

SUPREME COURT OF NIGERIA
FRIDAY 12TH DECEMBER, 2003. SC. 293/2001
CORAM:- I. L. KUTIGI, U. MOHAMMED, A. I. IGUH,
A. O. EJIWUNMI, D. MUSDAPHER, JJSC

FIRST AFRICAN TRUST BANK LTD APPELLANT
AND
PARTNERSHIP INVESTMENT
COMPANY LTD RESPONDENT

PLEADINGS - Binding nature of - Parties are bound by their pleadings - And evidence not pleaded cannot be allowed at trial - And if wrongly admitted - Appellate court must strike it out (H1)

JUDICIAL PRECEDENTS - Banking - Distinguishing - Facts of UBA v. Ibhafor are distinguishable from the instant case - As the drafts in that case were issued on sufficiently funded accounts (H2)

COURTS - Judgment - Interference - Appellate court does not ordinarily interfere - Save where the judgment was reached erroneously (H3)

FACTS

Plaintiff/respondent sued defendant/appellant before the High Court of Lagos State claiming the sum of N7.1 million being the value of a bank draft issued by appellant in favour of respondent, which was returned unpaid despite repeated demands for payment. Respondent also claimed interest on the sum at the rate of 21% per annum from the date of making the draft till date of judgment and 10% per annum thereafter until judgment debt is fully paid. In its defence, appellant alleged that it issued the draft on the instructions of one Alhaji Tijani Ladan as part payment for the sum of US \$500,000.00 to be sold to it by Alhaji Ladan. Appellant claimed that it was its understanding with Alhaji Ladan that the draft was not to be presented for payment until the said sum in dollars had been delivered to appellant.

However, contrary to agreement with Alhaji Ladan, the draft was presented for payment through clearing without the dollars be-

ing delivered to appellant whereupon appellant refused to honour it but rather returned it marked "Represent". Yet again the draft was presented for payment without Alhaji Ladan performing his own side of the agreement. Consequently appellant issued an order stopping payment on the draft. Though respondent was served with appellant's statement of defence raising the issue of failure or lack of consideration for the draft, it did not file a reply to debunk the allegation. Rather it simply made a case that appellant could not rescind from honouring the draft issued by it in so far as it did not have any condition for payment endorsed on the face of it. Eventually trial court gave judgment to respondent as claimed as it held that a banker's draft is payable at sight. Aggrieved, appellant appealed to Court of Appeal but the appeal was dismissed. Still dissatisfied, appellant has come on a further and final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

"(a) Whether in the circumstances of this case the appellant is obliged to pay the respondent on Exhibit P1 when the Court of Appeal had found that the pleadings and evidence of the appellant on want of value had not been controverted nor seriously challenged by the respondent.

(b) Whether the learned Justices of the Court of Appeal were right in holding that the appellant had not sufficiently pleaded nor proved the fraud which the appellant alleged in this case.

(c) Whether in the absence of a written endorsement of the condition precedent on the draft, the appellant is not permitted by law to prove that the delivery of the draft was subject to a condition precedent and whether the condition ought not to bind the respondent who is a nominee of Alhaji Ladan with whom the appellant entered into an agreement for the supply of forex."

HELD (Unanimously allowing the appeal per

EJIWUNMI JSC)

PLEADINGS - Binding nature of

1. It is pertinent to observe that the pieces of evidence attributed to the respondent concerning the purchase of shares from it by Alhaji Ladan would not have been considered by the trial

court and the court below as nowhere in its pleadings did the respondent make such averments. This is because it is settled law that as parties are bound by their pleadings, evidence not pleaded cannot be allowed at the trial. And if such evidence was admitted, then an appellate court is duty bound to strike out such evidence, and must not consider it in the determination of the appeal.

Therefore, the court below should not have alluded to the unpleaded evidence led by the respondent. (p. 2678 D)

JUDICIAL PRECEDENTS - Banking - Distinguishing

2. I think that learned counsel for the appellant was right in his argument in his brief when he contended that the facts in U.B.A. v. Ibhafidon (supra) and the Lagricom v. U.B.N cases could properly be distinguished from the facts in the instant appeal. From what I have said above, it is a common feature between the earlier cases that the bank drafts were issued against accounts that were sufficiently funded to accommodate the drafts issued by the appellant banks. In my humble view, the orders to compel the payment of the bank drafts so issued was clearly because there was no positive evidence to show why the bank drafts should not be paid over to the recipients. But with regard to the instant appeal, the facts in my humble view did not show that the respondent had any money which was proved to have been deposited in the account of the appellant bank by its procurers, namely, Alhaji Ladan and Alhaji Abubakar.

It is therefore plain from the pleadings the position taken by the respondent was based on the footing that it is claiming payment from the appellant as if it was indebted to the respondent on the sum claimed. However having regard to the Statement of Defence of the appellant and the evidence led thereon, I do not think that that position was sustainable to uphold the claim of the respondent. The bank draft is obviously without any consideration, as it was not established that the respondent or anyone else connected with the respondent had any money of any kind in any account within the system of the appellant at any time relevant to the issuance of the

2668 First African Trust Bank Ltd v. Partnership Inv. Co. Ltd (2003) 12 KLR
bank draft. (pp. 2683 E/2686 E)

Judgment - Interference

3. Now, it is settled law that an appellate court would not ordinarily interfere with the judgment of the court, but where the judgment of the court below was reached either upon erroneous inference drawn from finding of facts or that its application of the law to properly found facts is perverse and/or erroneous, then the appellate court has a duty to intervene to correct the injustice so caused. Bearing this principle above in mind, it is clearly my duty having regard to what I have said above, to interfere with the judgment of the court below. I must therefore allow this appeal for the reasons given above. (p. 2686 H)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Draft includes bill of exchange and cheque

With profound respect to both courts below, the word “draft” has been defined in law to include a bill of exchange as well as a cheque. It is said to be a nomen generale which embraces every request by the drawer upon the drawee to pay money. (p. 2692 G)

2. Bills of exchange are presumed to be given for value

The onus to prove value for the draft would ordinarily have been on the respondent to establish but the same, by law, is shifted to the appellant by virtue of the provisions of Section 30 (1) of the Bills of Exchange Act, Cap. 35, Laws of the Federation of Nigeria, 1990.

There is under the above section of the law a presumption with regard to value in favour of the respondent in so far as the issuance of Exhibit P1 is concerned. Accordingly, bills of exchange and promissory notes, unlike other forms of simple contract, are presumed to stand upon the basis of a valuable consideration pursuant to the provisions of Section 30 (1) of the Bills of Exchange Act, hereinafter also referred to as the Act . (p. 2693 D)

3. Bills of exchange - Presumption of value is rebuttable

It is, however, necessary to stress that this presumption of value provided under Section 30 (1) of the Act is not an irrebuttable presumption. It is only a prima facie presumption which may therefore be rebutted in appropriate cases. Once successfully rebutted, the presumption under the said Section 30 (1) of the Act is dislodged and ceases to operate. (p. 2693 H) B

4. Exhibit P1 might have been valid if respondent were a holder for value

In the absence or subsequent failure of consideration, the instrument, Exhibit P1, is invalid, at least, as between the parties in immediate relationship, that is to say, the appellant and Alhaji Ladan, but not necessarily as between remote parties when the holder is a holder for value. C

In the present case, however, the respondent was unable to establish that it is a holder of the draft, Exhibit P1 for value. The evidence of the respondent before this court on the issue of value was patently vague, speculative and lacked probative value. Neither share certificate nor a single document evidencing the alleged staggering loan of N26 million by the respondent to Alhaji Abubakar was tendered before this court. (p. 2695 A) D E

5. Respondent is a nominee of Alhaji Ladan and no more

It is my view that in the absence of any credible evidence of value in respect of Exhibit P1, the respondent will remain a volunteer who cannot claim upon the draft against the appellant. F

It is beyond dispute that the respondent is a nominee of the named Alhaji Ladan for the collection of payment on the draft. In my view, where the principal, Alhaji Ladan, has no claim to the draft as a result of the total absence of consideration by way of his failure to supply the agreed foreign exchange to the appellant, the respondent cannot claim a better right to the draft in the absence of evidence of a separate and distinct value it gave for the draft. (p. 2696 B) G H

6. Fraud vitiates every contract

The appellant, in its defence, admitted that it stopped payment of the draft to prevent itself from being defrauded with Exhibit P1. Fraud

vitiate every contract into which it enters, and an Instrument, the consideration for which is fraudulent even in part, is voidable at the option of the party defrauded except against a holder in due course. (p. 2696 F)

B **REPRESENTATION**

N.O. Olaiya, Esq., for the Appellant

P.O. Orbih, Esq., with A. A. Odunsi, Jnr. and S. M. Ilegionu, for the Respondent

C **CASES REFERRED TO**

U.B.N. v. Nwoye (1996) 3 NWLR (Pt. 435) 135

Okubule v. Oyagbola (1990) 4 NWLR (Pt. 147) 723

U.B.A. Ltd. v. Ibhafidon (1994) NWLR (Pt. 318) 90

D Fadlallah v. Arewa Textile Ltd. (1997) 8 NWLR (Pt. 518) 546

Joachimson v. Swiss Bank Corporation (1921) 3 K. B. 110

Lagricom Co. Ltd. v. U.B.N. Ltd. (1996) 4 NWLR (Pt. 441) 185

Omeregbe v. Edo (1971) 1 All NLR 282

Akeredolu v. Akinremi (1989) 5 S.C. 102

E National Invest. & Properties Co. Ltd. v. Thompson Org. Ltd. (1969) 1 ANLR 138

Yongo v. Commissioner of Police (1992) 8 NWLR (Pt. 257) 36

London Joint Stock Bank v. Macmillan and Arthur (1918) AC 777

F **STATUTE REFERRED TO**

Bills of Exchange Act Cap. 35 LFN 1990, s. 30

LEAD JUDGMENT BY EJIWUNMI JSC

G The claim that eventually led to this appeal was commenced by the plaintiff/respondent before the High Court of Lagos State in Suit No. LD/1395/95. In that suit, the plaintiff/respondent's claim was for the sum of N7,100,000.00 (Seven Million, One Hundred Thousand Naira) being the value of a bank draft issued by the appellant in favour of the respondent on the 8th of February, 1995, as per First African Trust Bank Cheque No. 40622-062150011 and which cheque was returned unpaid despite repeated demands. The respondent also claimed interest at the rate of 21% per annum from 8th February, 1995, to the date of judgment and 10% per annum there-

H

after until judgment debt is finally paid.

The writ of summons in respect of this claim was followed by a Statement of Claim. Thereafter, the respondent by a motion on notice applied to the trial court for leave to enter judgment against the appellant. That move was resisted by the appellant who eventually got the leave of the trial court to file its Statement of Defence in order to defend the action. The case was then heard on the pleadings filed by the parties. For the respondent, one witness gave evidence while appellant proffered evidence in support of its own case by calling two witnesses.

In view of the comments that will be made later in this judgment, the pleadings of the parties would be set out in this judgment. For the plaintiff/ respondent, the Statement of Claim filed on its behalf by its learned counsel reads thus:-

"1. The plaintiff is a registered company with its office at 37 Ademola Street, S.W. Ikoyi, Lagos, and carrying on the business of financial consultants and suppliers.

2. The defendant is a registered company carrying on banking services at Afribank Street, Victoria Island, Lagos.

3. On the 8th of February, 1995, the defendant issued a bank draft No. 40622-062150011 for N7,100,000.00 in favour of the plaintiff for services rendered.

4. That on presentation the cheque was first returned and marked "represent" "Valued not received."

5. That when the cheque was again represented it was returned and marked "payment stopped."

6. That payment could not be stopped because it was the bank itself that issue (sic) the cheque.

7. That the plaintiff had already given value on receipt of the bank draft."

And for the appellant, its Statement of Defence reads thus:-

"SAVE AND EXCEPT as hereinafter expressly admitted the defendant denies each and every allegation contained in the Statement of Claim as if the same were specifically set out and traversed seriatim.

1. That the defendant admits paragraphs 1 and 2 of the Statement of Claim.

2. The defendant denies paragraphs 3,4,5,6 and 7 of the

Statement of Claim.

3. *The defendant in particular response to paragraphs 3 and 7 of the Statement of Claim denies ever receiving value or consideration for the banker's cheque; the subject-matter of this suit, and avers that it stopped payment of the same to prevent fraud on itself.*

B 4. *Further to the immediately preceding paragraph the defendant states that sometime in February, 1995, while in the course of trading, a man called Alhaji Tijani Ladan offered to sell US\$500,000.00 to the defendant in the presence of one Alhaji*
C *Abubakar of Damco Bureau De Change and another.*

5. *The defendant further states that part of the conditions precedent to concluding and transferring the money was that part payment must be made in draft as evidence of the defendant's ability to pay before the transfer can be effected.*

D 6. *That defendant states that based on the aforesaid agreement in paragraph it issued two cheques for N15 Million Naira as follows:-*

(a) *Nigeria Universal Bank N 7,900,000.00*

(b) *Partnership Investment - N 7,100,000.00*

E *Total N15000,000.00*

7. *Contrary to the said agreement the Bankers cheque - subject-matter of this suit - came in through clearing. The defendant immediately threatened to stop payment, were prevailed upon by the aforesaid persons to return the cheque marked 'Represent' to*
F *enable the defendant receive value for the foreign exchange purchased.*

8. *However, the said cheque was represented without receipt of the foreign exchange and at this stage the defendant stopped*
G *payment to prevent loss of the Naira sum of N7,100,000.00*

9. *The defendant states that the said attempted fraud was reported to the Police Authorities, and some of the said persons involved were arrested.*

10. *The defendant avers that neither the said Alhaji Tijani*
H *Ladan nor the plaintiff has an account with it and denies receiving any value for the said Banker's Cheque from them or anyone else.*

11. *The defendant denies that the plaintiff gave it any value for the said cheque nor has the plaintiff suffered any loss at all.*

ALTERNATIVELY, if the plaintiff suffered any loss at all (which

is denied) the same is not attributable to the fault of the defendant.

12. *The defendant further states that only the outcome of police investigation can reveal what role (if any the plaintiff played in the entire transaction; as the plaintiff's name was given to the defendant as beneficiary of the said cheque.*

13. *That even with the endorsement on the cheque (i.e. 'Represent' value not received) the plaintiff did not contact the defendant for confirmation of the cheque until after same had been stopped.*

14. *The defendant further states that had it not stopped payment of the said cheque; it would have suffered a complete loss of the value of the cheque.*

15. *Whereupon the defendant states that the plaintiff's claim is speculative and unfounded and should be dismissed with costs to the defendant."*

At the trial, the case for the respondent as given by the only witness called appears to be that one Alhaji Abubakar brought a bank draft of N7.1 million which was part-payment of an amount owed by him to the respondent. Following the presentation of the cheque for payment to the appellant, claimed by the respondent to be its bankers, the bank draft No. 013922 dated 8-2-1995 was returned and that it should be re-presented. The respondent duly re-presented the bank draft Ex P/1 at a future date. When it was so re-presented to the appellant, it was returned unpaid with this remark: "value not received." As since the bank has remained unpaid, the respondent commenced this action. Under cross-examination, the witness said about Alhaji Abubakar who gave the bank draft to the respondent as follows, and I quote:-

"Alhaji Abubakar was interested in investing in the plaintiff's company by purchase of shares on the company. The plaintiff company made some payments to Alhaji Abubakar in terms of facilities granted to him. He was given credit facilities up to twenty-six million naira N26,000,000.00. The credit facilities was given to Alhaji in January 1995. The draft was given to the plaintiff by Alhaji Abubakar in part settlement of the credit facilities granted to him. When the draft was dishonoured we made contract (sic) with Alhaji Abubakar about it, he did not make any effort to repay the returned draft even after several meetings....."

For the appellant, evidence was given by its first witness inter

alia, that the respondent is not a customer of the appellant. That apart from the bank draft Exhibit P. 1, the appellant had no relationship whatsoever with the respondent. He said that around 8th February, 1995, one Alhaji Tijani Ladan came with Alhaji Abubakar of Damco Bureau De Change to the appellant where they had a meeting with the officials of the appellant. During that meeting the visitors offered to seek on the autonomous market a sum of \$500,000.00. As the representatives of the appellant became interested in the offer, it was agreed with the offerors that the said sum would be bought by the appellant for the sum of N15,000,000.00 (Fifteen Million Naira). At the request of Alhaji Tijani, the appellant also agreed that it would issue two cheques (bank drafts) for the sum of N15,000,000.00 as follows:-

- “(1) for the sum of N7.9 Million Naira in favour of Nigeria Universal Bank, and
- (2) the second cheque (bank draft) for the sum of N7.1 Million Naira in favour of the appellant.

The witness further added that it was a term of the agreement that the two bank drafts to be issued by the appellant would not be presented for payment until the sum of \$500,000.00 has been transferred and received into the foreign account of the appellant bank. The appellant was however surprised that the relevant bank draft in this case for N7.1 million (Naira) was presented for payment before the \$500,000.00 (Dollars) was paid into the foreign account of the appellant. As this action was contrary to the agreement reached between the appellant and Alhaji Ladan, the bank draft was not paid. It was returned and marked “Represent.” The other bank draft for N7.9 million was similarly treated. Despite that treatment of the cheques, the sum of \$500,000.00 (dollars) that was promised by the offerors, namely, Alhaji Abubakar and Alhaji Ladan remained unpaid into the account to the appellant. The bank draft of N7.1 Million Naira relevant to this case had to be stopped by the appellant to prevent a fraud on itself. The appellant subsequently explained to the Managing Director of the respondent its reasons for stopping the bank draft, Exhibit P1.

The evidence of the second witness for the appellant, one Rufus Adeosun, who described himself as a banker and in the employment of the appellant, confirmed the transaction as stated by the

first witness, a Mr. Solomon Osita Mbamalu, a legal practitioner and the legal adviser of the appellant. Following addresses at the close of the oral evidence given by the parties, the learned trial Judge delivered a considered judgment. By the said judgment, the respondent was awarded judgment in terms of its claim. Accordingly, the respondent was awarded its claim for the sum of N7,100,000.00 being the value of the bank draft issued by the appellant in favour of the respondent with interest at the rate of 21% per annum from the 8th of February, 1995, until the date of the judgment, and thereafter at the rate of 10% per annum until the judgment debt is fully paid.

Being dissatisfied with the judgment of the trial court, the appellant appealed to the Court of Appeal (Lagos Division). In that court, the appellant was also unsuccessful and has therefore appealed further to this court. Pursuant to its appeal to this court, the appellant was granted leave to appeal to this court. The appellant in compliance with the Rules of this court filed a brief for the appellant. Upon being served, the respondent also filed a respondent's brief.

For the appellant, the following issues were identified in the appellant's brief for the determination of the appeal:-

"(a) Whether in the circumstances of this case the appellant is obliged to pay the respondent on Exhibit P1 when the Court of Appeal had found that the pleadings and evidence of the appellant on want of value had not been controverted nor seriously challenged by the respondent (Ground 1).

(b) Whether the learned Justices of the Court of Appeal were right in holding that the appellant had not sufficiently pleaded nor proved the fraud which the appellant alleged in this case (Grounds 2 & 3).

(c) Whether in the absence of a written endorsement of the condition precedent on the draft, the appellant is not permitted by law to prove that the delivery of the draft was subject to a condition precedent and whether the condition ought not to bind the respondent who is a nominee of Alhaji Ladan with whom the appellant entered into an agreement for the supply of forex (Ground 4)"

In the respondent's brief, the following are the two issues set down for the determination of the appeal:-

"(1) Whether the respondent was required by law to show that it had given consideration for the draft before it could be paid.

(2) Whether the alleged fraud had been particularized as required by law and proved.”

As I have carefully considered the issues raised by the parties for the determination of the appeal, and although my judgment would be guided by the issues raised in the appellant’s brief, I would also
B advert to the two issues proffered for the respondent, as they are also germane to the determination of the appeal.

Now, a careful reading of the facts of this case, the pleadings of the parties, and the judgments of the courts below, would reveal
C that the core question raised in this appeal is, whether the court below was right to have upheld the conclusion reached by the trial court that the draft Exhibit “P1” was payable at sight to the respondent.

It is however argued for the appellant in the appellant’s brief
D and in the oral argument before this court that the court below was wholly wrong to have upheld the judgment of the trial court. In support of that submission, learned counsel for the appellant has argued that the court below properly adverted to the pleadings of the parties and rightly observed that having regard to the state of the pleadings,
E the respondent ought to have filed a reply to the Statement of Defence of the appellant. The court below, it is argued, without considering this aspect of the appeal before it, wrongly, in the view of learned counsel for the appellant, went on to hold that if the appellant had
F not received value, it would not have issued the draft, as it is the practice of banks to receive value before drafts are issued. He went on further to submit that the court below wrongly placed reliance on the decisions in *U.B.A. Ltd. v. Ibhafidon* (1994) NWLR (Pt. 318) 90 and *Lagricom Co. Ltd. v. U.B.N. Ltd.* (1996) 4 NWLR (Pt.441) 185.
G It is also argued in support of the above submission that the court below misconceived the evidence of the appellant or did not sufficiently relate the evidence of the appellant in support of its pleadings before reaching the conclusion that the respondent was entitled to be paid the sum claimed in Exhibit P1. In the view of learned counsel
H for the appellant, had the court below considered such evidence as was on record, it would have reached the conclusion that the decision in *U.B.A. Ltd. v. Ibhafidon* (supra) is not applicable to the case under consideration. He then referred to the case of *U.B.N. v. Nwoye* (1996) 3 NWLR (Pt. 435) 135, as more apposite to the determina-

tion of the question raised in respect of this issue. He also invited the attention of the court to Halsbury's Laws of England Vol.4. 4th Edition Paragraph 379 at page 164, and to the following cases: - Re Whitaker (1889) 42 Ch. D 119 at 124; and R.E. Jones Ltd. v. Waring & Gilow Ltd. (1926) AC 670 at 680, 687 and 699. On this main question, the contention made for the respondent in the respondent's brief and in the oral argument at the hearing of the appeal, is that the court below was right to have upheld the respondent's claim. Learned counsel for the appellant urged the court to apply the decision in UBA Ltd. v. Ibhaifidon (supra) for the appellant before issuing the draft Exhibit "1A" must have satisfied itself that the transactions leading to its issuance were in order. In the view of learned counsel for the respondent, the bank cannot rely on a mistake of the bank and another third party to repudiate the payment of the draft. It is the further submission of learned counsel that the appellant, once it has issued the draft, is estopped under Section 150 Evidence Act from denying that it was not issued for valuable consideration.

Before the consideration of the arguments proffered by learned counsel for the parties in respect of this issue, I think it is desirable to advert first to the pleadings filed in this matter. In this respect, it is pertinent to note that the court below in the course of the lead judgment delivered by Chukwuma-Eneh, JCA., adverted to the state of the pleadings when he had referred to the pleadings and said at page 345 of the Records, thus:-

"The foregoing represents the state of the pleadings of both parties upon which issues were joined in the lower court. No reply was filed by the respondent (i.e. the plaintiff in this court below) on the new issues of want of consideration and allegation of fraud. Perhaps it did not feel obliged in the circumstances that one was necessary. I do not intend to expatiate on the point."

Then he went on to make the following observation with regard to the position:-

"The respondent (as plaintiff) had strenuously argued that the appellant was estopped from denying that it had received value for Exhibit "P1". Besides that as a holder in due cause he was not obliged to give value. It went on to assert that the draft was for shares taken in the respondent's company in another breath that it was given to meet the credit facilities of N26m given to Alhaji Ladan. The

trial court upheld the respondent's case that value was given."

After making the above observation, the court below then went on to consider what both that court and the trial court perceived to be the case for the appellant as opposed to that of the respondent.

B In that regard, the court below had this to say at page 346 of the Printed Record:-

"The crux of the appellant's case on the pleading and evidence in the court below... is that Exhibit "P1" was issued and delivered to the (sic) Alhaji Ladan on condition that the draft would not be presented for payment unless and until the foreign exchange was paid into the appellant's account. The foreign exchange was not paid before Exhibit "P1" was presented for payment hence it was dishonoured. The witnesses were called to support the averments in the pleadings. It was suggested that the respondent prevaricated as to the nature of the transaction it alleges between it and Alhaji Ladan. And also that neither could serve as consideration for the draft."

It is pertinent to observe that the pieces of evidence attributed to the respondent concerning the purchase of shares from it by Alhaji Lagan would not have been considered by the trial court and the court below as nowhere in its pleadings did the respondent make such averments. This is because it is settled law that as parties are bound by their pleadings, evidence not pleaded cannot be allowed at the trial. And if such evidence was admitted, then an appellate court is duty bound to strike out such evidence, and must not consider it in the determination of the appeal. See National Investment and Properties Co. Ltd. v. Thompson Organisation Ltd. and Ors. (1969) 1 ANLR 138; Akeredolu v. Akinremi (1989) 5 S.C. 102; (1989) 3 NWLR (Pt.108) 164 at 173. **Therefore, the court below should not have alluded to the unpleaded evidence led by the respondent.** Be that as it may, it is in my view clear that the pleadings of the respondent show quite clearly that their claim was based solely on the fact that Exhibit "P1" was issued by the appellant. Now with that as the position of the respondent, the court below then accepted the formulation made by the trial court as to what the appellant need to prove in order to avoid the payment of Exhibit "P1" to the respondent.

The court below in accepting that formulation then opined as follows:-

"I am therefore compelled to hold the opinion that on the particular facts of this matter that for the appellant to succeed in this appeal it was obliged to prove want of consideration together with fraud on the part of Alhaji Ladan so as to establish that there was no contract at all, i.e. ab initio. If I may further observe, as the issues of want of consideration and fraud appear founded on the same substratum it is beyond conjecture that failing to establish either would completely collapse appellant's case. The question that naturally follows is; whether the appellant succeeded in this exercise."

The court below, per Chukwuma-Eneh, JCA., then proceeded to consider United Bank of Africa Ltd. v. Ibhafidon (1994) NWLR (Pt. 318) 90 and Lagricom Co. Ltd. v. Union Bank of Nigeria Ltd. (1996) 4 NWLR (Pt. 441) 185, to answer the question. And at the end of the consideration of these cases, the court below upheld the conclusion reached by the trial court that the draft Exhibit "P1" was otherwise payable at sight since as founded by the trial court, the alleged fraud had not negated the presumption of value as per S. 30 of the Act.

Now, as the lower court depended so much on the decision reached in the cases referred to above, namely, U.B.A. v. Ibhafidon (supra) and Lagricom v. U.B.N. (supra), it is necessary to examine the cases though they happened to have been judgments of the court below. The cross examination of the decision in the cases should help to decide whether the court below was right to have placed reliance on them in the determination of the question raised before it in the instant appeal. For this purpose, I will begin with the case of U.B.A. v. Ibhafidon (1994) 1 NWLR 90 where I delivered the lead judgment. The pertinent facts of this case are that

"One Mr. Ehinola who was introduced to the respondent in this appeal claimed to have a large sum of money in dollars in his domiciliary accounts with the appellant herein. He offered to sell to the respondent at the rate of N4 to one US dollar. The respondent was not willing to take advantage of the offer unless he was able to confirm the claim of Mr. Ehinola to ascertain the liquidity position of the account. Mr. Ehinola and the respondent together went to the appellant's central branch office in Lagos where the said Mr. Ehinola

applied to withdraw the sum of \$33,634.00 from his account. The Bank official told them to come back the following day. On getting there the following day the respondent was informed by the bank official that he could proceed with the foreign exchange transaction as Mr. Ehinola had sufficient funds to accommodate the amount applied for by Mr. Ehinola. The respondent claimed he handed over N134,572.00, the Naira equivalent of US\$33,643.00 to Mr. Ehinola in the presence of the Bank official concerned and that thereafter the appellant, through one of its officials drew up a Bank Draft No. 031069 for US \$33,643.00 in his (respondent's) favour and handed it over to him (respondent). The respondent went with the draft to the appellant's branch in Benin and was informed that he will be able to cash the sum on the draft. He was advised to open an account with the draft which advice the respondent complied with on 18/11/86 and he was allocated with an Account No. FCA/0003 with a teller with which advise he paid the draft into his account with the Bank. The respondent was asked to call back at the Bank after 21 days to collect the proceed of the draft. At the expiration of the 21 days, the respondent was not given any money but was informed that nothing had been heard from the appellant's head office in Lagos.

The appellant Bank later wrote a letter to the respondent repudiating the payment on the draft. The respondent as plaintiff therefore commenced this action and claimed in his Writ of Summons the sum of US \$33,613.00 (sic) interest at 15% on the said sum.

The case for the appellant was that the domiciliary account of Mr. Ehinola was funded from a forged cheque. It is also contended that the respondent is not entitled to recover the proceeds of the draft as the transaction or arrangement he made with Mr. Ehinola is illegal being in contravention of the Foreign Currency (Domiciliary Account) Decrees No. 18 of 1986 which forbids transaction in foreign exchange other than with an authorized dealer which the appellant claimed Mr. Ehinola was not. The defendant, not satisfied with the judgment of the trial court appealed to the court of Appeal."

And upon the facts revealed in that case after referring to pertinent cases on the question raised, namely Yesufu v. A.C.B 1 S.C. 74 at 92 and Balogun v. National Bank of Nigeria Ltd., I said at pages 120 -121:-

“It follows, having regard to the principles enunciated above that where as in the instant case that a customer who had deposited a cheque with the appellant banker and upon the authority of the customer who had deposited money standing in his name with the banker is instructed to pay a certain sum from that account to another person and acting on that authority the banker issued a draft accordingly the payee of the draft or the person to whose favour it was issued is entitled to the proceeds of that draft. In such circumstances as it is clear that when the appellant/bank issued the draft to the respondent as authorized by the depositor its customer, the appellant, did so because it was satisfied that the account of the depositor is sufficiently in funds to meet the amount for which the draft was issued. In my view the time when the draft was issued could well be described as the moment of truth for the appellant. It seems to me that the officials of the appellant who issued the draft ought to have been familiar with the effect of issuing a draft in respect of money standing to the credit of its customer. Secondly, it is not in evidence that the procedure for dealing with funds of this kind as laid down in the Enabling Acts was followed before the draft was issued. The appellant cannot be heard to refuse the payment of the draft that was issued to the respondent because of a further development that had nothing to do with him. The appellant is obliged to pay the proceeds of the draft of the respondent and should seek relief against its depositor, Mr. Ehinola. It follows therefore that the appellant was wrong to have refused to pay the proceeds of the draft to the respondent and I therefore would uphold the expressed views of the lower court that the appellant is obliged to pay the respondent the value of Exhibit 1 All

It must be noted that the respondent in that case was successful in that when the appellant received the bank draft issued from the Headquarters branch of the respondent, the respondent had previously ascertained from his enquiries that there was enough funds to pay the proceeds of the bank draft at the Benin Branch of the appellant bank.

I now turn to the case of Lagricon Co. Ltd. v. U.B.N. Ltd. (supra), where the facts are as follows:-

“The appellant sued the 3rd and 4th respondents jointly and severally for the sum of N3,205,000.00 being the value of cocoa

supplied to them for which they failed to pay, against the 1st respondent the sum of N2,400,000.00 and an injunction prohibiting the 1st, 5th and 6th respondents from paying the said sum of N2,400,000.00 to the 2nd respondent as well as general damages of N5,000,000.00 against the 1st, 3rd and 4th respondents for breach of their obligations. The appellant is a cocoa merchant and the 3rd and 4th respondents were his customers. It transpired that the 3rd and 4th respondents were agents of the 2nd respondent. Overtime, the 3rd and 4th respondents were buying cocoa on a regular basis from the appellant and at times on credit. According to the appellant, sometime in December, 1988, after settling their previous indebtedness, the 3rd and 4th respondent started evacuating cocoa with a promise to pay later. They evacuated cocoa amounting to N13,950,000.00 and that they paid a total sum N11,475,000.00 leaving a balance of N2,475,000.00 still owing. Thereafter the 3rd respondent issued a Draft for N2,400,000.00 to the appellant made by the 1st respondent in favour of the appellant. The said draft was lodged in the appellant's account with the 1st respondent's branch at Ife. Following the appellant's refusal to allow further evacuation of cocoa until he was paid the balance outstanding, the 3rd respondent took steps and prevailed upon the 1st respondent to stop the draft and it was stopped. According to the 3rd respondent the draft represented up front payment for the cocoa and that it was the failure of the appellant to deliver to him what he paid for that made him to stop the draft. It was for this that the appellant sued and made various claims against the respondents. The 3rd respondent also counterclaimed. The High Court dismissed the appellant's claims and granted the 3rd respondent's counterclaim against the appellant with costs. The appellant appealed to the court of Appeal."

The court below after hearing the appeal case, argument of counsel, upheld and ordered that the draft issued in favour of the appellant be paid by the respondent.

Again, it must also be noted from the accepted facts in that case that there had been transactions concerning the sale and evacuation of cocoa between the 3rd respondent and the appellant and which on the facts showed that the 3rd respondent was in debt in the sum of N2,475,000.00 to the appellant. That the 3rd respondent then issued a Bank Draft of the 1st respondent for N2,400,000.00 in

favour of the appellant. It was this bank draft which was not honoured by the 1st respondent and which the Court of Appeal ordered by its judgment to pay to the appellant. While it is clear from the judgment that that order was made in keeping with a similar order that was made in *U.B.A. Ltd. v. Ibhafidon* (supra), it must be emphasised that in that case, the order to pay was made because it was apparent that when the Bank draft was issued of the respondent, there was evidence that the money was sufficient to cover the amount on the Bank draft in the account of the respondent with the appellant Bank at its headquarters office in Lagos. I have earlier quoted what I said in this connection in *U.B.A. v. Ibhafidon* (supra). I therefore need not repeat it here. However, it suffices to refer to a portion from the above quoted passage from the said judgment for the sake of emphasis. It reads:-

“...as it is clear that when the appellant/bank issued the draft to the respondents authorized by the depositor its customer, the appellant did so because it was satisfied that the account of the depositor is sufficiently in funds to meet the amount for which the draft was issued.”

I think that learned counsel for the appellant was right in his argument in his brief when he contended that the facts in U.B.A. v. Ibhafidon (supra) and the Lagricom v. U.B.N case could properly be distinguished from the facts in the instant appeal. From what I have said above, it is a common feature between the earlier cases that the bank drafts were issued against accounts that were sufficiently funded to accommodate the drafts issued by the appellant banks. In my humble view, the orders to compel the payment of the bank drafts so issued was clearly because there was no positive evidence to show why the bank drafts should not be paid over to the recipients. But with regard to the instant appeal, the facts in my humble view did not show that the respondent had any money which was proved to have been deposited in the account of the appellant bank by its procurers, namely, Alhaji Ladan and Alhaji Abubakar. It is pertinent to refer also to the case of *U.B.N. v. Nwoye* (1996) 3 NWLR (Pt. 435) 135. The facts of this case stated briefly are as follows: The respondent who was the plaintiff in the High Court maintained a current account with the Asaba Branch of

the Union Bank Ltd, the appellant. On 2nd July, 1984, the respondent issued a cheque for N15,000.00 to a trading partner, but it was dishonoured because as at that time, the respondent had only N7,621.24 standing as balance in his current account. The respondent who believed that at the time he had enough money in his account to meet the said cheque felt greatly injured as to his credit and trade and then instituted the present action against the appellant claiming the sum of N100,000.00 as special and general damages for wrongful dishonour of his cheque or in the alternative, he claimed the N100,000.00 as special and general damages for negligence. At the hearing, the respondent gave evidence to the effect that he had deposited over N19,000.00 in his account. The appellant through its witness, admitted this but contended that most of the lodgments made by the respondent were made through drafts which had not been cleared. At the High Court, the respondent succeeded and the appellant appealed unsuccessfully to the court below. In this court, the further appeal by the appellant succeeded.

It is I think apposite to quote in part the reasons given by some of the Justices of this court for allowing the appeal. Mohammed, JSC., who wrote the leading judgment said thus at p. 143.

“There is evidence from both the plaintiff and defendant’s witnesses, who were bankers, on the banking procedure in respect of clearance of draft cheques. In this case A.C.B. Asaba did not clear draft cheque of N8,000.00 which was sent to it by the appellant. As I mentioned earlier, the bank sent to the Union Bank, Asaba, the appellant, a draft cheque for N86,285.46 drawn on A.C.B. Ring Road, Benin. The correct banking procedure, as has been explained by the bankers, is that the amount in the draft cheque, even if credited to a customer’s account, is not equivalent to cash lodgments. The customer has to wait until after the cheque has been cleared in the clearing House within the Central Bank before it could be regarded as cash.”

Iguh, JSC., at pages 144-145, had this to say:-

“The main issue that has arisen for determining in this appeal is whether the plaintiff had sufficient funds in his account as at the 11th July, 1984, to cover his cheque for N15,000.00 drawn on Exhibit 35 which was returned unpaid. If the answer is in the affirmative, his actions succeeds otherwise it will be liable to dismissal. The

parties appeared agreed that the key to resolving this issue lies with whether the plaintiff's A.C.B. Ltd., Asaba draft for N8,000.00, Exhibit 51, was cleared as at the said 11th July, 1984. On the undisputed evidence before the trial court, the said A.C.B. Ltd., Asaba draft forwarded to the defendant bank, namely the Union Bank of Nigeria Ltd., Asaba the afternoon of Friday, 6th July, 1984. On Monday, the 9th July, 1984, being the next working day, it was forwarded by the defendant to its head office, Benin City, for clearance by the Central Bank of Nigeria, Benin City. There can be no doubt that the said draft. Exhibit 51, as between A.C.B. Asaba and A.C.B, Benin City was, on the evidence cash but, certainly, not as between the defendant bank and A.C.B. Asaba until the draft was cleared at the Central Bank of Nigeria, Benin City. The facts of this case were not such as involves the credibility of witnesses. It is plain to me, on the uncontroverted evidence before this court, that the plaintiff failed to establish that Exhibit 51 was cleared as at 11th July, 1984. In my view, the findings of both courts below to the contrary, being totally unsupported by evidence led at the trial, must be regarded as perverse. See Sebastian S. Yongo and Another v. Commissioner of Police (1992) 8 NWLR (Pt. 257) 36 and Paul O. Omoregbe v. Ehigiator Edo (1971) 1 All NLR 282 at 289. A bank will ordinarily not honour a customer's cheque if funds in his account are insufficient to meet the cheque. It seems to me that the defendant/appellant on the facts of this case, was entitled to dishonour the plaintiff's cheque, Exhibit 35 as it was not established that he had sufficient funds in his account to satisfy the said cheque."

From a careful study of the judgment in U.B.N. v. Nwoye (*supra*), it cannot be in doubt that the appeal was allowed because the court was satisfied that a bank draft cannot be allowed to be paid upon uncleared effects. This in effect means that at the time the bank draft/cheque was issued at the behest of the respondent in favour of his partner/payee, the respondent did not have that sum of money in raw cash standing to his name in the bank. The reasoning in the Nwoye's case that resulted in the order that the respondent was not entitled to the proceeds of the bank draft/ cheque that he caused to be issued to his partner/payee, is not, in my respectful view, dissimilar to that which in the Ibhaifidon case (*supra*) and the Langricom case (*supra*), resulted in the order of the court below that the bank draft/

cheque be paid in favour of those in whose favour the bank drafts were respectively issued. In other words, it can be unequivocal that the common factor that is evident in respect of these three cases, namely, *L.J.B.A. v. Ibhaifidon* (supra): *Lagricom v. U.B.N. & Ors.* (supra) and *U.B.A. v. Nwoye* (supra) is this; each of the accounts involved in respect of these cases had sufficient physical cash to meet the draft cheques issued by the respective banks. The orders to pay or not to pay the various drafts/cheques were therefore not made simply because they were issued by the respective banks.

Let me now return to the instant appeal. I have earlier in this judgment quoted from the printed record the pleadings of the parties to this suit. It is clearly discernible from the said pleadings that it is the defence of the appellant that it did not pay the bank draft to the respondent, because the procurer of the bank draft, Alhaji Abubakar D and Alhaji Ladan, failed to honour the promise made to the appellant that it would pay to the appellant the total sum of US\$500,000 (Five Hundred Thousand US Dollars) being the equivalent of the sum of N 15,000,000.00 (Fifteen Million) Naira. This case is however concerned with the sum of N7,100,000.00 on the bank draft, E “Ex. 1” which was issued in favour of the respondent as agreed with Alhaji Abubakar and Alhaji Ladan. There is no doubt that they did not fulfil their own side of the bargain by paying the agreed sum of \$500,000.00 (Five hundred thousand U.S. dollars) or any part of it into the account of the appellant. ***It is therefore plain from the pleadings the position taken by the respondent was based on the footing that it is claiming payment from the appellant as if it was indebted to the respondent on the sum claimed. However having regard to the Statement of Defence of the appellant and the evidence led thereon. I do not think that that position was sustainable to uphold the claim of the respondent. The bank draft cheque is obviously without any consideration, as it was not established that the respondent or anyone else connected with the respondent had any money of any kind in any account within the system of the appellant at any time relevant to the issuance of the bank draft.***

Now, it is settled law that an appellate court would not ordinarily interfere with the judgment of the court, but where the judgment of the court below was reached either upon er-

roneous inference drawn from finding facts or that its application of the law to properly found facts is perverse and/or erroneous, then the appellate court has a duty to intervene to or correct the injustice so caused. See *Fatoyinbo v. Williams* (1956) 1 FSC 87; (156) SCNLR 274, *Sarakatu J. Amida v. Osholoja* (1984) 7 S.C. 68; *Finnih v. Imade* (1992) 1 NWLR (Pt. 219) 511. **Bearing this principle above in mind, it is clearly my duty having regard to what I have said above, to interfere with the judgment of the court below.** ⁵ **I must therefore allow this appeal for the reasons given above.** To hold otherwise would be to open wide the door for swindlers and all kinds of fraudulent and other manipulative characters to obtain funds, which they are not legally entitled to receive from banks, by claiming a right to such funds merely upon the presentation of bank drafts to the bank. C

In the event, the appeal is hereby allowed, the judgment orders of the courts below are accordingly set aside. As the appellant is entitled to its costs in the courts below and in this court, the following orders are made against the respondent: a refund of the judgment sum together with accrued interest deposited by it with the deputy Chief Registrar of the court below in fulfillment of the conditional stay of execution granted by that court. I also order that the said judgment sum of N7,100,000.00 be refunded immediately to the appellant accordingly with all the accrued interest on that sum. D

Secondly, it is also manifest from the appellant's brief that costs in the sum of N15,000.00 had been paid by the appellant to the respondent as awarded by the courts below. The cost of N4,000.00 ordered in favour of the respondent by the said court and by the court below for the sum of N3,000.00 are hereby also awarded in favour of the appellant. As the appellant is also entitled to its cost in this court for its success in this appeal, the sum of N 10,000.00 is hereby awarded in its favour. For the avoidance of doubt, the judgment sum with accrued interest and the cost paid as adumbrated above are to be paid immediately by the Deputy Chief Registrar, the Court of Appeal, Lagos, and the respondent in terms of the costs awarded. In the result, the claim of the respondent is dismissed in its entirety. E F G H

KUTIGI JSC

I have read in advance the judgment just delivered by my learned brother Ejiwunmi. JSC., I agree with his reasoning and conclusions. The defendant/appellant has conclusively established that it never received any value or consideration for the banker's cheque from the dubious one Alhaji Tijani Ladan or one Alhaji Abubakar, and both the trial High Court and the Court of Appeal having so found, the appellant is perfectly entitled to have refused to honour the bank draft or cheque. In other words the plaintiff/respondent herein is not entitled to the proceeds or value of the cheque.

The appeal accordingly succeeds and it is hereby allowed. The judgments of both the trial High Court and that of the Court of Appeal are set aside. In their place an order dismissing plaintiff/respondent's claim is substituted. I endorse the orders made in the lead judgment.

MOHAMMED JSC

I have had a preview of the judgment of my learned brother, Ejiwunmi, JSC., in draft, and I agree with him that this appeal has merit and ought to be allowed. I have tried to find the ground upon which the respondent hinged its claim for the payment of the N7,100,000.00 (Seven Million, One Hundred Thousand Naira) being value of a bank draft issued by the appellant in the company's favour. The facts are clear and cannot be interpreted in any other way. The appellant issued a draft/cheque of N7,100,000.00 in anticipation of the payment of US\$500,000 (Five Hundred Thousand Dollars) which Alhaji Abubakar and Alhaji Ladan promised to pay to the bank. And when the two foreign exchange dealers failed to fulfil their side of the agreement the appellant was left with no alternative but to decline to honour the draft/cheque. It is simple common sense. There is no consideration from the respondent for the payment of the amount in the draft/cheque.

The two courts below are clearly wrong to order for the honouring of a bank draft when the respondent had given no consideration for such payment.

This appeal is therefore allowed. I set aside the judgments of the two courts below. I dismiss the claim of the respondent. I abide

by all the consequential orders made in the lead judgment.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ejiwunmi, JSC., and I agree entirely that there is merit in this appeal and that the same should be allowed. B

This appeal by the defendant/appellant is against the judgment of the Court of Appeal, Lagos Division, delivered on the 14th day of November, 2000. The court below by that judgment upheld the decision of Alabi, J., sitting at the High Court of Lagos State in favour of the plaintiff/respondent in the suit. The respondent had instituted an action against the appellant at the High Court of Lagos State claiming inter alia the sum of N7,100,000.00 being value of a bank draft, Exhibit P1, issued by the appellant in favour of the respondent on the 8th day of February, 1995, as per cheque No. 40622-06662150011 which cheque on presentation by the respondent as returned unpaid by the appellant despite repeated demands. C D

The full facts that culminated in this action are fully set out in the leading judgment and no useful purpose will be served by my recounting them in any detail all over again. It is sufficient to reproduce hereunder paragraphs 3-7 of the respondent's short 7 point paragraph Statement of Claim as follows:- E

3. On the 8th of February 1995, the defendant issued a bank draft No. 40622-062150011 for N7,100,000.00 in favour of the plaintiff for services rendered. F

4. That on presentation the cheque was first returned and marked "represent" "valued not received." G

5. That when the cheque was again represented it was returned and marked "payment stopped."

6. That payment could not be stopped because it was the bank itself that issue the cheque.

7. That the plaintiff had already given value on receipt of the bank draft. H

Whereof the plaintiff claims as per its Writ of Summons."

The appellant by paragraphs 2 - 11 of its Statement of Defence and in reply to the above averments in the respondent's State-

ment of Claim answered thus-

"2. The defendant denies paragraphs 3,4,5,6 and 7 of the Statement of Claim.

3. The defendant in particular response to paragraphs 3 and 7 of the Statement of Claim denies ever receiving value or consideration for the banker's cheque; the subject-matter of this suit, and avers that it stopped payment of the same to prevent fraud on itself.

4. Further to the immediately preceding paragraph the defendant states that sometime in February, 1995, while in the course of trading, a man called Alhaji Tijani Ladan offered to sell US\$500,000.00 to the defendant in the presence of one Alhaji Abubakar of Damco Bureau De Change and another.

5. The defendant further states that part of the conditions precedent to concluding and transferring the money was that part payment must be made in draft as evidence of the defendant's ability to pay before the transfer can be effected. It was further agreed that the draft will not be presented for clearing until transfer had been effected.

6. That defendant states that based on the aforesaid agreement in paragraph 5, it issued two cheques for N15 million Naira as follows:-

(a) Nigeria Universal Bank- N 7,900,000.00

(b) Partnership Investment- N 7,100,000.00

Total N 15,000,000.00

7. Contrary to the said agreement the bankers cheque - subject-matter of this suit - came in through clearing, the defendant immediately threatened to stop payment, but was prevailed upon by the aforesaid persons to return the cheque marked 'Represent' to enable the defendant receive value for the foreign exchange purchased.

8. However, the said cheque was represented without receipt of the foreign exchange and at this stage the defendant stopped payment to prevent loss of the Naira sum of N 7,100,000.00

9. The defendant states that the said attempted fraud was reported to the Police Authorities, and some of the said persons involved were arrested.

10. The defendant avers that neither the said Alhaji Tijani Ladan nor the plaintiff has an account with it and denies receiving any value

for the said Banker's Cheque from them or anyone else.

11. The defendant denies that the plaintiff gave it any value for the said cheque nor has the plaintiff suffered any loss at all.

ALTERNATIVELY, if the plaintiff suffered any loss at all (which is denied) the same is not attributable to the fault of the defendant"

I think I need to mention that although the appellant in paragraph 3.03 of its brief of argument asserted that the underlined last sentence in paragraph 5 of its Statement of Defence was inadvertently omitted from the record of proceedings, the respondent in its own brief of argument did not deny or controvert this important averment of fact. On the contrary, the respondent in paragraph 3.01 of its brief of argument affirmed thus-

"Appellant admitted issuing the draft but claimed that it was issued on condition that the sum of US\$500,000.00 would be paid by the customer, namely, Alhaji Ladan, into the appellant's account D and as this was not done, appellant's was entitled to refuse payment of the draft. It was also admitted that the draft was presented for payment and refused."

It went on in paragraph 4.04 of its said brief -

The allegation that the condition for the issue of the draft was not fulfilled, even if accepted by the court, will not rebut the presumption that value was given"

I am, therefore, prepared to accept the above correction pointed out in the appellant's brief of argument as well founded.

It is crystal clear that the two main defences were raised by the appellant to the respondent's claim. The first is that the appellant never received appellant or consideration from Alhaji Tijani Ladan in respect of the draft in issue, Exhibit P1, and that the agreement between them is that the draft would not be presented for payment until UD\$500,000.00 purportedly being sold by Alhaji Ladan to the appellant had been transferred to the appellant. The second defence is that the appellant in the face of failure by the said Alhaji Ladan to give value for Exhibit P1 had no option but to stop payment of the cheque/draft to prevent fraud on itself. The appellant stressed that it would have been defrauded of the value of the draft if it did not stop the payment as the draft was presented for payment in breach of the condition precedent to the presentation of the draft for payment.

Dismissing the appellant's first defence, the trial court had this

to say -

“The intention of the parties to the contract in this case is for Alhaji Tijani Ladan to give value of \$500,000.00 to the defendant. It was not at any stage contemplated for the plaintiff to give value for the cheque of N7. 1 Million Naira. It is wrong and apparently too late
B for the defendant to suddenly wake up and expect the plaintiff to give them value. The defence of failure to give value for the draft of N7. 1 Million Naira is not available to the defendant.”

It went on -

C “If the defendant in this case was careless enough to have drawn a bank draft and hand it over to Alhaji Tijani Ladan without it having been paid for, it has itself to blame.

Having issued it in favour of the plaintiff, the defendant must be held to their responsibility...

D It is my judgment, that the defendant is not entitled to stop the draft the way it did in this case. I hold that the defendant is liable to the plaintiff as claimed.

Accordingly, judgment is hereby entered in favour of the plaintiff in the sum of N7,100,000.00 being the value of a bank Draft
E issued by the defendant in favour of the plaintiff which draft was returned unpaid.’

The above findings of the trial court were affirmed by the Court of Appeal when in its judgment it concluded as follows-

F “On the whole, having, as it were, dealt with all the issues raised in this appeal I uphold the conclusion reached by this court below that the draft, Exhibit “P1” was otherwise payable at sight since as found by this court below and confirmed by this court the alleged fraud had not negated the presumption of value as per S. 30(1) of
G the Act. In the result the appeal fails excepting as to the post-judgment rate of interest and it is hereby dismissed with N3,000.00 costs to the respondent. The trial court’s decision is hereby affirmed.”

With profound respect to both courts below, the word “draft”
H has been defined in law to include a bill of exchange as well as a cheque. It is said to be a nomen generale which embraces every request by the drawer upon the drawee to pay money. See *Hunter v. Bowyer* (1850) 15 L.T.O.S. 281 per Pollock, CB. See too *Words and Phrases Judicially Defined*, Vol. 2, Edited by Roland Burrows at Page 133.

Now, a banker, without doubt, is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose, or provided the cheques are within the limits of an agreed overdraft. See London Joint Stock Bank v. Macmillan and Arthur (1918) AC 777 at 789 HL, Joachimson v. Swiss Bank Corporation (1921) 3 K. B. 110 at 127, Union Bank of Nigeria Plc v. Nwoye (1996) 3 NWLR (Pt.435) 135. It needs be emphasised that there must be sufficient funds to cover the whole amount of the cheque presented for in the absence of special arrangement, there is, as a general rule, no obligation on the banker to pay any part of a cheque for an amount exceeding the available balance. The banker only contracts with the customer to honour cheques when he has “sufficient” and “available” funds in hand. See Carew v. Duckworth (1869) LR 4 Exch. 313, Joachimson v. Swiss Bank Corporation (supra).

In the present case, the major defence of the appellant as per paragraph 3 of its Statement of Defence is that it never received any value for the draft, Exhibit P1, and that it stopped payment to prevent a fraud on itself. The onus to prove value for the draft would ordinarily have been on the respondent to establish but the same, bylaw, is shifted to the appellant by virtue of the provisions of Section 30 (1) of the Bills of Exchange Act, Cap. 35, Laws of the Federation of Nigeria, 1990. That section of the law provides as follows-

“30(1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value”

There is under the above section of the law a presumption with regard to value in favour of the respondent in so far as the issuance of Exhibit P1 is concerned. Accordingly, bills of exchange and promissory notes, unlike other forms of simple contract, are presumed to stand upon the basis of a valuable consideration pursuant to the provisions of Section 30 (1) of the Bills of Exchange Act, hereinafter also referred to as the Act. The effect of the presumption, therefore, is that it shifts the burden of proof from the shoulders of the plaintiff who relies upon the instrument to those of the defendant who impugns it. It is, however, necessary to stress that this presumption of value provided under Section 30 (1) of the Act is not an irrebuttable presumption. It is only a prima facie presumption which may therefore be rebutted in appropriate cases. Once successfully

rebutted, the presumption under the said Section 30 (1) of the Act is dislodged and ceases to operate.

In the present case, the appellant led positive and direct uncontroverted evidence in support of its pleadings to the effect that Exhibit P1 was issued by the appellant as consideration for the purchase of foreign currency valued US\$500,000.00 to be supplied to it by Alhaji Ladan. The appellant also led unchallenged evidence that the draft, Exhibit P1, was issued subject to the condition precedent that it would not be presented for payment until its value or consideration for its issuance had been furnished to the appellant. It is also not denied that the presentation of the draft for payment was in breach of the said condition precedent as no forex had been supplied to the appellant to Alhaji Ladan or anyone else including the respondent.

It cannot be disputed that the prima facie presumption of value in favour of Exhibit P1 was conclusively rebutted by the appellant as a result of which the onus to prove value or alleged “service” averred in the Statement of Claim squarely fell upon the respondent. This position is trite law under the Evidence Act as in civil cases the burden of proving a particular fact is upon the party who asserts it and who will fail if no evidence is called upon the issue, regard being had to any presumption which may arise from the pleadings of the parties. This onus of proof is, however, not static. It continually shifts from side to side in respect of a fact in issue until it finally rests on a party against whom judgment will be given if no further evidence is proffered before this court. See *Igwe v. African Continental Bank Plc* (1990) 6 NWLR (Pt. 605) 1, *Fadlallah v. Arewa Textile Ltd.* (1997) 8 NWLR (Pt. 518) 546, *Okubule v. Oyagbola* (1990) 4 NWLR (Pt. 147) 723, *H.M.S. Ltd. v. First Bank* (1991) 1 NWLR (Pt. 167) 290. In my view, this court below was perfectly right when it observed as follows:-

“I must confess that the averments in paragraphs 3 to 8 of the statement of defence were traversed by way of a reply nor was the evidence tendered in support seriously challenged.”

It is plain to me that the appellant conclusively established that it never received value or consideration for the draft, Exhibit P1, and that there was an agreement between the appellant and Alhaji Ladan that the draft would not be presented for clearing until its value in

foreign exchange was paid over to the appellant. It is evident that there was an attempt to defraud the appellant by the presentation of the draft for payment even though the appellant, contrary to the aforesaid agreement, had not received any consideration for its issuance. In the absence or subsequent failure of consideration, the instrument, Exhibit P1, is invalid, at least, as between the parties in immediate relationship, that is to say, the appellant and Alhaji Ladan, but not necessarily as between remote parties when the holder is a holder for value. B

In the present case, however, the respondent was unable to establish that it is a holder of the draft, Exhibit P1 for value. The evidence of the respondent before this court on the issue of value was patently vague, speculative and lacked probative value. Neither share certificate nor a single document evidencing the alleged staggering loan of N26 million by the respondent to Alhaji Abubakar was tendered before this court. It cannot be disputed that bank loan transactions and/or the purchase of company shares are readily provable by documentary evidence, share certificate or other documents in proof of such transactions which ought to be pleaded and tendered before this court. Documentary evidence, where this is relevant, ought to be produced and tendered as they speak for themselves as against the ipse dixit of a witness in respect of such transactions which may not be readily accepted by this court. See *Bank of the North Ltd. v. Alhaji Abba Saleh* (1999) 9 NWLR (Pt.68) 331 at 346 F-G. It is clear to me in the present case that the respondent failed to establish that he gave any value for the draft, Exhibit P1. Indeed, on the finding of the trial court, as affirmed by this court below, there was even no need for the respondent to give any value whatsoever for the draft because the contract between the appellant and Alhaji Ladan did not contemplate that the respondent should give any value for the draft. C D E F G

Where, as in the present case, the consideration for which a party signed a bill or note consists of a definite sum of money or of something the value of which is definitely ascertained in money, and it was either originally absent or has subsequently failed, whether totally or in part, the sum, if any, which a holder standing in immediate relation to such party is entitled to receive from him is naturally reduced pro tanto. See *Oscar Harris Son and Co. v. Vallarman and Co.* (1940) 1 All ER 185 CA. However, a remote party who has H

given value for the instrument may be entitled to receive payment in full. See *Munroe v. Bordier* (1850) 8 CB 862. But as I have already indicated, it was clearly not established in the present case that the respondent gave any value for the draft, Exhibit P1. In the circumstance, it seems to me difficult to hold that the respondent is entitled
B to receive the value of the instrument. It is my view that in the absence of any credible evidence of value in respect of Exhibit P1, the respondent will remain a volunteer who cannot claim upon the draft against the appellant.

C It is beyond dispute that the respondent is a nominee of the named Alhaji Ladan for the collection of payment on the draft. In my view, where the principal, Alhaji Ladan, has no claim to the draft as a result of the total absence of consideration by way of his failure to supply the agreed foreign exchange to the appellant, the respondent
D cannot claim a better right to the draft in the absence of evidence of a separate and distinct value it gave for the draft. This evidence of value the respondent failed to establish.

The principle is well established at law that there cannot possibly be any claim by way of action on a promissory note by the original person to whom the promissory note was given if he never gave
E any consideration for it. Neither in law nor in equity can the payee under a promissory note, which appears on the facts before this court to be voluntary, have any claim as a creditor. See *Re Whitaker* (1889)
F 42 Ch D 199 at 124 per Cotton, LJ.

The appellant, in its defence, admitted that it stopped payment of the draft to prevent itself from being defrauded with Exhibit P1. In this regard, it must be recalled that the gist of the fraud relied upon by the appellant is that it would be defrauded of the value of
G the draft if either Alhaji Ladan or his nominee, the respondent, is able to collect payment by presenting the draft in breach of the condition precedent agreed upon by the parties as aforementioned. This is to the effect that the draft was being issued to Alhaji Ladan on the strict condition that the equivalent foreign exchange must be paid by
H the said Alhaji Ladan to the appellant before the presentation of the draft to the appellant for payment. Fraud vitiates every contract into which it enters, and an Instrument, the consideration for which is fraudulent even in part, is voidable at the option of the party defrauded except against a holder in due course. It ought also to be

pointed out that fraud may consist of negotiating an instrument in breach of faith, as when the bill is indorsed to a party for a special purpose of having it discounted by him, and the latter instead of doing so negotiates it to another person. It is immaterial that the fraud is that of a third party.

There is no doubt that the fraud relied on by the appellant is sufficiently pleaded in paragraph 3-8 of its Statement of Defence already set out earlier on in this judgment. Positive evidence in line with these averments was copiously led by the appellant at the trial and was in no way challenged or controverted. I think in all the circumstances of this case this court below was in error to have held that the appellant had failed to establish its defence to the respondent's action.

It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, Ejigunmi, JSC., that I, too, allow this appeal and dismiss the plaintiff/respondent's claims in their entirety. Accordingly, it is ordered that the judgment sum together with the accrued interest thereon deposited by the appellant with the Deputy Registrar of this court below in fulfillment of a conditional stay of execution granted by that court should be refunded forthwith to the appellant. The costs awarded by both the trial court and this court below against the defendant/ appellant if already paid shall be refunded to the appellant. There will be costs to the appellant against the respondent which I assess and fix at N4,000.00 in the trial court. N3,000.00 in this court below and N 10,000.00 in this court.

MUSDAPHER JSC

I have had the honour to read before now the judgment of my Lord. Ejigunmi, JSC.. just delivered and I agree with him that this appeal deserves to succeed. The main question for consideration in this matter is whether a bank who issued its cheque in favour of a third party on the instructions of a customer who undertook to make funds available before the bank honours its obligations, will be liable to the third party even though the customer fails to make good its promise to make the funds available. There is no doubt that the appellant bank issued its own cheque in the sum of N7,100,000 in

favour of the respondent on the condition that it customer. Alhaji Ladan. would pay into the bank the sum of US\$500,000.00 Dollars. It is not disputed that the customer, Alhaji Ladan, did not pay the dollars to the appellant bank. The trial court held that the appellant was duty bound in law to honour its cheque irrespective of the failure
 B of its customer to make good its pledge to make funds available. The lower court on appeal affirmed the decision of the trial court.

Now, in the pleadings before the trial court, the appellant specifically pleaded that neither its customer, Alhaji Ladan nor the respondent, gave any consideration for the issuance of the cheque and
 C most significantly by paragraph 5 of its Statement of Defence, it was stated that “it was further agreed that the draft will not be presented for clearing until transfer has been effected,” that is to say, Alhaji Ladan will not hand over the draft to the respondent until Alhaji
 D Ladan has paid in to the appellant the sum of U.S. 500,000.00 Dollars. How the lower court came to the conclusion that the condition precedent to the handing over of draft to the respondent by the appellant’s customer was a “ruse and clearly an afterthought” was not borne out by the pleadings and the evidence led.

E In my view, it is not even clear that the respondent had in fact given any consideration for the draft. The only witness called by the respondent stated that the bank draft was given to the respondent by Alhaji Abubakar to settle an amount owed in respect “of some trans-
 F actions” with the respondent, under cross-examination regarding this vague transaction, the witness said in one breath that the transaction was for the purchase of some shares of the respondent by Alhaji Abubakar and at the same time that the draft was for the settlement of credit facilities of N26 million Naira.

G Against these inconsistent statements, the appellant called two witnesses who gave positive and consistent evidence in support of the appellant’s case. Viz Exhibit P1. the bank draft was issued by the appellant in favour of the respondent at the request of Alhaji Ladan on condition that Alhaji Ladan will not hand over the draft to the
 H respondent until, he, Alhaji Ladan had transferred or paid to the appellants the sum of 500,000.00 U.S. Dollars. This condition is a standard condition applicable to autonomous foreign exchange transactions. It is not even clear how, Alhaji Abubakar came into the picture. It is manifest, that the appellant was entitled to stop the pay-

ment of the draft in order to prevent fraud against itself by its customer.

Now, Section 30(1) of the Bills of exchange Act reads:-

“Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.”

In the first place, the question for consideration imported under the above section is clearly a rebuttable presumption of fact. Since appellant pleaded and led evidence to the fact that no consideration was given by the respondent nor by Alhaji Ladan and respondent did not prove otherwise, it seems to me the presumption could no longer apply. Secondly, it is the “party whose signature appears” on the bill that is deemed to have given value. There is no evidence whatever that the respondent had “signed” the cheque or its signature “appears”

Further to the above, it cannot be said, that the respondent was made to alter its position by the receipt of the draft because, it is clear that the liability of either Alhaji Abubakar or Alhaji Ladan to the respondent arose long before the issuance of the draft by the appellant. In other words, the respondent was not in any way misled by the appellant when the respondent became engaged to Alhaji Abubakar.

There is no doubt under the circumstances, the appellant has the right to protect itself against any fraud against it by its customer Alhaji Ladan. The appellant had the undoubted right to stop the cheque until funds were made available as promised by its customer. It is for these reasons and the fuller reasons contained in the lead judgment aforesaid, that I too, allow the appeal and set aside the decisions of lower courts, in place of which, I order, the claims of the respondent before the trial court be and are hereby dismissed. I abide by the order for costs contained in the lead judgment aforesaid.