintiff by the Defendant or

in the alternative refund of all monies paid by the plaintiff to the Defendant on the said equipments".

Pleadings were filed and exchanged between the parties and the case proceeded to trial. At the trial the Plaintiff called two witnesses while the Defendant called only one witness. After hearing evidence from both sides and the addresses of their counsel, the trial court adjourned for judgment. In a considered judgment delivered on 21/7/89, the learned trial judge Ibiyeye J, after reviewing all the evidence before him, came to the conclusion that the transaction between the parties was a conditional sale and that the plaintiff had acted in violation of the conditions of sale i.e instalmental payments. The learned trial judge, therefore dismissed plaintiff's claims in their entirety as lacking in merit.

On the 24th July 1989, the Defendant sold the plant or machinery to AFCON ENGINEERING LTD, the 3rd party herein. Dissatisfied with the decision of the learned trial judge, the plaintiff appealed to the Court of Appeal, holden at Kaduna.

In a reserved judgment delivered on 10/4/91, the Court of Appeal unanimously allowed the appeal, set aside the judgment of the kaduna High Court and then proceeded to make the following orders in favour of the plaintiff:-

"1. *A perpetual injunction restraining the Defendant whether by themselves,..... their servants, agents, privies or other representatives from selling, leasing or otherwise creating any encumbrance on the equipments subject matter of this suit.*

2. *That the said equipments be delivered to the plaintiff subject to the Defendant paying the entire sum outstanding as balance of the total cost of the equipments, taking into account N381,160.00, the plaintiff had so far paid to the Defendant.*

3. *Order remitting the issue of general damages back to the High Court for Assessment.*

4. *3rd party to release the equipments, if it had taken possession of the same, forthwith.*

5. *N500.00 costs to the plaintiff".*

Aggrieved by the decision of the Court of Appeal, the Defendant

has now appealed to this court on seven Grounds of Appeal. It is not necessary to reproduce them. It suffices to say that pursuant to the Rules of Court, the parties filed and exchanged their briefs of argument which were adopted at the hearing .

The seven issues distilled from the Grounds of Appeal and submitted by the Defendant for the determination of this court are as follows-

"(i) *Whether the Court of appeal was right in its view that Ownership in the equipment passed to the plaintiff on proper construction of Exhibit 1 merely because the Defendant had delivered the equipments at the site of the plaintiff at Kontagora.* C

(ii) *Whether the Court of Appeal was right in its view that acceptance of negotiable instrument as payment for the equipment had converted the conditional sale of these equipment into an absolute sale.* D

(iii) *Was the Court of Appeal right in its view that the only remedy open to the Defendant was an action for the recovery of the balance of the sum unpaid and not in its exercise of the right of lien or Repossession of the plaint when the agreement between the parties provided for those remedies?* E

(iv) *Was the Court of Appeal right in holding that plaintiff has established a legal right in the equipments as to entitle it to the Equitable reliefs sought?* F

(v) *Was the Court of Appeal right in holding that the Defendant has waived all the restrictive conditions in Exhibit 1 when the waiver of the same as a defence was not specifically pleaded nor were circumstances and facts amounting to waiver pleaded in answer to the plaintiff's pleadings?* G

(vi) *Was the Court of Appeal right in making an order to enforce the second agreement when the respondent failed to fulfill its obligation under the first contract?*

(vii) *Whether the Court of Appeal was right in making an order that the said equipment be delivered to the plaintiff subject to the plaintiff paying the entire sum outstanding as balance of total cost of the equipment taking into account N381,160.00 the plaintiff has so far paid* H

to the Defendant when such relief was not placed before the trial court".
The plaintiff on its part, submitted six issues in its brief of argument as arising for determination thus :-

B " (a) Whether having regard to the pleadings and evidence led, the Defendant established any legal right to the equipment in dispute.

(b) If so, whether such legal right could be defeated by the "right of lien" or right to immediate possession" clauses following the failure of the plaintiff to complete the payment for the equipment.

C (c) Whether the said rights of lien and "immediate possession " have been waived by the conduct of the parties.

(d) Whether the plaintiff has by pleadings and evidence established the defence of waiver.

D (e) Should the Court of Appeal have granted the relief that the equipment be delivered to the plaintiff subject to the Defendant being paid the entire sum?

(f) Was the Court of Appeal right in holding that the plaintiff had established a legal right to the equipment?"

E I have examined the two sets of issues and found them to be basically the same even though the questions raised by the plaintiff appear to be short and succinct. I will therefore adopt the set of issues identified by the Defendant for my consideration of the appeal.

F The facts of this case which are not in dispute for the purposes of this appeal are as set out in paragraphs 1,2,3,4,5,6,7 and 8 of the plaintiff's Amended Statement of Claim as follows:-

G "(1) The plaintiff is a Limited Liability Company with its registered office in Kaduna engaged in civil construction and other related works.

(2) The Defendant is a Limited Liability Company engaged in the business of plant sales with its head office at lagos and branches in major towns in Nigeria.

H (3) The plaintiff by virtue of its business was a customer of the Defendant.

(4) The plaintiff by its L.P.O. No . 0358 of 8th February 1978 made ordered:-

(a) *Parker 5245 crushing plant combination*

(b) *Foden Dump Truck*

(c) *BD 440, 440 KVA generating set from the Defendant. The plaintiff shall at the hearing of this suit use and rely on its above stated L. P. O.*

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(5) *The plaintiff state that the total value of its order mentioned in paragraph 4 above was as stated below :-*

(a) *Parker 5245/4 Crushing plant combination - N476,600.00*

(b) *Foden Model Dump Truck - N84,000.00*

(c) *BD 440 Generating set - N66,000.00*

(d) *Spare parts for crushing plant - N38,000.00*

(e) *Transportation of Equipment to Kontagora - N28,000.00*

(f) *Commissioning Fee - N10,000.00*

=N702,600.00

C

(6) *The plaintiff further states that the equipments ordered above mentioned in paragraph (4) above was to be delivered at the plaintiff's construction site at Kontagora by the Defendant.*

(7) *The plaintiff in view of paragraph (4) above undertook by its letter of 28th March 1978 to pay the Defendant the sum of N702,900.00 for the supply of the equipments ordered and above mentioned in paragraph (5) of the statement of claim, subject to terms and conditions stated in the said plaintiff's letter of 28th March 1978. The Plaintiff shall at the hearing of this suit use and rely on its said letter of 28th March 1978 to the Defendant*

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(8) *The Plaintiff states that it made a down payment of N281,160 i.e 40% of the total sum for the equipments mentioned in paragraph (5) above wherein the Defendant proceeded and installed the equipments at the plaintiff's site at Kontagora. The plaintiff shall at the hearing of this suit use and rely on the Defendant's letter of 29th April, 1978 acknowledging receipt of the payment aforementioned by the plaintiff".*

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These paragraphs of the Amended Statement of Claim were admitted in paragraphs 2 and 6 of the Amended Statement of Defence which are set out as follows-

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"(2) *The Defendant admits paragraphs 1,2,3,4,5,6, and 7 of*

the Statement of Claim.

(6) The Defendant admits paragraph 8 of the Statement of Claim but avers that Other condition of sales contained in the sales Agreement were not fulfilled by the plaintiff"

B One other fact which is not in dispute in this case is that at a stage the Defendant agreed to move the equipments from Kontagora to Kaduna at plaintiff's request for a fee of N30,000.00 which was paid. The Defendant now took advantage of this to effect a seizure of the equipments on the ground that the plaintiff had failed to pay up the remaining instalments the equipments as provided in the Sales Agreement between the parties.

C The plaintiff in paragraph 7 of its Amended Statement of Claim above had pleaded its own letter to the Defendant dated 28th March 1978 and that it would use and rely on it. The Defendant agreed with it. That was the Sales Agreement between the parties. It was tendered and admitted as Exhibit 1 at the trial. Exhibit 1 is a two (2) paged document. I will set it out in full thus:-

E "28 March 1978
Afrotec Technical Services Nig. Ltd,
P.M.B. 1061,
Oshodi,
Lagos State.

F Dear Sirs,
SUPPLY OF ITEMS OF PLANT AND EQUIPMENT

We hereby unconditionally and irrevocably under-take to pay Afrotec Technical Services Nigeria Limited (hereinafter referred to as Afrotec the total sum of N702,900.00 (seven hundred and two thousand, nine hundred Naria) in consideration of their supplying us with the under-mentioned equipment on the following terms and conditions.

EQUIPMENT

H	Ex-Isolo	Ex-Isolo
	1 No. Parker Moblile Crushing Plant	
	Model 5245/4/7606	N476,000.00
	1 No. Foden Quarry dump Truck Model FC27	N84,000.00

Fast moving recommended spare parts to value	N38,900.00
BD 440 440KVA Generating Set	N66,000.00

PRICES

The agreed prices are as detailed above and are understood to be on the basis of delivery Ex Afrotec's yard at Isolo Industrial Estate. B

DELIVERY

The items of plant detailed above are to be delivered to site at an additional agreed price of N28,000.00 (Twenty-eight thousand Naira).

COMMISSIONING C

Afrotec to attend to commissioning and to provide skilled engineer to supervise installation at an additional cost of N10,000.00 (Ten thousand Naira) being five weeks at the rate of N2,000.00 per week.

TERMS OF PAYMENT D

We confirm that the total contract price of N702,900.00 is to be paid to Afrotec on the following terms.

40% cash deposit of N281, 160.00 (Two hundred and eighty-one thousand, one hundred and sixty Naira) payable in advance of delivery. E

Balance of 60% payable by six equal instalments of N70, 290.00 (Seventy thousand, two hundred and ninety Naira) each secured by post dated cheques payable on the 27th April, 27th May, 27th June, 27th July, 27th August and 27th September respectively. F

INTEREST

The interest charge on the instalmental payments is to be for Afrotec's account.

We unconditionally and irrevocably agree that Afrotec shall have a lien on all the machinery until such time as Afrotec receive payment of the full contract amount of N702, 900.00. G

We also confirm that should we fail to pay any of the instalments detailed above within one month of the due date, Afrotec shall take immediate H possession of those properties in specie that remains unpaid for within the subject of this transaction without hindrance and without recourse.
Yours faithfully,

For: MIA & SONS LIMITED.

(SIGNED)

ALHAJI M.I. ATTA

MANAGING DIRECTOR.

(SIGNED)

R. H. MAGGS

FINANCIAL CONTROLLER".

B As could be seen therefore from the pleadings and the evidence
led at the trial, the only serious issue before the learned trial judge and
therefore the Court of Appeal was as to whether or not the Defendant
had the right to seize the equipment in question. And in determining that
issue, it appears to me that the lower courts were called upon to resolve
C a very narrow issue as to whether the transaction between the parties
amounted to an absolute/outright sale or a conditional sale as contended
by the plaintiff and the Defendant respectively. I will proceed to consider
the issues.

D Issues (i), (ii), (iii) and (iv)

These issues can conveniently be treated together as they all
relate to the proper interpretation of Exhibit 1 above, and what remedies
or rights are available to the parties as a result of such an interpretation.
E It was argued that since it is common ground between the parties that the
sale Agreement dated 28th March, 1978 (Exhibit 1) was the basis upon
which the sale was conducted, the Court of Appeal ought to have held
the parties bound by its provisions; and that it should have interpreted the
F agreement to identify the intention of the parties as to whether or not the
property in the goods passed to the plaintiff on the installation of the plant
in kontagora by the Defendant. That the Court of Appeal was in serious
error when it held that under section 18 (1) of the Sale of Goods Act
1893 which is a received English statute of general application in force in
G England on 1st January 1900 (see section 28 of the High Court law cap
.49 Laws of Northern Nigeria 1963, Vol.2, hereinafter simply referred to
as the Act), mere installation of the plant in kontagora passed the title in
the plant to the plaintiff without regard to the express intention of the
H parties in Exhibit 1. That section 18 of the Act deals with unconditional
sale of goods unlike in the present case where the sale is conditional.
Reference was made to Section 19 of the Act and to the following au-
thorities:-

Afrotec Ltd v. Mia & Sons Ltd (2000) 12 KLR Kutigi JSC 3277

BURAIMO VS ADENIYI (1990) 2 NWLR (pt.133) 406 ODUYE VS NIGERIAN AIRWAYS (1987) 2 NWLR (PT.55/126

NIGER BENUE TRASPORT CO. LTD. VS NARUNMAL & SONS LTD (1986) 4 NWLR (PT. 33) 117'

BOOKSHOP HOUSE LTD VS STANLEY CONSULTANT LTD B (1986) 2 NWLR (PT. 26) 87.

OGBONAIYA VS OKUDO (1979) 6-9 SC.32.

We were also referred to specified conditions in Exhibit 1 headed "Terms of payment" and "Interest" respectively, which the plaintiff had failed to fulfil and which did not pass ownership to it thus leaving the Defendant with the right to repossess the plants. C

The plaintiff on the other had contended that having regard to the pleadings and evidence, it established a legal right to the equipments especially when the Defendant had parted with possession before receiving full payment for them. That there is no provision in the Act which makes a seller who has parted with possession to retain title unless there is specific provision or clause in the sale agreement to that effect. We were referred to section 17 of the Act and to the cases of : D E

ALLUMINIUM INDUSTRIES VASSEN BV VS ROMALPA ALLUMINIUM LTD (1976) 2 ALL E.R 552.

HENDY LECCOX (INDUSTRIAL ENGINES) LTD VS. GRAHAMME PUTTICK LTD (1984) 2 ALL E.R. 152. F

YAKASSAI V. INCAR MOTORS (NIG) LTD (1975) ALL N.L.R. 287.

It was also contended that by parting with possession the right of lien and immediate possession were lost and that title passed to the plaintiff when the contract herein was made. G

As I have indicated above the very narrow and decisive issue to be decided in this appeal is whether the sale or transaction between the parties amounted to an outright sale or a conditional sale

I have reproduced above the Sale Agreement (Exhibit 1). I say H straight away that I am in no doubt whatsoever that **the facts of this case show clearly that the equipments or machinery were sold to the Defendant conditionally. The conditions being that "the De-**

fendant shall have a lien on all the machinery until a time that the Defendant received payment of the full contract amount of N702, 900.00", and that "the Defendant shall take immediate possession of the machinery within one month should the plaintiff fail to pay any of the instalmental payment detailed in Exhibit 1". In other words I am of the view that the property in the equipments or machinery had never passed to the plaintiff when the Defendant effected the seizure which is the subject matter of this action. The parties are clearly bound by the provision in the Sale Agreement (Exhibit 1) without any subtraction or addition. The Court has no power to rewrite the agreement. I have carefully perused the agreement herein and have found nothing illegal in any of its provision. Exhibit 1 is in fact fortified by the provisions of sections 38,39 and 40 of the Act. They read in part:-

"RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Unpaid Seller defined

Section 38 (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act -

- (a) When the whole of the price has not been paid or tendered;
- (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

UNPAID SELLER'S RIGHTS

Section 39 (1) Subject to the provisions of this Act and of any Statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law.

- (a) A lien on the goods or right to retain them for the price while he is in possession of them;
- (2) Where the property in goods has not passed to the buyer, the unpaid 'seller has in addition to his other remedies, a right of withholding delivery to and coextensive with his rights of lien

UNPAID SELLER'S LIEN

SELLER'S LIEN

Section 41 (1) Subject to the provisions of this Act, the unpaid seller of Goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:-

(a) where the goods have been sold without any stipulation as to credit,

(b) where the goods have been sold on credit, but the term of credit has expired;

(c) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer."

One of the facts not in dispute in this case is that the six post dated cheques issued by the plaintiff to the Defendant in accordance with Exhibit 1 each bounced one after the other. Twenty-one other post dated cheques for smaller amounts as replacements also were returned unpaid. And all efforts to collect the balance of the sale price as agreed in (Exhibit 1) proved abortive. **There is no doubt at all that the Defendant is an unpaid seller under the Act. It was therefore acting within its rights when though acting as an agent of the plaintiff, it seized the machinery which had lawfully come into its possession at the relevant time. The short of it all is that the contract of sale between the parties being conditional, the Defendant was entitled to exercise its right of lien both under the contract agreement (Exhibit 1) and under the Act, the plaintiff having woefully failed to satisfy the condition of sale of paying the 60% balance of the sale price.** The case of YAKASSAL VS INCAR MOTORS (NIG) LTD (Supra) which was relied upon by the Court of Appeal and which was cited by learned counsel for the plaintiff will not apply here. In that case the Supreme Court held that the sale therein was an outright or complete or absolute sale. In the instance case the sale as I have found is Conditional. So also in KOFI VS MENSAH 1 WACA 76, the West African Court of Appeal also held that the sale therein being an outright sale, the purchaser was not bound by the agreement which allowed the seller to seize the lorry or

property on failure of instalments. That I believe was as it should have been. The agreement to seize the property when the sale was absolute or outright, is contrary to the provisions of the Act discussed above. The property in the lorry vested immediately in the purchaser and the seller
B could no longer take possession of it on failure by the purchaser to pay the instalment. These two authorities do not therefore apply in this appeal where the sale as I have already concluded is a Conditional Sale. The Court in the two cases above rightly held that in an outright sale, the
C seller's remedy lies in an action to recover the balance of purchase price owed by the purchaser only. **I therefore resolve issues 1,2,3, and 4 in favour of the Defendant as follows:-**

**(1) The Court of Appeal was wrong in its view that ownership in the equipment passed to the plaintiff on proper construction
D of Exhibit 1.**

(2) The Court of Appeal was wrong in its view that acceptance of negotiable instruments or cheques as payment for the equipment had converted the conditional sale into an absolute sale.

**(3) The Court of Appeal was wrong in its view that the only
E remedy open to the Defendant was an action for the recovery of the balance of the sum unpaid.**

**(4) The Court of Appeal was wrong in holding that the
F plaintiff had established a legal right in the equipment as to entitle it to equitable reliefs sought.**

Issue V and VI

These relate to the findings by the Court of Appeal that Defendant had waived all the restrictive conditions in Exhibit 1 and whether or
G not there was a second contract between the parties. The Defendant said the plaintiff neither pleaded waiver nor facts amounting to such waiver. The plaintiff contended otherwise. It referred to paragraphs 9 and 23 of the Statement of Claim and to Exhibit 11 a letter dated 3rd July 1981
H written by the Defendant to the plaintiff.

I have carefully examined the entire pleadings in this case. There is nowhere in the pleadings where waiver is expressly pleaded. But did the act of the Respondents in installing the equipment after dishonour of

plaintiff's cheques (both original and replacements) and a demand for a fresh letter of lien in its letter of 3/7/81 constitute waiver? My answer is in the negative. I also say that there was no second or new contract between the parties herein and none was produced.

Now, let see what the Act has to say about loss or termination of B
lien:-

"TERMINATION OF LIEN

Section 43(1) - The unpaid seller of goods loses his right of retention thereon -

- (a) omitted
- (b) omitted
- (c) By waiver thereof "

The Act thus recognised that the unpaid seller's lien may be D
waived.

But it must be stressed that by proceeding to install the machines in kontagora after the initial dishonour of the six post dated cheques, the defendant was merely fulfilling the terms of agreement (Exhibit 1) which included installation at Kontagora. Failure to install would have amounted E to a breach of the contract. Secondly the proposal to issue ten new post dated cheques in replacement of the original six which were also dishonoured, was conveyed to the Defendant vide plaintiff's letter MIA/A/27 dated 25th May 1981 (see Defendant's letter Exhibit 11 dated 3rd July F 1981) wherein the Defendant made its own suggestion including the request for a fresh letter of lien. It is noteworthy that the proposals in the letter under reference came only after the Defendant had repossessed the equipments/machinery which event had taken place before 28th March G 1980 (see paragraph 21 of the Amended Statement of Claim). The Defendant has not been shown to have waived its lien by dealing with the machines in any manner inconsistent with the lien or by making any new arrangement with the plaintiff which is inconsistent with the continuance H of its lien. A lien may be lost if the seller refuses to deliver the goods on some ground other than the buyer's failure to pay or tender the price, or on some ground other than his right of lien. That is not the case here (see HUNGMAN VS. BRIESEMANN (1892) 67 L. T. 642 WEEK VS. GOODE

(1859) 6C.B.(N.S) 367. Exhibit 1 being the agreement pleaded and relied upon by the parties, all subsequent acts of the parties in fulfillment of the agreement must be treated as such but not as giving rise to new contracts each and every time a proposal is made on how to effect a performance by a defaulting party. There was absolutely no need for the defendant to have asked the plaintiff for a fresh lien when exhibit 1 had provided for same. The request was superfluous. The fact was that the new cheques still bounced, one after the other and so the defendant remained an unpaid seller. **I therefore resolve issues (v) and (vi) in favour of the defendant and hold that the court of appeal erred when it held that the defendant had waived its right of lien as contained in exhibit 1 which is the only agreement or contract pleaded and relied upon by the parties. I also hold that the plaintiff did not establish any legal right in the equipments as to entitle them to any of the reliefs claimed.**

ISSUE (VII)

This issue is directed against the following order made by the court of appeal-

"That the said equipments be delivered to the plaintiff subject to the plaintiff paying the entire sum outstanding as balance of the total cost of the equipments, taking into account N381,160.00 the plaintiff had so far paid to the 1st respondent (defendant)"

There is no dispute about the fact that this is certainly not one of the reliefs sought by the plaintiff against the defendant in the trial court. The defendant also made no counter-claim in its Statement of defence before the high court against the plaintiff. The order made by the court of appeal is therefore clearly gratuitous. It is not the function of a Court of law to make a gratuitous award. Such an award will be incompetent (see for example EKPEYONG VS. NYONG (1975) 2 SC. 71, OBIOMAA VS. OLOMU (1978) 3 H S.C. 1). The issue therefore succeeds.

Having come to the conclusion as I have done above that the plaintiff did not establish any legal right in the property or machinery subject matter of the contract, it automatically failed to qualify for any of

the reliefs sought by it against the defendant. The property or title or the goods conditionally sold to the plaintiff remained perpetually in the defendant as an unpaid seller and as contained in the sale agreement (Exhibit 1).

It is noteworthy to observe here now that the Act, hitherto a received English statute of general application in Kaduna State, has since been Nigerianised vide the sale of goods edict NO. 15 of 1990. This is as it should be. All such laws should be Nigerianised as soon as possible to enable us know what laws actually govern us without having to travel all the way to England for the purpose!.

On the whole this appeal therefore succeeds and it is allowed. The judgment of the court of appeal including its orders, are hereby set aside. The judgment of the learned trial judge delivered on 21st July 1989 dismissing plaintiff's claims is restored. The defendant is awarded costs of this appeal which is fixed at N10,000.00 against the plaintiff.

WALI JSC

I have read before now the lead judgment of my learned brother, Kutigi, JSC and I agree with his reasoning that the appeal has merit and ought to succeed.

The vexed question that arises for determination in this appeal and upon which, the resolution of other issues raised depends, is issue 1 in the appellant's brief of argument. It reads as follows:-

"1. Whether the court of appeal was right in its view that ownership in the equipment passed to the respondent on proper construction Exhibit 1, merely because the appellant had delivered the equipment's at the site of the respondent at Kontagora.

Learned counsel for the respondent criticized the manner the issues in the appellant's brief were framed. He in particular referred to the grounds 1 and 3 and contended that they could not be attached to any issue in the appellant's brief. It was also his complaint that ground 2 was split into 2 by framing 2 issues out of it to wit issues (i) & (iv) and submitted that a ground of appeal ought to relate to only one issue for

determination. Learned counsel further complained that issue (iii) and (vi) were not based on or related to any ground of appeal.

I have examined the issues framed by the appellant as related to the grounds of appeal and have arrived at the conclusion that the only issue that could be hinged to any ground of appeal is issue (vi), and for that reason it is hereby struck out. On the question relating to formulating two issues from a single ground viz issues (i) and (iv) arising from ground 2, it is not against the procedure relating to briefs of argument that one or more issues are formulated out of a ground of appeal, but I agree that it is inelegant to do so and it may at times be incomprehensible and confusing. The purpose of filing a brief is to state with accuracy, brevity and precision whatever is essential to clear and adequate understanding of the questions which are required to be considered by the court. Ground I is in my view covered by issue (i), ground 3 by issue (ii) and ground 4 by issue (iii) of the appellant brief.

From the pleadings and evidence lead in this case, both oral and documentary the parties entered into agreement for the sale of specific goods and the conditions attached to such contract. These are contained in Exhibit 1 dated 28th March, 1978. It is a short document and for the purpose of clarity and convenience Exhibit 1 is reproduced hereunder-.

"Afrotec Technical services Nigeria Ltd.
P.M.B. 1061,
Oshodi,
Lagos State.

Dear Sirs,
SUPPLY OF ITEMS OF PLANT AND EQUIPMENT.

We hereby unconditionally and irrevocably undertake to pay Afrotec Technical Services Nigeria Limited (hereinafter referred to as Afrotec) the total sum of N702,900.00 (Seven hundred and two thousand, nine hundred naira) in consideration of their supplying us with the under-mentioned equipment on the following terms and conditions-

EQUIPMENT

N Ex-Isolo

1 N0. Parker Mobile Crushing plant model 5245/4/7606 476,000

<i>1 N0. Foden Quarry Dump Truck Model FC27</i>	<i>84,000.00</i>
<i>Fast moving recommended spare parts to value -</i>	<i>38,900.00</i>
<i>BD 440 KVA Generating Set</i>	<i>66,000.00</i>

PRICES

The agreed prices are as detailed above and are understood to be on the basis of Delivery Ex Afrotec's yard at Isolo Industrial Estate. B

DELIVERY

The items of plant detailed above are to be delivered to site an additional agreed price of N28,000.00 (Twenty-eight thousand naira). C

COMMISSIONING

Afrotec to attend to commissioning and to provide skilled engineer to supervise Installation at an additional cost of N10,000.00 (Ten thousand naira), being five weeks at the rate of N2,000.00 per week.

TERMS OF PAYMENT D

We confirm that the total contract price of N702,900.00 is to be paid to Afrotec on the following terms.

40% cash deposit of N281,160.00 (Two hundred and eight-one thousand, one hundred and sixty naira) payable in advance of delivery. E

Balance of 60% payable by six equal instalments of N70,290.00 (Seventy thousand, two hundred and ninety naira) each secured by post dated cheques payable on the 27th April, 27th May, 27th June, 27th July, 27th August and 27th September respectively.

INTEREST F

The interest charge on the instalmental payments is to be for Afrotec's account.

We unconditionally and irrevocably agree that Afrotec shall have a lien on all the machinery until such time as Afrotec receive payment of the full contract amount of N702,900.00. G

We also confirm that should we fail to pay any of the instalments detailed above within one Month of the due date. Afrotec shall take immediate possession of those properties in specie that remains unpaid for within the subject of this transaction without hindrance and without recourse.

Yours faithfully,

For: MIA & SONS LIMITED

ALHAJI M. I. ATTA

R.H. MAGGS

Managing Director

Financial Controller"

Following this agreement the appellant delivered the plant and accompa-
B nying equipment at the agreed site in Kontagora Town, Niger State and
installed them. Before the delivery and installation of the plant and equip-
ment, the respondent paid 40% of the contract price to wit N281,166.00
and the balance of N428,860.00 to be paid by six equal instalments of
C N70, 290.00, each secured by post-dated cheque payable on 27th April
27th May, 27th July, 27th August and 27th September, 1978 respec-
tively.

The following stipulations were specifically provided in Exhibit

1-

D "1. The interest charge on the instalmental payments is to be
for Afrotec's account.

2. We unconditionally and irrevocably agree that Afrotec shall
have a lien on all the machinery until such time as Afrotec receive pay-
E ment of the full contract amount of N702,900.00.

3. We also confirm that should we fail to pay any of the
instalments detailed above within one Month of the due date, Afrotec
shall take immediate possession of those properties in specie that remains
F unpaid for within the subject of this transaction without hindrance and
without recourse" (under-lining provided for emphasis)

The object of sale of goods is generally to transfer its ownership
to the purchaser from the seller. See section 16-19 of the Sale of Goods
Act, 1893. But where a contrary intention is shown the property in the
G goods only passes to the buyer at such time as the parties to the contract
intend to. And for the purpose of ascertaining the intention of the parties,
regard must be had to the terms of the contract, the conduct of the
parties and the circumstances of the case. In R.V. Ward Ltd. v. Bignall
H (1967) 2 All ER 449 at 453; (1967) QB 534 CA, Diplock L.J State-

".....in modern times very little is needed to give rise to the
inference that property in specific goods is to pass only on delivery or
payment" Having regard to the contents of Exhibit 1 and the conduct of

the parties in this case, can it be concluded that the ownership of the specific goods sold and delivered passed to the respondent?.

The respondent agreed in Exhibit 1 unconditionally and irrevocable that Afrotec shall have a lien on all the machinery sold and delivered under that contract, until such time as Afrotec receives payment of the full contract amount of N702,900.00. It was agreed by the parties in Exhibit 1 that should the respondent fail to pay any of the instalments detailed in Exhibit 1 within one Month of due date, the appellant Afrotec shall take immediate possession of those properties in specie that remains unpaid without hindrance and without recourse. This shows that the passing of the property to the respondent is conditional to the payment in full of the contract price as agreed in Exhibit 1.

Perusing through the documents tendered and admitted in the course of trial there was an attempt by the parties to reschedule the payment of the outstanding debts which was never concluded after default by the respondent. The respondent made a proposal to the appellant in that regard which the latter replied by a counter-proposal. A counter-offer by the offeree operates as a rejection of the original offer, thus terminating it. So it is futile for the respondent to claim that Exhibit 1 had been replaced or altered by another agreement which he called novation. The conditions in Exhibit 1 were still binding and enforceable at the time of litigation. There was no waiver by the appellant of his right of lien over the equipment sold and delivered to the respondent's site in Kontagora. The delay by the appellant in exercising the rights given him in Exhibit 1 was only to give the parties more time and opportunity to reach amicable settlement which the respondent failed to avail himself by resorting to unfulfilled promises and hollow under-taking before he resorted to litigation.

With consent and tacit approval of the respondent, the appellant regained possession of the equipment, that is when he was to remove them from Kontagora to Kaduna for servicing and relocation to another site in Kaduna. It was then he decided to hold on to them in exercise of his lien for the unpaid debt. The appellant was more or less at that time like the respondent's agent. See section 41(2) of the sale of goods Acts.

1893 and Grice v. Richardson (1877) 3 App. Cas. 319

Section 41(1) of the sale goods Act, 1893 provides as following:-

"Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely-

(a) When the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but term of credit has expired;

(c) Where the buyer becomes insolvent"

Paragraphs (b) and (c) could apply in the present case, because-

"(i) The appellant was an unpaid seller;

(ii) The stipulated period of credit had expired;

(iii) The buyer (who is the respondent) had become insolvent; and

(iv) The seller was in possession of the goods or part of them"

Section 62(3) of the sale of goods Act, 1893 also defined insolvency as followings:-

"A person is deemed to be insolvent within the meaning of this Act who has either ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not"

See the Feliciano (1915) 59 C.J 456; R.v. Saddlers CO. (1863) 10 H.L 404. 425, Parker v. Gossage (1835) 2 C M&R 617, 620 and Biddlecombe v. Bond (1835) 4 A & E 332, 337. The respondent was unable to pay his debts when they became due and was therefore insolvent.

By virtue of the provision of section 39 of the act the powers granted to the unpaid seller under part (iv) thereof can exercised by him "notwithstanding that the property in the goods may have passed to the buyer". See also section 41(2) of the Act that also provides that the seller- "may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee.....for the buyer". See Grice v. Richardson (1873) 3 App. Cas 319.

It is implicit in section 28 of the act that delivery of the goods is conditional on payment and where payment is not forthcoming or if the buyer becomes insolvent, the seller is entitled to retain the goods even during the currency of a period of credit. See Bloxam v. Sanders (1825) 4 B & C 941 at 949.

Subsequent to the judgment of the trial court in which the respondent as plaintiff lost to the appellant as defendant resulting in the dismissal of the action filed, the respondent brought an application for injunction to stay the implementation of the judgment pending appeal.

Parties filed affidavits and counter-affidavits and made oral submissions when the application was heard. In a considered ruling, the learned trial judge refused the application and concluded:-

"In sum the applicant has failed to establish that the res it seeks to preserve is still in existence or in the possession of the respondent. This court shall not therefore exercise its discretionary power in vain"

The learned trial judge found that before filing the litigation by the respondent due to the appellant's claim to the respondent that in exercise of their right of lien on the equipment in their possession, they intend to dispose of same by sale to satisfy the debt or part thereof and as a result of which the said equipment were thereafter sold and delivered to Messrs. Afcon Engineering Co. Ltd. Section 48(2) & (3) confers on the unpaid seller the right to sell goods in his possession in exercise of his lien over the same in order to satisfy his debt or part thereof. It provides:-

"48(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transit sells the goods, the buyer acquires a goods title thereto as against original buyer.

(3) Where.....the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

An unpaid seller can exercise the statutory right of resale of the goods in his possession whether or not property in the goods has passed to the buyer or not and the new buyer acquires good title in such goods

See R v. Ward v. Bignall (1967) Q.B 543;(1967) 2 All ER 449"

Under section 48 of the sale of goods Act, the unpaid seller retains the right to sell the identified property where the buyer has become insolvent. The right of sale can be exercise by the seller under this
B section where he has been in continuous possession of the goods or where he has regained possession by exercising his right of lien or stoppage of the goods in transit. This right is available to him whether or not the property in the goods has passed to the original buyer who has become insolvent by his failure to pay or tender the purchase price as agreed
C in the contract, within a reasonable time. The intention to sell the goods must be notified to the insolvent buyer. What is a reasonable time in this context is a question of fact. See Daarnhouwer & CO. Ltd. v. Christian (1917) KB 37. In that case it was agreed by the parties that payment was
D to be made within 90 days of the arrival of the goods. Over 90 days of the arrival of the goods the purchaser did not pay for the goods or take delivery of the same. The seller gave three days notice to the buyer on expiry of which he sold goods. It was held that the three days notice is
E reasonable having regard to all the surrounding circumstance of the case. The resale of the goods rescinded the original contract and the property in the goods reverted in the unpaid seller which had previously passed to the original buyer..... This act of resale rescinded the original contract,
F thus reverting the property in the goods to the seller who passed good title in them to the new buyer.

The court of appeal was therefore wrong in its conclusion that:-

*"I have considered all the relevant issues above and it is my judgment that this appeal must succeed and it is allowed. I hereby set
G aside the judgment of Ibiyeye J. delivered on 21/7/89.*

*I also agree that the third party, Afcon Engineering Company Ltd. did not obtain any title in the equipment in dispute which the 1st respondent allegedly sold it. The 1st respondent had no proprietary rights
H over the equipment when it sold and delivered it to the 2nd respondent. After parting with the property in the goods, the Company had no right to pass over to the 2nd respondent. It is also quite plain that the 2nd respondent bought the equipment with the knowledge of this suit and that*

in itself will disqualify it from obtaining any property in the equipment. The 2nd respondent is hereby ordered to released the equipment, if it had taken possession of the same, forthwith".

It is for these and other reasons ably stated in the judgment of my learned brother Kutigi, JSC which I have already expressed my agreement with that I also hereby allow this appeal, set aside the judgment and orders of the court of appeal and restore the judgment of the trial court. I award N10,000.00 costs to the appellant against the respondent.

C

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Kutigi J.S.C. and I am in full agreement with him that there is merit in this appeal and that the same should be allowed.

It is not in dispute that the transaction in issue is a contract of sale between the appellant and the 1st respondent in respect of the appellant's Parker crushing plant with its auxiliary equipment, that is to say:-

1. Parker 5245/4 Crushing plant combination value at :::::N476,000.00 (2) Foden Quarry Dump Truck Model FC27.....N84,000.00 (3) BD440 Generating set.....N66,000.00 (4) Spare part..... N38,900.00.

Transportation of the plant by the appellant to the 1st respondent's site at Kontagora together with agreed fees for the commissioning of equipment were assessed and fixed at N38,000.00 thus bringing the total contract price of the sale to N702,900.00. The contract which is in writing was duly executed by the appellant and was tendered in evidence at the hearing as Exhibit 1. Pursuant to the terms of Exhibit 1 dated 28th March, 1978, the 1st respondent, as the purchaser, "unconditionally and irrevocable" undertook to pay to the appellant, as the seller, the said total sum of N702,900.00 as consideration for sale and delivery of the plant to the 1st respondent's site at Kontagora. The precise terms of payment

were expressly stipulated by the parties as follows:-

"1. 40% cash deposit of N281, 160.00 (Two hundred and eight-one thousand, one hundred and sixty naira) payable in advance of delivery.

B 2. Balance of 60% payable by six equal instalments of N70,290 (seventy thousand, two hundred and ninety naira) each secured by post dated cheques payable on the 27th April, 27th May, 27th June, 27th July, 27th August and 27th September respectively"

C The parties further agree that the appellant would have a right of lien on all the machinery until such time as the contract amount was fully paid. The 1st respondent finally bound itself to the appellant as follows:-

D *"We also confirm that should we fail to pay any of the instalments detailed above within one month of the due date, Afrotec shall take immediate possession of those properties in specie that remained unpaid for within the subject of this transaction without hindrance and without recourse."*

E On receipt of the payment of N281,160.00 and the post-dated cheques, the appellant proceeded to install and commission the equipment with its accessories at the Kontagora quarry site of the 1st respondent. Regrettably, however, all the 1st respondent's post-dated cheques
F on presentation for payment by the appellant on their respective due dates were dishonoured and returned unpaid. Another set of post-dated cheques issued by the 1st respondent to the appellant in replacement of the bounced cheques were themselves again dishonoured and returned unpaid. All efforts by the appellant to collect the unpaid balance of the contract price
G of the said plant and equipment from the 1st respondent proved abortive.

Following the 1st respondent's request for the dismantling, transportation and reinstallation of the plant at its new site at Kaduna, the appellant proceed to Kontagora, dismantled the plant but transported the
H same to the appellant's warehouse in Kaduna. This, it did in exercise of its right to retake immediate possession of the property in issue as provided for in exhibit 1. The appellant again demanded the unpaid balance of the purchase price of the equipment from the 1st respondent. After

the failure by the 1st respondent to meet a revised payment proposal agreed to by the parties, the appellant resolved to exercise its right of lien and/or retention over the plant and to sell the same and refund the 1st respondent's deposit'

Accordingly, the appellant addressed the letter, exhibit 14 to the 1st respondent affecting it with notice of its intention to dispose of, by sale, the crushing equipment in issue. It was after the receipt of this notice that the 1st respondent instituted this action claiming against the appellant as follows:

"(i) *Perpetual injunction restraining the defendant, its agents, servants or other officers acting on its behalf from disposing of by sale or otherwise the equipments.*

(ii) *Damages*

(iii) *Specific performance of agreement of installation of equipments i.e.*

(a) *Parker 5245/4 crushing plant combination.*

(b) *Folden model dump truck*

(c) *BD 440 Generating set*

(d) *Spare parts for crushing plant at Kaduna quarry site of the plaintiff by defendant or, in the alternative, refund of all monies paid by the plaintiff to the defendant on the said equipment"*

The learned trial judge, Ibiyeye, J. as he then was at the conclusion of hearing held that the appellant's action was in the exercise of its right of lien and/or its right to withhold the subject matter of the sale until full payment of the contract price. He accordingly dismissed all the 1st respondent claims in their entirety.

Aggrieved by this decision of the high court, the 1st respondent appealed to the court of appeal, Kaduna division, which court in a unanimous decision allowed the appeal, set aside the judgment and orders of the trial court and proceeded to orders as follows:

(i) *Perpetual injunction restraining the appellant, its servant and/or agents from disposing of by sale or otherwise the equipment in issue.*

(ii) *Specific performance of the contract of sale and delivery of*

the equipment by the appellant to the 1st respondent subject to payment of the outstanding balance of the contract price by the said 1st respondent.

(iii) *An order remitting the issue of general damages claimed to the trial high court for assessment.*

The appellant being dissatisfied with this judgment of the court of appeal has now appealed to this court.

There can be no doubt that having regard to the pleadings and the evidence before the court together with the various legal questions that were canvassed by learned counsel for the parties, a number of issues would appear to arise for determination in this appeal. I propose to examine, by way of emphasis only, some of these issues as framed by the parties. These comprise of:-

(i) Whether the court of appeal was not in error by holding that property in the plant with its accessories had passed to the 1st respondent by virtue of the contract, exhibit 1, merely because the appellant had delivered the equipment at the site of the 1st respondent at Kontagora.

(ii) Whether the court of appeal was not in error when it held that the only remedy open to the appellant was an action for the recovery of the unpaid balance of the contract sum and not in its exercise of the right of lien and/or immediate possession of the plant as provided for in the agreement between the parties.

(iii) Whether the court of appeal was right in its view that acceptance of negotiable instruments as payment for the plant had converted the conditional sale thereof into an absolute sale.

(iv) Whether the court of appeal was not in error to have held that the 1st respondent had established a legal right in the equipment as to entitle it to the equitable reliefs sought.

(v) Whether the 1st respondent by its pleadings and evidence establish the defence of waiver.

(vi) Whether the court of appeal was not in error by making an order that the said plant/equipment be delivered to the 1st respondent subject to payment of the outstanding balance of the contract price by the 1st respondent to the appellant.

I will now consider these issues. I will take issue 1 first.

Issue 1 poses the question whether the court of appeal was not in error by holding that property in the plant had passed to the 1st respondent under exhibit 1 merely because the appellant did deliver the same at the site of the 1st respondent at Kontagora. As I have already pointed B out, it is not in dispute that the transaction in issue is a contract of sale which under section 1 of the Sale of Goods Act, 1893 is a contract whereby the seller transfers or agrees to transfer property in goods to the buyer for a money consideration called the price. See Doak V. Bedford C (1964) 2 O.B. 587.

Under section 1 (2) of the Sale of Goods Act, 1893, hereinafter also referred to as the Act, a contract of sale may be conditional or absolute. It ought to be stressed from the onset, however, that a contract of sale reduced into writing, such as Exhibit 1, must be construed and given effect to like any other written contract. See Coddington D V Paleologo (1867) L.R. 2 Exch. 193 at 200. So, where any right, duty or liability would arise under a contract of sale by implication of law such right, duty or liability may be negated or varied inter alia by the express E agreement of the parties. It is principally the intention of the parties, as shown by the terms of the contract, amongst other considerations, which determines the time when the property in the goods, the subject matter of a contract of sale is transferred or passes to the buyer. F

Accordingly, section 17(1) of the act provides that where there is a contract for the sale of specific goods, the property in them is transferred to the buyer at such time as the parties thereto intend it to pass. No difficulty can therefore arise where the contract between the parties G expressly states when or at what time the property in such good passes to the buyer.

Section 17(2) of the act, however, provides that for the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties, and the circumstances H of the case. See Nanka-Bruce V. Commonwealth Trust Ltd. (1926 A.C. 77). It should be pointed out that section 18 of the same act lays down three rules which govern the passing of property in specific goods unless

a different intention is expressed in the contract. These rules, however, are mere presumptions and the law does permit parties to a contract to settle the point for themselves by any intelligible expression of their intention. See Mc Entire V. Crossley Bros Ltd. (1895) A.C. 457 at 467. The said rules do not, however, apply to the facts of the present case and need not be given any consideration in this judgment.

In dealing with the question whether property in the goods in issue had passed from the appellant to the 1st respondent, the learned trial judge observed as follows:

"It is also apparent that by virtue of the default, property in the said three equipment has not passed to the plaintiff. It therefore has not established any legal right for which any equitable remedy could be ordered. I therefore failed to see any basis for ordering perpetual injunction or any injunction or ordering specific performance of the contract covered by exhibit 1"

The court of appeal, for its own part, was of the view that in so far as the appellant had delivered the plant and equipment at the 1st respondent's Kontagora site property in the said goods had passed to the 1st respondent.

I think the question of the property in goods must be distinguished from the possession of them. In particular it needs be emphasized that property in the goods does not connote possession of such goods. The property in the goods may be transferred to the buyer before or after he has taken possession of them or indeed, at the time the goods are delivered to him. In the present case, it is common ground that the contract of sale which is binding on the parties and governs the transaction in issue is exhibit 1. The question which must now be asked is whether from a close interpretation of exhibit 1, one can come to a definite conclusion that the intention of the parties was that the property in the goods passed to the 1st respondent on the installation of the plant at its Kontagora site.

The law is long settled that in interpreting the provision of a written contract, no addition thereto or, subtraction therefrom is permissible. The words used must be given effect to and no word should be

ignored in the interpretation of the intention of the parties, otherwise the court will be seen as rewriting the agreement between the parties. See Bookshop House Ltd v. Stanley Consultant Ltd. (1986) N.W.L.R. (Pt 26) at 97. I will now examine closely the specific conditions under which the transaction was entered into.

Although the contract, exhibit 1, admittedly stated that the plant and equipments were to be delivered by the appellant at the Kontagora site of the 1st respondent, it carefully made provisions as to how the price of the equipments were to be paid by the 1st respondent. This was by payment of 40% cash deposit and the liquidation of the balance by six equal instalments of N70,290.00. Each of these instalments was secured by a post dated cheque payable on the 27th day of every month, beginning with the 27th day of April, 1978 and terminating on the 27th day of September, 1978, In particular, the parties expressly stated thus:-

(i) That the 1st respondent unconditionally and irrevocably agreed that the appellant shall have a lien on all the machinery until such time as the appellant received payment of the full contract price of N702,900.00.

(ii) That should the said 1st respondent fail to pay any of the instalments within one month of the due date, the appellant shall take immediate possession of those goods that remained unpaid for without hindrance.

It is clear to me, from a close examination of the above terms, particularly the powers conferred on the appellant under item (ii) above that the transaction in issue was clearly not an absolute sale but a conditional contract of sale. In my view, it was the intention of the parties under *its* terms that the transfer of the property in the goods was subject to the fulfillment by the 1st respondent of the full terms and expressed conditions of the agreement. This must be so as it was expressly agreed to by parties that the appellant shall take immediate possession of the goods without hindrance on the 1st respondent's failure to comply fully with the conditions of the transaction.

In this regard, reference must be made to section 1 sub-sections (2) (3) and (4) of the Sale of Goods Act, 1893 which stipulate as follows:-

"(1)

(2) *A contract of sale may be absolute or conditional.*

(3) *Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale, but where of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.*

(4) *An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred"*

Accordingly, where a contract for the sale of specific goods, as in the present case, is made subject to a condition which to all intent and purposes suspends the passing of property, the property will not pass to the buyer at the time of the making of the contract, but only when the agreed condition as stipulated by the parties is fulfilled. Until then, the contract takes effects as an agreement to sell, and not an outright or absolute sale of the goods.

In the present case, all the post-dated cheques meant to clear the 60% of the purchase price spread over six months were dishonoured on presentation for payment. Other additional cheques issued by the 1st respondent in respect of these payments were also dishonoured and returned unpaid on presentation. I think the court below was in error to have held that property in the goods passed to the 1st respondent simply because the appellant, as contract in exhibit 1, had delivered the equipment at the Kontagora site 1st respondent. It is my view that had that court properly construed exhibit 1 as a whole, it would have come to the irresistible conclusion that the transaction in issue was not an absolute sale but a conditional contract of sale and that the property in goods could not have passed to the 1st respondent as the agreed conditions and stipulations governing the contract of sale had not been fulfilled by the 1st respondent. Issue one must therefore be resolved in favour of the appellant.

I must however, hasten to point out that my resolution of issue 1 in favour of the appellant cannot be regarded as any matter of great

moment in this appeal. This is because the ultimate decision I intend to reach in this appeal would appear to be the same, whether or not property in the goods in issue had passed to the 1st respondent under and by virtue of exhibit 1. For the moment, I will proceed to examine issue 2.

Issue 2 concerns the right of lien, retention of possession or B withholding delivery of the goods, the subject matter of the contract of sale. The question is whether the exercise of these rights was open to the appellant or whether the only remedy open to it was an action for the recovery of the balance of the unpaid contract sum.

A lien, broadly speaking, is a right to retain that which is in C one's possession belonging to another till certain demands of the person in possession are satisfied. The unpaid seller's lien however, is his entitlement to retain the goods in his possession until the buyer has paid or tendered the whole of their price. See Marthindale V. Smith (1841) 1, D Q.B 389 at 396. The point that must be emphasized is that the unpaid seller's right of lien depends on his being in possession of the goods at the time he exercises his right of lien. Even where the seller is in possession of the goods as agent or bailee for the buyer, as is the case in the present E appeal, he may still exercise right of lien

See Poulton and Son V. Anglo-American Oil Co. Ltd (1911) T.L.R. 216. Lien arises if the following conditions are satisfied, namely:-

1. *The seller is unpaid.*
2. *The goods have been sold without any stipulation as to credit, F or the stipulated period of credit has expired, or the buyer has become insolvent, and*
3. *The seller is in possession of the goods or part of them.*

Accordingly, section 41(1) of the sales of goods act provides G that subject to the provision of the act, unpaid seller of goods who is in possession of them is entitled to a lien over the goods and therefore to retain possession of them until payment or tender of the price.

By section 38(1) of the act, the seller of goods is deemed to be H an "unpaid seller" within the meaning of the act when:- (1) the whole of the price has not been paid or tendered, or (2) a bill of exchange or other negotiable instrument has been recovered as condition payment, and the

condition on which it was recovered has not been fulfilled by reason of the dishonour of the instrument or otherwise as in the present case.

Perhaps, it ought to be mentioned that where an unpaid seller who is in possession of the goods has exercise his right of lien or retention resells the goods pursuant to his powers under the act, the buyer acquires a good title thereto as against the original buyer. See section 48(2) of the Sale of Goods Act. 1893 which provides thus:-

"48(2) where an unpaid seller who has exercise his right of lien or retention or stoppage in transitu resells the goods, the buyer acquires a good title thereto as against the original buyer"

Under this sub-section, therefore, the 2nd buyer acquires a good title to the goods as against the original buyer and it would not matter that the unpaid seller at the time of the sale was not the owner of the goods. See The Bineta (1967) I.W.L.R 121. See too section 39(1) of the Sale of Goods Act, 1893, wherein its is expressly provided that subject to the provisions of the act and not withstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods has inter alia and by implication of law a lien over the goods or the right to retain them for the price while he is in possession of them . Such unpaid seller is not liable in conversion as the original buyer, being in default, is not entitled to possession of the goods. See Lord V. Price (1874) L.R. 9 Ex. 54.

There is also the provision of section 39(1)(C) which, subject to the provision of the act and notwithstanding that the property in the goods may have passed to the buyer, confers on the unpaid seller a right of resale of the goods but as limited by the act. And by section 39(2) of the act , even where the property in the goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien where the property has passed to the buyer as *prescribed* under section 39(1) as aforesaid. See Ex parte Chalmers (1873) L.R. 8 Ch. App. 289 at 292. It is thus apparent that a lien, although it may only arise stricto sensu when the property held belongs to another, on the other hand the right to withhold delivery exercised by the unpaid seller over goods in which he

Afrotec Ltd v. Mia & Sons Ltd (2000) 12 KLR Iguh JSC 3301
still has the property has, quite right, been described as a quasi-lien. See Ex parte chambers (supra).

In the result, therefore, the unpaid seller has the same right of retention or withholding delivery of the goods in his possession sold whether or not the property in them has passed to the buyer. See Ward Ltd v. Bignall (1967) 1 Q..B. 534 at 545. B

Applying the above principle of law to the facts of the present case, it is clear to me that whether or not the property in the goods had passed to the 1st respondent on the delivery of the plant and equipment at its Kontagora site, the appellant, once the goods were in its possession, would only be liable to deliver them to the 1st respondent on payment or tender of the balance of the purchase price. See section 28 of the Sale of Goods Act, 1893). The appellant was entitled until then to retain possession of the goods, the subject matter of the contract of sale, either by virtue of its lien as an unpaid seller, if the property had passed (See section 39(1) of the Sale of Goods Act, 1893) and I do not so hold, or virtue of his right to withhold delivery of the goods, if the property had not passed (See section 39(2) of the act). In either case, the appellant, as an unpaid seller had a right to resell the goods as it appears it did. See to Ward Ltd V. Bigmall (supra) per Diplock, L.J. I think the appellant was entitled in all the circumstance of this case to exercise its right of lien and/or retention of possession of the goods in issue as provided both under the act and pursuant to the terms of exhibit 1. D E F

It was then submitted by learned counsel for the 1st respondent that the appellant lost its right of lien over the goods the moment possession of them was first obtained by the 1st respondent by delivery at its Kontagora site. Without doubt, section 43(1) of the Sale of Goods Act, 1893 provides that the unpaid seller of goods loses his right of lien or right of retention when, inter alia, the buyer or his agent lawfully obtains possession of the goods. But it is settled law that although possession of the goods may have passed to the buyer or his agent so as to terminate the unpaid seller's statutory right to a lien, the contract itself between the parties, as is the case in the present appeal, may make express provision for or create a special right in the seller which is analogous to a lien. G H

Where such express provision is agreed to by the parties, it cannot be doubted that it will be binding on the parties.

In this connection, it ought to be stressed that rights which have been conferred on sellers or buyers under the Sale of Goods Act, 1893 are rights that arise under the contract between the parties by the implication of law. Section 55 of that Act, however, provides that where any right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negated or varied inter alia by express agreement between the parties. Accordingly, if the contract between the parties expressly create a lien, a right of retention of the goods, repossession thereof or other form of security for the price, such express terms will prevail over, and therefore exclude the statutory implication of a lien etc., at least to the extent of any inconsistency with the express terms. See Re Leith's Estate (1866) L.R. 1 P.C 296 at 307 and 308. This is because parties to a contract enjoy their freedom to contract on their own terms so long as these are not illegal and/or unlawful. The terms of a contract between parties are therefore clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any document which constitutes the contract are invariable the guide to its interpretation. When parties enter into a contract, they are bound by the terms of that contract and it cannot be anything but unfair to read into such a contract the terms on which there has been no agreement save terms which may arise by implication of law and in respect of which there is nothing in the contract that expressly provides otherwise.

See Alhaji Abdulahi Baba V. Nigeria Civil Aviation Training Centre, Zaria (1991) 5 N.W.L.R (Part 192) 388 at 392 and 393.

Exhibit 1 makes express provision for the rights of lien and immediate possession of the goods in issue reserved to the appellant as terms of security for the contract price. It seems to me that even if the goods were at all material times in the possession of the 1st respondent, there was clearly by express agreement, reserved to the appellant as the seller, and as between itself and the 1st respondent, the buyer, a special property or interest in the plant and/or equipment until the full price was paid. This price was never fully paid and I entertain no doubt that the

appellant rightly exercise its rights over the goods as agreed to by the parties in exhibit 1. See Benjamin's sale of goods, 1974 edition, paras 1079 and 1083.

Finally, on issue 2, is the finding of the court of appeal that the only remedy open to the appellant was an action for the recovery of the unpaid balance of the contract sum and not in its exercise of the right of lien and/or possession/retention of the goods. In the first place and as I have repeatedly pointed out, the contract exhibit 1 confers the exercise of the rights of lien and/or possession of the goods on the appellant as security for the price of the plant and equipment. This is quite apart from its rights over the goods under the provisions of the Sale of Goods Act, 1893. In the second place, the appellant's right to be paid the contract price of the goods is, under the law, quite independent of the existence of a lien; a lien being an additional security given to the seller who has yet to be paid, but he has a right to be paid besides and independently of his lien. See The Elder (1893) P.119 at 131. It is thus settled that the right of the seller to sue for the price of the goods is independent of his other remedies against the goods. Indeed under section 43(2) of the Sale of Goods Act, 1893, the seller does not lose his right to lien merely because he has obtained judgment for the price of the goods unless and until the buyer has fully satisfied the judgment debt by payment of the full contract price to the seller.

The court of appeal, with respect, was therefore in error when it held that the only remedy open to the appellant was action for the recovery of the balance of the price of the goods and not in its exercise of the right of lien or retention of the plant pursuant to the terms of exhibit 1.

There is next issue 3 which poses the question whether the court below was right when it held that acceptance of negotiable instrument as payment for the plant per se converted the conditional sale of the equipment to an absolute or outright sale. In this regard, it must be conceded that where a negotiable instrument is given by a debtor to his creditor, the question of upon what terms it is given is clearly one of fact depending on the intention of the parties. See Palmer v. Bramley (1895 2. Q B. 405 and Gunn V. Bokkrow, Vaughan and Co. (1875) L.R. 10Ch. App.491 at

501. It must however be added that the intention to take an instrument in absolute payment for goods sold must be clearly shown and not deduced from ambiguous expressions.

There can be no doubt that payment may, be agreement, as in
 B the present case, be made by means of a negotiable instrument such as a
 cheque. It is equally well settled that payment by means of a negotiable
 instrument is prima facie conditional on the instrument being honored at
 maturity. The seller's remedy to sue for the price is suspended during the
 C currency of the instrument. If the instrument is honoured at maturity,
 the amount therein will accordingly be deemed effectively paid. If, on
 the other hand, it is dishonoured, the seller's remedies both under the
 contract of sale in issue and the Sale of Goods Act, 1893 automatically
 revive and become enforceable. That seems to me to be the position of
 D the law. See too section 38(1)(b) of the Sale Goods Act, 1893.

In the present case, it is not in doubt that the intention of the
 parties was that the entire balance of the purchase price be secured by
 post dated cheques. The issue was clearly not a question of accepting
 E the post dated cheque as unqualified payment for the goods but as a
 promise to pay the cheques on the due date. As things turned out,
 however, all the cheques in question were, on presentation for payment,
 dishonoured.

F It cannot be disputed that the acceptance of a negotiable instru-
 ment is normally treated as condition payment. Certainly, on the facts of
 the present transaction, the negotiable instruments issued by the 1st re-
 spondent and accepted by the appellant were taken as conditional pay-
 ment. It is my view that where, as in the present case, a negotiable
 G instrument taken as conditional payment for the price of goods is disho-
 noured, various remedies for the breach of such contract of sale includ-
 ing but not limited to an action for the unpaid balance are available to the
 seller depending on the facts and circumstances of each case. I think the
 H court below was in error to hold that the acceptance of a negotiable
 instrument in all cases ipso facto converted the conditional sale in issue,
 as in the present case, into an absolute sale in the absence of any evi-
 dence to establish that the parties agreed to such arrangement.

I will now turn to issue 4. This deals with whether the court of appeal was in error by holding that the 1st respondent had established a legal right in the equipments as to entitle it to the equitable reliefs claimed. I will, in particular, deal with the equitable reliefs of specific performance and injunction claimed by the 1st respondent.

A decree of specified performance is a form of relief that is purely equitable in origin and is one of the earliest examples of the maxim that equity acts in personam. The fundamental rule is that specific performance will not be decreed if there is an absolute remedy at law in answer to the plaintiff's claim, that is to say, where the plaintiff would be adequately compensated by the common law remedy of damages. See Hutton V. Watling (1948) Ch.26 at 36 and Re Scott and Alvarez's Contract, Scott v. Alvarez (1895) 2 Ch. 603 C.A. at 612 and 615. The jurisdiction in specific performance is based on the inadequacy of remedy at law. See too Whiteley Ltd. v. Hilt (1918) 2 K.B. 808 at 819 and Re Clarke (1887) Ch.D. 348 at 352. In Flint V. Brandon (1803) 8 Ves. 159, the learned master of the rolls succinctly explained the position as follows:-

"This court does not profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective that it becomes necessary for court of equity to interfere In the present case, complete justice can be done at law. The matter in controversy is nothing more than the sum it will cost to put the ground in the condition in which by the covenant it ought to be".

See too Beswick v. Beswick (1968) A.C. 58 at 63.

Still on the issue of specific performance of the agreement for the installation of the plant by the appellant at Kaduna, attention must be drawn to a second equally important principle. This pertains to the well established principle that contracts which are personal in nature or which involve the performance of personal service will not be specifically enforced. So, in Rigby v. Connol (1880) 14 Ch.D. 482 at 407, Jessel, M.R. was obliged, and quite rightly in my view, to observe as follows:

"The courts have never dreamt of enforcing agreements strictly

personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or whether they are agreements for the purpose of pleasure:....."

In the present case, it cannot be disputed that there is an absolute remedy at law for the alleged breach complained of by the 1st respondent in that the 1st respondent would not only be adequately compensated by the common law remedy of damages, it did in fact make a claim for damages for the breach complained of. It is also clear to me that the contract sought to be specifically enforced is personal, in nature and/or involve the performance of personal services. The contract is simply that of hiring and service between the 1st respondent and the appellant for the transportation of the plant and equipment from Kontagora to Kaduna at an agreed fee. It was an employment and/or a master and servant contract. In all these circumstance, it is clear to me that the court below was, with respect, in error to have decreed specific performance of such a category of contract.

On the issue of the perpetual injunction claimed, it is another fundamental principle that the court will only grant a perpetual injunction at the suit of a plaintiff in support of a right known to law or equity. The conduct of a plaintiff must also be taken into consideration in determining whether or not to grant an injunction. The plaintiff must come to equity with clean hands and if, therefore, he is in breach of his own obligations, he will not be granted an injunction. In the same vein, he who comes to equity must do equity. Accordingly, a plaintiff will not succeed in his claim for injunction if he is unable or unwilling to carry out his own obligations.

In the present case, no right known to law or equity was established by the 1st respondent over the plant and/or equipment in issue. The court below did not disturb the finding of the trial court that the 1st respondent failed to fulfil its obligations under exhibit 1 as there was an outstanding debt of N635,059.78 representing 60% of the purchase price of the plant and equipment. I have also found that no legal or equitable claim was established by the 1st respondent in respect of the goods and that the appellant acted within its statutory and contractual rights in dis-

posing of by sale the said plant and equipment. I think that the equitable doctrines that he who seeks equity must do equity and that he who comes to equity must come with clean hands are applicable in this case and are sufficient to defeat the claim of the 1st respondent for any equitable reliefs. Issue 4 is therefore resolved in favour of the appellant. B

Issue 5 concerns the question of whether or not the rights of lien, retention and/or immediate possession over the goods provided for in exhibit 1 were waived by the appellant in the present proceedings. In this regard, I need only state that defence of waiver was neither pleaded C by the 1st respondent nor was evidence on the point led. It is a basic principle of law that parties are bound by their pleadings and it is the case they present on the basis of those pleadings that must be considered by the courts of law. No question of waiver therefore arises in this case and the court below, with respect, was in error to have held that the appellant D had waived its right of lien and/or repossession of the goods.

There is finally issue 6 which challenges the competence of the court below to have ordered that the equipment be delivered by the appellant to the 1st respondent subject to payment of the entire outstanding contract sum by the 1st respondent to the said appellant. I have E earlier on in this judgment set out the three reliefs claimed by the 1st respondent against the appellant in these proceedings. Perhaps, I should also state that the appellant filed no counter-claim against the 1st respon- F dent before the trial court for payment of the balance of the contract sum. I think I need to emphasized that the principle of law is well settled that a court of law must not grant to a party a relief which he has not sought or which is more than he has claimed. See Ekpenyong V. Nyong G (1975) 2.S.C. 71 at 81-82, Makanjuola V. Balogun (1989) 3 N.W.L.R. (part 108) 192 at 206, Olurotimi V. Ige (1993) 8 N.W.L.R.(Part 311) 257 at 271 etc. It is clear that the relief in issue was neither before the trial court nor before the court of appeal. In particular, the trial court had no opportunity of making any pronouncement on this controversial relief H which was gratuitously made in favour of the appellant by the court below. It seems to me plain that issue 6 must be resolved in favour of the appellant.

It is for the above and the other reasons contained in judgment of my learned brother, Kutigi, J.S.C. that I, too, allow this appeal set aside the judgment and orders of the court of appeal made on the 10th day of April, 1991 in these proceedings. The judgment and orders of the trial court are hereby restored and the 1st respondent's claim are hereby dismissed. I subscribe to the order for costs made in the leading judgment.

C

KATSINA-ALU JSC

I had the privilege of reading in draft the judgment of my learned brother Kutigi, JSC in this. I agree with it. For the reasons he has given, I also would allow the appeal and set aside the decision of the lower court. I abide by the order for costs.

AYOOLA JSC (Dissenting)

E By the letter dated 28th March, 1980 the plaintiff wrote to the defendant as follows:

"We hereby unconditionally and irrevocably undertake to pay Afrotec Technical services Nigeria Limited (hereinafter referred to as Afrotec the total sum of N702,900.00 (Seven Hundred and Two Thousand, Nine Hundred Naira) in consideration of their supplying us with the under-mentioned equipment on the following terms and conditions".

G Having stated the equipment and terms and conditions as to price, delivery and commissioning, the plaintiff stated the terms of payment as follows:-

"We confirm that the total contract price of N702,900.00 is to be paid to Afrotec on the following terms. 40% cash deposit of N281,160.00 ...payable in advance of delivery. Balance of 60% payable by six equal H installment of N70,290.00 each secured by post-dated cheques payable on the 27th April, 27 August and 27th September respectively".

The followed provision as to interest charged on the instalmental payment, the rate of which was not stated, and the following terms:

"We unconditionally and irrevocably agree that Afrotec shall have lien on all the machinery until such time as Afrotec receive payment of the full contract amount of N702,900.00. We also confirm that should we fail to pay any of the installments detailed above within one Month of remains unpaid within the subject of this transaction without hindrance and without recourse." B

Upon making a down payment of 40% of the purchase price the defendant installed the equipment at the plaintiff's site at Kontagora. The plaintiff did not meet its obligation to pay installments. It gave as reason C breaking down of the equipment shortly after its installation at Kontagora and failure of the defendant to supply spare parts to resuscitate the broken down equipment. Believing that the equipment would be put to more profitable use in Kaduna the plaintiff requested the defendant and the defendant agreed in January, 1980 to transfer the equipment to Kaduna D and install the same on the plaintiff's site. The defendant dismantled the equipment pursuant to that agreement. However, it transpired that instead of taking them to Kaduna, it kept them in its warehouse. After several denials that it had repossessed the equipment, the defendant some- E time in April, 1980 claimed that it had repossessed them.

On these facts the plaintiff sued the defendant. By its defence the defendant asserted that it was "perfectly entitled" to take possession of the equipment "as such action was provided for in the sale agreement F between the parties". The defendant claimed that it exercised a right of lien on the plant after all negotiations for payment had collapsed. The defendant averred that the plaintiff having failed to perform its part of the contract was not entitled to the reliefs claimed.

The learned trial judge, Ibiyeye, J. (as he then was) dismissed G the action. He found that the defendant rightly exercised its right of lien. He also held the view that by virtue of the default of the plaintiff property in the equipment had not passed to the plaintiff and, consequently, the plaintiff had not established any legal right to the remedies he claimed. H All these findings were made after he had described the transaction as a hire purchase transaction.

On the appeal to the court of appeal the plaintiff's argument,

apart from the arguments on the now inconsequential issues of novation and waiver, was that the property in the equipment did pass to the plaintiff and that the trial judge was wrong in holding to the contract. It was further argued that by parting with possession, the defendant extinguished its right of lien, and that the sale being an outright sale the defendant had no right of repossession.

For his part counsel for the defendant in the court of appeal argued that the plaintiff had failed to establish a legal right and that the defendant had established its right of lien.

Uthman Mohammed, JCA, (as he then was) had no difficulty in allowing the plaintiff's appeal. It is not difficult to follow the reasoning that led him to that conclusion from the following passages from his judgment which I now quote:

"In relying on the right of lien the 1st respondent (the defendant) made it abundantly clear that it was passing the property and ownership to the appellant (the plaintiff)" In the case in hand, the appellant claimed ownership of the equipment and it is quite clear that the 1st respondent did not deny that assertion. The learned counsel for the respondents had no answer to the claim by the appellant that title to the equipment had been passed over to the appellant" The tone of some of the documents clearly shows that the 1st respondent had transferred title of the equipment to the appellant. The only safety valve the company retained was the lien over the property which was agreed to be exercised until the balance due on the equipment was paid"

On the question of lien, the learned Justice of the court of appeal (as he then was) held that since:-

".....The equipment in dispute was not in possession of the 1st respondent when he exercise the right of repossession",

the argument that the defendant was an unpaid seller in possession of the goods until payment was not available to the defendant. He held that.

"The fact the seller no longer holds the goods in his capacity as seller, as is the case here, but as the buyer's agent or bailee, may be evidence that he has waived his lien".

The learned Justice further went on to say that acceptance by

the defendant of negotiable instruments, cheques, as payment had converted "a conditional pay to an absolute payment, thereby, removing the necessity for exercise of lien".

In the result, the court of appeal allowed the plaintiff's appeal and entered judgment for the plaintiff restraining the defendant in terms of the plaintiff's claim and ordering that the equipment be delivered to the plaintiff no condition that it pays the balance outstanding on the purchase price. The claim for damages was remitted to the high court for assessment of damages.

The defendant has now appealed. For convenience the defendant, which is the appellant in this appeal, is referred to as "the defendant;" while the plaintiff, which is the respondent, continues to be referred to as "the plaintiff".

It is evident that the transaction with which this case is concerned was clearly one of sale of goods. The trial judge had some difficulties in classifying the nature of the transaction, which he described as "a hire purchase or conditional sale". Proceeding on the basis that. "It is settled law that conditional sales hardly pass title to the purchaser unless the attendant conditions have been executed"; he inevitably came to the conclusion, in effect, that there could have been no sale, and therefore, no passing of property until price was fully paid.

The ambivalence of the trial judge in deciding the nature of the transaction is understandable, though, not justified. Hire-purchase, credit sale, conditional credit sale are all cognate transactions, the common factor they share is deferred payment of part or all of the purchase price. These though cognate transactions are distinguishable. For a better understanding and resolution of the issue that have arisen in cases such as the present one, the distinction should be borne in mind and not glossed over.

In the hire-purchase transaction there is no question of a sale coming into being unless and until the hirer exercise at the appropriate time the option to purchase the goods. Mixed in a hire-purchase transaction is a contract of hire an option to purchase.

In the credit sale transaction there is a sale on credit. The credit

may take the form of payment of the entire purchase at an agreed future time or payment of the purchase price by agreed installments. In a credit sale there is no question of an agreement to purchase the goods at a future time. A purchaser of goods under a credit sale agreement does not have the option, which the hire has, of returning the goods and freeing himself from the obligation to pay further installments. Two cases which show the nature and illustrate the consequence of a credit sale transaction are Osei Kofi V. Mensah (1930) 1 WACA 76 and Yakassai V Incar Motors Nigeria Ltd (1975) NSCC 284 both of which have been referred to by counsel in this appeal.

It is evident that a credit sale is not a hire-purchase transaction. A credit sale is a sale transaction subject to the same principles in regard to the passing of property in sale transactions which are not no credit.

The third cognate transaction is the conditional credit sale, which is distinguishable from a hire-purchase transaction because of the absence of option to purchase by the buyer or to resile from the sale by the seller. A credit sale may be conditional when by the agreement of the parties property passes to the buyer on condition that he pays the purchase price as agreed. The transaction in the case of Sengena v. Poku (IX WACA 143) is an example of such conditional credit sale. In that case the buyer bought a lorry on terms that part of the purchase price would be paid by installments. The seller reserved to himself the right to sell or use the lorry as his own in payment of the balance remaining should the buyer default in making installment payments as agreed. On default of payment by the buyer, the seller seized the vehicles. The buyer challenged the seizure of the lorry on the ground that it had become his absolute property. The divisional court agreed with him and gave judgment for the buyer. On appeal, the West African court of appeal was of the view that.

"..... The parties made it quite clear in terms of exhibit "A" particularly in clause 5, that the purchaser was not to acquire the property in the lorry unless and until the agreed installments of the price were paid in full. Until then the purchaser had only the right to possession, user and control of lorry so long as the agreed installments of the price

were punctually paid. It was made quite clear in clause 5 that upon any default in payment the owner could seize the lorry and upon notice given could sell or use the lorry as his own in payment of the balance remaining'. There was nothing whatever either unlawful or even unreasonable in that clearly expressed agreement between the parties".

B

The test whether a contract of sale of specific goods is conditional or not is whether the contract is made subject to a condition which suspends the passing of property, so that the property will not pass to the buyer when the contract is made, but only when the condition is fulfilled. That is made clear in section 1(2) and (3) of the sales good acts, 1893 as follows:

C

"(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell".

D

It seems clear from the provisions of section 1(3) that for a contract of sale to be conditional the parties must have agreed either.

E

(1) That the transfer of property in the goods is to take place at a future time; or,

(2) That the transfer of property in the goods is subject to some conditions thereafter to be fulfilled.

F

By section 62(1) of the Act a "contract of sale" includes an agreements to sell as well as a sale. Between the two, there is no intermediate category (see Benjamin's sale of goods [1974 Ed] paragraph 19).

G

That payment of price is deferred or agreed to be by installments does not by itself make a contract of sale a conditional sale. In order to determine whether a contract of sale is a conditional sale the totality of the agreement must be considered. Where there is express term as to the passing of property there is no problem. Effect must be given to such term. It is where there is no such express term that resort must be had to a construction of the agreement, if in writing, to deduce the intention

H

of the parties. Usually, such conditions are, for example, inferred from terms enjoining the buyer to insure the goods against risks, or empowering the seller to inspect the goods to ensure its goods condition, or as in Adigun V. Amao (1979) LRN 54 requiring the good (a lorry) to be registered in the seller's name, to mention but a few. In the case of Sengena V. Poku (supra) there was no difficulty in construing the contract of sale as a conditional sale. The parties themselves described the transaction, though inexactly, as an agreement to "purchase under a hiring purchase system" and the seller expressly reserved the right to himself "to sell or use the lorry as his own in payment of the balance remaining" in the event of the buyer's default.

In the present case neither the court below nor this court had the benefit of the reasoning of the trial judge that led him to conclude that the contract of sale was a conditional sale. He seemed to have been of the view that every credit sale is a conditional sale. That is erroneous. It needs to be stated that where the nature of a transaction or the intention of the parties is to be deduced from construction of an agreement in writing or from the terms of a contract the trial court should demonstrate from which terms and by what construction such intention is discovered.

Be that as it may, the court of appeal considered the terms of the contract whereby the defendant shall have lien over the equipment until the plaintiff paid the purchase price in full and the defendant had the right to repossess the equipment, in specie, if the installments were not paid. Notwithstanding those terms, the court of appeal held that the defendant had "behaved in a way which established beyond all doubt that it had transferred the title" to the plaintiff.

The substance of the defendant's counsel's argument on this aspect of the appeal is that the court of appeal ignored the intention of the parties as could be identified in the agreement. The terms which he submitted disclosed an intention of the parties that passing of property in the goods is conditional are those which gave a lien to the defendant and which reserved the right to the defendant to take immediate possession of the equipment should the plaintiff fail to pay any of the installments

within one month of the due date". It was argued that: "The right to take immediate possession does not support the right of ownership credited to the respondent by court of appeal" and, relying on section 19(1) of the Act, that it was open to the seller to reserve to himself the right of disposal of the goods until a specified condition is fulfilled. In this regard B I quote the submission made in the defendant's brief thus:-

"It is submitted that the specified condition which was not fulfilled by the respondent in this appeal is found in Exhibit 1 which states as follows:-

(a) *"We unconditionally and irrevocable agree that Afrotec shall have a lien on all the machinery until such time as Afrotec receive payment of full contract of N709,200.00".* C

(b) *"We also confirm that should we fail to pay any of the installments detailed above within one month of the due date Afrotec shall take immediate possession of those properties in specie that remains unpaid for within the subject of this transaction without hindrance and without recourse".* D

Learned counsel for the plaintiff argued for his part that the conduct of the defendant in parting with possession of the equipment before full payment was made and even after the plaintiff had defaulted in payment of three installments together with charging of interest over the balance of purchase price were indicative of intention to pass property. F Furthermore, it was argued, the defendant did not expressly reserve ownership by inclusion of a Romalpa clause. Finally, it was urged that "the clauses in Exhibit 1 relating to lien and possession cannot create any title" in the defendant after deliver of the equipment.

In my opinion, the question pertinent to the determination of the nature of the transaction is whether there is any term of the contract which makes the contract of sale a conditional sale. The submission of learned counsel for the defendant that the terms of the agreement granting a lien a right to take immediate possession of the goods to the defendant in case of the plaintiff's default are conditions, is, in my opinion, H misconceived. Those terms gave certain rights to the defendant and did not by themselves indicate that the plaintiff should do anything in order to

acquire property in the goods. The proper approach to the relevance of the terms is whether the grant to the defendant of lien over the good and right to take immediate possession of the goods in case of default of payment raise an inference that delay in passing of property until payment of full purchase price by the plaintiff was intended.

That issue falls into proper perspective when the general nature of a lien is appreciated. The dissenting judgment of Fletcher Moulton, L.J. Trustee of the property of F. Lord V. Great Eastern Railway Company (1908)

2KB 54 where at pp 63 - 64 explains the nature of a lien under English law thus:

"A lien under English law is a very peculiar right, but its precise nature has been conclusively settled by a long line of decisions. In contrast to the operations of pledging or pawning the creation of the lien does not, strictly speaking give to the holder any property in the goods subject to it : Per Lord Esher in Yungmann V. Briesemann. It is a right to retain the goods until the amount of the lien has been paid. During the period that the goods are so retained the true owner may be in complete possession of the goods and have and exercise over them most of the ordinary powers of an owner; and indeed in my opinion it is correct to say that there is nothing in English law which prevents his possession and exercising any and every right of an owner in possession which is not inconsistent with the maintenance by the holder of the lien of his right to retain. Take for example the best known and most familiar instance of a lien, namely, the lien of an innkeeper over the goods of a traveller at his inn for the amount of his charges. The traveller is in actual possession of all his goods. He wears the clothes; he reads the books. He can put them in his own box and lock them up, and during the traveller's stay in the inn the innkeeper has no right to get at them nor to take them into own personal possession so as to deprive the owner of their use. The owner is even entitled to certain legal rights and remedies in respect of those goods which depend on possession. For example, if a man in the next room were to detain those goods, the traveller could bring detinue for them. Nothing that is done with the goods short of removing them

from the hotel affects the existence of the lien. The owner may lock them up in cupboards in his rooms, of which he alone has the key, and if the innkeeper were to allot to the traveller a locker in the corridor or in the sample-room of the hotel for the purpose of holding his goods it would not, in my opinion, prejudice or affect the lien over them, even though the sacred word "demise" were used to describe the transaction, more especially if that "demise" was specifically for the sole purpose of holding goods which were to remain subject to the lien. But, although the innkeeper not only may but under certain circumstances must thus leave the goods in the actual possession of the owner, there are limits, which he may not pass without losing his lien. He must not permit the traveller to take the goods out of the inn, or, to put it more generally, he must not do anything that amounts to an abandonment of the power to exercise his right of retention."

Then, at page 71 he said:

"As I have said, a lien gives no property in the goods, nor does it entitle the holder to take possession of the goods, for it implies that they are already in his possession in the sense that I have explained, and not in the uncontrolled possession of the owner" (Emphasis mine).

It is pertinent to observe that the house of Lords allowed the appeal in G. E. Ry. v. Lords (1909) AC 109.

It is clear that a lien is merely a right to retain the goods subject to it until the amount of the lien has been paid. The lien does not give to the holder any property in the goods. A legal lien was described in Halsbury's laws of England Vol 28 (4th Edition) paragraph 702 thus;

"In its primary or legal sense 'lien' means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied. In the primary sense it is given by law and not by contract".

Apart from lien which the law give there is lien by contract, which is right to detain goods as security. In Halsbury's law of England (4th Edition) Vol 28 paragraph 731 the nature and formation of such lien is described thus:-

Lien in its proper sense is a right which law gives, but it is useful to speak of lien by contract, and numerous instances of a right to detain goods as security depends for their effect on the validity, scope and construction of the governing contract".

B Normally a lien implies that property in the goods is in another other than the person holding the lien. Section 39(1) provides that:

"Subject to the provision of this law and of any written law in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law-

(a) a lien on the goods for the price which he is in possession of them:....."

D By section 39(2) when property in goods has not passed to the buyer the unpaid seller has right to withhold delivery. Commenting on section 39(2) it was stated, quite rightly, in Benjamin's sale of goods (1997 Edition) paragraph 15 - 029 that:

"A lien, stricto sensu, can arise only when the property held belongs to another, hence, the right of withholding delivery exercise by the unpaid seller over goods in which he still has property, is a quasi-lien".

F Enough, I believe, has been said to show that term as to lien contained in the agreement of the parties does not by itself raise any inference of an intention to delay the passing of property to the buyer. If anything, the inference which it raises is that which is consistent with nature of lien, and that is, that property has passed to the buyer.

G By the agreement of the parties the defendant was given a right to "take immediate possession of those properties in specie that remains unpaid for within the subject of this transaction without hindrance and without recourse" should the plaintiff fail to pay any of the agreed installments within one month of the due date. I do not interpret this right as H suggesting an intention to delay passing of property to the plaintiff.

The entire agreement must be read as a whole. By the agreement the plaintiff bought the equipment and agreed to pay an additional agreed price of N28,000.00 for delivery and an additional cost of

N10,000.00 for commissioning of the plant. Interest was charged for delayed payment.

When it is disputed whether property has passed to the buyer or not, the approach which is in accord with sale of goods Act, 1893 is as contained in section 17 and 18 of the Act. In my opinion the following propositions should guide the court in determining the time when property passes when there is a contrary for the sale of specific or ascertained goods:

(i) Property in the goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(ii) Where the terms of the contract, the conduct of the parties and the circumstances of the case disclose the intention such must be given effect to.

(iii) Where the terms of the contract, the conduct of the parties and the circumstances of the case, do not disclose a definite intention as to the time at which the property in the goods is to pass to the buyer, the presumptions contained in section 18 of the Act should apply.

In this case, the relevant provision of section 18 is rule 1, which provides that:

"Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of delivery, or both, be postponed" (Emphasis mine).

I have held that this is not a conditional contract for sale of the equipment. I also find that there is nothing in the terms of the contract, the conduct of the parties and the circumstances of the case that disclose any intention different from that presumed by rule 1 of section 18.

It is clear from the judgment of the trial judge that he found that the defendant had exercised its "general right of lien in consonance with the spirit and intendment of exhibit 1". This was rejected by the court of appeal in a judgment delivered by Mohammed JCA (as he then was). They held that:

(i) *The equipment was not in possession of the 1st respondent as seller but as bailee of the plaintiff when he exercised the right of repos-*

session;

(ii) *The acceptance of negotiable instruments as payment (before the cheques were dishonoured) had converted the conditional sale of the equipment into an absolute payment and the 1st respondent could not thereafter exercise its lien;*

(iii) *Following Yakassai v. Incar Motors Nigeria Ltd (supra), that since the sale was an outright sale and property in the equipment had passed to the plaintiff, the defendant had no right of repossession even if he had agreed to that course".*

Mr. Agbesanwa for the defendant puts his case against findings in three ways. First, that the view of the court of appeal that the defendant not being in possession of the equipment as an unpaid seller but as a bailee could not exercise the unpaid sellers lien by virtue of its possession of the equipment, was erroneous in view of section 41(2) of the Act. Secondly, that if the defendant "had refused the contract to transfer the plant to Kaduna, the right of lien and repossession provided in exhibit 1 could not have been exercisable. It was by accepting the offer (i.e to transfer the equipment to Kaduna) the appeal (i.e the defendant) was able to exercise its right of lien and of repossession over the plants, since there was no time limit when those rights could be exercised, so long as the purchase price was still outstanding". Thirdly, waiver not having been pleaded not be raised.

Freedom of parties to determine the terms of their contract implies that the parties are free to agree that payment of the purchase price by a negotiable instrument may be taken as an absolute payment or conditional payment, conditioned on the instrument being honoured on maturity. The law is clear that payment by negotiable instrument is prima facie conditional. It is where the intention of the parties is that such payment is absolute that the prima facie view is excluded. Where payment is by negotiable instrument the legal position is clearly put in Benjamin's sale of goods (op cit) paragraph 695 thus:

"The seller's remedy to sue for the price is suspended during the currency of the instrument. If the instrument is honoured at maturity, the amount expressed therein is efficiently paid; if it is dishonoured, the seller's

remedy reviews".

The common sense view receives additional statutory support in section 38(1)(b) of the act which provides that the seller of goods is deemed to be an "unpaid seller" within the meaning of the act when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise. B

Acceptance of a negotiable instrument, normally treated as conditional payment of the purchase price, leads to waiver of the seller's lien for the period of the currency of the instrument. The law is stated in Benjamin's (op cit) paragraph 1066 as follows: C

"Where the buyer is given credit for the period of bill of exchange or other negotiable instrument given by him to the seller in payment of the price, the seller's lien is waived for that period, since acceptance of a negotiable instrument is normally treated as conditional payment. But if, before the goods are delivered to the buyer the negotiable instrument is dishonoured, or the buyer becomes insolvent, the seller's lien will review, so that he may retain the goods until he is paid;" (Emphasis is mine) D E

The court of appeal was wrong in the view it held that payment by negotiable instruments even after the instruments were dishonoured destroyed the unpaid seller's lien. F

However, was the possession of the equipment under a contract to transfer the same to Kaduna and install it at the plaintiff's site there, possession of an "unpaid seller" envisaged in section 41(1) of the Act?. That subsection reads:-

"Subject to the provision of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:- G

(a) *Where the goods have been sold without any stipulation as to credit;* H

(b) *Where the goods have been sold on credit, but the terms of credit had expired;*

(c) *Where the buyer becomes insolvent".*

By subsection 1 of section 43 the unpaid seller of goods loses his lien or right of retention thereon-

- (a) when he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
- (b) When the buyer or his agent lawfully obtains possession of the goods;
- (c) By waiver thereof.

It is clear from these two subsections that an unpaid seller who has ceased to be in possession of the goods loses his statutory lien. It was stated in Benjamin's (op cit) paragraph 1068 that;

"The unpaid seller's right of lien depends on his being in 'possession' of the goods at the time he exercises his right of lien. The lien entitles the seller to retain possession, but not to regain possession of the goods after he has given it up". (Emphasis mine)

In Valpy v. Gibson 136 E.R. 737 it was held, notwithstanding that the goods had come into possession of the buyer's agents, who subsequently delivered them to the sellers to be repacked, that the lien was lost by the first delivery, and that the seller's later possession for a limited purpose could not create a new lien for the price without the buyer's agreement. Valpy v. Gibson was decided before the Act was passed. Subsection 2 of section 41 of the act provides that:

"The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer."

Citing Poulton & Son v. Anglo- American Oil Co. Ltd. (1911) T.L.R. 216, it was stated in Benjamin's (op cit) paragraph 1070 that as a result of the Act, the seller may exercise his lien until the price is fully paid, despite the fact that he acknowledges that he retains possession of the goods sold in the capacity of bailee to the buyer.

Section 41(2) is capable of two views. One is that "possession of the goods as agent or bailee or custodian for the buyer" includes regaining possession of the goods after the seller has parted with it and the buyer had already been in possession. The other is that these words

apply only when the seller has not at any time parted with possession of the goods but has merely altered the capacity in which he possessed the goods. The latter will include a case in which the buyer is in constructive possession through his bailee or agent who happens to be the seller in continuous physical possession of the goods. The latter is to be preferred. B

For my part, I do not regard section 41 (2) as expanding the ambit of the statutory lien created by section 39(1). It is made clear in Benjamin's (op cit) paragraph 1058, and I agree with the view, that the seller's lien is a qualification on his duty to deliver the goods to the buyer. C That duty is imposed by section 27 of the Act and is discharged upon delivery of the goods to the buyer and ceases to be subject to qualification.

Notwithstanding section 41(2) of the Act. I am of the opinion D that the principle in Valpy v. Gibson (supra) still applies to this case. When the defendant delivered the equipment to the plaintiff it lost its statutory lien as an unpaid seller over the goods. Its possession of the goods as bailee of the plaintiff was possession by the plaintiff through it E as bailee. The position is different from the case in which the seller had not at any intervening period been out of physical possession.

In my judgment, the defendant having delivered the equipment to the plaintiff had lost the statutory lien which it had pursuant to section F 39(1) of the Act, notwithstanding that it subsequently regained possession, under a separate contract as a bailee of the plaintiff for purpose of transporting the equipment to Kaduna.

Even if the defendant had not lost its lien, it has waived it by its G conduct. The law is clear that lien is waived "where the party claims to retain goods on grounds different from those on which he rests his claim for lien and makes no mention of lien." (See Halsbury's laws of England (4th edition) Vol 28 paragraph 751). In my judgment, that the defendant assumed a contractual obligation to transfer the equipment to Kaduna H and install it on the plaintiff's site and proceeded to execute the contract and denied that it had repossessed the equipment amounted to waiver. That the defendant was negotiating for new terms of lien is hardly con-

sistent, in my view , with the continuation of an existing lien. Besides, the defendant, as the exchange of letters between the parties shows, encouraged the plaintiff to prepare site for the equipment in Kaduna, and to transport the defendant's crane to Kontagora pursuant to the agree-
 B ment. The conduct of the defendant showed that it had wanted the transaction to continue as if it had no lien. A waiver arises where one party leads the other to believe that he will not insist on the precise stipu-
 C lation in the contract e.g. as to the time of performance, and the other party has acted on that belief and has thereby prejudiced his position, the first party cannot afterwards insist on the terms of the original contract, e.g. as to time or otherwise: Bullen & Leaks & Jacobs, Precedents of pleadings.

The facts from waiver could be inferred were pleaded and given
 D in evidence. Although waiver was not expressly pleaded, there were sufficient facts pleaded the legal consequences of which would be inference of waiver if those facts were established.

Regardless of the lien, which the defendant had, by the agree-
 E ment of the parties, the defendant was expressly empowered to take immediate possession of the equipment in case of plaintiff's failure to pay installments. By its letter of 21st April, 1980 the defendant claimed that it had repossessed the equipment. The court of appeal relying on Yakassai
 F v. Incar Motors Nigeria Ltd. (supra) held that the defendant had no right of repossession since the sale was an outright sale and property had passed to the plaintiff.

In Kofi v. Mensah 1 WACA 76 it was decided as the head note stated that:

G *"When an outright sale of goods takes place and the purchaser makes default in paying the agreed installments, the seller has no right to retake the goods, even though the purchaser in his contract has agreed to that course".*

H Deane, C.J. (of Gold Coast) delivering the judgment of the West African court of appeal relied on the authority of Thompson v. Veale 1896 LT 130 for that proposition .

Kofi v. Mensah (supra) was cited with approval in Yakassai v.

Incar Motors (supra). This court in that case after quoting the passage in the judgment in Kofi v. Mensah in which this principle of the case was enunciated said.

"We ourselves agree with the principles of law enunciated above by their Lordship".

This court has not been invited to depart from the decision in Yakassai's case. All that has been attempted by counsel for the defendant is to distinguish it because, as he argued, the transactions in Yakassai and Kofi were conditional sales. In regard to Yakassai's it was said that the reason for the decision was that the trial judge should not have found that the sale was a conditional sale when such was not pleaded. In my opinion, these distinction do not hold. Both Kofi's case and Yakassai's case show that a sale does not become conditional merely because the purchase price was payable by installments.

It is expedient to observe that the principle in Kofi's case adopted and applied in Yakassai's case find support in statement of the law as contained in Benjamin's (op cit) paragraph 1147 as follows:

"Where, following the contract of sale. The buyer has both possession of, and the property in, the goods, any retaining of the goods by the unpaid seller will (except in cases of fraud or misrepresentation) be a conversion against the buyer. In the cases, which support this proposition, the seller, did not purport, prior to the retaking to terminate the contract of sale on the ground that buyer had repudiated his obligations under the contract or had committed a fundamental breach. Would it have made any difference if he had done so?. It is submitted that although directed authority is lacking, the assumption behind these cases that, once the seller has lost both his possession and right of stoppage in transit, and has transferred the property in the goods to the buyer, he has no remedy against the goods themselves, and his only remedy is claim for the price or for damages under the contract. The assumption behind the statutory rules on the unpaid seller's right of lien or of stoppage in transit is that if property has passed to the buyer and the goods themselves have reached the actual possession of the buyer or his agent, the unpaid seller has no further remedy against the goods, if the seller had common law

power of revesting the property in himself by terminating the contract even where buyer lawfully obtained both the property in, and possession of the goods, the statutory restrictions on the remedies of lien and stoppage could be easily evaded. Benjamin considered that, whenever the property has passed and the goods have reached the actual possession of the buyer the seller's sole remedy is by personal action. He stands in the position of another creditor to who the buyer may owe a debt, all special remedies in his favour qua seller are gone".

It is worthy of note that the learned authors also stated at paragraph 1147 note 6 that:

"An express power in the contract might entitle the seller to retake or to resell in these circumstances but the Bills of sale Act 1878 might then apply".

The circumstances referred to are those in which the seller had lost his possession and has transferred the property in the goods to the buyer. In passing, it is well to observe, further, that the above note further supports the position that provision of express power in the contract entitling the seller to retake the goods does not by itself raise an inference that the seller has not transferred the property in the goods.

On the strength of the principle followed in Yakassai's case, the conclusion that the defendant was not entitled to retake the equipment seems justified by authority. However, if there is a departure from Yakassai's case and I hold that effect ought to be given to the agreement of the parties conferring a right on the defendant to retake the equipment, it is expedient to consider the legal consequence of the defendant retaking the equipment pursuant to the agreement.

To put this aspect of the case in proper focus, it is right to note that what is challenged directly in this case, from the relief sought, is the right of the defendant to dispose of the equipment. As rightly noted by the trial judge from the evidence of the only witness for the defence.

"The three equipment are kept by the defendant in its exercise of right of lien stipulated in exhibit 1 and pending the times when the plaintiff would pay the outstanding balance".

Indeed the evidence of that witness read:

"I still have possession of this three equipment. We are ready to release the three equipment if the balance of N635,059.78k is paid to us".

The position thus taken by the defendant appears to me be consistent with the claimed contractual right of the defendant as a holder B contractual lien to retain possession pending the payment of sums due. No right of sale attaches to such lien. From the position taken by the defendant it would have been speculative for the court of appeal to proceed to explore whether the defendant had a right of re-sale and in what C circumstances. Indeed, on this appeal the defendant put its case on the basis that property had not passed. There was no distinction drawn, or attempted to be drawn, between a right to mere retention of the equipment pending payment of the sums due and a right to sell, if any, where D property had already passed to the buyer.

The court of appeal granted the injunction claimed and subjoined thereto an order not expressly claimed:

"That the said equipment be delivered to the plaintiff subject to the appellant paying the entire sum outstanding as balance of the equip- E ment, taking into account N381,160.00 the appellant had so far paid the 1st respondent"

The defendant made an issue of this order on the ground that the relief was not claimed and the trial court had no opportunity of making F any pronouncement on the relief. It is understandable that the trial judge having proceeded on the footing that the plaintiff had no right to support the entire claim would not proceed to make any consequential order. There is usually reserved to any superior court a residual power to grant G any consequential order which the justice of the case demands. In this case learned counsel for the defendant on this appeal, argued, with, commendable candour, thus:

"The order recognised the need of the respondent to pay the unpaid balance before delivery to them. There is justice in the order. H

" A fortiori the appellant has the right to keep the plant and only to deliver it after being paid. There is also justice here".

There is no difference in the two rendition of the order, the sub-

stance of which is that the plaintiff is only entitled to regain possession of the equipment if he tenders to the defendant the balance of the purchase price. The converse is that if he does not pay the purchase price he would not be entitled to regain possession. This was the understanding of the order which defendant's counsel considered just. I also add that not only is there justice in the order, but also,

(i) it reasonable follows from and reflects the right claimed by the evidence tendered on behalf of the defendant and the right of the defendant to retain the equipment until payment is made; and

(ii) it circumscribed the injunction granted to show that the injunction against disposal will be subject to the plaintiff making payment to regain possession of the equipment.

Besides, the order, though related in effect, is less onerous than an order for specific performance of the contract to install the equipment claimed. Although the order enjoined the defendant to deliver the equipment to the plaintiff (subject to payment of the balance of purchase price) it fell short of ordering that the defendant should deliver it at a particular place or installing it.

In these circumstances, there is really no miscarriage of justice occasioned by the order which counsel for the defendant himself conceded was just.

Of the seven issues formulated by learned counsel for the defendant, he proffered no argument on the sixth issue and, indeed, did not challenge the finding by the court of appeal that there was a contract to transfer, service and install the equipment and that the defendant was bound under that contract to carry out its obligation. Although the court below held that the trial judge was in error to refuse to grant specific performance of that contract, it did not itself order a specific performance of that contract. Instead, it ordered that the matter be remitted to the trial court for damages to be assessed. Although the appeal is against the whole decision, neither was there a ground of appeal relating to that aspect of the judgment nor was there issue directly formulated in relation thereto.

The court of appeal relying on Maiden Electronic Works Ltd v.

Attorney General of the Federation (1974) 1 All NLR 179 found a contract for transfer and installation separate from the contract of sale. A party is entitled to join several causes of action in one action. It follows that the cause of action on which the relief for injunction in this case was founded is quite separate from that on which the claim for damages was founded. The former is founded on the contract of sale while the latter is founded on the contract of transfer and installation. B

The consequence of the defendant's failure to challenge, on this appeal, the findings of the court of appeal on the question of breach of the second contract is that the order remitting the case for assessment of damages cannot be set aside. Also, where a party claims in regard to breach of contract damages and specific performance, refusal of specific performance on grounds of equity will not affect his right to the legal remedy of damages. C D

In the result, even if I have allowed this appeal in regard to the relief of injunction and specific performance, I would have dismissed it in regard to the order remitting the case to the high court for damages for breach of contract to be assessed. E

For the reasons, which I have given, it is evident that I would dismiss the appeal. In doing so, regrettably, my conclusion is not in agreement with the conclusion of my learned brothers. In this instance, I must tread the lonely path of one who dissents. If my minority opinion encourages further discussion of aspects of our sale of goods law it would have served some useful purpose. F

Be that as it may, I would dismiss the appeal in its entirety with costs to the plaintiff. G