

SUPREME COURT OF NIGERIA
FRIDAY 17TH MAY, 2002. SC. 58/1997
CORAM:- S. A. BELGORE, M. E. OGUNDARE,
E. O. OGWUEGBU, S. U. ONU, U. A. KALGO, JJSC

TSOKWA OIL MARKETING CO. NIG. LTD APPELLANT
AND
BANK OF THE NORTH LTD RESPONDENT

APPEALS - Notice of appeal - Regularization of - Effect of objection - Respondent is not foreclosed by the preliminary objection - From taking steps to regularize its position and correct errors objected to (H1)

APPEALS - Filing - Applicable laws - Filing of initial appeal is governed by Court of Appeal Act - While filing additional grounds is governed by the Court's rules - Thus noncompliance with the Act is fatal - But noncompliance with the rules is mere irregularity (H2)

APPEALS - Additional grounds - Filing - Objection to - Failure to raise - Effect - Since appellant did not object on the time frame within which the grounds were filed - He is deemed to have waived his right - To object to the appeal on that point (H3)

CONTRACTS - Establishment - Ingredients - For a contract to come into being - There must have been a definite offer by offeror - And a definite acceptance by offeree (H4)

EVIDENCE - Appeals - Reevaluation - Justification - Appellate court can reassess evidence - Where trial court's findings are perverse - Or the use made of a document goes beyond its evidential value (H5)

AGREEMENTS - Condition precedent - Binding nature of - Once a condition precedent is incorporated into an agreement - That condition precedent must be fulfilled - Before effect can flow (H6)

PLEADINGS - Document - Delivery - Onus of proof - In view of pleadings of both parties - Appellant has duty to adduce convincing

evidence - That Exhibit 92 was duly delivered to respondent (H7)

DOCUMENTS - Admission - Facts - Witness cannot admit facts not within his knowledge - As admission by a person of fact of which he knows nothing - Is of no evidential value (H8)

CONTRACTS - Terms - Nonperformance - Effect - Where a fundamental item is left unaccomplished - The same vitiates the contract (H9)

CONTRACTS - Binding nature of - Appellant's letter of acceptance - Is not enough to make the transaction a legally binding one - As he failed to meet the conditions precedent in Exhibit 75 (H10)

CONTRACTS - Discharge of - Means - Contract may be discharged by performance - Express agreement - Or by doctrine of frustration - And also by breach (H11)

APPEALS - Courts - Reliefs claimed - Failure to establish - Effect - Appellant is not entitled to relief awarded it by trial court - Since its claim was not established - Hence Court of Appeal was right to set aside damages awarded by trial court (H12)

FACTS

Plaintiff/appellant (an oil marketing company) was a customer of defendant/respondent. Dispute arose between the parties as to appellant's compliance with and respondent's cancellation of a performance bond earlier agreed upon. Consequently, Appellant sued respondent at the High Court of Taraba State, Wukari wherein it claimed the contract sum of N4,707,752.80 for failure of respondent to provide performance bond as earlier agreed by the parties. Appellant also claimed 10% interest on the said sum with effect from 17-10-91 until judgment and thereafter until final payment. At the trial, appellant called two witnesses in proof of its case and respondent called a lone witness in its defence. The court held in favour of appellant by granting the reliefs it claimed.

Respondent was dissatisfied. Hence, it appealed on eight grounds of appeal to the Court of Appeal Jos Division. Respondent

sought and was granted leave to file two additional grounds. However, respondent did not bother to file the said grounds. It rather proceeded to file its brief of argument wherein it canvassed its proposed issues one and two relating to the said grounds which had not yet been filed. In response, appellant filed a notice of preliminary objection challenging the anomaly. Respondent subsequently filed the additional grounds and also amended its brief of argument. In its judgment, the court disallowed the preliminary objection of appellant and allowed appeal of respondent. It dismissed the claim of appellant and set aside judgment of the trial court. Aggrieved, appellant filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

1. *Whether the judgment of the Court of Appeal, Jos delivered on 4th November, 1996 is an authenticated and valid judgment.*

2. *Whether the Court of Appeal was correct in allowing the Appellant to file an amended Appellant's Brief so as to accommodate the additional grounds 9 and 10 filed before the Court.*

3. *Whether the Appellant established his case before the trial High Court so as to entitle her to the award of N4,707,752.80 as damages for breach of contract.*

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

Notice of appeal - Regularization of - Effect of objection

1. Having regard to the grounds of objection and the argument proffered in the Appellant's Brief at the Court below, I take the firm view that the decision arrived at by the court below set out above is right such that when objection was raised on the Respondent's Brief of argument on the two additional grounds of appeal, the Respondent quickly took the right steps to regularize its position. Thus, in an analogous situation in the case of *Shanu v. Afribank (Nig.) PLC (2000) 13 NWLR (Part 684) 392 at 404 F. Ayoola, JSC held:*

"The contention that this application should not be granted because a preliminary objection has been raised show-

ing the errors in the process of the applicant's appeal, is without substance. The applicant is not foreclosed by the Preliminary Objection from correcting those errors or starting the process afresh or a more appropriate footing." (p. 1410 A)

B APPEALS - Filing - Applicable laws

2. In the light of the above, the submission, that the argument proffered in respect of paragraphs 4.7 and 4.10 at page 5 of the Appellant's Brief be discountenanced is of no avail. While the decision of the court below is unassailable and unimpeachable on the issue, the law governing the filing of an initial and amended appeal are not the same. For, while an original appeal is governed by the provisions of the Court of Appeal Act, the filing of additional grounds of appeal is governed by the Court of Appeal Rules. Thus, the principles of law as to when to file each and the non-compliance differ. While non-compliance with the Act is fatal, the non-compliance with the Rules is mere irregularity. See also *Ogbomo v. The State* (1985) 1 NWLR (Part 2) 225 at 240 per Obaseki, JSC where incompetence and procedural irregularity were distinguished as two different things having different effects on a decision.

In the instant case, since there were valid subsisting grounds of appeal, the Appellant's argument that the additional grounds ought to have been filed within three months should be discountenanced. There is no statutory provision relating to filing additional grounds of appeal in the Court of Appeal Act. The issue of Additional Grounds of Appeal is a procedural point contained in the Court of Appeal Rules. The case of *Ikeme v. Anakwe* (2000) 8 NWLR (Part 669) 484, a decision of the Court of Appeal sitting in Jos relied on is inapplicable. It relates to enlargement of time within which to file a substantive Notice of Appeal. (p. 1410 D)

H APPEALS - Additional grounds - Filing - Objection to

3. The Appellant having failed to raise objection on the time frame within which the additional grounds were filed is deemed to have waived any right to object to the appeal on that point. Cases relating to time frame for filing additional grounds of

appeal are regarded as mere technicalities which this Court has for long now been frowning at. (p. 1411 B)

CONTRACTS - Establishment - Ingredients

4. It must be remembered that for a contract to come into being in law there must have been a definite offer by the offeror and a definite acceptance by the offeree. (p. 1418 B)

EVIDENCE - Appeals - Reevaluation - Justification

5. The Appellant has contended that the Court below erroneously interfered with the findings of the trial Court which has not been demonstrated to be perverse. But this is not correct because the law is that while it is normally the prerogative of the trial court to admit, assess and consider evidence, an appeal court can in appropriate circumstances such as where the findings of the trial court were perverse or the use made of a document goes beyond its evidential value, particularly in respect of documentary evidence, reconsider and reassess the evidence and apply it if the justice of the case so require. A careful examination of the oral and documentary evidence on Record reveals that the findings of the trial court were perverse and were rightly interfered with by the court below. (p. 1420 B)

AGREEMENTS - Condition precedent - Binding nature of

6. From the evidence on record, it is clear that there is a condition precedent in the parties' arrangement. It is trite law that once a condition precedent is incorporated into an agreement, that condition precedent must be fulfilled before the effect can flow. (p. 1421 B)

Document - Delivery - Onus of proof

7. As the Respondent denied receipt of such documents in any of its branches and both parties joined issues as to whether or not the Appellant fulfilled the preconditions for there to be a binding contract between them, in view of the state of the pleadings, the onus lay on the Appellant to adduce convincing evidence that Exhibit 92 was duly delivered to the Respon-

dent. Thus, as Iguh, JSC put it in *Ajuwon v. Akanni* (1993) 9 NWLR (part 316) 182 at 200:

B *“It is one thing to aver a material fact in issue in one’s pleadings and quite a different thing to establish such a fact by evidence. Where a material fact is pleaded and is either denied or disputed by the other side, the onus of proof clearly rests on he who asserts such a fact to establish the same by evidence. An averment in pleadings is not and does not tantamount to evidence and must therefore be established by satisfactory evidence unless the same is expressly admitted.”* (Underlining is mine for emphasis). (p. 1422 A)

DOCUMENTS - Admission - Facts

D 8. With respect to the Appellant, an answer that someone is not aware of the existence of a fact is not an admission that the thing is actually in existence.

E It is trite law that a witness cannot admit facts not within its knowledge and the fact that the Appellant’s witness exhibited ignorance as to whether or not the alleged documents were received in the Respondent’s Kano Office does not amount to an admission that the Respondent received same. In civil cases, it is trite law that an admission by a person of fact of which he knows nothing is of no evidential value vide Adeyemi v. State (1991) 6 NWLR (Part 195) 1 at 42 D - E. The Respondent having denied knowledge of the receipt of the documents in its Kano Office, the Appellant would have produced evidence of postage and delivery to Kano but that this it failed to do. The failure of the Appellant to satisfactorily prove that the remaining documents were duly delivered to the Respondent is fatal to its (Appellant’s) case. As has been demonstrated herein before, Exhibit 75 clearly shows that the transaction between the parties is a conditional one. To claim benefit under the contract, the Appellant must establish that H it satisfied all (not some of) the conditions. (p. 1422 F)

CONTRACTS - Terms - Non-performance - Effect

9. From the foregoing, I am of the firm view that in a case of contract, like the instant case, where there is a fundamental

term in the making of any term left unaccompanied (sic) vitiates the contract. See Adebajo v. Brown (1990) 3 NWLR (Part 141) 661 at 689 G per Agbaje, JSC wherein the learned Justice held:

“The point is covered by the general principle that where there is a fundamental term left undecided there is no contract.” B

For, as Achike, JSC put it more pointedly in Sparkling Breweries Ltd. v. UBN LTD. (2001) 15 NWLR (Part 737) 539 at 567:

“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 circles 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’.” C D
(p. 1423 F)

CONTRACTS - Binding nature of

10. Consequently, I hold that the Appellant’s letter of acceptance is not enough to make the transaction a legally binding one. See Innih v. Ferado A & C 5 NWLR (Part 152) 604 at 622 D - E where the Court of Appeal (per Kolawole, J.C.A.) held as follows: E

“In the instant case the acceptance is not operative for failure to fulfill all the essential components of an acceptance.” F

Thus, as the Appellant failed to meet the whole conditions in Exhibit 75, there could be no conclusive contract between the parties. (p. 1424 D) G

Ways of discharging a valid contract

11. A valid contract between parties may be discharged in one of four ways known to law, viz:

- (i) By Performance,**
- (ii) By Express Agreement,**
- (iii) By the Doctrine of Frustration and**
- (iv) By Breach**

In the instant case the applicable way of discharging H

Exhibit '75' is the last method. However, that option never availed the Appellant.

Issue 2 is accordingly answered in the affirmative and grounds 2 and 5 of the Amended Notice of Appeal are hereby dismissed. (p. 1424 F)

B

Courts - Reliefs claimed - Failure to establish - Effect

12. Since the Appellant woefully failed to establish its claim, it is not entitled to the relief awarded it by the trial court on the evidence adduced thereat. Consequently, the court below was justified in setting aside the trial court's judgment in which damages were awarded. Accordingly, I dismiss the Appellant's case in its entirety. (p. 1425 G)

D **REPRESENTATION**

P. A. Akubo Esq. for the appellant

M. A. Tende Esq. for the respondent

CASES REFERRED TO

E Ojomo v. Ijeh (1987) 4 NWLR (Pt. 64) 216

UBA v. Nwora (1978) 2 LRN 149

Sneade v. Wetherston Barytes (1994) 1 KB 295

Warner v. Sampson (1995) 1 QB 297

F Shanu v. Afribank (Nig.) PLC (2000) 13 NWLR (Pt. 684) 392

Nofi Surakatu v. Nig. Housing Development Society Ltd. (1981) 4 SC 20

Ekwere v. The State (1981) 9 SC 4

Ogbomo v. The State (1985) 1 NWLR (Pt. 2) 225

G Kossen (Nig.) Ltd. v. Savannah Bank Ltd. (1995) 12 SCNJ 29

Sonuga v. Anadem (1967) All NLR 98

Oguma Associate & Co. v. IBWA (1990) 1 NWLR (Pt. 125) 225

Egbunike v. A.C.B. (1995) 2 SCNJ 58

UBA Ltd. v. Tejumola & Sons (1988) 2 NWLR (Pt. 79) 662

H Okechukwu v. Onuora (2000) 5 NWLR (Pt. 691) 597

Sparkling Breweries Ltd. v. UBN Ltd. (2001) 15 NWLR (Pt. 737) 539

STATUTE REFERRED TO

Evidence Act, s. 151

BOOKS REFERRED TO

Stroud's Judicial Dictionary vol. 1 A-C p. 538

Cheshire and Fifoot, 9th Ed. p. 521

B

LEAD JUDGMENT BY ONU JSC

In the High Court of Taraba State holden at Wukari, the Plaintiff (hereinafter referred to as "the Appellant") filed an action by a writ of summons dated 22/10/91 against the Defendant (hereinafter called "the Respondent") in a claim founded in breach of contract in the sum of N4,707,752.80 (four million, seven hundred and seven thousand, seven hundred and fifty two Naira eighty Kobo) for the failure of the Appellant to provide performance bond as earlier agreed in writing. The Appellant in addition equally claimed 10% interest on the said sum with effect from 17th day of October, 1991 until judgment and thereafter until final payment. Subsequently, the writ was issued and served on the Respondent through its Manager at Rafin Kada Branch, Taraba State. Consequently, the Respondent entered an unconditional appearance on 9/12/91 through its solicitor. Pleadings were ordered, duly filed, exchanged and subsequently amended by the parties before the case eventually went to trial.

For purposes of clarity I hereby set out the Appellant's Further Amended Statement of Claim in paragraph 9 thereof as follows:

"9. WHEREFORE the plaintiff claims the sum of N4,707,752.80 (Four Million, seven hundred and seven thousand, seven hundred and fifty two Naira eighty Kobo) being special damages for breach of contract to provide the Plaintiff N300,000.00 facility or performance bond or executed deed of guarantee as agreed in writing by the Defendant and accepted by the Plaintiff... The Plaintiff also claims 10% interest on the above sum from November, 1991 until Judgment and also from date of judgment until full payment and also the full costs of this action."

The facts of the case giving rise to this appeal may be briefly stated as follows:

The Appellant, a limited liability company, carrying on the business of oil marketing and bridging throughout Nigeria was at all ma-

terial times to this action, the Respondent's customer at its Rafin Kada branch in Wukari Local Government Area Branch in Taraba State.

The Appellant in a letter dated 8th May, 1989 (Exhibit 74) requested the Respondent for a performance bond for N300,000.00 in order to enable it bridge petroleum products from the Nigerian
B National Petroleum Corporation depot.

The Respondent in response to the Appellant's application, gave conditions for the Appellant to comply with before the performance bond could be released to it. The conditions were stated in
C Exhibit 75 which is the Respondent's letter dated 3 October, 1989 and contained on page 175 of the Record of Appeal. The conditions succinctly stated are as follows:

"Release of the executed performance guarantee to be subjected to:-

D *(i) Execution of the deed of legal mortgage of property covered by certificate of occupancy No. 0136.*

(ii) Taking Comprehensive Insurance Cover of pledged property without interest duly noted.

E *(iii) Submission of company's recent past three (3) years audited accounts.*

(iv) Written acceptance of the terms and conditions governing the facility."

The Appellant, by Exhibit 76 dated 23 November, 1989, wrote
F to the Respondent accepting the conditions stated in Exhibit 75 but this merely complied with only the fourth condition thereof. The Appellant later forwarded the legal mortgage in respect of the first condition. After waiting for the Appellant to fulfill the other conditions stated above, the Respondent was compelled to write a reminder
G dated 31st May, 1990, which was admitted as Exhibit 96. It stated as follows:

*"We are in receipt of your letter dated 29th May, 1990 requesting we should release your guarantee (Performance Bond). We wish to reiterate the fact that we are still being guided by the four
H conditions communicated to you vide our letter reference RK/IS/11/TOMG/89 of 30th October, 1990, regarding the release of the performance bond. As we are yet to convince ourselves you have met the two remaining conditions here:*

1. Taking a Comprehensive Insurance Cover of the pledged

property without interest duly noted.

2. Submitting your company's recent past three (3) years Audited Accounts. We await your compliance to the above two items before releasing the performance bond."

The documents submitted by the Appellant in respect of the legal mortgage were later found to be defective and were rejected by the Respondent through its letter dated 13th June, 1990 which was admitted in evidence as Exhibit 98. The letter stated in part inter alia:

"We refer to your letter dated 19th February, 1990 and wish to inform you that the security documents you offered in pursuance of the above have been rejected for the following reasons:

(a) The statutory consent of the Governor of Gongola State was not obtained for the mortgage.

(b) The endorsed power of Attorney was not registered at the land registration office as required by law.

(c) The power of Attorney should be by way of a deed expressed to be irrevocable and for consideration (even if meager) and then stamped and registered."

While the first application was awaiting consideration, the Appellant wrote a fresh letter dated 19th February, 1990, altering the first request by increasing the value of the Performance Bond from N300,000.00 to N539,000.00. This letter was tendered in evidence but rejected. Having regard to the Appellant's new request in its letter of 19/2/90 coupled with its default to comply with the requisite preconditions, the Respondent in a letter dated 1st July, 1991, cancelled the Appellant's application for the performance bond. The letter was admitted as Exhibit 89 and it stated thus:

"RE: GUARANTEE (PERFORMANCE BOND) FORMALITIES FOR NNPC FOR N300,000.00. We have received your letter dated 25th June, 1991 on the above subject matter, particularly, requesting for the release of a N300,000.00 Performance Guarantee Bond to you. We wish to inform you that ever since you requested for an increase in the amount to be covered by the Performance Bond from N300,000.00 to (N539,000.00) we were instructed to cancel the N300,000.00 guarantee and to work towards meeting your fresh demand (N539,000.00). Therefore, we regret to inform you that the cancelled N300,000.00 has been sent to your Head Office through our Area Office."

The Appellant challenged this cancellation, contending that it did not only accept the Respondents offer but had fulfilled all the conditions in Exhibit 75.

The Appellant thereafter proceeded to call two witnesses in proof of its case and relied heavily on documentary evidence, largely admitted in the case without objection by Respondent. The Respondent on the other hand, called a lone witness by equally tendering a number of documentary evidence in its defence. After carefully reviewing the evidence adduced before it, and bearing in mind paragraph 9 of the Amended Statement of Claim as well as the final addresses by counsel respectively, the learned trial judge found for the Appellant by granting all the reliefs it sought.

Dissatisfied with the said decision of the trial court, the Respondent now Appellant, filed its Notice of Appeal on 23/12/93 containing eight grounds. The said Notice and Grounds of appeal dated 19th day of December, 1993 is at pages 214 - 216 of the Record. The Appellant thereafter sought and was granted leave to file two additional grounds of Appeal numbered 9 and 10 on 13th September, 1994. The Appellant did not unfortunately bother to file the said Additional Grounds of Appeal until 22/12/94, i.e., a period of more than 3 months after the leave referred to above was granted. Strangely enough, the Appellant proceeded to file its Brief of argument dated the 15th day of September, 1994 wherein it canvassed its proposed issues 1 and 2 relating to the Additional Grounds 9 and 10 which had not yet been filed at the Lower Court. In response, the Respondent filed a Notice of Preliminary Objection challenging this anomaly. The Appellant countered by filing the Additional Grounds on 22/12/94 but applied to amend its Brief of Argument. The Respondent followed up by equally amending its Brief dated 16th September, 1996. In its judgment dated the 4th day of November, 1996, the Court of Appeal (hereinafter in the rest of this judgment called the court below) disallowed the Preliminary Objection of the Appellant, allowed the appeal of the Respondent, set aside the judgment of the trial court and proceeded to dismiss the claim of the Appellant in its entirety. Hence, the final appeal by the Appellant to this Court.

The parties acting pursuant to the Rules of this Court filed and exchanged Briefs of Argument. At the hearing of this appeal on 27th February, 2002, the Preliminary Objection learned Respondent's

counsel had filed earlier having been withdrawn, his Notice of intention to rely upon a Preliminary Objection that this Court lacked jurisdiction to entertain and determine the Appellant's Notice of Appeal on the ground that the eight grounds of appeal assailing the decision arrived thereat was incompetent, was accordingly struck out.

The above motion out of the way, what was left for me to consider was the appeal proper. In my consideration of it, I wish to adopt the Respondent's three issues set out below since they appear to me to be more comprehensive and apt. I shall treat them seriatim as hereunder. Having regard to the Grounds of Appeal filed as amended, the issues the Appellant formulated in its Amended Brief as arising for determination in this appeal could be narrowed down into two as follows:

1. Whether the Court of Appeal was right in striking out and/or dismissing the preliminary objection raised by the Appellant's counsel bordering on the validity of the Additional Grounds of Appeal filed more than three months after Leave was granted to file same as well as the propriety of filing and arguing issues arising from the said Additional Grounds in the Respondent's Brief filed aforetime (Ground one).

2. Whether having come to the conclusion and rightly, too, that the Appellant sufficiently pleaded special damages and satisfactorily proved same, the Court of Appeal was right to have dismissed the Appellant's claim on the ground that the Respondent was not in breach of its contract and that the Appellant failed to meet the conditions in Exhibit 75 especially as the Appellant's claim was not for specific performance (Grounds Two, Three, Four, Five and Six).

The three issues proffered on behalf of the Respondent for our determination on the other hand, are:

3.01 Whether the judgment of the Court of Appeal, Jos delivered on 4th November, 1996 is an authenticated and valid judgment.

3.02 Whether the Court of Appeal was correct in allowing the Appellant to file an amended Appellant's Brief so as to accommodate the additional grounds 9 and 10 filed before the Court.

3.03 Whether the Appellant established his case before the trial High Court so as to entitle her to the award of N4,707,752.80 as damages for breach of contract.

ISSUE NO. 1

This issue which is predicated on ground one of the Appellant's Amended Notice of Appeal asks whether the court below was right in striking out its (Appellant's) Preliminary Objection.

B An examination of the circumstances leading to that decision may be gleaned from the following string of events. When on 23rd December, 1993, the Respondent filed its appeal against the judgment of the trial court, it had only eight grounds of appeal. On 13th September, 1994, the Respondent was granted leave to file two additional grounds of appeal. The order made by the Court below in C this respect read thus:

"Application is granted as prayed. The applicant is hereby granted leave to file two additional grounds numbering grounds 9 and 10. Leave is also granted to the applicant to raise and argue D points of law which were not raised in the court below. N150.00 costs to the Respondent."

As can be seen from the above order, there was no time limit given to the Respondent to file its additional grounds of appeal. Before filing the two additional grounds of appeal the Respondent E inadvertently filed its Brief on 21st November, 1994, incorporating argument on the two additional grounds. The Appellant discovered this error and immediately filed a Preliminary Objection on 6th December, 1994, challenging the Brief as it touches the two additional F grounds of appeal on 22nd December, 1994. With this development, the Respondent with leave of the court below, filed an Amended Brief which covered the said additional grounds of appeal.

On 13th February, 1996, the Appellant brought a motion which was granted for leave to file an amended Brief of argument. G On that day, the Appellant indicated that it intended to file a Preliminary Objection, invariably different from the earlier one filed on 6th December, 1994, which appeared to have been overtaken by events. This intended Preliminary Objection, it will be recalled, was never filed. In its further Amended Respondent's Brief, the Appellant did H not raise any Preliminary Objection. Rather, it merely formulated issue One for determination based on the only Preliminary Objection earlier filed. It proceeded to proffer argument on it.

When this appeal came up for hearing before the court below, the Appellant did not from the on set, indicate that it had a Prelimi-

nary Objection. The Respondent commenced argument by adopting its brief. Thereafter, the Appellant also adopted its brief. In its judgment, the Court of Appeal after reviewing the circumstances on which the Preliminary Objection was raised held:

"The facts which respondent's counsel put forward in support of his argument are these:

(a) Appellant filed his first brief of argument on 21/11/94.

(b) By leave of court, appellant filed additional grounds of appeal 9 and 10 on 22/12/84.

*(c) On 19/9/95, the appellant filed an "amended appellant's brief" which in its contents was the same as one previously filed on 21/11/94 save that the word "amended" to the caption on the said "appellant's brief." Counsel then submitted that since an amending process of court relates back to the date the amended process was filed, the "amended" appellant's brief filed on 19/9/95 must be taken to have been filed on 21/11/94 when the First appellant's brief was first filed. When that is done, then the "amended appellant's brief" would have come into existence before the additional grounds of appeal No. 9 and 10 which were filed on 22/12/94. Counsel relied on *Sneade v. Wetherton Barytes* (1994) 1 K.B. 295 and *Warner v. Sampson* (1995) 1 Q.B. 297 in support of his argument that court process of which amends another process previously filed relates back to the date the first process was first filed."*

I do not see any merit in the argument of respondent's counsel. It is a correct principle of law that an amended statement of claim relates back to the date the statement of claim was first filed. In other words an amended statement of claim is deemed to have been filed on the date the statement of claim was filed but this is only a legal fiction. A legal device to attain certain ends. It does not obliterate the fact that a particular process is filed on a particular date. The "amended appellant's brief in the instant case was filed on 19/9/95 and the additional grounds of appeal No. 9 and 10 were filed on 21/12/94. The said grounds of appeal therefore actually came into existence before the amended appellant's brief.

In the course of argument we asked respondent's counsel how he expected appellant's counsel to have overcome the procedural problem. Counsel said that the appellant's counsel should have filed a *'fresh brief and not an 'amended brief'*. But in that situation, the

latter brief which in substance alters the brief that had been filed earlier will still be an amended brief since its purpose is to amend an earlier brief. The Preliminary objection is struck out.

Having regard to the grounds of objection and the argument proffered in the Appellant's Brief at the Court below, I take the firm view that the decision arrived at by the court below set out above is right such that when objection was raised on the Respondent's Brief of argument on the two additional grounds of appeal, the Respondent quickly took the right steps to regularize its position. Thus, in an analogous situation in the case of Shanu v. Afribank (Nig.) PLC (2000) 13 NWLR (Part 684) 392 at 404 F. Ayoola, JSC held:

"The contention that this application should not be granted because a preliminary objection has been raised showing the errors in the process of the applicant's appeal, is without substance. The applicant is not foreclosed by the Preliminary Objection from correcting those errors or starting the process afresh or a more appropriate footing."

In the light of the above, the submission, that the argument proffered in respect of paragraphs 4.7 and 4.10 at page 5 of the Appellant's Brief be discountenanced is of no avail. While the decision of the court below is unassailable and unimpeachable on the issue, the law governing the filing of an initial and amended appeal are not the same. For, while an original appeal is governed by the provisions of the Court of Appeal Act, the filing of additional grounds of appeal is governed by the Court of Appeal Rules. Thus, the principles of law as to when to file each and the non-compliance differ. While non-compliance with the Act is fatal, the non-compliance with the Rules is mere irregularity. See Nofiu Surakatu v. Nigerian Housing Development Society Ltd. (1981) 4 SC. 20 re-affirmed in Ekwere v. The State (1981) 9 SC. 4. See also Ogbomo v. The State (1985) 1 NWLR (Part 2) 225 at 240 per Obaseki, JSC where incompetence and procedural irregularity were distinguished as two different things having different effects on a decision.

In the instant case, since there were valid subsisting grounds of appeal, the Appellant's argument that the addi-

tional grounds ought to have been filed within three months should be discountenanced. There is no statutory provision relating to filing additional grounds of appeal in the Court of Appeal Act. The issue of Additional Grounds of Appeal is a procedural point contained in the Court of Appeal Rules. The case of Ikeme v. Anakwe (2000) 8 NWLR (Part 669) 484, a decision of the Court of Appeal sitting in Jos relied on is inapplicable. It relates to enlargement of time within which to file a substantive Notice of Appeal.

The Appellant having failed to raise objection on the time frame within which the additional grounds were filed is deemed to have waived any right to object to the appeal on that point. Reliance placed by the Appellant on Kossen (Nig.) Ltd. v. Savannah Bank Ltd. (1995) 12 SCNJ 29 at 37; Sonuga v. Anadem (1967) All NLR 98 at 100; Ojomo v. Ijeh (1987) 4 NWLR (Part 64) 216 at 244 - 245 and United Bank for Africa Ltd. v. Nwora (1978) 2 LRN 149 at 155, cases relating to time frame for filing additional grounds of appeal are regarded as mere technicalities which this Court has for long now been frowning at.

In the light of the foregoing, my answer to issue number one as framed by the Respondent is in the affirmative and consequently I proceed to dismiss ground One of the Amended Notice of Appeal.

ISSUE 2

This issue which the Appellant submits relates to grounds two, three, four, five and six of the grounds of appeal attacks the dismissal of the Appellant's claim by the court below on the ground that it did not fulfill the conditions stipulated in Exhibit 75 and/or that the Respondent was not in breach of the contract with it (Appellant) respecting the performance bond or Deed of Guarantee for the sum of N300,000.00 (Three Hundred Thousand Naira). Learned counsel for the Appellant after pointing out that this issue calls for the examination of the question whether the Appellant discharged the requisite burden of proof upon it as to entitle it to its claim in special damages which has nothing to do with an order of specific performance submitted that the point of departure is to restate that the claim of the Appellant is for specific damages in the sum of N4,707,752.80 (Four Million, Seven Hundred and Seven Thousand, Seven Hun-

dred and Fifty Two Naira, Eighty Kobo) for breach of contract to provide N300,000.00 facility or performance bond or executed deed of guarantee. After referring us to paragraph 9 of the Amended Statement of Claim at page 38 of the Record learned counsel asked what were the facts grounding it as pleaded?

B The Appellant can confirm as common ground that it made application to the Respondent requesting for bank guarantee on the lifting of petroleum products from Nigeria National Petroleum Corporation (NNPC) from any Depot in Federation. The application is Exhibit '74'. That the Respondent gave approval for the performance bond of N300,000.00 vide Exhibit '75'; that as expected, the Appellant formally accepted the facility vide Exhibit '76'. Surprisingly, it is maintained, the Respondent cancelled the facility vide Exhibit 89 on the pretext that the Appellant requested for an increase in the amount D to be covered by the Performance Bond from N300,000.00 to N539,000.00, adding that there was no basis or justification for the cancellation of the said facility. After referring us unequivocally to several paragraphs of the Further Amended Statement of Claim to show that it fulfilled the conditions stipulated in Exhibit '75', the Respondent admittedly denied same in its own Amended Statement of Defence. It (Respondent) conceded though, that in point of fact, it perfected the Deed of Legal Mortgage and charged the expenses against the Appellant's account. The Appellant, it is stressed, had said E in his testimony in court that it complied with all the conditions stipulated in Exhibit '75' - evidence in support of which PW.1 eloquently supported both in examination-in-chief and under cross-examination F which remained unshakable.

Besides oral evidence in support of Appellant's averments in G its pleading on this score, it was maintained, there was equally overwhelming documentary evidence to corroborate the oral testimony. For instance, Exhibit '77' is the Deed of legal Mortgage as required by the first condition in Exhibit '75', Exhibits '78' and '79' are the debit notes to show that the Deed of Legal Mortgage was duly stamped H and registered; Exhibits '80', '81', and '82' are relevant tax clearance certificates submitted to the Respondent in compliance as requested while Exhibit '90' confirms that the Appellant met the necessary conditions. So also is Exhibit 92 emphasizing that Exhibit 89 which cancelled the facility did not suggest for a moment that it was so can-

celled because the Appellant did not fulfill the conditions stipulated in Exhibit 75. Far from it, adding that the said Exhibit '89' gave a different reason, namely, increase in amount to be covered by the performance bond.

On the other hand, it was stressed, DW.1 made a futile attempt to expand the scope of Exhibit '75' stating at the concluding part of his evidence in chief thus:

"The performance bond of N300,000.00 was not released because the Plaintiff company did not fulfill the Defendant company's conditions."

However, it was maintained, the said DW.1 gave himself away under cross-examination so much so that his claim that the Appellant did not fulfill the conditions in Exhibit '75' in examination-in-chief can only be taken with a pinch of salt and that he conceded this much under cross-examination when he said:

"I do not know about the submission of Tax clearance certificate because it was not submitted to our Branch but to the Area Office; if any document relating to the conditions are submitted to the Head Office or Area Office I would not know."

Nothing, it was further contended, could be further from the truth. Little wonder that the Appellant urged the Respondent vide Exhibit 88 to release the Deed of Guarantee having completed all formalities. The trial Court, it was pointed out found as a fact that the cancellation of the Deed of Guarantee was not based on non-fulfillment of conditions under Exhibit 75; that the trial Court equally came to the conclusion by agreeing with Appellant's counsel that the Respondent cannot bring the contract to an end after its conclusion and proceeded to hold that Exhibit 89 is tantamount to breach of contract which entitles the Appellant to damages.

It was submitted that on the basis of evidence adduced in this case it discharged the burden of proof that lay upon it, adding that the Respondent was unable to controvert in essential particulars and/or diminish the utility of 'Appellant's evidence that it fulfilled the conditions in Exhibit 75. It was further submitted that it is the law that where evidence is adduced on an issue and the same is not challenged under cross-examination, it is not right to disbelieve such evidence without giving sufficient reasons for doing so. Vide Ikuomola v. Oniwaya (1990) 3 NWLR (Part 146) 617. For the proposition that it

is settled law that evidence which is uncontroverted ought to be accepted. See the cases of Oguma Associate & Co. v. IBWA (1990) 1 NWLR (Part 125) 225; Egbunike v. A.C.B. (1995) 2 SCNJ 58 at 75; Musa v. Yerima (1997) 7 SCNJ 109 at 123, and Otuedon v. Olughor (1997) 7 SCNJ 411 at 434.

B The Court below, it is further submitted in its judgment, faulted the cancellation of the facility by the Respondent vide Exhibit 89 just because the Appellant asked for additional facility when he said:

C *"It may be correct that the defendant was wrong to have cancelled Plaintiff's request for N300,000.00 facility vide Exhibit 89 just because the Plaintiff had asked for an additional facility of N239,000.00. I think the two applications were separate and that they should have been so treated by the defendant."*

D It was further submitted that the above strictures of the Court below knocked the bottom out of the pretentious reason given in Exhibit 89 by the Appellant for the cancellation of the facility. That reason, it was submitted, collapses like a pack of cards and the Appellant stood vindicated. In any case, the Appellant contended, having confined itself to the sole reason in Exhibit 89, the Respondent is
E estopped from adducing an additional reason i.e. non-fulfillment of the conditions in Exhibit 75 as another ground for canceling the facility. Section 151 of the Evidence Act is relevant on the issue of estoppel operates in this case to prevent the Respondent from improvising another reason for cancellation of the facility. Reliance was placed on
F the cases of Rotimi v. Faforiji (1999) 6 NWLR (Part 606) at 326 - 327; Iga v. Amakiri (1976) 11 SC. 1 at 12 and Ehidimhen v. Musa (2000) 8 NWLR (Part 669) 540 at 556.

G On the burden of proof as it relates to the claim for special damages by the Appellant, learned counsel for him (Appellant) submitted how pertinently the court below profoundly expressed its satisfaction therewith when it positively found in the lead judgment thus:

H *"I think that the Plaintiff in this case has pleaded the details of the special damages claimed as required by law. As to whether the Plaintiff called satisfactory evidence to prove the special damages claimed, it is my view that the Plaintiff did call satisfactory evidence."*

Surprisingly, and in a rather disappointing anti-climax, learned Appellant's counsel submitted, the court below nevertheless made an order allowing the Respondent appeal set aside its judgment and

dismissed the Appellant's suit. In coming to this conclusion, it was maintained, the court below nevertheless set aside the judgment of the trial court awarding damages in the sum of N4,707,752.00 to the Appellant and made an order dismissing Appellant's Suit of the certified but unauthenticated true copy of the lead judgment. In coming to this conclusion, it was stressed, the court had held that the Respondent was not in breach of the contract and that the Appellant had failed to meet the conditions set by the Respondent. It is further the contention of the Appellant that the court below acted erroneously in interfering with sound findings of facts of the trial court by setting same aside and dismissing Appellant's case, the issue of satisfaction or non satisfaction of the conditions in Exhibit 75 being one based on the credibility of the witnesses against the backdrop of their evidence. That being so, the Appellant contended learned counsel, the trial court that saw, listened and watched the parties witnesses was in a better position to properly assess those witnesses. A fortiori, the court below was not justified in interfering with evidence based on credibility. The cases of *Ajagbonna v. Iledare* (1997) 10 SCNJ 33; *Agbabiaka v. Saibu* (1998) 10 NWLR (Part 571) 534 at 546; *Odibu v. Muemue* (1999) 10 NWLR (Part 622) 174 at 184 were relied on.

It is settled law, it was further submitted, that evaluation of evidence and ascription of probative value falls within the domain of the trial court and as such the Appeal Court will not interfere and substitute its own view thereof unless such is shown to be perverse. The cases of *Dakur v. Dapal* (1998) 10 NWLR (Part 571) 573 at 586; *Enang v. Adu* (1981) 11 - 12 SC. 25 at 290; *Agbabiaka v. Saibu* (supra) at 184 were cited in support thereof.

As in the case in hand, there is no perverseness on the part of the trial court in the evaluation of evidence before it as well as the value attached thereto; it was further submitted, hence it is unnecessary to interfere with same. In any event, contended the Appellant, having come to the conclusion that it (Appellant) sufficiently pleaded and satisfactorily proved special damages, the ultimate dismissal of its suit by the same court is manifestly incongruous and irreconcilable with that conclusion, adding that the logic is simple. Thus maintained the Appellant, if it satisfactorily called evidence in proof of its special damages claimed, as the court below held it did, the Appellant was entitled to judgment. The Appellant having demonstrated it had been

wronged by the Respondent, the principle of law, which says where there is a wrong, there must be a remedy - the Latin maxim being *Ubi Jus Ibi Remedium*.

After submitting that the case of *Coker v. Ajewole* (1976) 9 - 10 SC. 17 at 28 - 29 relied on by the Court below is not on all fours with that at hand, learned counsel for the Appellant argued that while *Coker v. Ajewole* (supra) deals with specific performance, the present case is of for breach of contract; it being the principle of law that every case is to be considered on its peculiar nature and characteristics. The pith and substance of the foregoing submissions, it was finally argued, is that having discharged the burden of proof inter alia to the effect that the Appellant fulfilled the conditions of Exhibit 75, the peremptory cancellation of the facility by the Respondent contained in Exhibit 89 thereby occasioning loss to the Appellant, is inexcusable and indefensible. The dismissal of the Appellant's case, it was finally submitted, is unjustifiable. The end result is that, we are finally urged to intervene by resolving this issue in favour of the Appellant.

This second issue for determination overlaps grounds 2 and 5 of the Amended Notice of Appeal both of which are challenging the portion of the judgment of the Court below wherein it held:

"It is apparent from the extracts of the parties' pleadings reproduced above that parties joined issues on whether or not the Plaintiff met the conditions which the Defendant set down for plaintiff to meet before it would grant Plaintiff's request for a performance bond or executed deed of guarantee for N300,000.00. Did the plaintiff lead satisfactory evidence on the point?"

"With respect to the learned Judge I am unable to agree with him that the Plaintiff proved that he had satisfied the conditions in exhibit 75."

"I am satisfied that there was no evidence before the lower court upon which it could have come to the conclusion that the Plaintiff met the conditions in Exhibit 75."

"Since the Plaintiff did not show that he had met the conditions in exhibit 75, which conditions he ought first to have met before calling on the plaintiff to release the facility, it is my view that Plaintiff's case ought to have been dismissed in its entirety."

The above decision did not satisfy the Appellant in the least. The Appellant in paragraph 5.04 of the Amended Appellant's Brief

argued that *“there was no basis or justification for the cancellation of the said facility.”*

With utmost respect to Appellant’s counsel, I take the view that the judgment of the court below is perfectly right, and its decision unassailable as well as unimpeachable on that issue.

At the trial, the parties exchanged amended pleadings where issues were clearly joined on all material points. See *Ehimare v. Emhonyon* (1985) 1 NWLR (Part 177) at 183. See also pages 22 - 28 of the Record viz-a-viz paragraphs 5, 6, 7, 8, 10, 11 and 12 of the Amended Statement of Defence. The Plaintiff (Appellant) it ought to be stressed, has the onus to prove how the terms and conditions were actually met. The Appellant made futile attempts to discharge the onus of proof on it by calling its Managing Director (PW.1) and the relevant evidence adduced through him was to the effect that:

“The Defendant company approved guaranteeing our company to the tune of N300,000.00 with some conditions which we complied. The letter of approval was in writing.

Having accepted the conditions in Exhibit 75, our company fulfilled all the condition. ...The Defendant later cancelled the deed of guarantee earlier approved to us...”

From the evidence of PW.1 (*supra*), it is palpable that the Appellant misconceived the requirements of establishing a binding contract with the Defendant/Respondent. This is because Exhibit 75 was not an outright approval. It has some conditions attached to it. From the evidence of PW.1 it is clear that the Appellant misconceived the requirements of establishing a binding contract with the Respondent. Clearly, Exhibit 75 cannot by its purport be designated on outright approval. Indeed, it has some conditions attached to it as borne out on pages 175 and 176 of the Record wherein it states inter alia:

“We refer to your letter dated 8th May, 1989 applying for a bank guarantee on the lifting of petroleum Products from Nigerian National Petroleum Corporation, and are pleased to convey our approval on the following terms and conditions: ...

6. CONDITIONS:

Release of the executed performance guarantee to be subject to:

(i) Execution of the deed of legal mortgage over property covered by certificate of occupancy No. 0136.

(ii) *Taking Comprehensive Insurance Cover of pledged property with our interest duly noted.*

(iii) *Submission of Company's recent past three (3) years audited accounts.*

B (iv) *Written acceptance of the terms and conditions governing the facility.*

The executed deed of guarantee is being held in our Office (Rafin-Kada) until item six Sub-section (i) and (iv) of this letter is fulfilled." Underlining above is mine).

C ***It must be remembered that for a contract to come into being in law there must have been a definite offer by the offeror and a definite acceptance by the offeree.*** See *Ajayi-Obe v. Executive Secretary* (1975) 3 SC. 1 at 6 - 7.

D What the whole negotiation on this contract connotes in my view, is that it was made conditional. In other words, what in paragraph 6 of Exhibit 75 is said to be "*subject to*" has been held in the case of *Tukur v. Government of Gongola State* (1984) 4 NWLR (Part 117) at 542 C per Obaseki, JSC as follows:

E "*The expression "subject to" subordinates the provisions of the subject section to the section referred to which is intended not to be affected by the provisions of the latter*" and in *Labiya v. Anretiola* (1992) 8 NWLR (Part 258) 139 at 163 - 164 where Karibi-Whyte, JSC defined the words as follows:

F "*The phrase "subject to" in the section is significant. The expression is often used in statutes to introduce a condition, a proviso, a restriction and indeed a limitation - see Oke v. Oke (1974) 1 All NLR (Part 1) 443. The effect is that the expression evinces an intention to subordinate the provisions of the subject to the section referred to which is intended not to be affected by the provisions of the latter... In other words where the expression is used at the commencement of a statute, as in Section 1(2) of the Decree No. 1 of 1984, it implies that what the sub-section is "subject to" shall govern, control and prevail over what follows in that Section or Sub-section of enactment.*"

H The phrase 'subject to,' from the context it is used, thus makes it mandatory for the Appellant to satisfy all the conditions in Exhibit 75 before a legally binding contract can take place. See the case of *Messrs Sulaiman and Bros. v. Hans Mehr of Hamburg* (1957) SCNLR

261 at 263 where De Lestang, F.J. held inter alia:

“Exhibit B expressly says that the sale is “subject to confirmation from Messrs Hans Mehr of Hamburg,” and until that confirmation there can be no concluded contract. In other words, what we have here is a conditional sale which, until the conditions are fulfilled cannot become a binding contract.” B

The Defendant’s evidence as emanating from its Branch Manager (DW.1), Nanle Hosea Kasham, went like this:

“We did not give the Plaintiff the performance bond because our conditions were not met. The conditions are those contained in Exhibit 75. When the Plaintiff did not meet our conditions we approached the Plaintiff’s company in writing. On receipt of Exhibit 88 (which the witness identified), we insisted that the performance bond would not be released until our conditions are met. I insist on the fulfillment of our conditions before the release of the performance bond not based on my discretion but on an instruction from the Head Office of the Defendant’s Company. The instruction of the Head Office is contained in Exhibit 95.” C D

Thus, the Court below in exercise of its judicial powers carefully reviewed this case and came to the conclusion, rightly in my view, that: E

“It is obvious from the contents of Exhibit 96 reproduced above that as at 31/5/90, the defendant even if in a tentative language, was still stating that the plaintiff had not fulfilled two of the four conditions stated in exhibit 75.” F

“Throughout the length and breadth of the trial, the plaintiff did not tender any letter wherein it reacted to the defendant’s letter exhibit 96 which alleged that the plaintiff had not met the second and third conditions stipulated in exhibit 75 namely:” G

“Notwithstanding the state of the pleading of parties and the evidence of DW.1 that the plaintiff did not meet the conditions in exhibit 75, the plaintiff did not tender a copy of the comprehensive insurance cover on the pledged property which it said it had previously sent to the defendant. Neither did the plaintiff produce before the lower court copies of the three years audited account of the plaintiff’s company, which it said it had previously forwarded to the defendant. The plaintiff’s managing director just testified blandly that the plaintiff had met the conditions in exhibit 75 without stating how H

this was done.

Ultimately, the defendant vide exhibit 89 written on 1st July, 1991 wrote to the plaintiff canceling the earlier offer.”

“Since the plaintiff did not show that he had met the conditions in exhibit 75, which conditions he ought first to have met before calling on the plaintiff to release the facility, it is my view that plaintiff’s case ought to have been dismissed in its entirety.”

The Appellant has contended that the Court below erroneously interfered with the findings of the trial Court which has not been demonstrated to be perverse. But this is not correct because the law is that while it is normally the prerogative of the trial court to admit, assess and consider evidence, an appeal court can in appropriate circumstances such as where the findings of the trial court were perverse or the use made of a document goes beyond its evidential value, particularly in respect of documentary evidence, reconsider and re-assess the evidence and apply it if the justice of the case so require. See Adeleke v. Iyanda (2001) 13 NWLR (part 729) 1 at 20 B - F per Uwaifo, JSC. **A careful examination of the oral and documentary evidence on Record reveals that the findings of the trial court were perverse and were rightly interfered with by the court below.**

Exhibit 75 gave terms and conditions to be met. All the parties agreed to these. To satisfy the court that it met all the four conditions to bring the negotiations to a legally binding contract, the Appellant ought to have showed how the remaining two items listed in Exhibit 96 were met. Exhibit 96 is a letter dated 13/5/90 from the Respondent to the Appellant, which States:

“RELEASE OF PERFORMANCE BOND

We are in receipt of your letter dated 29th May, 1990 requesting we should release your guarantee (Performance Bond). We wish to reiterate the fact that we still are being guided by the four conditions communicated to you vide our letter ref: RK/IS/11/TOMG/89 of 30th October, 1990, regarding the release of the performance bond.

As we are yet to convince ourselves you have met the two remaining conditions here:

1. Taking a Comprehensive Insurance Cover of the pledged

property with our interest duly (sic) noted.

2. *Submitting your company's recent past three (3) years Audited Accounts. We await your compliance to the above two items before releasing the performance bond.*" (See page 208 of the Record of Appeal).

From the evidence on record, it is clear that there is a condition precedent in the parties' arrangement. It is trite law that once a condition precedent is incorporated into an agreement, that condition precedent must be fulfilled before the effect can flow. All conditions are (a) conditions precedent i.e. the sine qua non to getting the thing; or conditions subsequent, which keep and continue the thing (ibid). As to when conditions are precedent or subsequent, see 30 Law Journal 686; Porter v. Shephard 6 T.B. 665, Cooper v. London, Brighton & Southern Railway 4 Ex. D88; Barnard v. Fabe (1893) 1 Q.B. 340, cited WARRANTY; Horrigan v. Horrigan (1904) 1 Ir. R. 22, 271 (Stroud's Judicial Dictionary Vol.1 A - C page 538). See also the case of Nigerian Bank for Commerce and Industry v. Integrated Gas Nig. Ltd. (1999) 8 NWLR (Part 613) 119 at 127 G-H wherein Aderemi, J.C.A. held as follows:

"By Exhibits F and G, the parties have entered into what, in law, is a conditional contract, the condition precedent must happen before either party becomes bound by the contract. A condition must be fulfilled before the effect can follow."

In a letter dated 8/6/90 admitted as Exhibit 92 contained at page 196 of the Record, the Appellant wrote to the Respondent stating inter alia:

"We know as a fact and our records can speak for itself (sic) that when we were forwarding the documents in respect of it to Kano, we sent our three years Audited Accounts. We know very well that the Comprehensive Insurance has been made and given to them as well i.e. the receipt of the payment of the insurance has been given to them and they have a record of it. The evidence of payment is clear and by the insurance policy, the property is covered."

From Exhibit 92 one fundamental defect that easily comes to light is that Appellant's application for the Performance Bond and every other letter from the Appellant were sent to the Respondent's branch in Rafin Kada in Taraba State. To avoid the consequences of its neglect to fulfill the conditions, the Appellant alleged in Exhibit 92

that it submitted the remaining documents to the Respondent's Kano branch. Why the sudden change of destination of the Appellant's documents, one may ask? The Respondent, it must be noted denied receipt of such documents in any of its branches. **As the Respondent denied receipt of such documents in any of its branches** and both parties joined issues as to whether or not the Appellant fulfilled the preconditions for there to be a binding contract between them, in view of the state of the pleadings, the onus lay on the Appellant to adduce convincing evidence that Exhibit 92 was duly delivered to the Respondent. Thus, as Iguh, JSC put it in *Ajuwon v. Akanni* (1993) 9 NWLR (part 316) 182 at 200:

"It is one thing to aver a material fact in issue in one's pleadings and quite a different thing to establish such a fact by evidence. Where a material fact is pleaded and is either denied or disputed by the other side, the onus of proof clearly rests on he who asserts such a fact to establish the same by evidence. An averment in pleadings is not and does not tantamount to evidence and must therefore be established by satisfactory evidence unless the same is expressly admitted." (Underlining is mine for emphasis).

Unable to discharge the onus, the Appellant sought solace in an answer given by the Respondent's witness (DW.1) to the effect that he would not know if the remaining documents were delivered in the Respondent's Kano Office. The Appellant in paragraph 5.10 of the Amended Appellant's Brief submitted that the evidence of the Respondent's document was forwarded by the Appellant to the Respondent's office amounts to an admission. **With respect to the Appellant, an answer that someone is not aware of the existence of a fact is not an admission that the thing is actually in existence.**

It is trite law that a witness cannot admit facts not within its knowledge and the fact that the Appellant's witness exhibited ignorance as to whether or not the alleged documents were received in the Respondent's Kano Office does not amount to an admission that the Respondent received same. In civil cases, it is trite law that an admission by a person of fact of which he knows nothing is of no evidential value vide Adeyemi

v. State (1991) 6 NWLR (Part 195) 1 at 42 D - E. The Respondent having denied knowledge of the receipt of the documents in its Kano Office, the Appellant would have produced evidence of postage and delivery to Kano but that this it failed to do. See Nlewedim v. Uduma (1995) 6 NWLR (Part 195) 1 at 44. The failure of the Appellant to satisfactorily prove that the remaining documents were duly delivered to the Respondent is fatal to its (Appellant's) case. As has been demonstrated herein before, Exhibit 75 clearly shows that the transaction between the parties is a conditional one. To claim benefit under the contract, the Appellant must establish that it satisfied all (not some of) the conditions.

In the case of Olanlege v. Afro Continental Nigeria Ltd (1996) 7 NWLR (part 458) 29 at 46 Iguh, JSC held:

"One of the fundamental principles of the law of contract is that the parties must reach a consensus ad idem in respect of the terms thereof otherwise the contract cannot be regarded as legally binding and enforceable. The burden of proof of the existence of a term of an agreement squarely rests on the party asserting such a term. It is clearly a matter of evidence, which has to be established by the party who asserts it. Failure to establish a vital term of a contract, where its existence is a conditio sine qua non towards the successful prosecution of a suit upon which the contract is founded, renders such a suit subject to dismissal."

From the foregoing, I am of the firm view that in a case of contract, like the instant case, where there is a fundamental term in the making of any term left unaccompanied (sic) vitiates the contract. See Adebajo v. Brown (1990) 3 NWLR (Part 141) 661 at 689 G per Agbaje, JSC wherein the learned Justice held:

"The point is covered by the general principle that where there is a fundamental term left undecided there is no contract."

For, as Achike, JSC put it more pointedly in Sparkling Breweries Ltd. v. UBN LTD. (2001) 15 NWLR (Part 737) 539 at 567:

"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 circles 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.' See also the case of Okechukwu v. Onuora (2000) 15 NWLR (Part 691) 597 at 614 - 615 where Iguh, JSC quoted with approval the decision of Obaseki, JSC in U.B.A. Ltd. v. Tejumola & Sons Ltd. (1988) 2 NWLR (part 79) 662 at 686 where it was held:

"It is settled by authorities that where a contract is subject to the happening of a contingency, that contract only becomes enforceable provided the event has occurred or the contingency has happened. Where a date for commencement of a lease is not specified but stated by reference to the happening of a contingency which is certain in time, until the contingency happens, there is no enforceable lease." See also Ajayi-Obe v. Executive Secretary (1975) 3 SC 1.

Consequently, I hold that the Appellant's letter of acceptance is not enough to make the transaction a legally binding one. See Innih v. Ferado A & C 5 NWLR (Part 152) 604 at 622 D - E where the Court of Appeal (per Kolawole, J.C.A.) held as follows:

"In the instant case the acceptance is not operative for failure to fulfill all the essential components of an acceptance."

Thus, as the Appellant failed to meet the whole conditions in Exhibit 75, there could be no conclusive contract between the parties.

A valid contract between parties may be discharged in one of four ways known to law, viz:

- (i) By Performance,***
- (ii) By Express Agreement,***
- (iii) By the Doctrine of Frustration and***
- (iv) By Breach***

See Cheshire and Fifoot, 9th Edition, page 521.

In the instant case the applicable way of discharging Exhibit '75' is the last method. However, that option never availed the Appellant.

Issue 2 is accordingly answered in the affirmative and grounds 2 and 5 of the Amended Notice of Appeal are hereby

dismissed.

ISSUE NO.3

This third issue for determination which asks whether the Appellant is entitled to the award relates to grounds three, four and six of the Amended Notice of Appeal.

Towards the concluding end of the judgment of the court below Oguntade, J.C.A. who delivered the leading judgment held as follows:

“As to whether the plaintiff called satisfactory evidence to prove the special damages claimed, it is my view that the plaintiff did call satisfactory evidence. This is not however to say that the lower court was right to have made the award.”

The important question that follows is - was the plaintiff entitled to the award made in his (sic) favour? I think not.”

I held however that defendant was not in breach of its contract with the plaintiff and that it was the plaintiff that failed to meet the conditions set by the defendant. The result is that this appeal succeeds. The judgment of Audu, J. at Wukari High Court of Taraba State awarding a sum of N4,700,752.00 as damages to the plaintiff is set aside. In substitution therefore, I make an order dismissing plaintiff’s suit.”

The Appellant disagreed with the decision set out in the extract above and in its Amended Appellant’s Brief contended that it proved its case and should be entitled to the award made by the trial court.

It is an established principle of practice that in a claim for unliquidated damages, even if the trial court finds against the claimant, it is desirable that the court should indicate its views on the issue of damages and its assessment of them for the assistance of the Court of Appeal, as depending on the course taken by the appeal, these views and figures may become extremely useful. See *Adeyemi & Ors. v. Bamidele & Ors.* (1968) 1 All NLR 31 at pages 38 - 39. See also *Harrison v. National Coal Board* (1950) 1 K.B. 466 at 477. ***Since the Appellant woefully failed to establish its claim, it is not entitled to the relief awarded it by the trial court on the evidence adduced thereat. Consequently, the court below was justified in setting aside the trial court’s judgment in which damages were awarded. Accordingly, I dismiss the Appellant’s case in its entirety.***

In sum, this appeal lacks merit and I accordingly dismiss it with N10,000.00 costs to the Respondent.

BELGORE JSC

B It is clear the appellant never discharged the onus of proving his case and Court of Appeal was right to enter a verdict of dismissal of the case. My learned brother, Onu, JSC has comprehensively set out the facts to the conclusion that the appeal has no merit. I agree with him and adopt his reasons and conclusions as mine in dismissing this appeal.

OGUNDARE JSC

D The facts of this case are rather simple. The Plaintiff (who is appellant before us) was at all time relevant to this case, a customer of the Defendant at the latter's Rafin Kada branch. The Plaintiff was engaged in the lifting of petroleum products at NNPC depots in the country. By the arrangement between the Plaintiff and the NNPC, E the former was to pay for the products sold to it within 30 days of sale and as security for good performance, it was required to give a bank performance bond to the NNPC.

In consequence, the plaintiff, on 8/5/89, wrote to the Defendant (its Bankers) for a performance bond in the sum of N300,000.00 F (three hundred thousand Naira) in favour of the NNPC. Exhibit 74 is the letter. The defendant replied by Exhibit 75 dated 30th October 1989 approving the facility but subject to conditions. The Defendant's letter read in part:

G *"6. CONDITIONS:- Release of the executed performance guarantee to be subject to:-*

(i) Execution of the deed of legal mortgage over property covered by certificate of occupancy No. 0136.

(ii) Taking comprehensive Insurance cover of pledged property with our interest duly noted.

(iii) Submission of Company's recent past three (3) years audited accounts.

(iv) Written acceptance of the terms and conditions governing the facility.

The executed deed of guarantee is being held in our office (Rafin-Kada) until item six sub-section (i) to (iv) of this letter is fulfilled.

Since you know the procedure of executing a deed of legal mortgage, and procurement of insurance cover, we hope you will attend to them at once to prevent further delay of releasing the guarantee.” B

The Plaintiff wrote back to the Defendant (Exhibit 76) accepting the conditions. Exhibit 76 read in part:

“ACCEPTANCE OF THE APPROVAL OF OUR N300,000.00 NNPC DEED OF GUARANTEE: C

With a profound gratitude to the, (sic) above mentioned subject matter, we refer to your letter of 30th October, and to inform you that we have accepted the approval of N300,000.00 NNPC Deed of Guarantee with the conditions stated therein. D

2 For our fulfillment of the four conditions stated in under reference, we will be very grateful to you to get Legal Mortgage form for our necessary action please.”

The bond was not released to the Plaintiff. On 25th June 1991, however, the Plaintiff wrote to the Defendant (exhibit 88) requesting the latter to increase the amount of the bond from N300,000.00 to N539,000.00. On 1st July 1991, Defendant replied (exhibit 89). I need to set out the contents of Exhibit 89. It reads:

“RE: GUARANTEE (PERFORMANCE BOND) FORMALITIES FOR NNPC FOR N300,000.00 F

We have received your letter dated 25th June, 1991 on the above subject matter, particularly, requesting for the release of a N300,000.00 Performance guarantee Bond to you.

We wish to inform you that ever since you requested for an increase in the amount to be covered by the Performance Bond from N300,000.00 to N539,000.00, we were instructed to cancel the N300,000.00 guarantee and to work towards meeting your fresh demand (N539,000.00).

Therefore, we regret to inform you that the cancelled N300,000.00 has been sent to our Head Office through our Area Office.” H

In consequence of Exhibit 89 relations between the parties became sour and Plaintiff sued the Defendant claiming, as per para-

graph 9 of its amended statement of claim -

“9. *WHEREFORE the Plaintiff claims the sum of N4,707,752.80 (Four million, seven hundred and seven thousand, seven hundred and fifty two Naira eighty Kobo) being special damages for breach of contract to provide the Plaintiff N300,00.00 facility or performance bond of executed deed of guarantee as agreed in writing by the defendant and accepted by the Plaintiff. The Plaintiff also claims 10% interest on the above sum November, 1991 until Judgment and also from date of Judgment until full payment and also the full costs of this action.*”

Pleadings were filed and exchanged and, with leave of court, amended. The action went to trial at the conclusion of which, and after addresses by learned counsel for the parties, the learned trial Judge, in a reserved judgment, found for the plaintiff and entered judgment in its favour as per paragraph 9 of the amended statement of claim. The Defendant appealed to the Court of Appeal which allowed the appeal, set aside the judgment of the trial judge and dismissed Plaintiff’s claim with costs. The Plaintiff, being dissatisfied with that judgment, has now appealed to this Court upon 7 grounds of appeal contained in the amended notice of appeal. Leave to appeal was granted by this Court on 22nd September 1997. The parties filed and exchanged their respective briefs of argument and with leave of Court, amended same. The Plaintiff filed a reply brief. In its brief Plaintiff formulated two issues for determination in this appeal, to wit:

“1. *Whether the Court of Appeal was right in striking out and/or dismissing the preliminary objection raised by Appellant’s Counsel bordering on the validity of the Additional Grounds of appeal filed more than three months after leave was granted to file same as well as the propriety of filing and arguing issues arising from the said Additional Grounds in the Respondent’s Brief filed aforetime (Ground one).*

2. *Whether having come to the conclusion and rightly, too, that the Appellant sufficiently pleaded special damages and satisfactorily proved same, the Court of Appeal was right to have dismissed the Appellant’s claim on the ground that the Respondent was not in breach of its contract and that the Appellant failed to meet the conditions in Exhibit 75 especially as the Appellant’s claim was not for specific performance (Grounds two, three, four, five and six).”*

The Defendant in its own brief, set out three questions that is to say:

“1. Whether the Court of Appeal was right in striking out the Plaintiff’s preliminary objection before it? (Ground One).

2. Whether the Defendant was right in canceling the Performance Bond it was to grant in favour of the Plaintiff? (Grounds two & five) ^B

3. Whether the Plaintiff is entitled to the award made by the trial Court (Grounds three, four and six).”

Defendant’s Issues 2 and 3 are covered by Plaintiff’s Issue 2. Their Issue 1 are the same. I think the Defendant is right in breaking Plaintiff’s Issue 2 into Issues 2 and 3. I will, therefore, adopt the issues as formulated by the Defendant. ^C

The Defendant in its brief raised a preliminary objection to the competence of the grounds of appeal and argued the objection in the brief. The plaintiff filed a reply brief in which arguments were advanced against the Preliminary Objection. At the oral hearing of the appeal, learned counsel for the plaintiff withdrew the objection which was accordingly struck out. The rest of this judgment is, therefore, confined to the issues canvassed in this appeal. ^E

Issue 1

Whether the Court of Appeal was right in striking out the Plaintiff’s Preliminary Objection before it.

When this matter was before the Court below, the Defendant, as appellant in that court, sought and was granted leave on 13/9/94 to file two additional grounds of appeal numbered 9 and 10. The Defendant did not formally file the additional grounds but argued them in the brief it filed on 21/11/94. The Plaintiff, as respondent in the said Court, raised a preliminary objection to the competence of arguments in the Defendant’s brief on grounds of appeal that had not been filed. In response, the Defendant filed the grounds on 22/12/94 and, with leave of court, filed an amended brief on 19/9/95 which, in its contents, was on all fours with its original brief. The Plaintiff also filed an amended brief. ^F ^G ^H

The Plaintiff objection was argued at the hearing of the appeal before that court. In its ruling on the objection, which ruling is incorporated in the judgment of that Court that is now on appeal to this court, Oguntade JCA who read the lead judgment of the Court

summarised plaintiff's argument thus:

B *"Put simply the respondent has argued that the amended appellant's brief came into existence before the 9th and 10 grounds of appeal were filed. Counsel placed reliance on the following cases in support of his argument that the issues formulated from the 9th and 10th grounds of appeal and the argument thereon should be discountenanced."*

After citing those cases, the learned Justice of the Court of Appeal went on:

C *"The facts which respondent's counsel put forward in support of his argument are these:*

(a) *Appellant filed his first brief of argument on 21/11/94.*

(b) *By leave of court, appellant filed additional grounds of appeal 9 and 10 on 22/12/94.*

D (c) *On 19/9/95, the appellant filed an 'amended appellant's brief which in its contents was the same as the one previously filed on 21/11/94 save that the word 'amended' to the caption on the said 'appellant's brief.*

E *Counsel then submitted that since an amending process of court relates back to the date the amended process was first filed, the 'amended appellant's brief filed on 19/9/95 must be taken to have been filed on 21/11/94 when the first appellant's brief was first filed. When that is done, then the 'amended appellant's brief would have come into existence before the additional grounds of appeal Nos. 9 and 10 which were filed on 22/12/94. Counsel relied on Sueade v. Wetherlon Barytes (1904) 1 K.B. 295 and Warner v. Sampson (1959) 1 Q.B. 297. In support of his argument that court process which amends another process previously filed relates back to the date the first process was first filed."*

F *The learned Justice then ruled:*

G

H *"I do not see any merit in the argument of respondent's counsel. It is a correct principle of law that an amended statement of claim relates back to the date the statement of claim was first filed. In other words an amended statement of claim is deemed to have been filed on the date the statement of claim was filed. But this is only a legal fiction. A legal device to attain certain ends. It does not obliterate the fact that a particular process is filed on a particular date. The 'amended appellant's brief in the instant case was filed on 19/9/95 and the additional grounds of appeal Nos 9 and 10 were filed on 21/12/94. The*

said grounds of appeal therefore actually came into existence before the amended appellant's brief.

In the course of argument we asked respondent's counsel how he expected appellant's counsel to have overcome the procedural problem. Counsel said that appellant's counsel should have filed a 'fresh brief' and not an 'amended brief'. But in that situation, the latter brief which in substance alters the brief that had been filed earlier will still be an amended brief since its purpose is to amend an earlier brief. The preliminary objection is struck out."

The Plaintiff has now appealed against this decision and has proffered in this court precisely the same arguments raised by its counsel in the court below. I think Oguntade JCA gave a correct decision on the preliminary objection. In granting leave to file additional grounds 9 and 10, no time limit was imposed for the filing. It follows that when Defendant filed the grounds on 22/12/94, it could not be said that the grounds were filed out of time. Obviously, the Defendant's earlier brief contained arguments on grounds of appeal that were yet to be filed. To correct this error and meet plaintiff's objection, the Defendant in 1995 filed another brief captioned "amended Appellant's Brief" incorporating arguments on grounds 9 and 10 that were filed in December 1994. What then is Plaintiff's complaint? I, too, see no merit in its complaint. The Court below rightly struck out its objection. I, therefore, resolve the Issue 1 against the plaintiff.

Issue 2

Whether the Defendant was right in canceling the performance Bond it was to grant in favour of the Plaintiff.

The facts have been fully set out earlier in this judgment; I need not go over them again. Suffice it to say that Plaintiff sued for damages for breach of contract. To succeed Plaintiff must show that it is the Defendant who is responsible for the breach before the latter can be made liable for the losses arising from the breach - C.C.I.A. (Nig) Ltd. v. Onayemi (1972) 3 SC 22. That is to say, Plaintiff must show that it performed its own side of the bargain that is, that it fulfilled all the conditions for it to perform as laid down in Exhibit 75 and it was the Defendant, by canceling the performance bond who reneged on its bargain and thereby committed a breach of the contract constituted by Exhibits 75 and 76.

What then is the position in this case? It is plaintiff's case that it

fulfilled its own part of the agreement between it and the Defendant. Plaintiff, in its further amended statement of claim, pleaded:

“7. In pursuance of and in consideration of the defendant’s approval as aforesaid, the plaintiff gave to the defendants written acceptance of the approved N300,000.00 performance bond or executed deed of guarantee. This was done through the plaintiff’s acceptance letter dated 23/11/89. The plaintiff also duly perfected an executed legal mortgage over property covered by Certificate of Occupancy No. 0136. The defendant debited the plaintiff’s account No. 500014 for the stamp duties, Registration of the mortgage and other charges. The plaintiff hereby pleads and rely on Debit Advice on Account No. 500014 of 28/5/90 for N4,506 and Debit Advice on Account No. 50014 of 10/4/90 for N2,306.00, letter reference No. Sam/WO/HE/JAO/RK/90 of 2/2/90, letter reference No. RK/JSP/OIL/Mark/NK/90 of 1/6/90, the plaintiff’s acceptance letter of 23/11/89 addressed and sent to the defendant. The defendant is hereby put on notice to produce the original of the said letter of 23/11/89 and all other documents the originals of which were sent to the defendant and/or are in the defendant’s possession.

7(a) The plaintiff also sent tax clearance certificate dated 11/8/88 to the defendant. The copy of the said tax clearance certificate is hereby pledged and shall be relied upon at the hearing of this suit. The defendant is hereby put on notice to produce the original (sent to it) at the trial. Also pleaded is Tax clearance dated 2/10/90 and which was also sent to the defendant and defendant is put on Notice to produce same.

7(b) The plaintiff also states that on the whole and pursuant to the release of the N300,000.00 facility by the defendant, it (plaintiff) duly submitted the following documents to the defendant:

- (i) Board resolution of the Company dated 3/7/89 to borrow or request for guarantee and showing that Emmanuel D. Tsokwa has accepted to assign his landed property to the Plaintiff.
- (ii) The company’s certificate of incorporation.
- (iii) Memorandum of Association of the Company.
- (iv) Executed deed of legal mortgage over the property covered by certificate of occupancy No. 01306.

(v) The company’s written acceptance (dated 23/11/89) of the terms and conditions governing the N300,000.00 facility to be pro-

vided by the defendant.

(vi) Three years' Tax clearance and/or tax clearance certificate of Emmanuel Danjuma Tsokwa.

(vii) Three years Tax Clearance on (sic) the Plaintiff-Company.

(viii) Three receipt (sic) years' audited account of the Plaintiff's company. B

(viii) Comprehensive insurance cover over pledged property with the interest of the defendant duly noted.

7(c) The plaintiff hereby pledge (sic) and relies on the afore-said board resolution of the company dated 3/7/89, the Plaintiff's written acceptance of the N300,000.00 facility dated 23/11 /89, the executed deed of legal mortgage, three years' tax clearance (for tax clearance certificates) of both the plaintiff and Emmanuel Danjuma Tsokwa and three years' audited account of the plaintiff which said documents the plaintiff has copies or photocopies thereof. The plaintiff (sic) is hereby put on notice to produce the originals of the said documents in its possession. The plaintiff also pleads defendant's letter of 26th June, 1989. C

7(d) To (sic) proof of the plaintiff's averment that it duly satisfied all the conditions stipulated by the defendant for the grant of the said N300,000.00 facility, the plaintiff hereby pleads and shall rely on the following documents at the hearing of this suit: E

(i) Defendant's letter to the plaintiff dated 30/1/90

(ii) Defendant's letter to the plaintiff dated 2/2/90

(iii) Defendant's letter to the plaintiff dated 11/6/90 including a copy of the deed of legal mortgage which was registered by the defendant's Solicitors, M. Z. Sanda & Company. F

(iv) Plaintiff's letter to the defendants dated 6/2/90

(v) Plaintiff's letter to the defendant dated 25/6./91 which content, with regard to plaintiff having satisfied the conditions of the guarantee, was not denied by the defendant's letter dated 1/7/91 which (is) also hereby pledged (sic) G

(vi) Plaintiff's letter to the defendant dated 8/6/90 in which said letter the Plaintiff complained to the defendant's Area Manager in Jos about the attitude of the Rafin-Kada Branch Manager of the defendant." H

The Defendant denied the above averments and pleaded in reply:

"5. In further reply to paragraph 6 of the claim, the Defendant avers that the plaintiff failed/refused to comply with the terms and/or conditions stated in the Defendant's approval for the release of the Performance Bond/Deed of Guarantee.

B 6. Except that a legal Mortgage was perfected, and the charges debited to the plaintiff's account, the Defendant denies paragraph 7 of the claim and puts the plaintiff to the strictest proof.

C 7. The Defendant denies paragraphs 7(a) (i-ix) and will at the trial put the plaintiff to the strictest proof. The Defendant further avers that the release of the performance Bond/Guarantee was to be made strictly subject to the plaintiff's compliance with the following conditions/terms:

(a) Execution of Deed of Legal Mortgage over property covered by Certificate of Occupancy No. 0136.

D (b) Taking of a comprehensive Insurance cover on the pledged property with the Defendant's interest duly noted on the property.

(c) Submission of plaintiff's three (3) years audited Account.

(d) Written acceptance by the plaintiff of the terms and conditions governing the facility.

E 8. The Defendant will at the trial rely on her letters to the plaintiff communicating the terms and conditions of the facility and avers that the plaintiff refused/failed to comply with all the Defendant's terms and conditions of the approval despite repeated correspondence from the Defendant.

F 9. The defendant denies paragraphs 7(c), (d)(i-iv), (e), (f) and all the allegations contained therein and will at the trial put the plaintiff to the strictest proof.

G 10. The defendant avers that plaintiff did not comply with the terms and conditions of the grant of the facility rather the plaintiff by a letter dated 19th December, 1990 applied for the increase of the Bond/Guarantee from earlier approved N300,000.00 (Three hundred thousand naira) to N539,000.00 (Five hundred and thirty nine thousand naira) which means starting the whole process of the plaintiff's application afresh, in view of the defendant's request of additional security from the plaintiff for further reappraisal. The said letter by the plaintiff to the Defendant is hereby pleaded and shall be relied upon at the trial.

11. The defendant will at the trial contend that the plaintiff

submitted a Certificate of Occupancy Number GS/1433 in the name of one JONATHAN EMMANUEL along with a power of attorney authorising the Plaintiff to use the said Certificate of Occupancy as a security for the grant, however, the power of Attorney was defective and was returned to the plaintiff. The plaintiff failed to provide the additional security required for the release of the Guarantee Bond. B The Defendant shall rely on all the correspondences exchanged."

It is clear from the pleadings, therefore, that the parties joined issue on whether or not the plaintiff satisfied the conditions laid down by the defendant in Exhibit 75. The onus, of course, was on the plaintiff to satisfy the Court that it did so. At the subsequent trial, C plaintiff's managing director, Danjuma Tsokwa and its Accountant, Baku Aji gave evidence for the plaintiff. The defendant called its branch manager at the Rafin Kada branch, Nanle Hosea Kasham as its only witness. The learned trial Judge, after a painstaking review of the D evidence, both oral and documentary, observed:

"I had earlier stated in this judgment that exhibits 88, 89 and 98 are very relevant to the determination of this issue. I have also taken the pains of reproducing some contents of some of the exhibits E and some relevant paragraphs of the Statement of defence. I have done all these to show that the cancellation of the Deed of guarantee was not based on non fulfillment of conditions under exhibit 75. As I had said exhibit 88 required the plaintiff to resubmit the security documents on the rectification of same. This exhibit was dated 13/6/90. F Exhibit 98 dated 25/6/91 complained of none release of the bond despite repeated demands and completion of formalities. By this exhibit i.e. exhibit 98 one can safely say it is a reply and compliance to exhibit 88. How come it that accepting in that paragraph one of exhibit 89 plaintiff was requesting for the release of N300,000.00 G guarantee bond just from no where could the issue of the application for additional facility easily cancelled the approved bond duly offered, accepted with consideration furnished as shown in exhibit 74, 75, 76, 88 and 98. For the foregoing reason, I entirely agree with the submissions of the learned counsel to the plaintiff that the defendant H cannot bring this contract to an end since the contract for the N300,00.00 guarantee bond had been concluded. The DW1 has himself said in his evidence and particularly under cross-examination that he would not know if other documents relating to the fulfillment

of the conditions were submitted to the Head Office. He also stated under cross examination that there is no letter from the Head Office giving him instruction to cancel the guarantee bond duly approved by the Defendant. By this it means the witness unilaterally without the defendant's instruction cancelled the guarantee bond. It is my view that by exhibit 88 which is the fulfillment and compliance with exhibit 98. Therefore the issuance of exhibit 98 by the defendant canceling the guarantee bond without reference to the contents of exhibit 89 is a breach of contract and therefore entitles the plaintiff to a remedy which is a loss or damage caused to him."

It is apparent from the above observation leading to the trial court's verdict that the learned trial Judge acted mainly on Exhibits 88, 89, and 98. The Court below, per Oguntade, JCA on the question of Defendant's liability considered Exhibits 88, 89 and 98 which to the trial Judge were vital to the resolution of the case, and observed:

"The plaintiff vide exhibit 76 dated 23/11/89 wrote to the defendant accepting the conditions stated in exhibit 75. However, on 31/5/90, the defendant in a reply to plaintiffs written request for the release of the facility wrote vide exhibit 96.

'We are in receipt of your letter dated 29th May 1990 requesting we should release your guarantee (Performance Bond).

We wish to reiterate the fact that we are still being guided by the four conditions communicated to you vide our letter ref. RK/15/L11/TON.G/89 of 30th October, 1990 regarding the release of the performance bond.

As we are yet to convince ourselves you have met the two remaining conditions:-

(1) *Taking a comprehensive insurance cover of the pledged property with our interest duly noted.*

(2) *Submitting your company's recent past three years audited accounts.*

We await your compliance to the above two items before releasing the performance bond.

Sgd. Manager'

It is obvious from the contents of exhibit 96 reproduced above that as at 31/5/90, the defendant even if in a tentative language was still stating that the plaintiff had not fulfilled two of the four conditions

stated in exhibit 75. On 13th June, 1990, the defendant wrote a letter to the plaintiff which I consider important for the purpose of the conclusion reached in relations to issues 4 and 5. The letter exhibit 98 reads:

*'13th June, 1990,
The Managing Director,
Tsokwa Oil & Marketing Co. (Nig.) Ltd.,
P.M.B. 35,
Wukari.*

B

Dear Sir,

C

Re: Application for adjustment of Deed of Guarantee

We refer to your letter dated 19th February, 1990 and wish to inform you that the security documents you offered in pursuance of the above have been rejected for the following reasons:

(a) The statutory consent of the Governor of Gongola State was not obtained for the mortgage.

(b) The endorsed power of Attorney was not registered at the land registration office as required by law.

(c) The power of attorney should be by way of a deed expressed to be Irrevocable and for consideration (even if meagre) and then stamped and registered.

We therefore return herewith the following security documents for you to resubmit when the above requirements are met.

(1) Gongola State C of O No. GS/1433 dated 12/1/81 (original)

F

(2) Power of Attorney: Jonathan Emmanuel to Emmanuel Danjuma Tsokwa, dated 1st March, 1990 (original).

(3) Professional valuation report on property (two copies).

(4) Deed of Guarantee.

G

Kindly acknowledge receipt on the duplicate of this letter.

Yours faithfully,

Sgd. Manager.'

The above exhibit 98 did not in anyway derogate from the contents of exhibit 96. It did not say expressly or by implication that the two conditions which were said not to have been met in exhibit 96 have since been met. It is also important to bear in mind that exhibit 98 did not relate to the existing plaintiff's application for facility. Rather it relates to plaintiff's request for an additional facility of

H

N239,000.00. On 25th June, 1991, the plaintiff wrote a letter exhibit 88 to the defendant. The letter reads:

*The Manager;
Bank of the North Ltd.,
Rafin-Kada Sub-Branch,
Wukari.
Sir,*

*Re: Guarantee (Performance Bond)
Formalities for NNPC for N300,000.00*

We refer to your approval letter Ref. No. RK/15/DH/TOMC/89 dated 30th October, 1989 for the sum of N300,000.00 to our company under the NNPC Deed of Guarantee Scheme and wish to state that since the approval, the Deed of Guarantee has not been released to us in spite of repeated demand.

We do not know why you are still withholding the release of the Deed of Guarantee.

We wish to use this opportunity again to request you to release the Deed of Guarantee to us since we have completed all formalities.

Please could you reply in good time.

Thanks for your co-operation.

*Sgd. Managing Director,
Tsokwa Oil & Marketing Company (Nig.) Ltd.'*

Throughout the length and breadth of the trial, the plaintiff did not tender any letter wherein it reacted to the defendant's letter exhibit 96 which alleged that the plaintiff had not met the second and third conditions stipulated in exhibit 75 namely:-

(1) Taking a comprehensive insurance cover of the pledge property with the interest of the defendant duly noted therein.

(2) Submitting plaintiff/company's 'recent past three years audited accounts.'

Later in his judgment, the learned Justice of the Court of Appeal again observed:

"Notwithstanding the state of pleadings of parties and the evidence of DW1 that the plaintiff did not meet the conditions in exhibit 75, the plaintiff did not tender a copy of the comprehensive insurance cover on the pledged property which it said it had previously sent to the defendant. Neither did the plaintiff produce before the lower court copies of the three years audited account of the plaintiff

company which it said it had previously forwarded to the defendant. The plaintiff's managing director just testified blandly that the plaintiff had met the conditions in exhibit 75 without stating how this was done."

And finally found:

"Since the plaintiff did not show that he had met the conditions in exhibit 75, which conditions he ought first to have met before calling on the plaintiff to release the facility, it is my view that plaintiff's case ought to have been dismissed in its entirety."

In its brief in this appeal, it has been argued on behalf of the plaintiff that on the oral evidence of the plaintiff's managing director (PW1) and the documentary evidence submitted in evidence, that is Exhibits 77 (Deed of legal mortgage to fulfill condition 1), 78 and 79 (debit notes for the stamping and registration of Exh. 77), 80, 81 and 82 (tax clearance certificates), 90 and 92, the Court below was in error not to have found that plaintiff satisfied all the conditions laid down in Exhibit 75. It was submitted that the plaintiff discharged the burden of proof on it. It was further submitted that as the sole reason given by the Defendant in Exhibit 89 for canceling the Performance Bond was faulted by the Court below, the Defendant could not adduce additional reason namely, non fulfillment of the conditions in Exhibit 75 for canceling the facility. For the Defendant it was submitted in its brief that a careful examination of the oral and documentary evidence on record revealed that the findings of the trial court were perverse and were rightly disturbed by the court below.

As earlier remarked in this judgment, both parties, on the pleadings, joined issue as to whether or not plaintiff fulfilled the conditions stipulated in Exhibit 75 which formed the terms of the contract between the parties. And as the plaintiff is suing for breach of contract, it has the burden to prove that it fulfilled its own part of the contract and that the Defendant failed to fulfill its own part. By the nature of the contract in Exhibit 75, the plaintiff must first fulfill its own part, that is the conditions laid therein, before it could call on the defendant to fulfill its by releasing the Bond in question. True enough, the defendant cancelled the bond it had executed rather than release it to the plaintiff, for the reason that the plaintiff asked for higher facility - see Exhibit 89. Such a reason was, of course, not contemplated in Exhibit 75. The defendant would have for this reason been liable in

breach of contract had the plaintiff satisfied the conditions imposed on it in Exhibit 75. But did it? For ease of reference, the conditions are:

“(i) *Execution of the deed of legal mortgage over property covered by certificate of occupancy No. 0136.*

B “(ii) *Taking comprehensive Insurance cover of pledged property with our interest duly noted.*

 “(iii) *Submission of Company’s recent past three (3) years audited accounts.*

C “(iv) *Written acceptance of the terms and conditions governing the facility.*”

There is no problem about condition (iv) as Exhibit 76 satisfied it. As regards condition (i), Plaintiff claimed this was fulfilled by Exhibit 77. Exhibit 84 wherein defendant wrote-

D *“We write to forward herewith a counterpart of an executed Deed of Legal Mortgage on your Ibi Local Govt. C. of O. No. 0136, stamped for N230,000.00 for your records.”*

Also supports Plaintiff’s assertion of the fulfillment of condition (i).

E There remained conditions (ii) and (iii), the fulfillment of which is best proved by production of the Insurance policy/certificate and audited reports. No where did plaintiff claim he forwarded to the defendant relevant documents to satisfy conditions (ii) and (iii). The defendant made this point in its letter Exhibit 96. Exhibit 98 which F the trial Judge regarded as essential in this case does not in anyway assist the plaintiff; rather it is against its interest. The ipse dixit of PW1 is not enough moreso that defendant denied the fulfillment of all the conditions, particularly (ii) and (iii).

G The conclusion I reach after a consideration of all the evidence adduced, both oral and documentary, is that plaintiff failed to discharge the onus on it to prove that it had satisfied the conditions laid down in Exhibit 75. The court below, per Oguntade JCA, was clearly right when it held that::

H *“I am satisfied that there was no evidence before the lower court upon which it could have come to the conclusion that the plaintiff met the conditions in exhibit 75.”*

Not having fulfilled its own part of the contract plaintiff cannot complain that the defendant cancelled the Performance Bond. That

being so, plaintiff's claim was rightly dismissed by the Court of Appeal. I, therefore, resolve Issue 2 against the Plaintiff.

ISSUE 3

Whether the Plaintiff is entitled to the award made by the trial court.

This issue does not pose much difficulty. Plaintiff would not be entitled to award of damages where it failed to establish the liability of the defendant. The trial court that found liability proved was justified in awarding damages. But as that finding was set aside on appeal, the award of damages went with it. I know that the Court below considered the issue of damages and concluded:

"If I had been able to hold that the defendant was in breach of its contract with the plaintiff, I would have awarded no more than nominal damages of N15,000.00."

For the reasons given by their Lordships of the Court below I would most probably have come to the same conclusion had it been necessary for me to decide the issue in this appeal. Having found that defendant was not liable for breach of contract the question of quantum of damages due plaintiff has become purely academic. I, therefore, make no further pronouncement on it.

For the reasons I give in this judgment I join my learned brother Onu JSC, a preview of whose judgment I had advantage of before now, in dismissing this appeal with N10,000.00 costs as assessed by him.

OGWUEGBU JSC

I have had the advantage of reading in draft, the judgment just delivered by my learned brother Onu, JSC. I agree with him that the appeal be dismissed and affirm the decision of the Court of Appeal.

The main issue for determination in the appeal is whether the defendant was right in canceling the performance Bond which it was to grant to the plaintiff. The facts of the case have been fully set out in the leading judgment of my learned brother Onu, JSC, and I do not desire to repeat them except where such facts seek to clarify my short contribution.

The plaintiff wrote to the defendant on 8th May, 1989 for a performance Bond for N300,000.00 (three hundred thousand naira)

in favour of the Nigerian National Petroleum Corporation (NNPC) - Exhibit "74". The defendant's reply is dated 30th October, 1989 (Exhibit "75"). It conveyed its approval to provide the plaintiff performance guarantee on lifting of petroleum products from the NNPC subject to certain terms and conditions. Six conditions are set out in Exhibit "75" and the 6th condition is relevant to the issue joined by the parties in their pleadings and evidence. The said sixth condition reads:

"6. CONDITION:- Release of the executed performance guarantee to be subject to:-

(i) Execution of the deed of legal mortgage over property covered by certificate of occupancy No. 0135.

(ii) Taking comprehensive Insurance cover of pledged Property with our interest duly noted.

(iii) Submission of Company's recent past three (3) Years audited accounts.

(iv) Written acceptance of the terms and conditions governing the facility."

By Exhibit "76", the plaintiff accepted the conditions set out in Exhibit "75". On 31 - 5- 90 the defendant in a reply to the plaintiff's written request for the release of the facility wrote Exhibit "96" reminding the plaintiff that the latter had not complied with two of the four conditions set out in its letter - Exhibit "75". The two conditions are:

"(i) Taking comprehensive insurance cover note of the pledged property with our interest duly noted.

(ii) Submitting your company's recent past three years audited accounts."

The plaintiff was requested to comply with the above two conditions.

On 13-6-90, the defendant wrote another letter Exhibit "98" to the plaintiff in reply to plaintiff's letter dated 19th February, 1990. Exhibit "98" relates to plaintiff's request to adjust the legal mortgage deed to the tune of N539,000.00. It did not alter the position taken by the defendant in Exhibit "96". On 25-6-91, the plaintiff wrote Exhibit "88" to the defendant expressing surprise in the delay in releasing the Deed of Guarantee or Performance Bond. Throughout the trial, the plaintiff did not lead any evidence oral or documentary

of his reaction to Exhibit “96”. The defendant insisted on compliance with the remaining two conditions before the release of the Performance Bond. The defendant eventually cancelled the offer contained in Exhibit “75” by its letter dated 1/7/91 - Exhibit “89” and the plaintiff commenced the proceedings leading to this appeal.

The learned trial judge held that there was a binding contract between the plaintiff and the defendant which the latter breached. He awarded damages against the defendant and the court below on appeal by the defendant allowed the appeal, and dismissed the plaintiff’s claim. The court below held as follows:

“Since the plaintiff did not show that he had met the conditions in Exhibit “75”, which conditions he ought first to have met before calling on the plaintiff (sic) to release the facility, it is my view that plaintiff’s case ought to have been dismissed in its entirety”.

In the absence of any evidence that the plaintiff met two of the four conditions set out in Exhibit “75”, the learned trial judge was in grave error to have found for the plaintiff. Even though the plaintiff wrote Exhibit “76” in acceptance of the conditions contained in Exhibit “75”, it must fully comply with those conditions before calling upon the defendant to release performance bond to it.

The plaintiff having failed to discharge the Onus of proof that it fulfilled all the conditions set out in Exhibit “75”, the court below was right in dismissing its action in its entirety. There is no merit in the appeal and I hereby dismiss it and make the same order for costs as proposed in the judgment of my learned brother, Onu, J.S.C.

KALGO JSC

I have the opportunity to read in advance the judgment just delivered by my learned brother Onu JSC in this appeal. I entirely agree with him that there is no merit in the appeal and that it ought to be dismissed with costs. The appellant’s claim against the respondent in the trial court was founded on special damages for breach of contract for failure of the respondent to provide it with performance bond for N300,000.00 to enable it bridge petroleum products from the Nigerian National Petroleum Corporation (NNPC). When the appellant applied to the respondent on 8th May 1989 vide Exhibit 74, for the performance bond (hereinafter referred as the bond) the

appellant by its letter dated 3rd October 1989, (Exhibit 75) agreed to provide the bond only subject to certain four conditions being complied with by the appellant. The conditions set out for the release of the bond as contained in Exhibit 75 were:-

- B *i. Execution of the deed of legal mortgage over property covered by certificate of occupancy No. 0136;*
- ii. Taking comprehensive Insurance cover of pledged property with our interest duly noted;*
- C *iii. Submission of company's recent past three (3) years audited accounts;*
- iv. Written acceptance of the terms and condition governing the facility."*

On the 23rd of November 1989, the appellant wrote a letter (Exhibit 76) to the respondent accepting the terms and conditions D governing the facility in compliance with condition (iv) above. Later on, the appellant sent what he called a legal mortgage to comply with the condition (i), but this was earlier rejected in the respondent's letter to him (Exhibit 98) for the following reasons:-

- E *"(a) The statutory consent of the Governor of Gongola State was not obtained for the mortgage;*
- (b) The endorsed power of Attorney was not registered at the registration office as required by law;*
- F *(c) The power of Attorney should be by way of a deed expressed to be irrevocable and for consideration and then stamped and registered."*

But these defects were put right and the legal mortgage Exhibit 77 was perfected and submitted to the respondent in compliance with condition (i) above. This therefore leaves conditions (ii) G and (iii) to be complied with.

The evidence of the appellant's witness at the trial PW. 1 and 2 did not prove that the two remaining conditions were fulfilled. They did not produce any documentary evidence to support the compliance if any. They only alleged sending some relevant documents to H the Headquarters office or Area Office of the respondent's Bank. And D. W. 1, the Branch Manager of the respondent emphatically denied receiving any documents in respect of conditions (ii) and (ii) in Exhibit 75 from the appellant or any where. That was why when the appellant wrote exhibit 88 demanding the release of the bond,

the respondent reminded it vide Exhibit 96, that he had not yet met the two remaining conditions to be entitled to the release of the bond.

It is a general principle of the law of contract that where a contract is made subject to the fulfillment of certain specified terms and conditions, the contract is not formed or becomes binding unless and until those terms and conditions are complied with or fulfilled. ^B See *Sparkling Breweries Ltd. v. UBN Ltd.* (2001) 15 NWLR (pt.737) 539/567; *Okechukwu v. Onuora* (2000) 5 NWLR (pt. 691) 597/614; *UBA Ltd. v. Tejumola & Sons* (1988) 2 NWLR (pt. 79) 662/686. This is clearly the position in this case. That is why I fully agree ^C with the Court of Appeal in this case when it concluded that:-

“Notwithstanding the state of pleadings of parties and the evidence of D.W. 1 that the plaintiff did not meet the conditions in Exhibit 75, the plaintiff did not tender a copy of comprehensive insurance cover on the pledged property which it said it previously sent to the defendant. The plaintiff’s managing director just testified blandly that the plaintiff had met conditions in Exhibit 75 without stating how this was done...”

Since the plaintiff did not show that he had met the conditions in Exhibit 75, which conditions he ought first to have met before calling on the plaintiff (sic) to release the facility, it is my view that plaintiff’s case ought to have been dismissed in its entirety.”

I entirely agree with this finding in the circumstances of this case, and find accordingly. This, in my view, will be the end of the whole case because since the whole claim is founded on a contract, ^F which is now found to be non-existent, no claim whatsoever can succeed based on the non-existent contract. Consequently, I find that the trial court was wrong to award the appellant the sum of N4,707,752.80 as damages for breach of contract, and the Court of ^G Appeal was right in dismissing the claim. I adopt as mine, the treatment of the rest of the respondent’s issues and the conclusions reached therein by my learned brother Onu JSC in the leading judgment.

Finally, I find that there is no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal delivered on 4th November 1996. I award N10,000.00 costs in favour of the respondent. ^H