

**SUPREME COURT OF NIGERIA**  
11TH MAY, 2001. SC. 250/1993  
**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI,**  
**U. MOHAMMED, O. ACHIKE, E. O. AYoola, JJSC.**

BANK OF THE NORTH LTD. .... APPELLANT  
AND  
ALHAJI BALA YAU ..... RESPONDENT

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***APPEALS** - Evidence - Document - That was discountenanced by the trial judge - In respect of which there was no appeal - Cannot be directly or surreptitiously looked at by the appellate court (H 4)*

***APPEALS** - Judgment - Decision - Based on an erroneous premises - On a matter that goes to the root of the controversy - Cannot be allowed to stand (H 2)*

***BANKING** - Bill - Notice of dishonour - Reasonable time - A delay in giving notice extending for a period of nearly one year - Without any satisfactory explanation - Is unreasonable (H 3)*

***ESTOPPEL** - Nature and effect - Of admissions and the plea of estoppel (H 7)*

***ESTOPPEL** - Statements - Which have been acted upon by another to his detriment - In the belief that the statements were true - The maker thereof is absolutely estopped to contradict or deny the truth of such statements (H 6)*

***EVIDENCE** - Estoppel - Admission of liability by a party - That party is estopped from denying such admission (H 8)*

***JUDGMENTS** - Error - Appellate court - Inherent power - To correct judgment - There is such power in the Supreme Court to correct its judg-*

*ment or that of the lower court - In order to avert mischief (H 1)*

**WAIVER** - *Implied waiver - Conduct - Waiver may be implied from conduct (H 5)*

### **FACTS**

In the Maiduguri High Court the Plaintiff/Appellant, a banker claimed against the Defendant/Respondent the sum of N494,593.39 being the debit balance as at 28/2/87 in the Respondent's account with Appellant bank plus 13% per annum compound interest on same from 28/2/87 to date of judgment and 10% simple interest per annum from the date of judgment until the whole judgment debt is fully paid. The Appellant also claimed a declaration that moneys secured by Deed of legal Mortgage dated 1st day of May, 1979, over property covered by the certificate of Occupancy No. BO/2167, created by the Respondent to secure his borrowings from the appellant have fallen due for payment and that the Appellant as unpaid mortgagee was entitled to exercise its right of sale under the said Deed of legal Mortgage. The main controversy between the parties arose from the appellant's debiting the account of the defendant with the sum of N185,650.00 being the total value of the five cheques issued in favour of the Respondent, which he paid into his overdraft account in Maiduguri and were despatched in normal banking business by the Appellant for payment by the drawee bank, i.e. Kano city branch of the Bank of the North Limited, Kano.

The said cheques were alleged by the appellant to have been dishonoured and lost in transit. But the Respondent took benefit of the value of the said five cheques. The Appellant claimed that as the value of the said cheques were never received from the Drawee Bank the Respondent's enjoyment of direct credit of the said sum of N185,650.00 amounted to the granting of an unauthorized facility by the Appellant to the Respondent. Although the Appellant failed to put the Respondent and the Drawers of the five cheques on notice in good time with regard to the dishonoured cheques, but the Respondent in Exhibits F, G, J and K made various admissions of liability to the Appellant. After due trial, the learned

trial judge entered judgment for the Appellant. Dissatisfied, the Respondent appealed to the Court of Appeal. The appeal was allowed. The Appellant has now appealed to the supreme court raising 3 issues.

**ISSUES FOR DETERMINATION:**

“i. Whether the issue of the “dishonour and subsequent loss” of the five cheques has been specifically pleaded.

ii. Whether by his conduct both passive and active the Respondent has not waived his rights under Sections 47, 48 and 49 of the Bills of Exchange Act Cap. 15 of the Laws of the Federation 1990 and whether the Respondent is estopped from denying such waiver.

iii. Whether the learned Court of Appeal Justices ought not to have come to the same conclusion as the learned trial judge that the Respondent is in law estopped from denying liability in the sum claimed having regard to the several unequivocal written admissions of liability made by the Respondent himself and his Counsel.”

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

***Judgments - Appellate Court***

1. There is inherent power in this Court to correct its judgment or that of the lower court on appeal in order to avert any mischief that would otherwise arise in reading such judgment without the necessary correction. (p. 1571 D)

***Appeals - Judgment***

2. One is obviously in no doubt that both parties as well as the trial court fully addressed the issue of the “*dishonour and subsequent loss of the five cheques*” respectively in the parties’ pleadings and in the judgment of the trial court. Okezie, J.C.A. was therefore in grave error to have reached the decision, inter alia, to set aside the judgment of the trial judge on the premises that the appellant at the trial court failed to establish in its pleadings and by evidence that the five cheques paid in by the respondent were in fact dishonoured. His decision based on this erroneous premises is a matter that goes to the root of the controversy between the parties and an

appellate court cannot allow it to stand. (p. 1575 H)

***Banking - Bill***

3. Undoubtedly, time is of the utmost importance in relation to giving notice of dishonour. There is no hard and fast rule in this matter save that  
B it is common ground that what constitutes a reasonable time is a question of fact dependent upon the circumstances of the case. A delay in giving notice extending for a period of nearly one year, without any satisfactory explanation, as earlier observed, cannot be but unreasonable; see Lombard  
C Banking Ltd. V Central Garage and Engineering Co. Ltd (1963) 1 QB: 220. (p. 1578 E)

***Document - That was discountenanced by the trial judge***

4. I am not prepared to look at Exhibit C. Suffice it to say that this was the  
D document wherein the respondent agreed to provide replacement cheques covering the value of those lost in transit. Although this document was admitted in evidence, it was suo motu discountenanced by the learned trial judge on the rather flimsy ground that the agreement (otherwise referred  
E to as Exhibit C), and which was duly signed by the respondent, but to which no jurat was subjoined; the trial court presumed that the respondent was illiterate. Against this decision, there is no appeal in respect thereof, as submitted by respondent's counsel. I entirely agree with this submis-  
F sion, it is well-founded. Exhibit C having been discountenanced by the trial judge, it cannot now be directly or surreptitiously looked at by the appellate court. (p. 1579 F)

***Waiver - Implied conduct***

G 5. In this case, it is certainly clear that the conglomeration of events borne out by the contents of Exhibits F, G, J and K (which have been summarised in the immediate proceeding paragraph) provides ample and unquestionable evidence of conduct sought to infer waiver and made before action  
H brought. As I had already held in this judgment, it cannot be doubted that there was failure on the part of the appellant to give due or reasonable notice of dishonour, nevertheless facts relevant to that delay were within the knowledge of the respondent as particularly set out in the aforesaid

Exhibits F, G, J and K. It is unthinkable that if the respondent had not inferentially waived the requirement of due notice he would not have taken it earlier. This is so because waiver may be implied from conduct that is inconsistent with the continuance of the right. Furthermore, authorities are awash that the courts have readily inferred waiver from very minimum or slight evidence; see Lombard Banking Ltd v Central Garage & Engineering Co. Ltd (1963) 1 K.B 220. I have therefore reached the firm view without any hesitation whatsoever that even though appellant did not give due notice of dishonour of the five cheques, the respondent had, before action brought, waived the requirement of due notice. (p. 1580 E)

### ***Estoppel - Statements***

6. Certainly, it will be inequitable for anyone, such as the respondent herein to enjoy the liberty of making statements by himself or through his accredited agents or representatives, which having been acted upon by another to his detriment in the belief that the statements were true, is thereafter allowed to renege from such statements. The law has accorded reasonable protection to unsuspecting members of society who are misled by such statements because the maker thereof is absolutely estopped to contradict or deny the truth of such statements. (p. 1583 G)

### ***Estoppel - Nature***

7. Expatiating on the nature and the far-reaching effect of admissions and the plea of estoppel, Ibekwe J.S.C. in Yoye v Olubode & ors (1974) 9 N.S.C.C. 409 opined at p. 414:

*“Estoppel is an admission, or something which the law views as equivalent to an admission. By its very nature, it is so important, so conclusive, that the party whom it affects is not allowed to plead against it or adduce evidence to contradict it.”*

A similar illuminating view of the nature of estoppel was succinctly expressed in Bassil v Honger, 14 WACA 569 at p. 572, per Coussey, J.A.:

*“Estoppel prohibits a party from proving anything which con-*

*tradicts his previous acts or declarations 'to the prejudice of a party, who relying upon them, has altered his position. It shuts the mouth of a party'.*”

The above propositions as to estoppel have become necessary if only to be stated to demonstrate how applicable they are to the facts and circumstances of this case. (p. 1584 B)

### ***Estoppel - Admission of liability***

8. The lower court was palpably in grave error when it failed to appreciate the overwhelming evidence – documentary and oral – showing in unmistakable terms, admission of liability by the respondent. In the light of such unchallenged pieces of evidence of admission, surely, the respondent is, in law, estopped from denying such admission; to hold otherwise is to act prejudicially to the chagrin and detriment of the appellant. (p. 1584 F)

## **NOTABLE POINTS OF INTEREST**

### **KARIBI-WHYTE JSC**

#### ***1. The meaning of Waiver***

It is well settled that waiver is an abandonment of a right. Two elements must co-exist to constitute a waiver. First the party against who the doctrine is invoked must have knowledge or be aware of the act or omission which constitutes the waiver; and secondly, there must be on the part of the person against whom the doctrine is invoked, some unequivocal act adopting or recognising the act or omission – See Olatunde v. Obafemi Awolowo University & anor. (1998) 5 NWLR. 178. (p. 1590 D)

#### **AYOOLA JSC**

#### ***2. Banker/Customer relationship as a basis of an action***

In the course of carrying on business of banking, a bank enters into several contractual relationships and performs various roles. It is important in an action between bank and customer to be clear which of the several contractual relationships forms or form the basis of the action. In this case it is pertinent to note only four of these possible relationships, namely: (i) the relationship of creditor and debtor that arises in regard to the customer's

funds in the hands of the bank; (ii) the relationship of creditor and debtor that arises when the bank loans money to the customer or allows him to overdraw on his account; (iii) the relationship that arises from the role of the bank as a collecting bank of cheques drawn on other banks or branches of the same bank by a third person, and (iv) the possible role of the bank as a holder for value of a negotiable instrument. (p. 1596 A) B

### 3. *The meaning of a collecting Bank*

The collecting bank is an agent of the customer for the purpose of receiving payment of the cheques from the banker on whom they are drawn. The law is clearly and succinctly put in Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 3(1), para 212 thus: C

*"In collecting cheques and other instruments for a customer a banker acts as a mere agent or conduit pipe to receive payment of the cheques from the banker on whom they are drawn and to hold the proceeds at the disposal of his customers."* D

But then, the learned authors went on to say:

*"The character in which a banker receives a cheque is a matter of fact in each case: he may be a mere collecting agent, or he may take as a holder for value or in due course."* E

The banker can be both an agent for collecting and a holder for value at the same time (See Halsbury's (op cit) para. 212 at page 179). (p. 1596 E) F

### 4. *Duties of a collecting Bank*

As to the duties of the collecting bank, the law, again, is clear. The collecting bank has a duty to present a cheque within a reasonable time after it reaches him. He is liable to his customer for loss arising from delay. When a cheque is dishonoured the collecting bank's duty is, in my opinion, prescribed by section 49(m) of the Act as follows: G

*"where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal; and if he gives notice to his principal he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving no-* H

*tice as if the agent had been independent holder.”*

The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter: s.49(1). (p. 1597 C)

B 5. *When a Bank becomes a holder for value of a cheque*

Consequently, for the bank to claim to be or to be treated as a holder, it is not sufficient to show that it has permitted the customer to draw against an uncleared cheque pursuant to an express or implied contract, unless it has been shown in terms of section 2 that it has become an endorsee or a bearer, or in terms of section 77(1) that, although it is not an endorsee or bearer, the cheque is payable to order. (p. 1598 C)

6. *What facts to be pleaded where a Bank claims a bill*

D In my opinion, it is not a matter of assumption at all whether or not a bank is a holder. The fact must be averred and proved. As a rule of pleadings, where a bank claims on a bill, a statement of claim must allege the right in which the bank claims on the bill, that is, whether as payee, holder or endorsee and whether as holder in due course or holder for value. (See, E generally, Bullen and Leake and Jacob’s Precedents on Pleadings (13<sup>th</sup> Edn). In the present case those facts were not pleaded, understandably because the Bank’s claim was not on the cheques. (p. 1598 E)

F 7. *Choice of action open to a Banker*

In my judgment, a bank that has allowed a customer to draw on an uncleared cheque which was later dishonoured whereby the customer’s account becomes overdrawn, has a choice of action. If it is a holder for value, it can sue the drawer or the endorser on the bill and claim all the G benefits of so doing under the Act. If it chooses, he can sue the customer on the debt. (p. 1598 F)

H 8. *Consequence of a customer drawing against an uncleared cheque*

When a customer paid a cheque to his banker and drew another for payment before the effect of the one he paid was cleared, he was only asking the bank for a loan. The case of Cuthbert v Robarts, Lubbock & Co [1909]



2 Ch. D 226 was cited with approval in support of this proposition in Adereti & Anor v Attorney-General, Western Nigeria [1965] N.S.C.C. 193, 195. (p. 1598 H)

9. *Distinction between a collecting Bank and a creditor*

B

Whatever may be the duties of a collecting bank to its customer who has lodged a cheque for collection, it is not right to equate the collecting bank with a creditor who has received negotiable instrument as payment of debt without any allegation in the pleadings and proof by evidence of those facts. (p. 1600 B)

C

10. *Remedy of a customer where the collecting Bank failed to give him due notice of dishonour of a cheque*

I venture to think that where the collecting bank has failed in its duty to give due notice of dishonour of a cheque, delivered to it merely for collection, to its customer within a reasonable time and the customer has suffered prejudice, thereby his action properly lies in damages for negligence. (p. 1600 E)

D

E

**REPRESENTATION**

Fatima Kwaku, Esq. for the appellant

T. E. Williams, Esq. for the respondent.

F

**CASES REFERRED TO**

Lombard Banking Ltd. v. Central Garage and Engineering Co. Ltd (1963) 1 QB: 220

Olatunde v. Obafemi Awolowo University & anor. (1998) 5 NWLR 178

G

First Bank of Nigeria Ltd. v. African Petroleum Ltd. (1996) 4 NWLR (part 443) 438, 447

Cuthbert v. Robarts, Lubbock & Co (1909) 2

Adereti & Anor v. Attorney-General, Western Nigeria (1965) N.S.C.C. 193, 195.

Oyerogba v. Olaopa (1998) 13 NWLR.509

Iga v. Amakiri 1976 11 SC 1

**STATUTES REFERRED TO**

Bills of Exchange Act, Cap.15 LFN, 1990, ss. 47, 47, 49 and 50  
Evidence Act, ss.19, 20 (1) and 151

**B** **BOOK REFERRED TO**

Chitty on Contract, Vol.1 para. 155, p.982

**LEAD JUDGMENT BY ACHIKE JSC**

**C** The plaintiff/appellant, a banker claimed against the defendant/  
respondent in Maiduguri High Court the sum of N494,593.39 being the  
debit balance as at 28/2/87 in the respondent's account with the appellant  
bank plus 13% per annum compound interest on same from 28/2/87 to  
**D** date of judgment and 10% simple interest per annum from the date of judg-  
ment until the whole judgment debt is fully paid. The appellant also claimed  
a declaration that moneys secured by Deed of Legal Mortgage dated 1<sup>st</sup>  
day of May, 1979 over property covered by the Certificate of Occupancy  
**E** No. BO/2167, created by the respondent to secure his borrowings from  
the appellants have fallen due for payment and that the appellant as unpaid  
mortgagee was entitled to exercise its right of sale under the said Deed of  
Legal Mortgage.

**F** The main controversy between the parties arose from the  
appellant's debiting the account of the defendant with the sum of  
N185,650.00 being the total value of the five cheques issued in favour of  
the respondent, which he paid into his overdraft account in Maiduguri and  
were despatched in normal banking business by the appellant for payment  
**G** by the drawee bank, i.e. Kano-City Branch of the Bank of the North Lim-  
ited, Kano. The said cheques were alleged by the appellant to have been  
dishonoured and lost in transit but the respondent took benefit of the value  
of the said five cheques when neither the drawee bank in Kano paid the  
**H** value of the said cheque nor was respondent's account at Maiduguri cred-  
ited with the value of the said five cheques. After due trial, the learned  
trial judge held that the respondent's account was properly debited with  
the said sum in question, i.e. the value of the five cheques.

Dissatisfied, the respondent appealed to the Court of Appeal, which by its judgment dated 16/6/93, allowed the appeal. It set aside the judgment of trial court, and held as follows:

*“(a) The Respondent has failed to establish before the court below that the five cheques paid in by the Appellant were in fact dishonoured.* B

*(b) Having regard to the facts and circumstances relating to the said five cheques, it was right and proper for the Respondent to have debited the account of the Appellant with the total of the said cheque.*

*(c) The Respondent has failed to discharge the onus on it of proving if anything was owing to it by the Appellant out of the overdraft of N50,000.00 granted to the said Appellant.* C

*(d) The mortgage was executed as security for the aforementioned overdraft of the said N50,000.00.*

*(e) In the premises, the decision that the Appellant shall pay the sum of N494,593.39 to the Respondent with interest and the declaration that the Respondent is entitled to the mortgaged property is set aside.”* D

It may be observed that the word ‘not’ is missing in (b) above between the words ‘was’ and ‘right’. **There is inherent power in this Court to correct its judgment or that of the lower court on appeal in order to avert any mischief that would otherwise arise in reading such judgment without the necessary correction.** Therefore, suo motu, I effect this amendment to the judgment of the lower court as may be found at p. 125 of the record in the manner hereinbefore stated. F

The appellant’s learned counsel, Fatima Kwaku, Esq. postulated three issues for determination, namely,

“i. Whether the issue of the “dishonour and subsequent loss” of the five cheques has been specifically pleaded. G

ii. Whether by his conduct both passive and active the Respondent has not waived his rights under Sections 47, 48 and 49 of the Bills of Exchange Act Cap. 15 of the Laws of the Federation 1990 and whether the Respondent is estopped from denying such waiver. H

iii. Whether the learned Court of Appeal Justices ought not to have come to the same conclusion as the learned trial judge that the Respondent is in law estopped from denying liability in the sum claimed having regard

to the several unequivocal written admissions of liability made by the Respondent himself and his Counsel.”

*Learned respondent’s T. E. Williams, Esq., in turn, postulated the following two issues for determination, to wit,*

B “i. Whether, having regard to all the facts and circumstances relating to the aforementioned five cheques, it was right and proper for the Plaintiff to have debited the account of the Defendant with the value of the said cheques.

C ii. In the light of the answers to the foregoing questions what final order should the Court below have made on the various reliefs claimed by the Plaintiff Bank.”

*I shall adopt the appellant’s issues for the purpose of determination of this appeal.*

D *At the oral hearing, while appellant’s learned counsel simply adopted her brief of argument, learned counsel for the respondent also adopted respondent’s brief and submitted briefly that the admission in Exhibit C would not bind the respondent because the document contained*  
E *no jurat. This was the decision of the trial judge who in turn discountenanced Exh. C in the course of preparing his judgment. Counsel further submitted that there was no appeal against this finding.*

#### Issue 1

F The first issue raises the question whether the issue of the “dishonour and subsequent loss” of the five cheques was specifically pleaded.

G It may be recalled that one of the five main reasons given by the court for setting aside the judgment of the trial court was that the appellant herein failed to establish that the five cheques paid in by the respondent herein were in fact dishonoured. This is manifest from the lower court’s pronouncement when it said, through the leading judgment of Okezie, J.C.A., as follows:

H “I am in agreement with the submission of the learned counsel for the Appellant which has not been faulted by counsel for the Respondent in his brief and oral argument before us that there is no averment that the cheques were presented to the drawer Bank – Kano City branch

*for payment and dishonour and all of the cheques. Nor is there an allegation that the cheques lost in transit. Such issues were not before the trial court.”*

To stress the seriousness of this point, the learned Justice continued:

*“I hold the view that the matter of the dishonour of cheques and the alleged loss are material facts which ought to have been pleaded. As these facts are not put in issue in the pleadings, they do not arise for any finding by the learned trial Chief Judge.”*

Referring to paragraphs 9, 13 and 14 of the Statement of Claim, as well as paragraphs 9 and 14 of the defendant’s counter-claim, and also paragraph 5 of the plaintiff’s reply to the defendant’s counter-claim, counsel submitted that these clearly showed that the parties overwhelmingly pleaded the dishonour and loss of the five cheques, contrary to what the lower court had said.

Respondent did not make any input in respect of this issue in his brief of argument.

On this issue, the question is whether the lower court was justified in holding that the appellant failed to establish at the court of trial that the five cheques paid in by the respondent were in fact dishonoured. This is another way of enquiring whether the issue of the “dishonour and subsequent loss” of the aforesaid cheques had been specifically pleaded in order to justify the finding in respect thereof made by the trial Judge. In this regard, appellant’s counsel refers to paragraphs 9, 13 and 14 of the statement of claim. For ease of reference I reproduce them below:

*“9. The Defendant in or about December, 1978 / June 1979 paid the said 5 cheques into his Account with the Plaintiff at Maiduguri and the Plaintiff in the course of its normal banking duties despatched the cheques for payment by the Drawee Bank – i.e. Kano City Branch of bank of the North Limited, Kano.”*

*13. The aforesaid 5 cheques, the total value of which amounted to N185,650 were in effect never paid by the Drawee bank and the Defendant’s Account at Maiduguri was never credited with the said sum.*

*14. Having already taken the benefit of the total value of the 5 cheques valued at N185,650.00 and as the value of the said cheques*

*were never received from the Drawee Bank the Defendant's enjoyment of direct credit of the said sum of N185,650.00 amounted to the granting of unauthorised facility by the Plaintiff to the Defendant."*

In turn, the respondent answered the above paragraphs of the statement of claim in some paragraphs of his statement of defence. Perhaps, it will be enough in this regard to reproduce only paragraph 13 of the statement of defence:

*"13. The defendant denies paragraph 13 of the statement of claim and puts plaintiff to the strictest proof of the fact that the N185,650.00 cheques were presented but not paid by the drawee Bank. The plaintiff admits that his account No. 4 A00219 was not credited with the said sum as the Plaintiff had claimed that the cheques got lost in transit and he defendant had been informed of this fact only after about a year of paying in the first cheque No. 027510 of N30,000.00 on 8/12/78. The defendant shall rely on the said 5 cheques and hereby pleads same."*

It may be useful to refer also to paragraph 14 of the statement of defence although I need not reproduce it. Again, it is pertinent to reproduce paragraphs 9 and 14 of the counter-claim:

*"9. It was only after about a whole year of the payment of the said cheques into the defendant's account and only after the defendant had made use of the amount of the cheques by withdrawals of some from the plaintiff's branch in Maiduguri that the defendant for the first time became aware of the fact that the said cheques had all got lost in transit while in possession and control of the plaintiff."* (Underlining is mine)

*"14. The defendant avers that having been informed of the lost (sic) of the cheques in transit he could not be issued with new cheques to cover the said sum of N185,650.00 as the people who had paid him by those cheques did not believe that the cheques got lost in transit and so even if defendant can pay to the plaintiff the total sum of N185,650.00 then he the defendant cannot recover his money from the people who had issued him the cheques."*

Finally, it is pertinent to reproduce paragraph 5 of the plaintiff's reply to the defendants counter-claim which runs as follows:

*"5. With reference to paragraph 9 of the Counter-Claim the Plain-*

*tiff while admitting that the Defendant had made use of the said cheques amounting to N185,650.00 denies that the said cheques got lost in transit while in the possession and control of Plaintiff and further denies that the Defendant was only notified of the dishonour of the cheques after about one year of the payment of same into the Defendant's account. The Plaintiff avers that the said cheques were on several occasions presented for payment to the paying Bank but same were not honoured and the Plaintiff advised the Defendant accordingly within reasonable time...*" (underlining is mine)

The above reproduced paragraphs of the parties' pleadings eloquently attest to the fact that the parties substantially joined issues on the vexed question of the dishonour and subsequent loss of the aforesaid cheques in their pleadings. Thus it is undoubted that the parties fully reacted on the dishonouring and loss of the controversial cheques lodged by the respondent in his account. What is however more interesting is that the learned trial judge made a finding in relation to the status of these cheques in terms of the parties' pleadings and evidence led at the trial. This is how the trial judge summarised the issue, and permit me for purposes of clarity, to reproduce the relevant excerpt of the judgment *in extenso*:

*"There is ample evidence clearly showing that the five cheques in question were dishonoured and consequently his account was being debited with the sum of N185,650 as the proceeds of the cheques were already paid to him. I believe the evidence of Yahaya Mahmud that on discovering that the cheques were dishonoured he invited the defendant and told him in an unequivocal terms that the cheques he paid in and collected the proceeds before they were cleared had been dishonoured and that unless he made good the amount involved by issuing a replacement cheques his account would be debited with the amount in question. Whether he took Yahaya Mahmud seriously or not in another matter but it is certain that he was put on notice that his account would be debited and in fact true to Yahaya Mahmud's threat the account was debited."*

**One is obviously in no doubt that both parties as well as the trial court fully addressed the issue of the "dishonour and subsequent loss of the five cheques" respectively in the parties' pleadings and in**

**the judgment of the trial court. Okezie, JCA was therefore in grave error to have reached the decision, inter alia, to set aside the judgment of the trial judge on the premises that the appellant at the trial court failed to establish in its pleadings and by evidence that the five**  
B **cheques paid in by the respondent were in fact dishonoured. His decision based on this erroneous premises is a matter that goes to the root of the controversy between the parties and an appellate court cannot allow it to stand.**

C Issue No.2

*“i. Whether the issue of the “dishonour and subsequent loss” of the five cheques has been specifically pleaded.*

*ii. Whether by his conduct both passive and active the Respondent has not waived his rights under Sections 47, 48 and 49 of the Bills of*  
D *Exchange Act Cap. 15 of the Laws of the Federation 1990 and whether the Respondent is estopped from denying such waiver.*

*iii. Whether the learned Court of Appeal Justices ought not to have come to the same conclusion as the learned trial judge that the*  
E *Respondent is in law estopped from denying liability in the sum claimed having regard to the several unequivocal written admissions of liability made by the Respondent himself and his Counsel.”*

It is common ground that both the respondent and the drawers of  
F the vexed five cheques were not put on notice in good time with regard to the dishonoured cheques. Consequently, the respondent places reliance on sections 47, 48 and 50 of the Bills of Exchange Act which outline rules that govern giving of notice of dishonoured bills and the effect of not giving such notice. Appellant’s counsel however submits that the respondent  
G is by his conduct deemed to have waived whatever rights or remedies that have accrued to him by reason of the provisions of section 50(2)(b) of the said Act. Counsel further submits that the net effect of Exhibits C, F, G, J and K is that the respondent must be estopped from denying waiver of his  
H rights under the provisions of sections 47, 48 and 49 of the Act. Counsel finally submits that it was failure of the lower court to advert its mind to the legal implications of the doctrines of waiver and estoppel that led to the erroneous conclusion reached by the lower court that it was improper for



the appellant to have debited the respondent's account with the total value of those cheques.

For the respondent, it is submitted that on the facts of this case the five cheques were accepted by the appellant as absolute (as opposed to conditional) payment of cash to the bank. First, the cheques were drawn B by a third party on another branch of the appellant bank and the respondent was not a party to the instrument. Secondly, there was an understanding, as attested to by one of the appellant's witnesses, that the respondent was allowed to take the value of the cheques without waiting for C the usual period for the clearance of the cheque as the respondent had convinced the branch manager of appellant bank that all the five cheques would be honoured promptly.

Arguing in the alternative, i.e. if the Court does not accept the submission that the plaintiff bank accepted the cheques as absolute pay- D ments, the only other optional finding is that the cheques were accepted on condition that when presented, they will be honoured. In that situation, the defendant adopts the opinion of the law as stated in Chitty on Contract, Vol. 1 para. 155, p.982. Put briefly, where the creditor, such as the plain- E tiff herein accepts a negotiable instrument upon which the debtor, such as the respondent herein, is not primarily liable, the creditor must present the instrument, the cheque herein within a reasonable time. If he fails to do so, and the debtor is prejudiced, the creditor is deemed to be guilty of F laches and therefore makes the cheque his own, and it amounts to payment of the debt. Again, the creditor must give due notice of dishonour and thereby preserve his remedies against other parties secondarily liable. Such notice is not necessary to be given to the debtor unless he is a party to G making of the negotiable instrument. Finally on this issue, counsel submits that under cross-examination of PW2, that witness admitted that a delay of a period of one year in informing a customer that his cheque were not paid was unreasonable.

It is pertinent to preface the discussion under this issue by ob- H serving that both the trial court and the Court of Appeal were of the same opinion first, that the respondent lodged five cheques and took value for them at a time when he had no money in his account before the effects

were cleared. Second, that the respondent knew that he had no money in his account when he lodged the said cheques. Thirdly, because his account was in red when he was asking for a further overdraft. However, as earlier noted, respondent's counsel then submitted that since the respondent was not put on notice of the dishonour of the cheques within a reasonable time, the respondent was no longer liable, relying on the cumulative effect of sections 47, 48 and 49 of the Act.

I have perused sections 47, 48, and 49 of the Act. The summary of the provisions of the three sections of the Act, as they are relevant to the parties' case, may now be noted. Section 47 makes it clear that a bill is dishonoured by non-payment of the value of money stipulated thereon. Section 48 states that notice of dishonour must be given to the drawer and each indorser of the bill and failure to do so, the right of a holder in due course subsequent to the omission shall not be prejudiced by the omission. These two sections, in my view, are not relevant to the situation under consideration in this appeal. But section 49(1) stipulates that notice of dishonour of the bill must be given within a reasonable time thereafter.

**Undoubtedly, time is of the utmost importance in relation to giving notice of dishonour. There is no hard and fast rule in this matter save that it is common ground that what constitutes a reasonable time is a question of fact dependent upon the circumstances of the case. A delay in giving notice extending for a period of nearly one year, without any satisfactory explanation, as earlier observed, cannot be but unreasonable; see Lombard Banking Ltd. V Central Garage and Engineering Co. Ltd (1963) 1 QB: 220.**

In other words, if the matter rested there, I would have had no compunction to hold that the delay has discharged the respondent from further liability under the five cheques. Indeed, my conclusion in this regard will be supportable from the angle that the five cheques were accepted by the appellant bank on condition that when presented, they would be honoured. This, in effect, will tantamount to accepting the view of the law on bill of exchange, ably and lucidly enunciated in Chitty on Contracts, Vol.1, para.1551, at p. 982. Such inevitable consequence of dilatory treatment of a bill of exchange was endorsed by Willes, J. in Peacock v Purssell (1863) 32 LJCP 266 at 267:

*“The plaintiffs here (such as appellant herein) took the bill at first conditionally but having dealt with it in such a manner as to render it useless to the defendant, (as the respondent herein) they must now be considered as having taken it absolutely.”* (the words in parenthesis are mine)

However, appellant’s counsel disagreeing with this conclusion has, relying on the provision of section 50(2) of the Act, submitted that even if there were laches in giving notice to the respondent within the provisions of section 49 of the Act, the Court should infer waiver from the conduct of the respondent. Counsel further submits that the subsequent actions and steps taken by the respondent to repay the value of the five cheques serve as an estoppel against any denial by him of waiver of his rights under the Act. So, also, by virtue of actions taken by the respondent in Exhibits C, F, G, J and K, where he admitted his indebtedness and made proposals for repayment.

I shall start by first looking at the statutory provisions for excuse for delay or failure to give notice arising from waiver. The Act by its section 50(2) provides:

*“(2) Notice of dishonour is dispensed with –*

*(a)xxxx (b) by waiver express or implied; and notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice.*

*(c) xxxx*

I shall first call attention to Exhibit C which the appellant heavily relies on as evidence of waiver of conduct on the part of respondent. **I am not prepared to look at Exhibit C. Suffice it to say that this was the document wherein the respondent agreed to provide replacement cheques covering the value of those lost in transit. Although this document was admitted in evidence, it was suo motu discountenanced by the learned trial judge on the rather flimsy ground that the agreement (otherwise referred to as Exhibit C), and which was duly signed by the respondent, but to which no jurat was subjoined; the trial court presumed that the respondent was illiterate. Against this decision,**

**there is no appeal in respect thereof, as submitted by respondent's counsel. I entirely agree with this submission, it is well-founded. Exhibit C having been discountenanced by the trial judge, it cannot now be directly or surreptitiously looked at by the appellate court.**

B Next is Exhibit F. It is a letter written and signed by the respondent, dated 22/12/81. In it, respondent acknowledged his indebtedness to the appellant and made proposal for immediate down payment of N20,000.00 in January 1982 and "*a monthly instalmental payment of N3000.00 commencing from the 31<sup>st</sup> day of February 1982.*" (Sic) Exhibit C  
Exhibit G was an agreement between the parties wherein the respondent made new proposals and agreed to settle his indebtedness to the appellant. On the other hand, Exhibit J, was a letter dated 6<sup>th</sup> February 1985 written by respondent's solicitor and along which he forwarded a cash payment of D  
N21,000.00 and the request to be apprised of the respondent's balance of indebtedness to the appellant. Finally, Exhibit K is a letter by respondent's solicitor, dated 13/3/85 wherein the appellant was requested to treat the respondent's indebtedness as a loan which was to be re-scheduled for pay-  
E ment, allowing a moritorium of six months and with an additional security to be provided by the respondent.

**In this case, it is certainly clear that the conglomeration of events borne out by the contents of Exhibits F, G, J and K (which have been summarised in the immediate proceeding paragraph) provides ample and unquestionable evidence of conduct sought to infer waiver and made before action brought. As I had already held in this judgment, it cannot be doubted that there was failure on the part of the appellant to give due or reasonable notice of dishonour, nevertheless facts relevant to that delay were within the knowledge of the respondent as particularly set out in the aforesaid Exhibits F, G, J and K. It is unthinkable that if the respondent had not inferentially waived the requirement of due notice he would not have taken it earlier. This is so because waiver may be implied from conduct that is inconsistent with the continuance of the right. Furthermore, authorities are awash that the courts have readily inferred waiver from very minimum or slight evidence; see Lombard Banking Ltd v Central Ga-**

**rage & Engineering Co. Ltd (1963) 1 K.B 220.** I have therefore reached the firm view without any hesitation whatsoever that even though appellant did not give due notice of dishonour of the five cheques, the respondent had, before action brought, waived the requirement of due notice. B

The lower court was clearly in error by its failure to advert to the consequence of waiver under section 50(2)(b) of the Act which was undoubtedly relevant in the resolution of the controversy between the parties. From all the above, Issues No.2 is accordingly resolved in favour of the appellant. C

Issue No.3

*“Whether the learned Court of Appeal Justices ought not to have come to the same conclusion as the learned trial judge that the Respondent is in law estopped from denying liability in the sum claimed having regard to the several written admissions of liability made by the Respondent himself and his counsel.”* D

We had earlier in this judgment recaptured and reproduced the grounds of the decision of the Court of Appeal for setting aside the judgment of the trial court and in turn dismissing the appellant’s claim. Issue 3 seeks the determination of whether the respondent was rightly and properly saddled with the financial liability now claimed by the appellant. The relevant grounds of decision which are pertinent for the consideration of the issue under reference are (b), (c), (d) and (e). In summary, (b) states that it was wrong to fix the respondent with liability of the value of the five dishonoured cheques of which the appellant failed to give due notice to the respondent as required by law, while the cumulative effect of (c), (d) and (e) is that the liability of the respondent was limited to his overdraft of N50,000.00 granted him by the appellant wherein the mortgage of respondent’s property served as security for that overdraft and there was therefore, no basis for the declaration made in respect of the mortgaged property. F G H

The narrow question left in this appeal is whether from all the circumstances of this case the liability of the respondent is restricted only to the original overdraft of N50,000.00, including the relevant interest ac-

cruing thereto or is it the larger amount comprising the overdraft with interest and the value of the five dishonoured cheques? It is common ground that the respondent by reason of the arrangement between the parties, took sole benefit of the value of the said five dishonoured cheques which  
B amounted to N185,650.00, even before the cheques were cleared. Again, the two lower courts were consensus ad idem that the account of the respondent before the five cheques were credited to him prematurely was in red. Below are some excerpts of the judgment of the trial judge that I consider apposite for consideration in this regard:

C *“There is ample evidence clearly showing that the five cheques in question were dishonoured and consequently his account was being debited with the sum of N185,650.00 as the proceed (sic) of the cheques were already paid to him.”*

D Further down in the judgment, he continued:

*“His conduct after he was served with demand letter does not give support or credence to the defendant’s contention that he was not aware that the amount with which his account had been debited attracted  
E interest. He had made proposals for rescheduling the huge debits brought to his notice but his proposals were rejected. He then decided to pay in the N21,000.00 to appease his creditors. All these go to show that the defendant was aware of his indebtedness to the plaintiff.”*

F Finally, the learned trial judge had this to say with regard to the stepping up of the value of the property in the light of further financial commitment made in favour of the respondents:

*“The defendant also seems to make capital out of the fact that initially he mortgaged his landed property for the loan of N50,000.00  
G and it was stamped N55,000.00. But Yahaya Mamud explained and I believe him that it is banking practice to up-stamp the property if there are other commitments and hence his creditors up-stamped mortgaged property.”*

H Additional to the above excerpts of the judgment of learned trial judge, the respondent’s various admissions of liability to the appellant featured vividly in Exhibits F, G, J and K. One should not lose sight of respondent’s bank statement of account, Exhibits P1-19 and Q1-4 that

were regularly sent to him. At the trial, and under cross-examination, respondent's attention was specifically drawn to paragraph 2 of Exhibit K which was a letter written by Ismail Gadzama & Co., of counsel to the respondent pleading with the appellant for a reschedule of respondent's indebtedness that then stood at N374,530.56. Respondent said at that juncture:

*"I have seen paragraph 2 of Exhibit K. I wanted the bank to reschedule the money they claim I was owing them because I know the Bank had added to my account because unless I do that they would persist in threatening to sell my house."*

All the above, including the exhibits, the testimony of the respondent, particularly under cross-examination and the letters of admission of indebtedness made by respondent's counsel on his behalf are glaring admissions and awareness on the part of the respondent of the fact of his financial liability to the appellant. I am clearly of the view that the various statements made on behalf of the respondent by his counsel through his correspondence with the appellant are admissions within the purview of sections 19 and 20(1) of the Evidence Act. It will be perfidious to allow the respondent to get away with such financial accommodation he obtained from the appellant bank. This is more disturbing for, when it suited the respondent, he evoked the technical rule of absence of jurat meant to protect illiterates to defeat the admissibility and coerciveness of certain document, e.g. Exhibit C that would have unquestionably pinned him down to his liability. Paradoxically, respondent did not deny nor challenged the content or admissibility of Exhibit F which was a letter dated 22<sup>nd</sup> March, 1981 signed by him, and visibly, this document was not accompanied by any jurat.

**Certainly, it will be inequitable for anyone, such as the respondent herein to enjoy the liberty of making statements by himself or through his accredited agents or representatives, which having been acted upon by another to his detriment in the belief that the statements were true, is thereafter allowed to renege from such statements. The law has accorded reasonable protection to unsuspecting members of society who are misled by such statements because the**

**maker thereof is absolutely estopped to contradict or deny the truth of such statements.** Thus section 151 of the Evidence Act provides:

B *“When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe anything to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or such persons representative in interest, to deny the truth of that thing.”*

C **Expatriating on the nature and the far-reaching effect of admissions and the plea of estoppel, Ibekwe J.S.C. in Yoye v Olubode & ors (1974) 9 N.S.C.C. 409 opined at p. 414:**

D *“Estoppel is an admission, or something which the law views as equivalent to an admission. By its very nature, it is so important, so conclusive, that the party whom it affects is not allowed to plead against it or adduce evidence to contradict it.”*

E A similar illuminating view of the nature of estoppel was succinctly expressed in Bassil v Honger, 14 WACA 569 at p. 572, per Coussey, J.A.:

F *“Estoppel prohibits a party from proving anything which contradicts his previous acts or declarations ‘to the prejudice of a party, who relying upon them, has altered his position. It shuts the mouth of a party’.”*

The above propositions as to estoppel have become necessary if only to be stated to demonstrate how applicable they are to the facts and circumstances of this case.

G **The lower court was palpably in grave error when it failed to appreciate the overwhelming evidence – documentary and oral – showing in unmistakable terms, admission of liability by the respondent. In the light of such unchallenged pieces of evidence of admission, surely, the respondent is, in law, estopped from denying such**  
H **admission; to hold otherwise is to act prejudicially to the chagrin and detriment of the appellant.**

From all the above, the third issue is again resolved in favour of the appellant.



Consequent upon the views I have expressed and the conclusions I have reached in the resolutions of the three issues for determination, it is certainly clear that the judgment of the Court of Appeal based on the five main reasons that court identified for its decision, (reproduced in this judgment) cannot be allowed to stand. The result is that the appeal succeeds B and is allowed. The judgment of the lower court is hereby set aside, and the judgment of the trial court, including the costs and the declaration that the appellant is entitled to sell the respondent's landed property covered by the Certificate of Occupancy No. BO/2167 to settle the judgment debt, is C hereby restored.

The respondent will pay to the appellant the costs of this appeal assessed at N10,000.00.

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D

**KARIBI WHYTE, JSC**

I had read the leading judgment in this appeal of my learned brother Okay Achike, JSC. I agree entirely with his reasoning and conclusion allowing the appeal. E

The facts of the case have been stated comprehensively and with clarity in the leading judgment. I only wish to make some contribution to the reasoning and conclusion in respect of issue 2 of the Appellants issues for determination as to whether the Respondent has waived his rights under Sections 47, 48 and 49 of the Bills of Exchange Act, Cap.15, Laws of the Federation of Nigeria 1990 and whether the Respondent is estopped F from denying such waiver.

The facts relating to the circumstances giving rise to waiver of conduct and estoppel are not in dispute. It is common ground that the Respondents and the drawers of the cheques in issue were not put on notice within a reasonable time with respect to the dishonoured cheques. G

The Respondent is accordingly relying on the provisions of Section 47, 48 and 50 of the Bills of Exchange Act for the effect of not giving H due notice in respect of the dishonoured cheques.

The Respondent is accordingly relying on the provisions of Sections 47, 48 and 50 of the Bills of Exchange Act for the effect of not giving

due notice in respect of dishonoured cheques in good time.

Appellant is contending that the Respondent had by his conduct to be deemed to have waived whatever rights or remedies that might have accrued to him by virtue of the provisions of section 50(2)(b) of the Bills of Exchange Act.

The conduct relied upon by the Appellant consists in a letter dated 22/12/81 written and signed by the Respondent in which the indebtedness to Appellant was acknowledged and in which he made proposal for the immediate payment of N20,000.00 in January 1982, and a monthly instalmental payment of N3,000.00 commencing from 31<sup>st</sup> day of January (sic) February, 1982. This was tendered as Exhibit F. In Exhibit G also tendered in these proceedings, the Respondent made new proposals and agreed to settle his indebtedness to the Appellant. Exhibit J, a letter dated 6<sup>th</sup> Feb. 1985, was written by Respondent's solicitor and forwarding a cash payment of N21,000.00 with a request to be apprised of the balance of the indebtedness to the Appellant. Again, the Respondent's Solicitor wrote a letter dated 13/3/85 Exhibit K in these proceedings, wherein he requested Appellant to treat Respondent's indebtedness as a loan to be rescheduled for payment and asking for a moratorium of six months, with an additional security to be provided by the Respondent.

It was submitted that the net effect of the conduct referred to above is to estop the Respondent from denying waiver of his rights under the provisions of sections 47, 48 and 49 of the Bills of Exchange Act. Appellant's counsel finally submitted that the failure of the Court below to advert to the legal implications of the doctrine of waiver, and estoppel led to the erroneous conclusions reached in the court below, that Appellant improperly debited the Respondent's account with the total value of those cheques.

On his part, learned Counsel for the Respondent submitted that the cheques in issue were accepted by the Appellant as absolute, as opposed to conditional, payment of cash to the bank. He argued that First the cheques were drawn by a third party on another branch of the Appellant Bank and the Respondent was not a party to the instrument. Secondly, the understanding, attested to by one of Appellant's witnesses, was that Re-

spondent was allowed to take the value of the Cheques without waiting for the usual period of clearance of the cheque, the Respondent having convinced the branch Manager of Appellant Bank that all the five cheques would be honoured promptly.

In the alternative, the cheques were accepted on condition that they will be honoured when presented. Reliance was placed on the law as stated in Chitty on Contracts, Vol.1 para. 155, p. 982. Summarily stated, the law is that, where the Creditor accepts a negotiable instrument upon which the debtor is not primarily liable, the creditor must present the instrument within a reasonable time. If he fails to do so and the debtor is prejudiced, the creditor is deemed to be guilty of laches and therefore makes the cheque his own, and it amounts to payment of the debt.

The creditor must give due notice of dishonour and thereby preserve his remedies against other parties secondarily liable. Such notice need not be given to the debtor unless he is a party to the making of the negotiable instrument. It was finally submitted that witness admitted under cross-examination of PW.2 that a delay of a period of one year is unreasonable in informing a customer that his cheque has not been paid.

The above concisely stated are the summary of the contentions of Counsel on issue 2.

It is helpful to accentuate the concurrent findings of facts touching on the issue in the two courts below. First, the Respondent lodged the five cheques, took value for them at a time he had no money in his account and before the cheques were cleared. Secondly, the Respondent knew he had no money in his account when he lodged the cheques. Thirdly, because his account was in debit when he was asking for an overdraft. Relying on the provisions of sections 47, 48 and 49 of the Bills of Exchange Act, learned Counsel submitted that because the Respondent was not put on notice of the dishonour of the cheques, within a reasonable time, he was no longer liable.

The resolution of this issue depends on the proper construction of the provisions of sections 47, 48, 49 and 50 of the Bills of Exchange Act, Cap. 35 Laws of the Federation 190. For ease of reference I set out the provisions verbatim.

*“I find it necessary to set out the provisions of Sections 47, 48, and 49 of the Bills of Exchange Act 1990 material to this case:*

*47 (i) A bill is dishonoured by non-payment –*

*(a) When it is duly presented for payment and payment is refused or cannot be obtained or where an advice is sent through the post office in pursuance of Sub-section (3) of Section 45 of this Act, payment is not obtained.*

*(ii) in the case of a bill payable on demand, within ten days from the time the advice is posted.*

*48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged:*

*Provided that –*

*(a) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission.*

*49. Notice of dishonour in order to be valid and effectual, must be given in accordance with the following rules that is:*

*(i) the notice may be given as soon as the bill is dishonoured and must be given within reasonable time thereafter, and in the absence of special circumstances notice shall not be deemed to have been given within a reasonable time unless...”*

A cursory construction of the provisions of Sections 47, 48 and 49(1) as they are relevant to the facts of this issue can be summarily stated as follows. By virtue of section 47 a bill is dishonoured by non-payment of the value of money stipulated thereon. By section 48 notice of dishonour must be given to the drawer and each endorser of the bill, and failure to do so, the right of a holder in due course subsequent to the omission shall not be prejudiced by the omission.

Section 49(1) stipulates the giving of notice of dishonour within a reasonable time thereafter. Hence, time is clearly of the essence and is of critical importance in relation to the giving of notice of dishonour of a bill.

Learned Counsel to the Respondent has emphasised the delay in

giving the notice of dishonour extending for a period of nearly one year. It is not disputed that what constitutes a reasonable time is a question of fact depending upon the circumstances of the particular case. A delay in the giving of notice for a period of about one year without any satisfactory explanation cannot be anything but unreasonable – See Lombard Banking Ltd. v. Central Garage and Engineering Co. Ltd. ( 1963 ) 1 QB. 200

This however, is not the issue in this case as contended by learned Counsel to the Appellant. Counsel has argued that the subsequent actions of the Respondent in the steps taken to repay the value of the dishonoured cheques estops from denying any waiver of the exercise of his rights under the Bills of Exchange Act. Similarly the admissions of the Respondent of his indebtedness to Appellant by virtue of actions taken in Exhibits C, F, G, J and K and his proposals for repayment.

It is helpful to refer to the relevant provisions of the Bills of Exchange Act. I have already summarised the effects of sections 48 of the Bills of Exchange Act. The legal consequences of dispensing with notice of dishonour is provided in section 50(2)(b) of the Bills of Exchange Act which states,

*“(b) by waiver express or implied; and notice of dishonour may be waived before the time of giving of notice has arrived, or after the omission to give due notice.”*

Thus the conduct indicating waiver and precluding the requirement for giving notice of dishonour may result from conduct before the time of giving notice and indeed preclude the giving of notice after the omission to give due notice.

Appellant relied on Exhibit C as expressive of the conduct of waiver on the part of the Respondent. Exhibit C was the document in which Respondent agreed to replace the cheques covering those lost in transit. This document was admitted in evidence, but was discountenanced by the learned trial Judge on the ground that the jurat was subjoined. Appellant has not appealed against this decision, and learned Counsel to the Respondent has properly drawn attention to that fact. Exhibit C having been discountenanced by the trial Judge, the Court below cannot directly or surreptitiously look at it. Exhibit F is a letter written and signed by the Respondent

dated 22/12/81. Respondent therein acknowledged the indebtedness to the Appellant and made concrete proposals for repayment. Again Exhibit G was an agreement by Respondent in Appellant making new proposals for settling his indebtedness to Appellant. In Exhibit J, Respondent's solicitor B had written a letter dated 6<sup>th</sup> February, 1985, and forwarding N21,000.00 requesting to be apprised of the balance of the indebtedness of the Respondent to the Appellant. Exhibit K is another letter dated 13/3/85 of Respondent's Solicitor to Appellant requesting that the Respondent's C indebtedness be treated as a loan to be rescheduled for payment and seeking a period of moratorium of six months, with an additional security to be provided by the Respondent.

The events catalogued above from Exhibits F, G, J, and K, provide unarguable evidence of conduct implied and express from which waiver of D the notice of dishonour of the cheque can be inferred. It is well settled that waiver is an abandonment of a right. Two elements must co-exist to constitute a waiver. First the party against who the doctrine is invoked must have knowledge or be aware of the act or omission which constitutes the E waiver; and secondly, there must be on the part of the person against whom the doctrine is invoked, some unequivocal act adopting or recognising the act or omission – See Olatunde v. Obafemi Awolowo University & anor. (1998) 5 NWLR. 178.

F The failure of Appellant to give due or reasonable notice of dishonour of the cheques is not disputed. However, the facts relevant to the delay were within the knowledge of the Respondent as disclosed in the transactions in Exhibits 'F', 'G', 'J' and 'K'. It is obvious that Respondent was aware of the situation when he was making the suggestions about G rescheduling his indebtedness with Appellant. He is accordingly estopped by his conduct from relying on the failure of Appellant to give notice of dishonour of the Bill within a reasonable time.

H It is well accepted in our jurisprudence that where a person by words or conduct made to another a clear and unequivocal representation of a fact or facts either with knowledge of its falsehood, with intention that it should be acted upon, or has so conducted himself that another would as a reasonable man in his full faculties, understand that a certain representa-

tion of fact was intended to be acted upon, and that other person in fact acted upon that representation whereby his position was thereby altered, to his detriment, an estoppel arises against the person who made the representation and he will not be allowed to aver the contrary of what he presented it to be. – See Oyerogba v. Olaopa (1998) 13 NWLR. 509. Respondent B cannot in the instant case who had proceeded as if he had no rights against the Appellant in respect of the dishonour of the cheques, is estopped from relying any such rights.

It is obvious on the authorities that even though Appellant did not give due notice of dishonour of the cheques, the Respondent had before action was brought waived the requirement of due notice, and is estopped from raising the issue. The Court below was patently in error in its failure to consider the consequence of waiver under section 50(2)(b) of the Bills of Exchange Act which in my considered judgment was of crucial relevant in the resolution of the controversy between the parties. I therefore resolve issue 2 in favour of the Appellant. D

In addition to the fuller reasons in the judgment of my learned brother Okay Achike JSC in this appeal, I also hereby allow the appeal of the Appellant, set aside the judgment of the Court below. The judgment of the trial Court, including the costs and the declaration that the appellant is entitled to sell the Respondent's landed property covered by the Certificate of Occupancy No. B0/2167 to settle the judgment debt is hereby restored. F

The Respondent will pay to the Appellants, the costs of this appeal, which I assess at N10,000.00.

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### KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Achike J.S.C. He has adequately covered the issues argued in the appeal. The judgment of the Court of Appeal is set aside while that of the trial High Court is restored in its entirety. The appellant is awarded H costs of N10,000.00 against the respondent.

MOHAMMED JSC

I, agree that this appeal has merit and ought to be allowed. My learned brother Achike, JSC, has considered all the issues raised by the parties in this appeal and I concur with that the respondent, from the facts of this case and by his conduct had waived whatever rights or remedies accruing to him under Section 50 (2) (b) of Bills of Exchange Act, Cap. 35 Laws of the Federation of Nigeria 1990.

After the attention of the respondent had been drawn to the fact that the five cheques he issued to the appellant totalling N185,650.00 had been dishonoured and that the cheques were lost on transit he signed an agreement in which he undertook to issue a replacement of the cheques in Exhibit C. The learned trial judge discountenanced Exhibit C because of the absence of illiterate jurat on the document. The learned trial judge however considered other pieces of evidence to establish that the respondent knew that his account was being debited with the sum of N185,650.00. In his judgment the learned trial judge opined thus:

*“But I must add that the fact Exhibit “C” is discountenanced does not at all affect the case of the plaintiff. There is ample evidence clearly showing that the five cheques in question were dishonoured and consequently his account was being debited with the sum of N185,650.00 as the proceeds of the cheques were already paid to him. I believe the evidence of Yahaya Mahmud that on discovering that the cheques were dishonoured he invited the defendant and told him in an unequivocal terms that the cheques he paid in and collected the proceeds before they were cleared had been dishonoured and that unless he made good the amount involved by issuing a replacement cheque his account would be debited with the amount in question. Whether he took Yahaya Mahmud seriously or not is another matter but it is certain that he was put on notice that his account would be debited and in fact true to Yahaya Mahmud’s threat the account was debited.”*

In exhibit “F” the respondent admitted his indebtedness to the appellant and made proposal for payment of the outstanding debt against him. Again in Exhibits “J and K” the solicitors of the respondent admitted the indebtedness to the appellant. After all these admissions it is amazing



how the court below came to the conclusion that the appellant had failed to establish before the High Court that the five cheques paid in by the respondent were dishonoured. I believe that the court below had read the contents of those exhibits. There is evidence showing that the amount with which his account was debited attracted interest. The respondent B was aware of the condition of his account. He even made proposal for the rescheduling of his debt. It is very clear from the documentary evidence that he admitted liability to the bank. An admission voluntarily made by a party is enough to constitute estoppel against the denial of such admission. See Iga v. Amakiri (1976) 11 S.C. 1. C

For these reasons and the fuller reasons in the judgment of my learned brother Achike, J.S.C. I allow this appeal and set aside the judgment of the court below. I affirm the judgment of the learned Chief Judge of Borno State. I also award N10,000.00 in favour of the appellant. D

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### AYOOLA JSC

I have had the privilege of reading in draft the judgment delivered by my learned brother, Achike, JSC. I agree with his conclusion that this appeal should be allowed. There are certain aspects of this appeal which I would like to comment on. I am content to adopt my learned brother's detailed and lucidly put recital of the facts. I narrate the facts shortly only as far as it is necessary to put my comments in context. F

The respondent ("the defendant") was at all material times a customer of the plaintiff appellant ("the Bank"). As at 30<sup>th</sup> December 1980 he had a debit balance of =N=54,928.58 in his current account. Sometime G in 1979 he was granted overdraft facilities, initially in the sum of =N=50,000 with interest on the same at the rate of 11% per annum. The overdraft facilities were secured by a mortgage of the defendant's landed property. Sometimes between December, 1978 and June, 1979, the defendant paid H into his account five separate cheques, four of which were issued to him by his brother, one Alhaji Ahmed Yau and one of which was issued to him by another brother of his, one Alhaji Ali Tahir. These five cheques were

all drawn on the Kano branch of the Bank. It is common ground on the pleadings that these cheques in all to the value of =N=185,650.00 were paid “in or about December, 1978 / June 1979” into the defendant’s account at Maiduguri” and that the Bank “in course of its normal banking duties dispatched the cheques for payment by the Kano City branch.” Without waiting for the usual period to ensure clearance of the cheques the defendant withdrew from his account the total value of the uncleared cheques. Eventually, the Bank did not receive the total or any value of the five cheques even though the defendant had received benefit of the total amount of the cheques. After abortive attempts to make the defendant perform the undertakings he had given to repay the sum of =N=185,650.00 being value he had received for the uncleared cheques, the Bank debited the defendant’s account with that amount and so advised the defendant by a letter dated December 28, 1980. Claiming that the debit balance in the defendant’s account as at 28<sup>th</sup> February, 1987 was =N=494,593.39 the Bank sued the defendant claiming that sum with interest at the rate of 13½% per annum until judgment.

The defendant’s defence, among other things, was that he had waited for about two months before drawing against the cheques. He, in turn, counter-claimed for damages for negligence. He alleged by his counter-claim that “it was utterly negligent of the plaintiff to have delayed for up to a year before informing the defendant” of the fact that the cheques were lost in transit or whether or not the cheques were presented for payment but were dishonoured by the Kano branch.

The High Court of Borno State (Kolo, Chief Judge) entered judgment for the Bank. He treated the case as one of a loan made to the defendant. He said: “*It is a case of direct loan accorded to the defendant dictated by inevitable circumstances.*”, and held that although the defendant did not “apply for loan in the conventional way but by lodging bogus checks (sic: cheques) which were later dishonoured after he had utilised the proceeds through the courtesy of the Manager, he cannot be heard to say that he did not ask for loan when he failed to make good the dishonoured cheques”. It is right to observe that there was neither averment nor evidence that any of the cheques in question was bogus. He held that the

Bank “through normal banking practice rightly and properly debited the account of the defendant when it was clear that the cheques could not be honoured and nor the defendant was prepared to make a replacement.”

The Court of Appeal allowed the defendant’s appeal from the decision of the High Court. Okezie, JCA, who delivered the leading judgment of that court held that the defendant who took value for the five cheques which he lodged, before they were cleared, was, by doing so, only asking for an overdraft. Relying mainly on sections 47, 48, and 49 of the Bills of Exchange Act, (“the Act”) he held that by failing to give notice of dishonour of the five cheques to the defendant pursuant to sections 47(1), and 48 of the Act, the Bank made the cheques their own and lost its remedy against the defendant. He held that, “the laches of the respondent in not duly presenting the cheques or bills constituted thus a payment before the action.” Finally, he concluded that:

*“...the learned trial Chief Judge was wrong in finding the appellant liable to the respondent when the respondent did not sue on the ground that the cheques were dishonoured and lost averred such in the pleadings and in the absence of any evidence adduced in that regard.”*

On this appeal one of the three issues for determination submitted for consideration by learned counsel for the Bank is: “Whether (the defendant) by his conduct both passive and active, the Respondent has not waived his rights under Section 47, 48 and 49 of the Bills of Exchange Act Cap 15 of the Law of the Federation 1990 and whether the Respondent is estopped from denying such waiver.” For his part, learned counsel for the defendant set down as one of two issues for determination, the question whether it was right and proper for the plaintiff to have debited the account of the defendant with the value of the said cheques. It is because of the issues submitted by counsel on behalf of the Bank and the argument proffered by counsel on behalf of the defendant, that the applicability of the provisions of the Act, particularly section 47, and 48, referred to by the Court below, is the essential focus of this contribution.

Counsel for the parties and the Court of Appeal have proceeded on an assumption that sections 47, 48, and 49 and 50 of the Act applied as if the Bank were a holder for value suing on the cheques. It is necessary to

examine that assumption having regard to the fact that the case as formulated on the statement of claim was not one founded on the dishonoured cheques.

In the course of carrying on business of banking, a bank enters into several contractual relationships and performs various roles. It is important in an action between bank and customer to be clear which of the several contractual relationships forms or form the basis of the action. In this case it is pertinent to note only four of these possible relationships, namely: (i) the relationship of creditor and debtor that arises in regard to the customer's funds in the hands of the bank; (ii) the relationship of creditor and debtor that arises when the bank loans money to the customer or allows him to overdraw on his account; (iii) the relationship that arises from the role of the bank as a collecting bank of cheques drawn on other banks or branches of the same bank by a third person, and (iv) the possible role of the bank as a holder for value of a negotiable instrument.

Of these several relationships, the one that deserves close consideration in the instant case is the third one. The Bank in regard to the five cheques is a collecting bank. The collecting bank is an agent of the customer for the purpose of receiving payment of the cheques from the banker on whom they are drawn. The law is clearly and succinctly put in Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 3(1), para 212 thus:

*"In collecting cheques and other instruments for a customer a banker acts as a mere agent or conduit pipe to receive payment of the cheques from the banker on whom they are drawn and to hold the proceeds at the disposal of his customers."*

But then, the learned authors went on to say:

*"The character in which a banker receives a cheque is a matter of fact in each case: he may be a mere collecting agent, or he may take as a holder for value or in due course."*

The banker can be both an agent for collecting and a holder for value at the same time (See Halsbury's (op cit) para. 212 at page 179).

The law seems clear that if a cheque is dishonoured on presentation, the collecting bank can debit the customer's account with the amount. The learned authors of Halsbury's (op cit) described this as "the universal

custom of bankers”. (See Halsbury’s (op cit) para 217 n.1). There is also a statement of the law in Halsbury’s (op cit ) para. 216 that:

*“Where cheques are credited as cash prior to receipt of payment, the customer is entitled to draw on them at once only if there is an agreement, express or implied, to that effect. If a cheque received for collection is dishonoured or if the banker has to account to the true owner for the proceeds, the banker is entitled to debit the customer’s account accordingly.”*

The latter part of the above passage was cited with approval in First Bank of Nigeria Ltd. v. African Petroleum Ltd. [1996] 4 NWLR (Part 443) 438, 447. C

As to the duties of the collecting bank, the law, again, is clear. The collecting bank has a duty to present a cheque within a reasonable time after it reaches him. He is liable to his customer for loss arising from delay. When a cheque is dishonoured the collecting bank’s duty is, in my opinion, prescribed by section 49(m) of the Act as follows: D

*“where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal; and if he gives notice to his principal he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been independent holder.”* F

The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter: s.49(1).

The question whether a collecting bank, apart from being an agent, also becomes a holder for value of a cheque is one dependent on the facts. The mere fact of crediting the customer’s account before receipt of the proceeds of a cheque does not make the bank a holder for value. A bank becomes a holder for value of a cheque by virtue of section 27(2) of the Act as regards all parties to the cheque who became parties prior to such time. Any consideration sufficient to support a simple contract or an antecedent debt or liability is valuable consideration in terms of section 27(1) of the Act and is value in terms of section 2. G H

There is authority for the proposition that a collecting bank which

has allowed a customer to draw against the amount of a cheque received by him for collection before it is cleared may become a holder for value if there is a contract, express or implied, entitling the customer to so draw. There must be a contract which entitles the customer to draw against the amount. It would appear that mere indulgence would not amount to such a contract. However, even if it does, as our law at present stands a collecting bank does not become a holder unless it is one in terms of section 2 or section 77(1) of the Act. Section 2 defines a “holder” as meaning “the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof”. “Bearer” means “the person in possession of a bill or note which is payable to bearer.” Consequently, for the bank to claim to be or to be treated as a holder, it is not sufficient to show that it has permitted the customer to draw against an uncleared cheque pursuant to an express or implied contract, unless it has been shown in terms of section 2 that it has become an endorsee or a bearer, or in terms of section 77(1) that, although it is not an endorsee or bearer, the cheque is payable to order.

In my opinion, it is not a matter of assumption at all whether or not a bank is a holder. The fact must be averred and proved. As a rule of pleadings, where a bank claims on a bill, a statement of claim must allege the right in which the bank claims on the bill, that is, whether as payee, holder or endorsee and whether as holder in due course or holder for value. (See, generally, Bullen and Leake and Jacob’s Precedents on Pleadings (13<sup>th</sup> Edn). In the present case those facts were not pleaded, understandably because the Bank’s claim was not on the cheques.

In my judgment, a bank that has allowed a customer to draw on an uncleared cheque which was later dishonoured whereby the customer’s account becomes overdrawn, has a choice of action. If it is a holder for value, it can sue the drawer or the endorser on the bill and claim all the benefits of so doing under the Act. If it chooses, he can sue the customer on the debt. When a customer paid a cheque to his banker and drew another for payment before the effect of the one he paid was cleared, he was only asking the bank for a loan. The case of Cuthbert v Robarts, Lubbock & Co [1909] 2 Ch. D 226 was cited with approval in support of this propo-

sition in Adereti & Anor v Attorney-General, Western Nigeria [1965] N.S.C.C. 193, 195.

In the present case the Bank's claim as finally stated in its statement of claim is for the amount reflected on the defendant's statement of account as debit balance. I do not immediately see the propriety of importing into the suit considerations which would have been appropriate had the Bank sued on the cheques. The Bank's case as averred in paragraph 14 of the statement of claim was that the defendant has an "unauthorised direct credit granted to him". The case proceeded at the trial on the main issue whether or not the Bank had a right to debit the defendant's account with the value of the unpaid cheques against which the defendant had already drawn. The trial judge held that the Bank rightly so debited the defendant's account.

The question pursued by counsel for the defendant, on this appeal, as in the court below, is whether the five cheques were not received by the Bank in absolute or conditional payment of the defendant's indebtedness to the Bank. The court below agreed with learned counsel for the defendant that the five cheques were accepted by the Bank as conditional payment and that by reason of the laches of the Bank in "duly presenting" the cheques, they became money in the hands of the Bank. Before us, counsel for the defendant urged that we should hold that the cheques were given by way of absolute payment; or, if not, as conditional payment. Cited in support of the alternative submission was a passage from Chitty on Contracts Vol. 1 para. 1551 p. 982 as follows:

***Duties of creditor holding a negotiable instrument.*** *Where a negotiable instrument, upon which the debtor is not primarily liable, is accepted by the creditor as conditional payment, he is bound to do all that a holder of such an instrument may do in order to get payment; thus it is his duty to present a cheque within a reasonable time, and if he fails to do so, and the debtor is thereby prejudiced, the debtor is guilty of laches and makes the cheque his own, so that it amounts to payment of the debt. Similarly, the creditor must give due notice of dishonour and take other necessary steps to preserve his remedy against the other parties secondarily liable. It is necessary to give a notice of dishonour to*

*the debtor only where he is a party to the negotiable instrument to whom such notice is required to be given.”*

The principle of the above passage can only be relevant if the transaction had been between the defendant as debtor and the Bank as creditor and if the Bank had accepted the cheques as settlement of the defendant's indebtedness. Whatever may be the duties of a collecting bank to its customer who has lodged a cheque for collection, it is not right to equate the collecting bank with a creditor who has received negotiable instrument as payment of debt without any allegation in the pleadings and proof by evidence of those facts. Notwithstanding that the bank was a creditor to the defendant at the time when the cheques were delivered to it by the defendant for collection, much more is needed to show that the cheques were delivered not merely for collection but with intention that their proceeds should be utilised in payment of the defendant's indebtedness to the bank. The inference from the facts points the other way, for how can one explain the immediate cashing of the value of the cheques were they paid in as settlement of indebtedness? I feel no hesitation in coming to the conclusion that the cheques were not delivered to the Bank with the intention that they be accepted in payment, conditional or otherwise, of any indebtedness to the Bank. There was no such averment in the pleadings of the parties. I venture to think that where the collecting bank has failed in its duty to give due notice of dishonour of a cheque, delivered to it merely for collection, to its customer within a reasonable time and the customer has suffered prejudice, thereby his action properly lies in damages for negligence. That was the basis of the defendant's counterclaim which was dismissed by the trial court and against which dismissal there had been no appeal to the court to below.

Having regard to the case as pleaded and the issues that arose from the pleadings, I am not convinced that there is need to have recourse to the provisions of sections 47, 48, 49 and 50 of the Act as if the Bank had sued on the cheques, in order to determine this appeal, even though some provisions of the Act apply to the Bank as collecting Bank. Those provisions may, of course, be useful in determining the liability of the Bank in an action by the defendant for breach of duty owed him by the Bank as a



collecting bank. The defendant was not a drawer of the cheques and he has not been shown to be an endorser.

I am satisfied that on the Bank's case as pleaded, it is entitled to succeed even without the introduction of the doctrine of waiver and estoppel. Those doctrines are, rather, matters of defence than foundation for a cause of action. They are relevant as defence to the defendant's counter-claim. It is in that light that I agree that on the evidence the defendant had waived his right to complain about any infraction of its duty by the Bank as a collecting bank in regard to him and is estopped by his conduct from claiming against the Bank for failure of the Bank in its duty towards him. I am content to deal with the questions of estoppel and waiver under general equitable principles, rather than invoke section 50(2)(b) as counsel for the Bank has urged us to do. On the other matters raised in this appeal I agree with the reasoning and conclusions of my learned brother, Achike, JSC. I too would therefore allow the appeal. I abide by the orders made by him and the order for costs he makes.

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