

SUPREME COURT OF NIGERIA

13TH JULY, 2001. SC. 113/1996

**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
U. MOHAMMED, O. ACHIKE, A. O. EJIWUNMI, JJSC**

1. SPARKLIN BREWERIES LTD.
 2. OLO COLD DRINKS NIG. LTD.
 3. OLO PLASTIC IND. NIG. LTD. PLAINTIFFS/APPELLANTS
 4. OBOLI NIGERIA LTD.
 5. DELTA CROWN AND SEAL CO. LTD.
 6. MORRISON INT. PRINTING PRESS LTD.
- AND
- UNION BANK OF NIGERIA LTD. DEFENDANT/RESPONDENT
-

***ACTIONS** - Torts - Alternative claim - In the tort of unlawful interference with business - Grounded wrongfully on breach of contract - The alternative claim must fail (H 2)*

***APPEALS** - Ground of appeal - Omnibus ground - Where there was no evidence to support the trial court's finding of liability - The finding can be challenged on the omnibus ground - Though not very ideal (H 3)*

***TORTS** - Business - Unlawful interference with - Meaning - The tort consists in one person using unlawful means - With the aim and effect of causing damage to another (H 1)*

FACTS

The plaintiffs/appellants sued the defendant/respondent claiming damages amounting to billions of naira for breach of contract. In the alternative, the Plaintiffs claimed the sum of N16,315,365,565.00 special and general damages for unlawful interference with the business of the Plaintiff and interest on the said sum, and in the further alternative, the sum of N42,325,000.00 to each of the 3rd - 6th Plaintiffs being special and general damages for unlawful interference with their respective busi-

nesses.

The plaintiffs belong to a group known as Olori group of Companies. The case of the plaintiffs is that the defendant, after issuing letters of credit in favour of the plaintiffs/appellants' customers/creditors abroad unilaterally and wrongfully cancelled them in breach of the contractual arrangement between the parties. As a result of the said breach the Plaintiffs suffered damages. Hence they claimed as herein before stated. The defendant on the other hand denied the alleged contract. It maintained that the opening of the letter of credit was predicated on eight stipulated conditions which the Plaintiffs failed to comply with.

At the conclusion of trial, the learned trial judge in a reserved judgment found for the plaintiffs. The learned trial judge found that there was breach of contract and made specific awards to the six Plaintiffs totalling several billion naira. Dissatisfied, the defendant appealed to the Court of Appeal against the judgment of the trial court both as to liability and damages. That court allowed the appeal, set aside the judgment of the trial court and dismissed plaintiffs' claims. The Plaintiffs' cross-appeal on quantum of damages was dismissed. The Court of Appeal found that the defendant was not liable for any breach of contract or for unlawful interference with the Plaintiffs business. The Plaintiffs have now appealed to the Supreme Court raising two issues. The defendant adopted the two issues raised by the plaintiff but the appeal was decided based on a single issue.

ISSUE FOR DETERMINATION

(1) " *Whether the Court of Appeal was right in reversing the finding of the lower court that the Defendant/Respondent unlawfully interfered with the business of the 3rd to 6th Plaintiffs Appellant.*

HELD (Unanimously dismissing the appeal per lead judgment of **OGUNDARE JSC**)

Torts - Business - Unlawful interference with

1. The tort of unlawful interference with the business of another consists in one person using unlawful means with the aim and effect of causing damage to another. To constitute the tort the means used must be unlaw-

ful otherwise the tort is not established. (p. 2929 D)

Actions - Torts

2. In the case on hand, the Court of Appeal having held that there was no breach of contract (and this was the unlawful means relied on to ground the tort) it must necessarily follow that the alternative claim in the tort of unlawful interference with business must fail. (p. 2929 H)

Appeal - Omnibus ground

3. This Court, in *NTA V. ANIGBO* (1972) 3 SC 156 decided that the *omnibus* ground of appeal postulates that "*there was no evidence which, if accepted, would support the finding of the learned trial judge or the inference which he had made.*" See also *ALI V. THE STATE* (1988) 1 NWLR 1. That undoubtedly is the case here. There was no scintilla of evidence to support the trial court's finding of liability on the alternative claim of the Appellants. I think this finding can be challenged on the *omnibus* ground of appeal. Ideally, though, it would have been more prudent if the appellants in the court below had raised a specific ground of appeal challenging the finding of liability on the alternative claim. (p. 2930 H)

NOTABLE POINTS OF INTEREST

ACHIKE JSC

1. Doubt on whether agreement is binding

Where there is doubt on whether the parties have concluded a legally binding agreement, the court has the responsibility to analyse the circumstances surrounding the alleged agreement and determine whether the traditional notion of 'offer' and 'acceptance' can be distilled from the purported agreement. The mutual assent must be outwardly manifested. The test of the existence of such mutuality is objective. When there is mutual assent, the parties are said to be ad idem. Now the two items 'offer' and 'acceptance', earlier referred to, call for some explanation in order to recognise whether or not the parties are ad idem. (p. 2934 D)

2. *Offer and acceptance*

An 'offer' is an expression of readiness to contract on the terms specified by the offeror (i.e. the person making the offer) which if accepted by the offeree (i.e. the person to whom the offer is made) will give rise to a binding contract. In other words, it is by acceptance that the offer is converted into a contract. (p. 2934 G)

3. *Failure to perform condition precedent*

The alleged breach of contract arose from the cancellation of the letters of credit at the instance of the respondent. Clearly, if the respondent did not issue any letters of credit there was nothing to cancel. Indeed, it became obvious that where some of the conditions - precedent for the issuance of letters of credit were not performed, it was extremely difficult, in legal circle, to appreciate how one can either picture the existence of the alleged contract or objectively analyse the fancied contract between the parties in terms of 'offer' and 'acceptance'. Thus on appellants' admission that some conditions-precedence to the conclusion of a legally binding contract were yet to be complied with, it became certainly unarguable that there was no meeting of the minds between the parties that could lead to the conclusion that the parties were ad idem to the obligation on the issuance of a contract. Had the learned trial judge adverted his mind to this basic principle of the law of contract, he would have easily appreciated that it was wishful thinking to hold that the parties had concluded a legally binding contract. This clearly explains why the Court of Appeal had no difficulty in holding that the respondent was not liable in contract. It is worthy of note that the appellants never appealed against that finding. (p. 2936 D)

REPRESENTATION

J. I. Nweze (M. B. Idris-Kutigi with him), for the Appellants.
H Prof. A. B. Kasumu, SAN (L .O Akhidenor & E. I. Eseme with him).

CASES REFERRED TO

J. T. STRATFORD & SONS LTD V. LINDLEY & ANOR (1965) AC

269

OTUEDON V. OLUGHOR. (1997) 9 NWLR 355

OGUNBIYI V. ISHOLA (1996) 6 NWLR 12

IJALE V. LEVENTIS & CO LTD. (1959) SCNLR 255

NTA V. ANIGBO (1972) 3 SC 156

B

ALI V. THE STATE (1988) 1 NWLR 1

BOOK REFERRED TO

Clerk & Lindsell on Torts 16TH Edition

C

LEAD JUDGMENT BY OGUNDARE JSC

The Appellants were, at all times relevant to this case, customers of the Respondent Bank. All the Appellants belong to a group known as Olori Group of Companies. Following the cancellation by the Respondent of purported letters of credit issued by it at the request of the Appellants, the latter sued, claiming as per paragraph 27 of their amended statement of claim-

"27. WHEREFORE all the Plaintiffs claim against the Defendant as follows;-

(i) an order of injunction restraining the Defendant and all their agents whomsoever from taking any steps to sell any of the Plaintiffs' properties mortgaged to it since the Defendant is in fact indebted to the Plaintiffs.

(ii) the sum of N656,919,000.00 only being special and general damages against the Defendant for breach of contract arising from the unlawful cancellation of Irrevocable Letters of Credit issued by the Defendants, and so issued for valuable consideration given by the Plaintiffs to the use of the Defendant, and for the specific purposes and benefits of the Plaintiffs' business.

(iii) Pursuant to paragraph 26 the sum of N554,732,565.00 for the 1st Plaintiff and N103,723,000.00 for the 2nd Plaintiff.

(iv) Pursuant to paragraph 25, the sum of N6,000,000.00 being the value of 12,000,000 crates for the 1st plaintiff and N9,000,000.00 being the value of 18,000,000 (sic) for the 2nd plaintiff.

OR IN THE ALTERNATIVE TO (ii) (iii) & (iv) ABOVE

(v) *The said sum of N16,315,365,565 being special and general damages for unlawful interference with the business of the Plaintiffs.*

B (vi) *interest on the said sum of N16,315,365,565 only from 1st day of April, 1989, until payment.*

(vii) *further and or other reliefs.*

IN THE FURTHER ALTERNATIVE TO (v) (vi) & (vii) ABOVE

C (viii) *the sum of N42,325,000.00 being special and general damages for unlawful interference with the business of the 3rd Plaintiff.*

(ix) *the sum of N42,325,000.00 being special and general damages for unlawful interference with the business of 4th Plaintiff.*

D (x) *the sum of N42,325,000.00 being special and general damages for the unlawful interference with the business of the 5th Plaintiff.*

(xi) *the sum of N42,325,000.00 being special and damages for unlawful interference with the business of the 6th Plaintiff.*

In their amended statement of claim, they had pleaded, *inter alia*:

E "5. *In addition to the foregoing, the 1st and 2nd Plaintiffs aver that they also bring this action in their capacity as those persons for whose benefit and advantage the contractual arrangements with the Defendant more specifically pleaded in paragraphs 7, 8, 12, 13 and 14 of this Statement of claim were entered into, and to whom the rights acquired under the said contract have accordingly been transferred.*

F 6. *All the Plaintiffs further state that all the transactions that have given rise to the reliefs sought by them in paragraph 27 of this Statement of Claim, to which by this action they claim to be entitled, arise from diverse contracts between their respective selves (as 'the Buyer' or 'the importer' of the goods and materials) of the one part, and the Defendant (as the Issuing Bank' of documentary credits) of the other part, by virtue of which the Defendant, in consideration of the payment to them by the Plaintiff of the local value of the various documentary credits, and the further payment by the Plaintiffs to the Defendant of commissions, and other bank charges as remuneration for its services, agreed to issue and establish Irrevocable letters of Credit in favour of*

certain third party - Sellers/Suppliers of goods and materials and to finance their importation into Nigeria by, and upon the application of, the Plaintiffs for the purposes of their aforesaid business. The Plaintiffs state that the relevant and precise particulars of each of the said 'Documentary Credit' contracts between their respective selves and the Defendant are as appear by the date contained in 'Particulars of Letters of Credits Contracts' shown in paragraph 14 of this Statement of Claim.

7. About the month of March, 1986, by an agreement made between the Plaintiffs and the Defendant at the Defendant's Head Office/ principal place of business at No. 40, marina, Lagos, the parties entered into a 'Further Contract' under the terms of which the Defendant as the 'Issuing Bank' of documentary credits agreed to open Letters of Credit for the importation of brewery raw materials for the specific purpose (known to the Defendant) of enabling the 1st and 2nd plaintiffs to produce beer and soft drinks in sufficient quantities.

8. In order to achieve the objective of the said 'Further Contract' referred to in paragraph 7 above, and upon the specific and express written directions of the Defendant, (as contained in those exchanges of correspondence particularised below), the parties further agreed that all Federal Government of Nigeria 'Import Licences' held in the name of and available for use by any and all of the Plaintiffs and other members of the OLORI GROUP OF COMPANIES should be utilised for the importation of brewery raw materials for the benefit of the 1st and 2nd plaintiffs. In the alternative it was understood that the 3rd to 6th plaintiffs shall import the brewery raw materials for sale to the 1st and 2nd Plaintiffs at a profit of 15% of the production value.

(Particulars are omitted)

9. At the material time, each of the 3rd - 6th Plaintiffs inclusive possessed all due and necessary Governmental authority for the importation into Nigeria of various goods, being holders of those Federal Republic of Nigeria Import Licenses of which precise description details are given in the Particulars of Import Licenses shown immediately below. All the original import licences are with the Defendant and it is hereby given notice to produce them.

(Particulars are omitted)

XXXXXXXXXX

12. In consideration for, and as condition-precident to issuing and establishment of the said 'Documentary Credits, the Defendant demanded and did receive from the respective Plaintiffs the Nigerian currency value to the various credits to be established, and did further cause the respective Plaintiffs to make 'Advance to be imported under the various 'contract for Sale of Goods' referred to in paragraph 10 of this Amended Statement of Claim, the said payments being in the respective equivalent amount shown in the 'Payments to the Issuing Bank' (i.e. the Defendant) shown immediately below.

All the original receipts of payments are with the Defendant and it is hereby given notice to produce them in Court.

(Particulars are omitted)

13. By various 'Applications to purchase Foreign Currency' (as in 'Form M') pleaded in 'Particulars of Applications to Purchase Foreign Currency' shown immediately below, the respective Plaintiff (as 'the Applicant') applied to the Defendant (as 'the Issuing Bank') for foreign exchange allocation for payment for the importation of those goods to which the 'contract of Sale of Goods pleaded in paragraph 10 refer, and their said applications were all granted and approved by the Defendant on or about the 11th day of August, 1986.

All the original Applications are with the Defendant and it is hereby given notice to produce them in Court.

(Particulars are omitted)

14. In pursuance of all those matters pleaded in paragraphs 6-13 above, and upon the fulfillment by the respective Plaintiffs of all the contractual obligations reserved as to their own part particularly referred to in paragraphs 6 and 12 above, the Defendant - (as 'the Issuing bank'), did issue and establish 'Irrevocable Letters of Credit' for the account of the respective Plaintiffs (as 'Accreditors') in the respective amounts, and in favour of those sellers/suppliers of goods and materials (as 'Beneficiaries') as shown in the 'Particulars of Letters of Credit Contracts' immediately below.

All the original letters of credit are in the custody of the Defendant and it is given notice to produce the original at the trial.

(Particulars are omitted)

15. Subsequent to the issue and establishment of the said 'Letters of Credit', but before they could be utilised by the respective Plaintiffs and the respective beneficiaries in whose favour they were issued, the Defendant unilaterally repudiated the terms of the contract pleaded in paragraph 6, 7, 8, 12 and 13 of this Amended Statement of Claim by cancelling/procuring the cancellation of each and every one of the Letters of credit particularised above, in spite of the fact that 'Irrevocable Letters of Credit' are in law incapable of cancellation or modification by Issuing Bank (including the Defendant) and in spite of the plaintiff's written protests and warnings as to the loss and damage that would be occasioned to them in consequence of the Defendant's said act in breach of contract, and the Defendant's written assurances and undertaking to rectify the position.

(Particulars are omitted)

XXXXXXXXXX

23. In addition/in the alternative to the reliefs claimed by these Plaintiffs in paragraph 27 below the Plaintiffs repeat the material averments of facts set out in paragraphs 7 - 22 above, and will contend at the trial of this action that the Defendant has (their said act of cancellation of the Letters of Credit) interfered with (or prevented or hindered) the Plaintiffs in the execution of all the contracts herein-before pleaded, and further, that the said interference was deliberate and furthermore, that the said interference was direct, and that the said unlawful interference with the plaintiffs in the due performance of all the said contract has occasioned loss and damage to them, in consequence of which they claim to be entitled to the reliefs sought in paragraph 27 of this Amended Statement of Claim"

It would appear from the amended statement of claim that the main complaint of the Appellants was that the Respondent, after issuing letters of credit in favour of the former's trade creditors, wrongfully cancelled same, thereby causing injury to the Appellants which occasioned to them

damage. They claimed as stated earlier above.

The Respondent denied Appellants' claims and joined issues with them on their pleadings. In its further amended statement of defence, it averred, *inter alia*:

B "5. *The Defendant avers that at the request of the 1st and 2nd plaintiffs, it made available to the two plaintiffs (1st and 2nd) credit facilities which were fully utilised. The Defendant shall rely on all material documents evidencing this averment at the trial of this action.*

C 6. *Further to paragraphs 4 and 5 above, the Defendant further states that it granted loans and other facilities in the sum of N6.5million (as regards the 1st plaintiff) and N1.2million (as regards the 2nd Plaintiff) respectively. The defendant shall found on all material documents evidencing this averment at the trial of this action.*

D XXXXXXXXXX

E 9. *As a result of the loans, advances and other credit facilities made available to the 1st and 2nd Plaintiffs (which they fully drew and utilised) the said 1st and 2nd plaintiffs are substantially indebted to the Defendant well in excess of N27million (the current figures of which shall be made available at the trial of this action). The said indebtedness is subject of litigation as Counter-Claim in Suit No. W/259/89-PRINCE MORRISSON OLORI & 2 ORS. V. UNION BANK OF NIGERIA PLC. & ANOR. The Co-Plaintiffs in Suit No. W259/89 are the 1st and 2nd Plaintiffs herein.*

F XXXXXXXXXX

G 11. *The defendant denies paragraph 5 of the Amended Statement of Claim and avers that it was neither aware of nor was it a party to any agreement or arrangement as stated in paragraph 6, 7, 8, 12, 13 and 14 of Amended Statement of Claim.*

H 12. *With further reference to paragraphs 5 and 9 of the Amended Statement of Claim, the Defendant denies having reached any agreement, contract or further contract with the Plaintiffs either individually or collectively whereby it was agreed that import licences issued in the name of one would be utilised by or for the benefit of any other Company in whose name the import license was issued.*

The Defendant will at the trial rely on the express provision in the import licences which prohibit the making of such an arrangement.

13. *The Defendant denies paragraph 7 of the Amended Statement of Claim and avers that there was no contract between it and the 1st and 2nd plaintiffs as alleged.*

14. *The Defendant denies paragraphs 9, 10 and 11 of the Amended Statement of Claim and puts the Plaintiffs to the strictest proof of the existence of the alleged import licences and contracts of sale and the conditions relating to such contracts of sale.*

15. *With reference to paragraphs 12 to 24 of the Amended Statement of Claim, the Defendant avers that there were negotiations between it and some of the Plaintiff Companies for the opening of letters of credit.*

16. *That consequent upon these negotiation and exchange of letters between it and some of the plaintiff Companies, it (the Defendant) by its letter of 25/7/86 addressed to the 1st plaintiff, agreed to register 1st plaintiffs Form M with a view to the opening of a letter of credit if the following condition are met:*

'1. Irrevocable undertaking to resume full operation of account in our books when production resumes with all sales proceeds paid direct to our branch.

2. Up-dating of repayment of liability in the name of Olori Motors & Co. Ltd. at our Mission Road Branch.

3. Clearing of overdraft created as a result of loan repayment on Sparkling Breweries Ltd. and Olo Cold Drinks Nig. Ltd. accounts.

4. That Inspection of properties mortgaged and those held on simple deposit is undertaken.

5. Payment of 30% Import levy/Tariff without increasing the current account overdraft.

6. 150% cash margin up-front to be held on a separate cash margin account.

7. Payment of Import Duty without increasing the current account overdraft.

8. A corresponding reduction to the loan (i.e. N300,000.00 if

the documentary credit is going to be for N300,000.00 exactly) separately and in addition to the normal monthly N130,000.00 repayment.

The Defendant avers that none of the conditions listed above was complied with.

B 17. *The defendant denies the payment allegedly made by the Plaintiffs on paragraph 12 of the Amended Statement of claim and also denies paragraph 13 in respect of the making of Application to purchase foreign currency.*

C 18. *In the alternative to paragraph 17 hereof, the Defendant avers if such payments were in fact made (which is denied), the payments made were in settlement of the indebtedness of the Plaintiffs to the Bank and/or were made subject to the fulfillment of the other conditions stipulated in Defendant's letter of 25/7/86.*

D 19. *The Defendant denies the issuance of irrevocable letters of credit to the Plaintiffs as alleged in paragraph 14 of the Amended Statement of Claim and in the alternative, the Defendant avers that if any letter of Credit was issued (which is denied), it was issued subject to the*
E *conditions stipulated in paragraph 16 herein being met which conditions were never met."*

In summary, the Appellants' case is that sometime in March 1986, the 3rd - 6th Appellants applied to the Respondent for irrevocable letters
F of Credit for the importation of hops and other raw materials for the use of the 1st and 2nd Appellants. As a result of this, the Respondent set out certain conditions (see exhibit 2) for Appellants to meet before the letters of credit were established - The Appellants substantially complied with Exhibit 2 except conditions 2, 3 and 8 which they by exhibit 3 asked the
G Respondent to waive. The Appellants stated that they entered into a further contract whereby the import licences of the 3rd - 6th Appellants were to be utilised for the benefit of the 1st and 2nd Appellant for the production of beer and soft drinks. According to the Appellants the
H profit accruing from this arrangement would be shared 15% to the holders of the import licences and the rest to defray the outstanding loan of the 1st and 2nd Appellants. The Appellants contended that the Respondent eventually waived the remaining conditions, registered their Form M

and processed the letter of credit which it later cancelled without any reference to them. The Appellants tendered Exhibit 10, 10(a) and 10(b) as copies of the established letters of credit which the Chairman/Managing Director of the Appellants took with him when he travelled overseas and he used in inducing their trade creditors as to payment to them and thus enabled him to secure from the creditors some quantities of hops. It is Appellants' further case that when they learnt of the cancellation of the letters of credit they made several appeals to the Respondent to consider the position and warned it of the attendant damages the cancellation would cost them. When the Respondent would not yield, they instituted the action leading to this appeal. C

The Respondent, on the other hand, contended that the Appellants failed to comply with all the conditions set out in Exhibit 2. The Respondent further contended that if the facts were as claimed by the Appellants, the right to sue did not lie in them but in their trade creditors. It finally contended that Exhibit 10, 10(a) and 10(b), that is the alleged letters of credit, were mere forms as they did not contain such details as the name of the corresponding bank that would transform the forms into valid letters of credit. It is the Respondent's case that the contract was not concluded. D E

The action proceeded to trial at the conclusion of which, the learned trial Judge, in a reserved judgment, found for the Appellants and adjudged- F

"On the whole Plaintiffs' claim as contained in their final endorsed statement of claim succeed and are hereby allowed with cost of N2,000.00 to the plaintiffs."

The learned Judge made the following findings of fact: G

1. *That the Respondent waived conditions 2, 3, and 8 contained in Exhibit 2*
2. *That the letters of credit were established by the Respondent.*
3. *That the Appellants could maintain the action* H
4. *That there was no transfer of import licences from the 3rd - 6th Appellants to the 1st and 2nd Appellants.*
5. *That the Respondent was a party to the tripartite agreement*

between it on the one hand, 3rd - 6th Appellants on the second part and 1st and 2nd Appellants on the third part whereby the 3rd - 6th Appellants as holders of import licences would use the same to import raw materials to be sold to the 1st and 2nd Appellants to produce beer and soft drinks; B the 1st and 2nd Appellants were to pay to each of the 3rd - 6th Appellants 15% of the total production value as profit to the latter and the balance was to be used to defray any indebtedness to the Respondent.

6. That the Respondent was in breach of contract.

C On damages, the learned judge made the following specific awards:
*(i) N17,104,700.00 loss of profit to 1st Appellant.
(ii) N20,200,000.00 loss of profit to 2nd Appellant.
(iii) N32,355,000.00 to each of 3rd - 6th Appellant.
(iv) The sum claimed for reactivation of the beer and soft drinks D factories was allowed.
(v) N2.5 billion to 1st and 2nd Appellants each to repurchase their crates.*

The Respondent appealed to the Court of Appeal against the judgment of the trial court both as to liability and damages. That Court allowed the appeal, set aside the judgment of the trial court and dismissed Appellants' claims. The Appellants' cross-appeal on quantum of damages was dismissed. The Court of Appeal found that the findings made by the trial court were perverse and unhesitatingly set them aside. The Court found the Respondent not liable for breach of contract or for unlawful interference with Appellants' business. F

On damages, the Court of Appeal found that the evidence was not sufficient or credible to support the awards made by the trial court and set aside these awards. G

The Appellants being aggrieved by the decision of the Court of Appeal have, with leave of that court, appealed to this Court upon 9 grounds of appeal. In their written brief of argument filed pursuant to H the rules of this Court they, however, formulated only two issues as calling for determination in this appeal, that is to say:

"(a) Whether the Court of Appeal was right in reversing the finding of the lower court that the Defendant/Respondent unlawfully

*interfered with the business of the 3rd to 6th Plaintiffs Appellants and
(b) whether the award of damages made in favour of the 3rd to
6th plaintiffs appellants is sustainable in law.*

All grounds of appeal not covered by these two issues are deemed abandoned and are hereby struck out. For the avoidance of doubt, these grounds are (i), (ii), (iii), (vii) and (ix). The Respondent, in its own written brief adopted the two issues raised by the Appellants. I shall now proceed to consider these two issues. Before doing so, however, I need to observe that these two issues relate only to the case of the 3rd - 6th Appellants. It follows, therefore, that the 1st and 2nd Appellants are no longer pursuing the appeal. The appeal, as it relates to them is hereby dismissed.

At the oral hearing to the appeal before us, learned counsel for the parties adopted and relied on their respective briefs and offered no further submissions. This appeal, therefore, rests on the submissions in the written briefs.

ISSUE (a):

It is submitted in the Appellants' brief that the court below was in error in holding that a finding that there was no breach of contract equally absolved the Respondent bank of liability for unlawful interference with the Appellants' business for the reason that the tort of unlawful interference with business can be established independently of contract or breach thereof. It is argued that in the case on hand the Respondent instead of sticking to its guns not to open the letters of credit asked the Appellants to resubmit their original documents. The respondent retained the import licences until they expired and could no longer be used. It is submitted that even as the court below held that the Respondent was not in breach of contract when it failed to open the letters of credit its conduct in frustrating the Appellants from utilising the import licences through the opening of the letters of credit by other banks is tortious and amounted to unlawful interference with the Appellants' business. It is argued that Respondents' purpose in detaining the import licences could only be to injure the business of the Appellants. The case of J. T. STRATFORD & SONS LTD V. LINDLEY & ANOR (1965) AC 269 and Clerk & Lindsell

on Torts 16th edition at page 850 are relied upon in support of these submissions. It is further submitted that as there was no ground of appeal specifically challenging the finding of the trial court on the issue, the court below was wrong to have reversed the finding. It is urged that the finding ought to stand. OTUEDON V. OLUGHOR. (1997) 9 NWLR 355; OGUNBIYI V. ISHOLA (1996) 6 NWLR 12 and IJALE V. LEVENTIS & CO LTD. (1959) SCNLR 255 are relied on. This Court is urged to hold that the claim for unlawful interference with business was made out.

For the Respondent, it is submitted that by the pleading, evidence and address of learned counsel for the Appellants at the trial, the alternative claim for unlawful interference with the business of the Appellants was based on there being a breach of contract on the part of the Respondent and as the court below had held that there was no breach of contract, the alternative claim collapsed and was rightly dismissed by the court below.

I have carefully considered the arguments advanced by both sides. It would appear that the Appellants have changed their case in this Court. Their case for damages for the tort of unlawful interference with their business is pleaded in paragraph 23 of their amended statement of claim, which for ease of reference I quote here again. Paragraph 23 reads:

"23. In addition/in the alternative to the reliefs claimed by these Plaintiffs in paragraph 27 below, the plaintiffs repeat the material averments of facts set out in paragraphs 7 - 22 above, and will contend at the trial of this action that the Defendant has (their said act of cancellation of the Letters of Credit) interfered with (or prevented or hindered) the Plaintiffs in execution of all the contracts hereinbefore pleaded, and further, that the said interference was deliberate and furthermore, that the said interference was direct, and that the said unlawful interference with the Plaintiffs in the due performance of all the said contract had occasioned loss and damage to them, in consequence of which they claim to be entitled to the reliefs sought in paragraph 27 of this Amended Statement of Claim."

(Underlining are mine for emphasis)

It is clear that this alternative claim of the Appellants was predicated on the alleged breach of contract by the Respondent for unlawfully cancelling the letters of credit established for the Appellants. It was not their case that the retention of their import licences by the Respondent was responsible for the collapse of their business. PW2, Prince Dr. Morrison Olori, the Chairman/Managing Director of the six Appellants and their star witness, testified thus:

"The Plaintiffs sued the Defendant with whom they opened Letters of credit and it cancelled the same which is law (sic) it (not?) was allowed to do. The cancellation of the Letters of Credit made the whole business of the Plaintiffs to collapse. The Import Licence expired before I was informed that the Letters of Credit had been cancelled and so, I could not utilise them. Before then, I had travelled to Europe and carried some of the Import Licence to show to the manufacturer who exported some to me which I used for a short period of time."

(underlining is mine for emphasis)

I may pause here to observe that the witness could not have been speaking the truth when he deposed that the *"Import Licence expired before I was informed that the Letters of Credit had been cancelled."* This is so because in his letters of 17th September 1986 and 17th October 1986 (Exhibits 12 and 15 respectively) he was pleading with the Respondent to reconsider its decision 'to cancel' the said purported letters of credit. In Exhibit 27 dated 26 September 1986 and written in reply to the letter of 17 September (Exhibit 12) the Respondent wrote to the witness that *"the matter has been reconsidered but the Bank's view has not changed."*

Later in his evidence the witness said:

"The Plaintiffs have sued the Defendant to Court because it cancelled the Letters of Credit."

Testifying further on the damages suffered by the 3rd - 6th Appellants Chief Olori said:

"The 3rd - 6th Plaintiffs suffered damages because the workers of these Companies sued for their Salaries and Allowances as they were

forced to close down as a result of the cancellation of the Letters of credit and the Plaintiffs paid N10million to settle the Staff of each of the 3rd - 6th Plaintiffs. These Plaintiffs also suffered the loss of profit of 15% of total production after sales, of the raw material imported on behalf of each of the 3rd - 6th Plaintiffs.

It is not his evidence that the business of the 3rd - 6th Appellants collapsed as a result of the wrongful retention by the Respondent of Appellants' import licences that subsequently expired.

In his final address at the trial, Mr. Nwese learned counsel for the Appellants, as plaintiffs, submitted as hereunder:

"The Plaintiffs also claimed for unlawful interference with their business. Counsel for the Plaintiffs submitted that this claim was contingent on the Defendant's Breach of Contract and it was a claim in Tort. Counsel then referred to the case J. T. STAFFORD & SONS LTD. V. LINDLEY [1965] A.M.C. 269 and CLERK & LINDSELL on torts: 16th Edition page 850. Counsel contended that as a result of the interference the following facts had emerged namely that Letters of Credit were issued by the defendant but the seller was not notified; that at a point in time, the Defendant withheld all the documents of the plaintiffs without which the Plaintiffs could not open Letters of Credit with another bank as stated by DW1, the defendant kept the plaintiff in suspense believing thinking that they would notify the seller and the Plaintiffs continued to warn the Defendant of the damage that it would cause and these warnings were unheeded until the Import Licences expired. Counsel maintained that the above amounted unlawful interference with Plaintiffs business as they were calculated to injure them."

In effect, learned counsel based the claim for the tort of unlawful interference with business on the alleged breach of contract.

The learned trial Judge, in his judgment, said this of the claim for unlawful interference with business:

"Counsel for the Plaintiffs also submitted that Plaintiffs' business was unlawfully, interfered with and gave reasons which have been enumerated supra. The Court is of the view that the Plaintiff has also established this in view of the fact that there was no rebuttable evidence

by the Defendant."

Again, it cannot be said that this verdict was based on unlawful retention of import licences, a fact that was not pleaded.

In the light of all I have said above, Appellants cannot now in this Court base their claim in tort on the retention by the Respondent of the import licences and their eventual expiration. That claim was based on the alleged breach of contract occasioned by the Respondent cancelling the purported letters of credit. In my respectful view, Ayoola JCA (as he then was) was on a *terra firma* when in his judgment he observed:

"Although the judge purported to find the claim for unlawful interference established, it is clear that the alternative claim was predicated on there being a contract and a breach of that contract."

I can see no merit in the appellants' complaint against the learned Justice's view. **The tort of unlawful interference with the business of another consists in one person using unlawful means with the aim and effect of causing damage to another. To constitute the tort the means used must be unlawful otherwise the tort is not established.** As Viscount Radcliffe put it in *J. T. STRATFORD & SON LTD. V. LINDLEY* (supra) at pages 328 - 329 of the report:

"The case comes before us as one in which the defendants have inflicted injury on the plaintiffs in the conduct of their business and have resorted to unlawful means to bring this about. It cannot be denied that to induce breaches of contract is to employ unlawful means. If the defendants were within the protection of section 3 of the Trade Disputes Act their interference with their members' contracts of employment would not in itself be wrongful or unlawful, but even so, the procuring of the breaches of the hiring contracts would be against them; and where, as here, there does not appear to be even a trade dispute in contemplation of which the defendants can be said to have acted, they have two sets of tortious or unlawful acts which the plaintiffs can pray in aid against them."

In the case on hand, the Court of Appeal having held that there was no breach of contract (and this was the unlawful means relied on to ground the tort) it must necessarily follow that the alternative claim in the tort of unlawful interference with business must

fail. This, in my respectful view, was the point being made by Ayoola JCA in his judgment.

Ayoola JCA's further observation to the effect that -

"The defendant has appealed against the "whole decision" which must include the judge's view on the alternative claim. It is evident that if there was no breach of contract and if the condition precedent to the performance by the defendant of any obligation has not been fulfilled, there would be no unlawful interference with business as the two claims were based on the same facts. The whole tenor of the appeal had been to challenge the basis of the whole decision. In the result, the consequence of allowing the appeal is to set aside the whole decision and substitute therefor an order dismissing the action in its entirety."

has also come under attack for the reason that there was not before the Court of Appeal any ground of appeal challenging the finding of the trial court on Respondent's liability for the tort of unlawful interference with Appellants' business. It is urged on us to restore the trial court's finding on liability for the said tort.

The Respondent (as appellant in the court below) in its amended notice of appeal filed 11 grounds of appeal the last of which read:

"Judgment is against the weight of evidence."

In the Appellant's brief before the court below 4 issues were formulated as calling for determination issues 3 and 4 which read:

"3. Was the trial Judge right in law in holding that the Defendant is liable to the six Plaintiffs for breach in cancelling the irrevocable Letters of credit it issued in favour of the 3rd to 6th Plaintiffs?

4. If the answer to Issue No. 3 is in the affirmative was the trial Court right in making the various awards of damages it made in favour of the six Plaintiffs?"

It would appear to me that in the circumstances of this case Ayoola, JCA was in order to observe, as he did, in the passage of his judgment under attack. **This Court, in NTA V. ANIGBO (1972) 3 SC 156 decided that the omnibus ground of appeal postulates that "there was no evidence which, if accepted, would support the finding of the learned trial judge or the inference which he had made."** See also ALI V. THE STATE

(1988) 1 NWLR 1. That undoubtedly is the case here. There was no scintilla of evidence to support the trial court's finding of liability on the alternative claim of the Appellants. I think this finding can be challenged on the *omnibus* ground of appeal. Ideally, though, it would have been more prudent if the appellants in the court below had raised a specific ground of appeal challenging the finding of liability on the alternative claim.

The case of OTUEDON V. OLUGHOR (supra) relied on by the appellants is just not apposite to the present case. In that case the two courts below had found that the defendants were bound by a documentary evidence tendered at the trial. That finding that they were bound by the evidence tendered was not appealed against on appeal to this Court. There I held that the defendants could "*not be heard to argue against that finding.*" In OGUNBIYI V. ISHOLA (supra), Onu JSC observed at page 23 of the report:

"Be it noted that where a party has not appealed against a finding of the trial court or the Court of Appeal, he cannot be heard to question that finding on appeal. See IJALE V. LEVENTIS & CO, LTD. (1959) SCLR 255; (1959) 4 F.S.C. 108, the essence of an appeal being, to have an opportunity to have one's suit re-examined before a higher or independent panel with a view to convincing such a panel in its favour." I agree with this statement of law. In the circumstances of this case, however, where there was no evidence to support a finding made by the trial court, I think that finding can be challenged under the *omnibus* ground of appeal that the decision is against the weight of evidence.

In view of all that I have been saying, I answer question (a) in the affirmative. As the alternative claim was predicated on there being a breach of contract and that promise having been found not to be the case by the court below, the verdict of the trial court on that claim was rightly reversed by the Court below.

ISSUE (b):

In view of the conclusion reached on Issue (a), no useful purpose will be served by discussing this issue. The Respondent was found not liable for breach of contract and for unlawful interference with Ap-

pellants' business. It is not necessary any longer to consider the issue of damages. Suffice it to say that the court below was right in its decision setting aside the award of damages made by the trial court. I affirm that decision.

B In conclusion, I find no merit in this appeal which I dismiss with N10,000.00 costs to the Respondent.

BELGORE JSC

C The appellant never fulfilled conditions the respondent needed to open a letter of credit as requested of him. There is therefore no evidence, throughout the proceedings in the trial court, of any breach of contract much less any damages arising therefrom. The Court of Appeal
D came to a correct conclusion in this matter. I agree with the lead judgment of my learned brother, Ogundare J.S.C., in his conclusion that this appeal has no merit. I also dismiss it with N10,000.00 costs to the respondent.

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MOHAMMED JSC

I also agree that this appeal has failed as my learned brother,
F Ogundare, JSC., has ably elaborated in his judgment. I have had the privilege to read the judgment in draft before now. In the lead judgment all the salient issues have been considered and I have nothing more to add. The appeal is dismissed. I award N10,000.00 costs in favor of the respondent.

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ACHIKE JSC

I have had the privilege of reading the judgment just delivered by
H my learned brother, Ogundare JSC. I entirely agree with the reasoning and the conclusion that this appeal is completely devoid of merit and deserves to be dismissed. The appeal raises some elementary but fundamental principles of the law of contract that demand to be reiterated, if

only by way of emphasis.

The six plaintiffs/appellants had in their prolix twenty-seven paragraphs of their amended statement of claim sought for eleven reliefs. The amended appellants' pleadings have been substantially reproduced in the leading judgment and no reason demands that they be reproduced again in this judgment. The resume of the plaintiffs' claim, as can be distilled from the tedious paragraphs of the amended statement of claim, is that the respondent, after issuing letters of credit in favour of the plaintiffs/appellants' customers/creditors abroad unilaterally and wrongfully cancelled them in breach of the contractual arrangement between the parties. It is in consequence of the said breach that has occasioned injury that the plaintiffs made this claim of several billion naira for breach of contract. In the alternative, the plaintiffs claimed the sum of N16,315,365,565, special and general damages for unlawful interference with the business of the plaintiffs, including interest on the aforesaid several billions, and in the further alternative, for a total sum of N221,627,500.00 special and general damages for unlawful interference with the business of 3rd to 6th defendants.

The respondent in its own further amended statement of defence denied the alleged contract. In fact, the respondent averred that the opening of the letter of credit was predicated on eight stipulated conditions which the plaintiffs failed to comply with.

After due hearing, the learned trial judge found for the plaintiffs and held that there was breach of contract and made specific awards to the six plaintiffs totalling several billion naira.

Dissatisfied, the respondent appealed to the Court of Appeal against the judgment of the trial judge as regards liability and quantum of damages. The lower court allowed the appeal, set aside the judgment of the trial court and also dismissed appellants' cross-appeal on quantum of damages. The lower court expressly held that the respondent was not liable for any breach of contract or for unlawful interference with the appellants' business.

The appeal to this Court is at the instance of the plaintiffs/appellants. In their brief, the appellants identified two issues for determina-

tion, namely,

"(a) Whether the Court of Appeal was right in reversing the finding of the lower court that the Defendant/Respondent unlawfully interfered with the business of the 3rd to 6th Plaintiffs/Appellants and

B (b) whether the award of damages made in favour of the 3rd - 6th plaintiffs/Appellants is sustainable in Law."

The respondent adopted these two issues formulated by the appellants. It is clear that these two issues are expressly directed to the case of 3rd to 6th appellants because 1st and 2nd appellants cease to be
C interested in the appeal.

The nature of the plaintiffs/appellants' claim, as averred in their amended statement of claim which of course they failed to prove, was that there was a subsisting contract between the parties. Whether or not
D there is a semblance of a legally binding agreement between the parties, that is, a situation where the parties to the contract confer rights and impose liabilities on themselves - will largely depend on whether there exists a mutual assent between them. Where there is doubt on whether
E the parties have concluded a legally binding agreement, the court has the responsibility to analyse the circumstances surrounding the alleged agreement and determine whether the traditional notion of 'offer' and 'acceptance' can be distilled from the purported agreement. The mutual assent
F must be outwardly manifested. The test of the existence of such mutuality is objective. See Norwich Union Fire Insurance Society v Price (1943) A.C. 455, p.463. When there is mutual assent, the parties are said to be ad idem. Now the two items 'offer' and 'acceptance', earlier referred to, call for some explanation in order to recognise whether or not
G the parties are ad idem. An 'offer' is an expression of readiness to contract on the terms specified by the offeror (i.e. the person making the offer) which if accepted by the offeree (i.e. the person to whom the offer is made) will give rise to a binding contract. In other words, it is by
H acceptance that the offer is converted into a contract.

The first question that calls for determination is whether there was a binding contract between the parties, and if so, whether there was a breach of same. On their part, the appellants maintain that they applied

to the respondent for irrevocable letters of credit to enable the 1st and 2nd appellant to import hops and other raw materials. Consequent to this, the respondent stipulated certain conditions - precedent to be met by the appellants before the letters of credit could be issued. These were set out in Exhibit 2. The appellants in evidence attested that they substantially complied with the conditions stipulated in Exhibit 2 excepts conditions 2, 3 and 8 for which they requested the respondent to waive. By another contract, the import licences of the 3rd to 6th appellants were to be put to use for production of beer and soft drinks and the profits be shared partly accruing therefrom would by the 3rd to 6th appellants and partly used to defray the outstanding loan of 1st and 2nd appellants. The appellants concluded their version of the transaction by putting the evidence Exhibits 10, 10(a) and 10(b) as copies of the established letters of credit that the Chairman and Managing Director of the appellants showed to their overseas creditor in convincing them as regards security for goods that would be supplied on credit to the appellants. When the appellants learned of the threat of cancellation of letters of credit by the respondents, they advised the respondent to reconsider the position and warned it of the inevitable damages that would result therefrom. In fact, this action was commenced as the respondent failed to heed appellants' warning.

For the respondent, it was contended that there was no concluded contract between the parties because the appellants failed to comply with the conditions stipulated in Exhibit 2 and submitted that even if there was a binding contract as alleged, its breach would avail only the overseas creditors of the appellants the right to initiate an action for breach of contract, but definitely not the appellants. It concluded by pointing out that Exhibit 10, 10(a) and 10(b) were not letters of credit but were forms which, if properly and completely furnished with the necessary details, would enable the appellants to obtain the desired letters of credit.

The learned trial judge, without embarking on detailed evaluation of the evidence placed before him regarding whether or not the parties concluded a binding contract, particularly as it related to the unfulfilled conditions 2, 3 and 8 under Exhibit 2, whether there was waiver of these

three conditions and whether there had been issuance of letters of credit in favour of appellant's overseas creditors, arrived at a precipitate conclusion that there existed a binding contract between the parties. But in allowing the appeal, the Court of Appeal denied that such a conclusion was tenable. In allowing the appeal, the Court of Appeal, inter alia, specifically found as follows:

1. *That some of the conditions-precedent to the issuance of irrevocable letters of credit were not complied with by the appellants.*
2. *That the respondent did not waive any of the conditions that were not complied with.*
3. *That the respondent did not issue any letters of credit and none was cancelled.*
4. *That the respondent was not liable to the appellants either in contract or tort.*

The alleged breach of contract arose from the cancellation of the letters of credit at the instance of the respondent. Clearly, if the respondent did not issue any letters of credit there was nothing to cancel. Indeed, it became obvious that where some of the conditions - precedent for the issuance of letters of credit were not performed, it was extremely difficult, in legal circle, to appreciate how one can either picture the existence of the alleged contract or objectively analyse the fancied contract between the parties in terms of 'offer' and 'acceptance'. Thus on appellants' admission that some conditions-precedence to the conclusion of a legally binding contract were yet to be complied with, it became certainly unarguable that there was no meeting of the minds between the parties that could lead to the conclusion that the parties were ad idem to the obligation on the issuance of a contract. Had the learned trial judge adverted his mind to this basic principle of the law of contract, he would have easily appreciated that it was wishful thinking to hold that the parties had concluded a legally binding contract. This clearly explains why the Court of Appeal had no difficulty in holding that the respondent was not liable in contract. It is worthy of note that the appellants never appealed against that finding.

In the face of this far-reaching position, the appellants now turned

to their alternative claim, i.e. that the respondent unlawfully interfered with the appellants' business. This found favour with the learned trial judge which it predicated on the lawful retention of the appellants' import licences. That approach, surely, could not avail either the court or the appellants, first, as that fact was not pleaded by the appellants, and second, this claim in the alternative was based on the alleged breach of contract on the part of the respondent, which as earlier stated, had been denied by the lower court. Respectively, I agree with and adopt, the reasoning of Ayoola, JCA, as he then was, when in his judgment, he observed thus:

"Although the judge purported to find the claim for unlawful interference established. It is clear that the alternative claim was predicated on there being a contract and a breach of that contract. The defendant has appealed against the "whole decision" which must include the judge's view on the alternative claim. It is evident that if there was no breach of contract and if the condition precedent to the performance by the defendant of any obligation has not been fulfilled, there would be no unlawful interference with business as the two claims were based on the same facts. The whole tenor of the appeal had been to challenge the basis of the whole decision. In the result, the consequence of allowing the appeal is to set aside the whole decision and substitute therefore an order dismissing the action in its entirety."

What this boils to is that since the trial court premised respondent's liability on the alternative claim of unlawful interference with business of the appellants by the respondent's breach of the alleged contract that was discredited by the lower court, it necessarily follows that the non-existence of the contract alleged completely negated the alternative claim of unlawful interference with business. In effect, the appellants, as plaintiffs, had no cause of action. The Court of Appeal was right to have set aside the judgment of the trial court wherein it upheld the alleged contract.

Since the lower court had found that the respondent was not liable to the appellants either in contract or in tort, a finding I am in full agreement, with no useful purpose will be served to consider the issue of

damages the award in respect thereof the lower court set aside. I would accordingly affirm the decision on damages.

In the result, this appeal fails and I dismiss it with N10,000.00 costs.

B _____

EJIWUNMI JSC

C I have had the privilege of reading in advance the judgment just delivered by my learned brother Ogundare JSC. In the said judgment the facts that led to this appeal have been adequately reviewed and I also agree with the reasoning in respect of the issues raised for the determination of the appeal which resulted in the dismissal of the appeal in its entirety.

D For all the reasons so advanced in the lead judgment, I also dismiss the appeal with costs in the sum of N10,000.00 in favour of the respondent.

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