

**SUPREME COURT OF NIGERIA**  
FRIDAY 22ND FEBRUARY, 2002. SC. 98/2000  
**CORAM:- M. E. OGUNDARE, S. U. ONU, U. A. KALGO,**  
**S. O. UWAIFO, E. O. AYOOLA, JJSC**

ALEX O. ONWUCHEKWA	..... APPELLANT
AND	
NIGERIA DEPOSIT INSURANCE	
CORPORATION (Liquidator of	..... RESPONDENT
Co-operative & Commerce Bank Nig Ltd)	

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PLEADINGS - Statute of limitation - Need to plea - Whenever a statute is relied on as a bar to an action - Same should be specially pleaded (H1)

PLEADINGS - Defence of illegality - Proof - Defendant must state facts of the illegality he relies on - And the statute that has been contravened (H2)

STATUTES - Prohibition - Exchange Control Act s. 1 - The prohibition is not absolute - As absence of permission is a fact - Which must be alleged (H3)

CONTRACTS - Claim - Validity of - Claim under a lawful contract will not fail - By reason of illegality of another contract - If plaintiff can establish his case - Without reference to the illegal contract (H4)

CONTRACTS - Appeals - Misconception - Effect - Where an appellate court misconceives appellant's case - Its decision can hardly be right (H5)

CONTRACTS - Breach - Establishment - To establish breach of contract - Appellant need not prove entering into contract with a third party (H6)

CONTRACTS - Defence of illegality - Who can raise - Stranger to illegal transaction will not be allowed - To raise defence of illegality in such a transaction (H7)

**ACTIONS** - Public policy - Consideration of - Court should consider whether to allow a claim will be contrary to public policy - Or a denial of same will amount to injustice (H8)

**STATUTES** - Interpretation - Exchange Control (Anti-Sabotage) Act - The mischief which the Act was aimed at - Is not included in circumstances of this case (H9)

**COMPANY LAW** - Actions - Right of action - CAMA s. 425 - Liquidator in a winding up by court - Shall have power to bring or defend - Action on behalf of a company (H10)

### ***FACTS***

Plaintiff/appellant was a businessman and customer to Co-operative and Commerce Bank (Nig) Ltd (being liquidated by Nigeria Deposit Insurance Corporation) i.e. defendant/respondent. Sometime in 1983, appellant received a contract from the then Federal Electoral Commission to supply certain goods pursuant to which the Commission requested the Central Bank and respondent to make available foreign exchange to appellant. Appellant duly requested respondent to undertake the submission, processing and obtaining from the Central Bank and to request approval for the remittance to appellant's overseas suppliers (Tellscar Ltd. of London) the sum of £32,500 being the value of the goods to be imported into Nigeria. Appellant gave respondents the necessary documents and paid the sum of money required demanded by respondent for the transaction. Appellant took delivery of the goods air freighted to Nigeria by his suppliers but respondent failed to remit the purchase price to the overseas suppliers and neglected to complete fully the form transmitted to the Central Bank. The default persisted till a new military administration introduced a Trade Debt Refinancing Scheme which affected uncompleted transactions like appellant's and requiring defaulting banks to re-submit necessary application for remittance.

In consequence of the non-remittance of the sums, appellant's suppliers refused to entertain fresh orders from him and he had to secure from another source foreign exchange which he paid to his suppliers. He therefore suffered loss and damage which resulted in

the institution of this action at the High Court of Enugu State, Enugu. Appellant claimed the sum of £32,500 being indemnity for the value of the money which respondent negligently failed to remit to London and damages for breach of contract on the part of respondent. Respondent contended that it performed all necessary duties in accordance with banking practice towards the transaction and information supplied by appellant. After the hearing, the court held that respondent was negligent. Judgment was thus entered for appellant. Dissatisfied, respondent appealed to the Court of Appeal, Enugu. The appeal was allowed by majority judgment of the court. Aggrieved, appellant filed appeal at Supreme Court.

## **HELD**

(Unanimously allowing the appeal per

### **AYOOLA JSC)**

*Statute of limitation - Need to plea*

**1. I am in agreement with Akpabio, JCA, who in his dissenting judgment held the view that on the pleadings illegality had not been raised as a defence. The respondent who averred that “plaintiff negligently caused the delay in processing his documents” but added as separate sentence thereto “And illegally paid his suppliers” cannot be rightly said to have pleaded the illegality of any transaction or that he was relying on any statute. A cardinal rule of pleading is that whenever a statute is relied on as a bar to the action it should be specially pleaded.**  
(p. 378 B)

*PLEADINGS - Defence of illegality - Proof*

**2. Also, a defendant who relies upon the defence of illegality should state the facts on which he relies in his pleadings. The law is well put in Bullen & Leake & Jacob’s Precedents of Pleadings p. 1199 that:**

**“Where the defendant relies upon the defence of illegality, he should distinctly raise that defence by his pleading, and should state the facts or refer to facts already stated in the statement of claim, so as to show clearly what the illegality is: If a man ‘intended to charge illegality, he must state facts for**

***the purpose of showing what the illegality is. Bullivant v. Attorney-General for Victoria [1901] A C 196, per Lord Davey at 204.***

**A defendant who alleges that the plaintiff has acted illegally in the sense that he had acted in a contravention of a statute  
B must plead what statute had been contravened and in what regard. (p. 378 D)**

*STATUTES - Prohibition - Exchange Control Act s. 1*

**C 3. In this case the prohibition in section 1 of the Act was not absolute. The acts prohibited must have been done “without the permission of the appropriate authority.” Absence of permission of the appropriate authority is a fact which must be alleged even though the onus of proving due permission would  
D be on the person making the payment or doing anything for which permission is prescribed by section 1 of the Act.  
(p. 378 G)**

*CONTRACTS - Claim - Validity of*

**E 4. The law is clear that where the plaintiff’s claim is under a lawful contract such will not fail by reason of illegality of another contract if the plaintiff can establish his case without reference to another illegal contract to which he is a party.  
F (p. 379 B)**

*CONTRACTS - Appeals - Misconception - Effect*

**G 5. In these circumstances the majority of their Lordships of the Court of Appeal were wrong when they approached the matter on the basis that the appellant “seeks to recover from the (respondent) the money he paid in contravention of the Exchange Control (Anti-Sabotage) Act of 1984.” Whether the appellant did or did not pay his suppliers was not a material averment to his cause of action as long as he was able to show,  
H in regard to the breach of contract that there was a breach and in regard to negligence that he suffered damages. The trial court and the court below found both established not at all on the basis that he had paid his overseas suppliers.**

**It is evident that the conclusion arrived at by the major-**

**ity of the court below is flawed by a misconception of the appellant's claim which led to a failure to apply the appropriate principles of law. Where an appellate court misconceives a plaintiff's case, its decision can hardly be right.**

**The majority of the court below took a wrong turning when they misconceived the appellant's claim and proceeded to use a transaction which they described as illegal, to which the respondent was not a party and which had no direct relevance to the contract in respect of which the action was brought or to the liability of the respondent under that contract, to deprive the appellant of his rights under a perfectly legal transaction.** (p. 380 C)

*CONTRACTS - Breach - Establishment*

**6. Whether the appellant's claim is regarded as a claim in contract or one in negligence, it is clear that the basis of his claim was the contract he had with the bank for the remittance of funds to his suppliers overseas. To establish a breach of that contract or negligence in its performance he did not need to allege and prove that he entered into a contract with a third party. "If a person asserts a right in the law of tort and the tort claim is one in respect of which the plaintiff must show a contract as a necessary element, then it would seem that for the tort claim to be good the plaintiff must show a lawful, not illegal, contract."** (p. 380 F)

*CONTRACTS - Defence of illegality - Who can raise*

**7. Besides, necessary consequence should have been given to the fact that a stranger to an alleged illegal transaction will not normally be allowed to raise a defence of illegality founded on a transaction to which he is not a party.** (p. 381 E)

*ACTIONS - Public policy - Consideration of*

**8. It is to be observed that public policy is at the root of the defence of illegality. A decision to allow the defence or permit recovery sometimes cannot be divorced from public policy considerations. Sometimes it is expedient to consider whether to allow the plaintiff's claim will be contrary to public policy**

**or whether to deny the claim on the ground of the defence of illegality will occasion him such an injustice as to be contrary to another aspect of public policy which is that a citizen should not without just cause be deprived of his entitlements. The court is not precluded from weighing competing aspects of public policy and, after so doing, from deciding which one should be the overriding public policy in each particular case.**  
(p. 381 G)

**STATUTES - Interpretation - Exchange Control (Anti-Sabotage) Act**  
**9. Such deeper reflection in this case would no doubt have necessitated such construction of the Act that would reflect the mischief at which the Act aimed, which in this case, as the preamble showed, “was to make special penal provisions with respect to acts subversive of the exchange control legislation in force in the country.” It is to be doubted if the Act was designed to prohibit such casual family transaction as the appellant’s relation in London helping him to pay his indebtedness overseas when there was nothing to show that the transaction was a contrivance to circumvent our exchange control laws. The ambit of section 1 of the Act is so wide as to be absurd were it to be construed literally without qualifications. For instance a resident of Nigeria who on a visit to London borrowed £10 to pay his taxi fares to the airport would have committed an offence, and one who borrowed or even got a gift of £50 which he paid into his London account from which he issued a cheque to settle his hotel bills would similarly have committed a contravention of one paragraph or the other of section 1(1) of the Act, examples can be multiplied all going to show that the courts were bound to imply qualifications in the provisions of section 1 of the Act. Since, however, the Act itself has been repealed in 1995 by section 38(1) of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree No. 17 of 1995, any comment on the Act beyond what may be necessary for the case in hand is of purely historical and academic interest. Suffice it to say that for the purpose of this case enough attention had not been paid, first to the mischief at which the Act aimed and, secondly, to the**

***absence of any evidence to show that the offer of the appellant's relations to make funds available to him in England to pay his debts, without more, came within that mischief.***

(p. 382 E)

*COMPANY LAW - Actions - Right of action*

***10. The provisions of an enactment should not be read so as to deny access to the court. There is nothing in section 417 which prohibits such company as is described in the section from proceeding with action or proceedings against another person. What that section prohibited subject to leave of the court is proceeding with an action or proceedings against the company. By virtue of section 425(1)(a) of the Companies and Allied Matters act the liquidator in a winding up by the court shall have power, with the sanction either of the court or of the committee of inspection, to bring or defend any action or other legal proceeding in the name and on behalf of the company. I do not read section 417 as introducing a further restriction of what is permitted by section 425(1)(a).***

(p. 383 G)

## NOTABLE POINT OF INTEREST

### **AYOOLA JSC**

#### ***1. Procedure to follow when court feels uneasy about its conclusion***

When a court feels uneasy about the justice of its conclusion it should pause to examine the relevant law and facts more deeply before it accords finality to such conclusions. (p. 382 D)

### **REPRESENTATION**

P. I. N. Ikwueto Esq., for the appellant

C. C. Ngwuluka Esq., for the respondent

### **CASES REFERRED TO**

Coburn v. Collins (1877) 35 Ch. D 373

Bullivant v. A-G for Victoria (1901) AC 196

St. John Shipping Corp. v. J. Rank Ltd (1956) 3 All ER 683

Hadley v. Baxendale (1954) 9 Exch. 314

Victoria Laundry (Windsor) v. Newman Industries (1949) 1 All ER 997

Koufos v. C. Czarnikow Ltd (The Heron II) (1969) 1 AC 350

**B STATUTES REFERRED TO:**

Exchange Control (Anti-Sabotage) Act Cap 114, LFN, 1990, ss. 1(1)(a)(i)(v),(e)

Companies & Allied Matters Act, LFN, 1990, ss. 417 & 425(1)(a)

**C**

**LEAD JUDGMENT BY AYoola JSC**

The appellant, Alex O. Onwuchekwa, has appealed to this court from the decision of the Court of Appeal (Tobi and Ubaezonu, JJCA Akpabio, JCA, dissenting) whereby the appeal of Nigerian Deposit Insurance Corporation (Liquidator of Co-operative & Commerce Bank (Nigeria) Ltd.) (Now “*the respondent*”) was allowed and judgment was entered dismissing the appellant’s claim.

In the High of Court of Enugu State the appellant claimed against the CO-operative and Commerce Bank (Nigeria) Ltd. (“*the bank*”) the “*sum of £32,500 (Thirty-two Thousand, Five Hundred Pounds Sterling) being an indemnity or recompense for the value of the money which the defendant negligently failed to remit to London on the plaintiff’s instruction*” and damages for negligence and/or breach of contract on the part of the defendant.

The appellant who was a businessman and the bank’s customer sometime in 1983 received a contract from the Federal Electoral Commission to supply certain good pursuant to which the Commission requested the Central Bank and the respondent to make available foreign exchange to the appellant. The appellant duly requested the respondent to undertake the submission, processing and obtaining from the Central Bank and to request approval for the remittance to the appellant’s overseas suppliers (Tellscar Ltd. of London) the sum of £32,500 being the FOB value of the goods to be imported into Nigeria. The appellant gave the respondent necessary documents and paid the equivalent sum of money (including bank commission) demanded by the respondent for the processing and remittance of the price of the said goods through the normal banking procedure. The appellant duly took delivery of the goods which were



air freighted to Nigeria by his suppliers.

However, the respondent failed to remit the purchase price of the goods to the overseas suppliers and neglected to complete fully the form transmitted to the Central Bank. The respondent continued to default by non-remittance of the price of the said goods until a take-over of government ushered in a new military administration which introduced a Trade Debt Refinancing Scheme affecting banks, such as the respondent, to re-submit necessary applications for remittance. The appellant alleged that the respondent in responding to the Central Bank's circular for the Scheme "*did not exercise due care and diligence in filling the requisite forms.*"

The respondent's "*negligence, wrong figures, careless filling of forms and utter disregard to the care required in processing the application caused the non-remittance of the sums involved in the suit.*" In consequence of non-remittance of the sum the appellant's suppliers refused to entertain fresh orders from the appellant. According to the appellant, in the circumstances he had to secure from another source foreign exchange with which he paid directly to Tellscar Ltd. He suffered loss and damage. Hence, his claim.

The substance of the respondent's defence was that it "*did all that was necessary and proper in banking practice and operations and relying at all times material on information supplied by the plaintiff.*" The rest of the defence was an expatiation of this main defence.

The trial judge after considering the evidence came to the conclusion that the respondent was negligent. Since nothing turns in this appeal on whether he was right or not in coming to that conclusion his grounds for so concluding are immaterial. Suffice it to say that he entered judgment for the appellant in the sum of £32,500.48p "*to enable him repay relatives and friends overseas who dipped hand into their pockets and paid the debt which the defendant defaulted (sic) him from paying*" and N100,000 damages.

On the respondent's appeal to the Court of Appeal from that decision the issues considered to be dominant by Ubaezonu, JCA, who delivered the leading judgment, was whether the act of the appellant in making arrangement for the payment of his overseas customers and in paying them offended the Exchange Control (Anti-Sabotage) Act (Cap 114: Laws of Nigeria, 1990).

Holding that the issues of illegality was raised in the state-

ment of defence by the bare averment that the appellant *“illegally paid his suppliers,”* Ubaezonu, JCA, proceeded to consider *“whether what the respondent did as disclosed by the evidence amount to an illegality.”* The evidence in question had consisted of the evidence of the appellant who in examination in chief had said:

B *“I made an arrangement with my friends and relations in Europe to settle the bills in foreign currencies. I did settle them. The overseas suppliers wrote me that he was paid while defendant (sic) still battling with remitting the money”;*

C and, under cross-examination, he said:

*“I discussed with my relations when they visited home so that when they went back to London they credited my account in London and I issued cheques to my foreign customers who acknowledged receipt for payment.”*

D From this evidence he held that the appellant in making payment to Tellscar Limited in London had made payment to or for the credit of any person resident outside Nigeria and had placed a sum to the credit of a person resident outside Nigeria in contravention, respectively, of section 1(1)(a)(i) and section 1(1)(a)(iv) of the Exchange Control (Anti-Sabotage) Act. He also said that the appellant  
E borrowed foreign currency outside Nigeria contrary to section 1(1)(e) of the Act.

The relevant sub-sections of section 1 of the Act are in the following terms:

F *“1(1) Any person who, whether or not before the commencement of this Act but not earlier than 1<sup>st</sup> October, 1979 does any of the following things, that is to say -*

(a) *without the permission of the appropriate authority -*

G (i) *makes any payment to or for the credit of a person resident outside Nigeria; or x x x x*

(vi) *places any sum to the credit of any person resident outside Nigeria x x x x*

H (e) *without the permission of the appropriate authority, and not being an authorized dealer, while resident in Nigeria buys or borrows any foreign currency outside Nigeria from or sells or lends any person other than an authorized dealer;*

*shall, notwithstanding anything to the contrary in any law, be guilty of an offence under this Act.”*

Relating these provisions to the evidence earlier quoted Ubaezonu, JCA, came to the crucial conclusion which in his opinion was conclusive of the appeal in the court below thus:

*“Now, the important issue in this case is that the respondent seeks to recover from the appellant the money he paid in contravention of the Exchange Control (Anti-Sabotage) Act of 1984. Can he do this? The answer is clearly and regrettably in the negative. No court should aid or assist illegality no matter the circumstances. I say “regrettably” because it seems to me that the failure to get the approval of the appropriate authority to remit the money paid to it (the appellant) was due to the negligence or incompetence of the appellant. The respondent in his effort to save his reputation and perhaps the reputation of this country from his overseas customers ran foul of the law. Be that as it may the hands of the Court are tied by the law (sic: viz) Exchange Control (Anti-sabotage) Act of 1984 Cap 114.”* D

With that opinion Tobi, JCA, agreed but not so Akpabio, JCA, who in a powerful and well considered dissenting judgment held the view that the question of illegality under the Exchange Control (Anti-Sabotage) Act was never canvassed in the pleadings at the trial and that even if the question had been raised, such contention would have been untenable as the contract between the parties was a simple and legitimate one. In his view the whole transaction in London between the Respondent (i.e. the present appellant) and his relations was a *“res inter alios”*. Even if any one was to complain it should have been the Central Bank and not the appellant. F

Their Lordship of the Court of Appeal were unanimous in the view that the respondent had committed a breach of contract. They also agreed on the nature of the loss for which the appellant could recover damages consequent on the breach. Ubaezonu, JCA, G after considering the principles relating to award of general damages in contract said:

*“With the above principles in mind the damages recoverable in this case would be in the first place the naira equivalent of the money to be remitted to the oversea suppliers to cover the cost of the commodity as well as the incidental expenses, if the respondent’s claim were in order. This amounted to £32,500 plus £50.48. In addition, the respondent suffered some other damage which flows directly from the breach.”* (Emphasis mine) H

The only reason the majority in the court below withheld judgment for the appellant was because it had been mentioned in his pleadings and evidence that he paid his suppliers. It was suggested that he “*could have left off everything about paying money to any person overseas as that did not concern the appellant.*” (Emphasis mine)

***I am in agreement with Akpabio, JCA, who in his dissenting judgment held the view that on the pleadings illegality had not been raised as a defence. The respondent who averred that “plaintiff negligently caused the delay in processing his documents” but added as separate sentence thereto “And illegally paid his suppliers” cannot be rightly said to have pleaded the illegality of any transaction or that he was relying on any statute. A cardinal rule of pleading is that whenever a statute is relied on as a bar to the action it should be specially pleaded. See Coburn v. Collins (1877) 35 Ch. D. 373, Hayward v. Lely (1887) 56 LT 418. Also, a defendant who relies upon the defence of illegality should state the facts on which he relies in his pleadings. The law is well put in Bullen & Leake & Jacob’s Precedents of Pleadings p. 1199 that:***

***“Where the defendant relies upon the defence of illegality, he should distinctly raise that defence by his pleading, and should state the facts or refer to facts already stated in the statement of claim, so as to show clearly what the illegality is: If a man ‘intended to charge illegality, he must state facts for the purpose of showing what the illegality is’ Bullivant v. Attorney-General for Victoria [1901] A. C. 196, per Lord Davey at 204.”***

***A defendant who alleges that the plaintiff has acted illegally in the sense that he had acted in a contravention of a statute must plead what statute had been contravened and in what regard.***

***In this case the prohibition in section 1 of the Act was not absolute. The acts prohibited must have been done “without the permission of the appropriate authority.” Absence of permission of the appropriate authority is a fact which must be alleged even though the onus of proving due permission would be on the person making the payment or doing any-***

**thing for which permission is prescribed by section 1 of the Act.**

Quite apart from the pleading question, was this a case in which the defence of illegality availed the respondent? The answer involves a consideration of a number of established principles of law against the undisputed background of the fact that the contract which formed the pillar of the appellant's claim was a lawful contract, it being, simply, a contract between customer and bank for the remittance of money overseas.

**The law is clear that where the plaintiff's claim is under a lawful contract such will not fail by reason of illegality of another contract if the plaintiff can establish his case without reference to another illegal contract to which he is a party.** However, confusion crept into the consideration of the appellant's case in the court below because the trial judge after rightly appreciating the cause of action had described inaccurately the purport of the appellant's claim in the relief he granted, and also, because, in one breath the majority of the Court of Appeal regarded the case as one in which the present appellant had sought "*to recover from the appellant the money he paid in contravention of the Exchange control (Anti-Sabotage) Act of 1984*" and, in another, one in which "*the damages recoverable in this case would be in the first place the naira equivalent of the money to be remitted to oversea suppliers...*" Ubaezonu, JCA, stated that -

*"as a result of the breach the respondent's business name has been blacklisted in England and there is no likelihood of his being able to do business with his suppliers or any other British firm. This is a serious damage which arises directly from the breach. It is my considered view that the respondent shall be entitled to substantial damages for the damage he has sustained whether the damages he has sustained are called general damages or by any other name. The trial court awarded N100,000. I see no reason to disturb the award."*

Yet, at the end of the day, the majority of the court below dismissed the appellant's case in its entirety by reason of illegality, even in regard to the claim for general damages, without advertent to the fact that the damages of N100,000 awarded was for breach of a contract which was not, and could not by any stretch of imagina-

tion be, at all tainted by any illegality.

Akpabio, JCA, was clear in his conclusion that the “*main complaint of the Respondent [the appellant here] against the Appellant [the respondent here] in not filling the appropriate form accurately thus making it impossible for the Central Bank to grant their approval within the time prescribed between the Respondent and his overseas suppliers.*” That view is consistent with the cause of action disclosed in the appellant’s statement of claim. It is clear from the relief sought by the appellant in the action that what he sought was ‘recompense for the value of the money which the defendant negligently failed to remit to London on plaintiff’s instruction and general damages “*for negligence and/or breach of contract on the part o the defendant.*” ***In these circumstances the majority of their Lordships of the Court of Appeal were wrong when they approached the matter on the basis that the appellant “seeks to recover from the (respondent) the money he paid in contravention of the Exchange Control (Anti-Sabotage) Act of 1984.” Whether the appellant did or did not pay his suppliers was not a material averment to his cause of action as long as he was able to show, in regard to the breach of contract that there was a breach and in regard to negligence that he suffered damages. The trial court and the court below found both established not at all on the basis that he had paid his overseas suppliers.***

***It is evident that the conclusion arrived at by the majority of the court below is flawed by a misconception of the appellant’s claim which led to a failure to apply the appropriate principles of law. Where an appellate court misconceives a plaintiff’s case, its decision can hardly be right. Whether the appellant’s claim is regarded as a claim in contract or one in negligence, it is clear that the basis of his claim was the contract he had with the bank for the remittance of funds to his suppliers overseas. To establish a breach of that contract or negligence in its performance he did not need to allege and prove that he entered into a contract with a third party.*** I quickly refer to two relevant principles in this regard.

The first is that:

*“It is not in every case that a plaintiff’s claim under one contract will fail because of illegality in another contract to which he is a*

party. *A claim under a lawful contract will not fail by reason of illegality in another contract if the plaintiff can make out his claim without reference to the illegal agreement.*"

The second is that:

***"If a person asserts a right in the law of tort and the tort claim is one in respect of which the plaintiff must show a contract as a necessary element, then it would seem that for the tort claim to be good the plaintiff must show a lawful, not illegal, contract."***

These two principles are usefully set out in Enonchong: *Illegal Transactions* (pub. 1998) at pp. 54 - 55. I gratefully adopt them.

I am of the view that learned counsel for the appellant was right when he submitted that: *"the consequences of the breach of this apparently legal contract are not to be affected by extraneous factors such as the Appellant's efforts to privately pay his overseas suppliers."* ***The majority of the court below took a wrong turning when they misconceived the appellant's claim and proceeded to use a transaction which they described as illegal, to which the respondent was not a party and which had no direct relevance to the contract in respect of which the action was brought or to the liability of the respondent under that contract, to deprive the appellant of his rights under a perfectly legal transaction. Besides, necessary consequence should have been given to the fact that a stranger to an alleged illegal transaction will not normally be allowed to raise a defence of illegality founded on a transaction to which he is not a party.***

It is right to observe, that Ubaezonu, JCA, and Tobi, JCA, felt constrained to dismiss the appellant's claim only because they felt that their hands were tied and, apparently, that all forms of illegality have the same consequence of defeating all claims against which a defence of illegality is raised. ***It is to be observed that public policy is at the root of the defence of illegality. A decision to allow the defence or permit recovery sometimes cannot be divorced from public policy considerations. Sometimes it is expedient to consider whether to allow the plaintiff's claim will be contrary to public policy or whether to deny the claim on the ground of the defence of illegality will occasion him such an injustice as to be contrary to another aspect of public policy***

**which is that a citizen should not without just cause be deprived of his entitlements. The court is not precluded from weighing competing aspects of public policy and, after so doing, from deciding which one should be the overriding public policy in each particular case.** It was in this vein, I believe, that Devlin, J. B said in *St. John Shipping Corp. v J. Rank Ltd.* [1956] 3 All ER 683:-

*"It may be questionable also whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression. Commercial men who have unwittingly C offended against one of a multiplicity of regulations may nevertheless feel that they have not thereby forfeited all right to justice, and may go elsewhere for it if courts of law will not give it to them... I have said enough, and perhaps more than enough, to show how important it is that the courts should be slow to imply statutory prohibition of D contracts and should do so only when the implication is quite clear."*

I have digressed slightly to show that the majority of the court below may not have been as helpless in the particular circumstances of this case as they thought they were. When a court feels uneasy about the justice of its conclusion it should pause to examine the E relevant law and facts more deeply before it accords finality to such conclusions.

**Such deeper reflection in this case would no doubt have necessitated such construction of the Act that would reflect the mischief at which the Act aimed, which in this case, as the F preamble showed, "was to make special penal provisions with respect to acts subversive of the exchange control legislation in force in the country."** It is to be doubted if the Act was designed to prohibit such casual family transaction as the G appellant's relation in London helping him to pay his indebtedness overseas when there was nothing to show that the transaction was a contrivance to circumvent our exchange control laws. The ambit of section 1 of the Act is so wide as to be absurd were it to be construed literally without qualifications.

H **For instance a resident of Nigeria who on a visit to London borrowed £10 to pay his taxi fares to the airport would have committed an offence, and one who borrowed or even got a gift of £50 which he paid into his London account from which he issued a cheque to settle his hotel bills would similarly have**



**committed a contravention of one paragraph or the other of section 1(1) of the Act. Examples can be multiplied all going to show that the courts were bound to imply qualifications in the provisions of section 1 of the Act. Since, however, the Act itself has been repealed in 1995 by section 38(1) of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree No. 17 of 1995, any comment on the Act beyond what may be necessary for the case in hand is of purely historical and academic interest. Suffice it to say that for the purpose of this case enough attention had not been paid, first to the mischief at which the Act aimed and, secondly, to the absence of any evidence to show that the offer of the appellant's relations to make funds available to him in England to pay his debts, without more, came within that mischief.** In my judgment the majority of the Court of Appeal should not have held that a defence of illegality had been properly raised and, if it had been, that it was established so as to defeat the appellant's claim.

Before I part with this appeal, I add that I do not think there is substance in the argument raised by counsel for the appellant that the proceedings in the court below were a nullity. On 14<sup>th</sup> November 1996 the bank filed its notice of appeal from the decision of the High Court in the court below. On 12<sup>th</sup> March 1998 a winding up order was made against the bank. On 15<sup>th</sup> June 1998 the court below gave judgment in the appeal. On these facts counsel for the appellant argued that by virtue of section 417 of the Companies and Allied Matters Act the proceedings were a nullity. That section provides that:

*"If a winding up order is made or a provisional liquidator is appointed, no action or proceedings shall be proceeded with against the company except by leave of the court."*

**The provisions of an enactment should not be read so as to deny access to the court. There is nothing in section 417 which prohibits such company as is described in the section from proceeding with action or proceedings against another person. What that section prohibited subject to leave of the court is proceeding with an action or proceedings against the company. By virtue of section 425(1)(a) of the Companies and Allied Matters act the liquidator in a winding up by the**

***court shall have power, with the sanction either of the court or of the committee of inspection, to bring or defend any action or other legal proceeding in the name and on behalf of the company. I do not read section 417 as introducing a further restriction of what is permitted by section 425(1)(a).***

B Be that as it may, the appellant having succeeded on what I consider to be the main issue in the appeal, I allow the appeal. I set aside the decision of the Court of Appeal allowing the respondent's appeal in that Court. I restore the judgment of the High Court whereby judgment was entered for the appellant in the sum of £32,500.48p and N100,000 being general damages. For avoidance of doubt I state that the first sum awarded is as claimed by the appellant "*rec-ompense for the value of the money which the defendant negligently failed to remit to London on plaintiff's instructions*", and that the D second sum is general damages for breach of contract. I award to the appellant N5,000 being costs of the appeal in the court below and N10,000 being costs of this appeal.

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E **OGUNDARE JSC**

I agree entirely with the judgment of my learned brother Ayoola JSC just delivered. I have nothing more to add.

I abide by his order for costs.

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F **ONU JSC**

Having read in advance the leading judgment of my learned brother Ayoola, JSC, I entirely agree with his resolution and conclusion that the appeal succeeds. I have nothing further to add thereto.

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**KALGO JSC**

H I have had the advantage of reading in draft, the judgment just delivered by my learned brother Ayoola JSC and I entirely agree with him that there is merit in the appeal.

Illegality, which the Court of Appeal (majority decision) used to set aside the decision of the trial court, has not been specifically pleaded by the respondent at the trial, and even the relevant appli-

cable law, Exchange Control (Anti-Sabotage) Act has not been pleaded in any particular way. The claim of the appellant before the trial court was completely misunderstood by the Court of Appeal. It was not for money in foreign exchange, which the appellant paid his suppliers in London for goods supplied from the funds borrowed from his relative but for recompense for value of money the respondent negligently failed to remit on his instructions and for damages for breach of contract/negligence for failure to do so. It is clear that both the trial court and the Court of Appeal found evidence of negligence/breach of contract against the respondent notwithstanding evidence of payment of the money by the appellant. It is therefore wrong for the Court of Appeal (majority decision) to defeat the appellant's action by bringing in the issue of illegality not specifically pleaded and irrelevant to the claim of the appellant.

In the circumstances, I also allow the appeal, set aside the decision of the Court of Appeal (majority decision) and restore the decision of the trial court. I award N10,000.00 costs to the respondent.

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### **UWAIFO JSC**

I read in advance the judgment of my learned brother Ayoola JSC. I am in full agreement with him that the appeal has merit for the reasons he has given.

A careful understanding of the claim shows that it is not to recover money paid to or borrowed from a person outside Nigeria by the appellant while resident in Nigeria. The fact that the appellant was able to meet his indebtedness through private arrangement after the respondent let him down is not an issue upon which his claim was founded. It is clearly irrelevant to his claim which is for "*an indemnity or recompense for the value of the money which the defendant negligently failed to remit to London on the plaintiff's instruction*" as well for damages for negligence and/or breach of contract on the part of the defendant.

It was on that basis the appellant claimed in essence for the value of the money he deposited with the respondent bank for remittance to his overseas creditors which, had it been so remitted, would have been worth £32,500.00. In addition, he claimed general

damages of N1,000,000.00 for negligence and/or breach of contract on the part of the respondent. It is plain to me that the Exchange Control (Anti-Sabotage) Act upon which the court below gratuitously relied was inapplicable. The claim stood on its own and could be prosecuted without reference to how the appellant privately settled his indebtedness overseas.

The trial court awarded the appellant the naira equivalent of a total amount of £32,550.48 and also N100,000.00 general damages for breach of contract. Nothing was said by the court below about the propriety of awarding the general damages and what they actually represent in the principles of award of damages in contract enunciated in *Hadley v. Baxendale* (1854) 9 Exch. 314 and as interpreted and restated in *Victoria Laundry (Windsor) v. Newman Industries* (1949) 1 All ER 997 and *Koufos v. C. Czarnikow Ltd. (The Heron II)* (1969) 1 A. C. 350. There is no complaint in regard to that before us by the respondent. I therefore will say no more on that other than to remark, albeit as an aside, that I should not be taken to have accepted the basis for that award made inconsistently with those established principles.

I am satisfied that the majority decision of the court below which reversed the judgment of the trial court upon which a misapplication of the Exchange Control (Anti-Sabotage) Act was wrong. I too allow this appeal, set aside the decision of the court below and restore the judgment of the trial court. I abide by the cost awarded by my learned brother Ayoola JSC.

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