

**SUPREME COURT OF NIGERIA**  
30TH JANUARY, 2003. SC. 144/2001  
**CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU, U. A. KALGO, S.**  
**O. UWAIFO, D. O. EDOZIE, JJSC**

1. FORTUNE INTERNATIONAL

BANK PLC ..... 1ST DEFENDANT/APPELLANT  
AND

1. PEGASUS TRADING OFFICE (GmbH)

2. APT ANLAGEN IMPORT-

EXPORT (GmbH) ..... PLAINTIFFS/CROSS-APPELLANTS

3. FIMSENOD HOLDINGS

NIGERIA LIMITED ..... 2ND DEFENDANT/RESPONDENT

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APPEALS - Failure to appeal - Award of transport expenses - Granted by trial court - Is still binding upon 2nd defendant - As it did not appeal (H7)

BANKING - Documents - Oral evidence - Is inadmissible in this case - To neutralise appellant's commitment vide Exhibit P13 - To pay a debt on behalf of its customer (H3)

CONTRACTS - Guarantee - Debt - Parties - Principal debtor has to default before liability - In some cases - But in the present case - Appellant as guarantor is solely liable (H5)

EVIDENCE - Documents - Guarantee - Exhibit P13 being in the form of a guarantee - Is binding on the appellant (H4)

EVIDENCE - Documents - Oral evidence - Cannot be admitted to contradict a document - Where it is inconsistent with the terms thereof (H1)

LEGAL DRAFTING - Documents - Proviso - Its effect on a section - Is to relax limitations or throw light - But not to completely neutralise the provisions (H2)

PLEADINGS - Claims - Interest - Averment - In respect of 11.5 percent interest rate - Claimed in respect of letters of credit - Is granted - As it was not denied (H6)

### **FACTS**

The plaintiffs/cross-appellants (two German Companies) sued the defendants for a breach of contract. The breach was in respect of a dairy product, Royal Evaporated milk supplied by the plaintiffs to the 2nd defendant. Two letters of credit (LCs) were opened by the 1st defendant at the instance of the 2nd defendant in favour of the plaintiffs. The 35% of the LCs value being confirmed irrevocable was paid at sight. But 65% of the LCs value meant to be paid 90 days after presentation of documents to it was not paid by the 1st defendant.

Plaintiffs therefore filed an action before the high court claiming (a) Dm 540,000 - Cost and value of goods supplied (b) DM 11,663 - Legal action in Germany, (c) DM 25,000 - Transportation expenses. They also claimed 11.5% per annum interest on DM 540,000 and 10% per annum on judgment debt till it is liquidated. The trial judge dismissed the action against the 1st defendant/bank but found against the 2nd defendant awarding a total of DM 751,300 inter alia, in plaintiffs' favour. Plaintiffs' appeal to the court of appeal was allowed in part as that court entered judgement against both defendants jointly and severally. Being dissatisfied the 1st defendant has now appealed to the Supreme court and the plaintiffs cross-appealed.

### **ISSUES FOR DETERMINATION**

*"1. Whether the Court of Appeal was right in setting aside the judgment of the trial Court and holding the Appellant liable to the 1st & 2nd Respondents for Breach of Contract under the two (2) Letters of Credit.*

*2. If the answer to (1) above is in the affirmative, whether Exhibit D2 did not relieve the Appellant of all/any liability and/or liabilities under the two (2) Letters of Credit.*

*3. Was the Appellant obliged under Exhibit P13 to pay any money*

*to the 1st and 2nd Respondents without further reference to the buyer - 3rd respondent?"*

The cross-appellants, in support of their cross-appeal, have raised one issue thus: *"Whether the Court of Appeal was right to dismiss the claims for the transport expenses and the 11.5% per annum interest on the principal sum of DM 540,000 claimed from 1/5/92 up to date of judgment on the outstanding sum of DM 540,000."*

**HELD** (Unanimously dismissing the appeal and upholding the cross-appeal per lead judgment of **UWAIFO JSC**)

***Documents - Oral evidence***

1. Having regard to the provisions of section 132(1) of the Evidence Act, oral evidence cannot be admitted to contradict, alter, add to or vary a contract or document unless such evidence falls within any of the matters that may be proved by such oral evidence by virtue of the provisos thereto. The provisos only permit evidence which will not be inconsistent with the terms of the relevant contract or document. See *Alli v. Ikusebiala* (1985) 1 NWLR (pt.4) 630 at 641. (p. 193 A)

***Documents - Proviso***

2. It should be realized that a proviso of necessity serves to cut down or qualify the general provision in the body of a section. But it would be contrary to the ordinary operation of a proviso to give it an effect which would cut down those provisions beyond what compliance with the proviso renders necessary. A proviso does not therefore set out to do other than create exception or relax limitations or throw light on any ambiguous aspect of an enactment. It certainly does not aim at completely neutralizing the general provision it has created exceptions to etc.: *Re Tabrisky expert Board of Trade* (1947) 2 ALL ER 182 at 183-184. (p. 193 D)

***Oral evidence - Is inadmissible***

3. In the present case oral evidence is inadmissible to neutralize the commitment of the appellant as recorded in exhibit P13. Therefore d.w.1's evidence to the effect that the commitment was subject to funds to be

provided by the 2nd defendant is in contradiction of the plain agreement.

I think the proper view of the evidence which d.w.1 tried to introduce to explain why the appellant executed exhibit P13 is to discountenance it; or at best regard the appellant's reliance on the 2nd defendant's ability to provide financial backing for the post-dated cheques given to the appellant as nothing more than the result of the private arrangement between both of them. That has nothing to do with the appellant's obligation and liability towards the cross-appellants on exhibit P13. Exhibit P13 binds the appellant. It was a document made by the appellant as an agreement by way of settlement of the dispute that arose between it and the cross-appellants, and the cross-appellants are entitled in law to found their cause of action on it: See *Abey v. Alex* (1999) 14 NWLR (pt. 637) 148 at 159. (p. 193 F)

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***Document - Guarantee***

4. Again, exhibit P13 is in the form of guarantee given by the appellant to the cross-appellants to pay the debt owed them by the 2nd defendant. It was in writing; it was a promise made to persons to whom another was answerable; and the promise was to pay the liability of a third party. That is what *Eastwood v. Kenyon* (1840) 11 Ad. & EL. 438 at 446; (1840) 113 ER 482 at 485 per Lord Denman CJ established. This clearly supports a cause of action in the cross-appellants against the appellant without recourse to the original liability of the 2nd defendant. (p. 194 B)

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***Guarantee - Debt - Parties***

5. In matters of guarantee of this nature, there is sometimes the need to recognize the three parties, namely, the creditor, the principal debtor and the secondary debtor or guarantor. Either of two situations could thus arise. One is that the guarantor may not primarily undertake to discharge the liability but only if the principal debtor failed in his obligation. There is the other situation where a person by his undertaking makes himself the real debtor. In the first case, the principal debtor has to default before the liability of the guarantor would arise. In the second case, the principal debtor simply drops out so that the guarantor becomes solely liable. Ex-

G

H

hibit P13 unequivocally represents this scenario. The tendency is that the law appears to have moved to the centre to make the right of the creditor less conditional. The creditor is now entitled to proceed against the guarantor without or independent of the incident of the default of the principal debtor. This view is expressed in Andrew & Millet, Law of Guarantees, 1st edition, pages 162-163 thus: *"The fact that the obligations of the guarantor arise only when the principal has defaulted in his obligations to the creditor does not mean that the creditor has to demand payment from the principal or from the surety, or give notice to the surety, before the creditor can proceed against the surety. Nor does he have to commence proceedings against the principal, whether criminal or civil, unless there is an express term in the contract requiring him to do so."* This principle thus stated, which I endorse, was recently approved by this court in the leading judgment of Ayoola JSC in African Insurance Development Corporation v. Nigeria Liquified Natural Gas Ltd (2000) 4 NWLR (pt. 653) 494 at 505-506. I find no merit in the appeal. (p. 194 D)

### **Claims - Interest**

6. There is an admission by appellant's counsel that 11% is payable on LC but there is no evidence of that in the LCs tendered in the present case. It is clear on the undenied averment in the statement of claim that interest of 11.5% was pleaded and claimed. It would simply have been a matter of course for the court below to accept 11.5% which is the rate admitted on the pleadings. That is what conforms with justice and not a total rejection of interest rate just because the court below found difficulty, when really there was none, with interest in the circumstances. There was never any dispute that the cross-appellants were entitled to interest. This was clearly admitted in the evidence of d. w.1 and stated in exhibit P13. I therefore hold that the cross- appellants are entitled to interest of 11.5% per annum which was admitted upon the rules of pleadings and this is to be calculated on DM 540,000 as claimed in paragraph 13 of the further amended statement of claim up to the day judgment ought to have been given to the cross-appellants (as plaintiffs in the trial court i.e. from May 1, 1992 to 12 October, 1998. They are also entitled

to interest of 10% per annum on the total judgment debt until it is settled.  
(p. 196 E)

***Failure to appeal***

- B 7. The Court of Appeal allowed the appeal to include the 1st respondent (i.e. present appellant) in the liability but excluding the DM 25,000. But the 2nd defendant/respondent is still liable to that amount by virtue of the judgment of the trial court which 2nd defendant did not appeal. In effect, therefore, The 2nd defendant/respondent is still bound by the judgment of the trial court in respect of the sum of DM 25,000. In the result, I dismiss the appeal and allow the cross-appeal as indicated. (p. 197 G)

**REPRESENTATION**

- D C.N. Eke Esq. with him Mrs. R.R. Adejo-Andrew for the appellant  
Prince A. Kayode SAN, with him Mrs. J.O. Adeshina, Miss F. Sanni and Miss C.N. Duru for the cross-appellants.

E **CASES REFERRED TO**

NWOKEDI vs ORAKPOSIM (1992) 4 NWLR pt. 233 at 122  
Alli v. Ikusebiala (1985) 1 NWLR (pt.4) 630 at 641  
Abey v. Alex (1999) 14 NWLR (pt. 637) 148 at 159, (1999) 12 KLR (pt 92) 3051  
F Birkmyr v. Darnell (1704) 1 Salkeld 27; (1704) 91 ER 27  
African Insurance Development Corporation v. Nigeria Liquified Natural Gas Ltd (2000) 4 NWLR (pt. 653) 494, (2000) 2 KLR (pt 97) 469

G **STATUTE REFERRED TO**

Evidence Act s. 132(1)

**LEAD JUDGMENT BY UWAIFO JSC**

- H The plaintiffs (two German companies) sued the defendants for breach of contract arising from two letters of credit (LCs) opened by the 1st defendant bank at the instance of the 2nd defendant in favour of the plaintiffs for the importation of dairy product known as "Royal Evapo-

rated Milk." The LCs were confirmed irrevocable up to 35% of their value. This meant that the amount involved was to be paid at sight. As to that, there is no dispute, the 35% cost of the goods was accordingly paid. The difficulty was with the 65% of the LCs which by description was unconfirmed irrevocable. The amount involved was to be paid by B the 1st defendant/bank 90 days after presentation of documents to it. That amount was not paid hence the plaintiffs (the sellers of the goods) sued the 1st defendant/bank (the issuing bank) and the 2nd defendant (the buyer) claiming as follows:

- |  |                   |   |
|--|-------------------|---|
| (a) Cost and value of goods supplied.....  | DM 540,000        | C |
| (b) Legal action in Germany.....           | DM 11,663         |   |
| (c) Transportation from Germany to Nigeria |                   |   |
| and total expenses for seven trips.....    | DM 25,000         |   |
| Total                                      | <u>DM 576,663</u> | D |

In addition, interests were claimed thus: 11.5% per annum on DM 540,000 from 1/5/1992 - 31/4/1995 (DM 186,300); 11.5% per annum from 1/5/1995 up to date of judgment; and 10% per annum from date of judgment until the settlement of the judgment debt.

On 12 October, 1998, the learned trial judge dismissed the action against the 1st defendant/bank but found against the 2nd defendant and entered judgment as follows:

- |   |                   |   |
|---|-------------------|---|
| (i) Principal debt                              | DM 540,000        | F |
| (ii) Transport expenses                         | 25,000            |   |
| (iii) Interest up to 30/4/1995 at 11.5% p.a.    | <u>186,300</u>    |   |
|   | <u>DM 751,300</u> |   |
| (iv) 10% p.a. on judgment debt till liquidated. |                   | G |
| (v) Cost against 2nd defendant                  | DM 5,000          |   |

The plaintiffs appealed the judgment. On 16 February 2001, the Court of Appeal, Abuja Division allowed the appeal, set aside the judgment and entered judgment in favour of the plaintiffs against both defendants jointly and severally for the sum of DM 540,000 and costs of N2,000. The 1st defendant/bank and the plaintiffs have appealed from that judgment to this court: The 1st defendant/bank being the appellant while the plaintiffs are the cross-appellants. I shall hereafter refer to the parties as appellant

and cross-appellants respectively.

The appellant is contending that it is free from liability in the circumstances of this case and has raised three issues for determination thus:

B *"1. Whether the Court of Appeal was right in setting aside the judgment of the trial Court and holding the Appellant liable to the 1st & 2nd Respondents for Breach of Contract under the two (2) Letters of Credit.*

C *2. If the answer to (1) above is in the affirmative, whether Exhibit D2 did not relieve the Appellant of all/any liability and/or liabilities under the two (2) Letters of Credit.*

*3. Was the Appellant obliged under Exhibit P13 to pay any money to the 1st and 2nd Respondents without further reference to the buyer -*  
D *3rd respondent?"*

The cross-appellants, in support of their cross-appeal, have raised one issue thus:

*"Whether the Court of Appeal was right to dismiss the claims for*  
E *the transport expenses and the 11.5% per annum interest on the principal sum of DM 540,000 claimed from 1/5/92 up to date of judgment on the outstanding sum of DM 540,000."*

I shall deal with the main appeal first. In doing so I intend to take  
F all three issues together. It must be pointed out that the liability of the appellant in this transaction no longer depended *stricto sensu* on the obligation under the LCs. Learned Senior Advocate, Prince Kayode, abundantly made this clear in his argument in reference to exhibit p13. In fact the learned trial judge based his judgment as to whether the appellant was  
G liable to the claim on his understanding of the said exhibit p13 and the circumstances in which it was made. Exhibit D2 which was issued sometime in February, 1992 was clearly overshadowed by exhibit p13 which came into being in July, 1992.

H The goods in question had been cleared by the 2nd defendant and kept in warehouses. The Managing Director and Chief Executive of the 2nd cross-appellant, Engineer Eyo Ita, came down from Germany where he lives to pursue the outstanding payment for the goods. He saw the



goods in the warehouses. He had been told that the goods were stored in the warehouses by Mr. Giwa (d. w. 1) and that was why he went to verify for himself. He testified as p.w.7. His evidence is vital. First he said:

*"Later, I went to the warehouses mentioned by Mr. Giwa and I saw B that the goods had been cleared and stored in those warehouses. After that I returned to the Bank and harassed Mr. Giwa to pay us for the value of the goods. He pleaded that we should hold on. On the expiration of the 90 day period the 1st defendant did not pay us and I threatened to report the matter to the INTERPOL and the Central Bank of Nigeria Mr. C Giwa then begged me to hold on and to Invite the Germany manufacturers for a meeting to pacify them and to discuss how they will pay."*

He went on to say that a meeting was fixed for 24 July, 1992 but that on 20 July the appellant rushed in a part payment of N80,000 by D telex message. The meeting did take place as scheduled. It was held in the appellant's Managing Director's office where compromises were made and decisions reached. Exhibit P13 is the evidence of the agreement concluded to settle the indebtedness which Mr. Akinunde A. Giwa (d.w.1) E signed on the behalf of the appellant. The witness (p.w.7) said inter alia:

*"At that meeting interest was taken into account and it was agreed that the 1st defendant was to pay an additional sum of DM35,000.00 as interest. Instead of DM 541,700.00 we rounded it up to DM 540,000.00. F The first defendant gave us copies of the papers showing 'that they remitted DM 80,000.00 into our account in Germany ..... We eventually received the DM80,000.00 but the 1st defendant did not comply with Exh. 13. They did not pay us anything in either August or September G 1992. On the 17/8/92, a day to the due date we received a letter from the 1st defendant that there was a court injunction stopping them from making the payment."*

Mr. Giwa (d.w.1) in his testimony did not deny the transaction and the agreement as per exhibit P13. I will say that in the face of exhibit H P13 which is not ambiguous, d.w.1 tended to give his testimony in respect thereof in a rather clumsy manner. He said in examination-in-chief:

*"Yes, I see Ex P13 . On 24/7/92 a meeting was held in our Bank*

where we made it clear to the parties that the matter was not our business. At that meeting the 2nd Plaintiff and 2nd defendant agreed that money should be released by 2nd defendant which will be subsequently remitted to 2nd plaintiff at certain date. The money was to come from 2nd defendant who then had the goods. There was no money available on that date but the 2nd defendant issued two post-dated cheques to us so that once he makes money available we can debit his Account and make that money available to 2nd plaintiff. I was present at that meeting. We wrote Ex P13 as an intermediary to assure 2nd plaintiff that if 2nd defendant provides money we will remit same to them. The 2nd defendant did not provide the money for remittance to 2nd plaintiff. The post-dated cheques issue to us were counter manded by 2nd defendant a day before the 1st one become due. The 2nd defendant wrote us a letter asking us to stop D payment on both cheques."

When cross-examined, he said:

"Yes, I signed P13. Yes, I was at the meeting that led to Ex P13. Yes, I believed 2nd defendant when they promised that money will be made available for remittance to 2nd plaintiff hence Ex P13. 2nd defendant had said they were expecting payment with which they will use to release the money to us. I did not ask the 2nd defendant where the money will come from. We did not ask him how much he was expecting."

It is important to recognize the effect of exhibit P13 upon a proper interpretation. The learned trial judge seemed to have taken a correct view at the outset although, with due respect, he later contradicted that view. In regard to how to assess the said exhibit, he said:

"The 1st defendant admitted writing Exhibit P13 but explained that at the meeting held on 24/7/92 they made it clear that the matter of payment to the plaintiffs was not their business and that the money was to come from the 2nd defendants' who then had the goods. Testifying on the issue DW1 stated in evidence in chief that there was no money available on the date but the 2nd defendants issued two post-dated cheques to them so that once money is available the 2nd defendants can be debited and the money thus debited made available to the 2nd Plaintiffs. He explained further that Exhibit P13 was written by them as intermediaries

*to assure the 2nd Plaintiff that if 2nd defendant provides money same will be remitted to 2nd plaintiff. It is hardly necessary to point out that oral evidence will not be allowed to vary or add anything to a written document. See NWOKEDI vs ORAKPOSIM (1992) 4 NWLR pt. 233 at 122. Exhibit P13 speaks for itself. The writer of that document did not state that their commitment to remit the balance of the debt owed the 2nd plaintiffs was subject to the provision of money by 2nd defendants"*

At this juncture reference must be made to the contents of the said exhibit P13 and for this purpose I shall reproduce them in full as follows:

"24 July 1992

The Managing Director  
Apt Anlagen Import & Export  
Feuerbachstrabe 39  
W- 4530 Ibbenburen  
Germany

Attention: Engineer Ita

Dear Sir,

LETTER OF INTENT

RE: FIMSENOD HOLDINGS NIGERIA LTD.

Sequel to the meeting held today with your officials from Germany in respect of the outstanding indebtedness of Fimsenod Holdings Nigeria Limited, we (CBA) write to confirm our commitment to remit the balance of debt owed to yourselves as stated below:

A. Latest August 18,1992 - DM200,000

B. Latest September 30, 1992 - DM340,000

DM540,000

The last remittance includes DM35,000 interest payment refund (to APT)

The above stated commitment is however subjected to the ruling foreign exchange regulations of the Federal Republic of Nigeria.

Yours faithfully,

For: COMMERCIAL BANK OF AFRICA LTD

A.A. GIWA

Principal Manager (Credit & Marketing)"

The only reservation stated in the undertaking, as rightly pointed out by the learned Senior Advocate, is that it is subject to the Nigerian foreign exchange regulations otherwise the commitment is total.

Section 132(1) of the Evidence Act governs how written documents may be interpreted particularly as regards the restriction against varying their contents with extrinsic oral evidence. It provides thus:

*"132. (1) When any judgment of any court or any other judicial or official proceedings, of any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings, or of the terms of such contract, grant or disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained; nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence:*

*Provided that any of the following matters may be proved-*

*(a) Fraud, intimidation, illegality; want of due execution; the fact that it is wrongly dated; existence, or want or failure, of consideration; mistake in fact or law; want of capacity in any contracting party, or the capacity in which a contracting party acted when it is not inconsistent with the terms of the contract; or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto;*

*(b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them;*

*(c) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property;*

*(d) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property;*

*(e) any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract."*

**Having regard to the provisions of section 132(1) of the Evidence Act, oral evidence cannot be admitted to contradict, alter, add to or vary a contract or document unless such evidence falls within any of the matters that may be proved by such oral evidence by virtue of the provisos thereto. The provisos only permit evidence which will not be inconsistent with the terms of the relevant contract or document. See *Alli v. Ikusebiala* (1985) 1 NWLR (pt.4) 630 at 641; *Ekwunife v. Wayne (W. A) Ltd* (1989) 5 NWLR (pt.122) 422 at 440-441; *Macaulay v. NAL merchant Bank Ltd* (1990) 4 NWLR (pt.144) 283 at 311. It should be realized that a proviso of necessity serves to cut down or qualify the general provisions in the body of a section. But it would be contrary to the ordinary operation of a proviso to give it an effect which would cut down those provisions beyond what compliance with the proviso renders necessary. A proviso does not therefore set out to do other than create exceptions or relax limitations or throw light on any ambiguous aspect of an enactment. It certainly does not aim at completely neutralizing the general provision it has created exceptions to etc. see *Re Tabrisky ex parte Board of Trade* (1947) 2 ALLER 182 at 183-184; *West Derby Union v. Metropolitan Life Assurance Co.* (1897) A.C. 647 at 652. In the present case oral evidence is inadmissible to neutralize the commitment of the appellant as recorded in exhibit P13. Therefore d.w.1's evidence to the effect that the commitment was subject to funds to be provided by the 2nd defendant is in contradiction of the plain agreement.**

**I think the proper view of the evidence which d.w.1 tried to introduce to explain why the appellant executed exhibit P13 is to discountenance it; or at best regard the appellant's reliance on the 2nd defendant's ability to provide financial backing for the post-dated cheques given to the appellant as nothing more than the re-**

sult of the private arrangement between both of them. That has nothing to do with the appellant's obligation and liability towards the cross-appellants on exhibit P13. Exhibit P13 binds the appellant. It was a document made by the appellant as an agreement by way of settlement of the dispute that arose between it and the cross-appellants, and the cross-appellants are entitled in law to found their cause of action on it: See *Abey v. Alex* (1999) 14 NWLR (pt. 637) 148 at 159. Again, exhibit P13 is in the form of guarantee given by the appellant to the cross-appellants to pay the debt owed them by the 2nd defendant. It was in writing; it was a promise made to persons to whom another was answerable; and the promise was to pay the liability of a third party. That is what *Eastwood v. Kenyon* (1840) 11 Ad. & EL. 438 at 446; (1840) 113 ER 482 at 485 per Lord Denman CJ established. This clearly supports a cause of action in the cross-appellants against the appellant without recourse to the original liability of the 2nd defendant.

In matters of guarantee of this nature, there is sometimes the need to recognize the three parties, namely, the creditor, the principal debtor and the secondary debtor or guarantor. Either of two situations could thus arise. One is that the guarantor may not primarily undertake to discharge the liability but only if the principal debtor failed in his obligation. There is the other situation where a person by his undertaking makes himself the real debtor: see *Birkmyr v. Darnell* (1704) 1 Salkeld 27; (1704) 91 ER 27. In the first case, the principal debtor has to default before the liability of the guarantor would arise. In the second case, the principal debtor simply drops out so that the guarantor becomes solely liable. Exhibit P13 unequivocally represents this scenario. The tendency is that the law appears to have moved to the centre to make the right of the creditor less conditional. The creditor is now entitled to proceed against the guarantor without or independent of the incident of the default of the principal debtor. This view is expressed in *Andrew & Millet, Law of Guarantees*, 1st edition, pages 162-163 thus:

*"The fact that the obligations of the guarantor arise only when*

*the principal has defaulted in his obligations to the creditor does not mean that the creditor has to demand payment from the principal or from the surety, or give notice to the surety, before the creditor can proceed against the surety. Nor does he have to commence proceedings against the principal, whether criminal or civil, unless there is an express term in the contract requiring him to do so."* B

This principle thus stated, which I endorse, was recently approved by this court in the leading judgment of Ayoola JSC in *African Insurance Development Corporation v. Nigeria Liquified Natural Gas Ltd* (2000) 4 NWLR (pt. 653) 494 at 505-506. I find no merit in the appeal. C

The cross-appeal is on the question of transport expenses and interest on the amount owing before judgment. The cross-appellants have submitted one issue for the determination of the cross-appeal as follows: D

*"Whether the Court of Appeal was right to dismiss the claims for the transport expenses and the 11.5% per annum interest on the principal sum of DM 540,000 claimed from 1/5/92 up to date of judgment on the outstanding sum of DM 540,000."* E

Although the above is stated as one issue, it has two aspects to it. I shall deal first with the aspect of payment of interest. There was admission before the court below by counsel for the appellant (the 1st respondent in the court below) that the LCs provided for 11% interest per annum. I have examined the said LCs and cannot find that figure. I think it was a mere concession that LCs bear that interest rate. The court below however, referred to the 11.5% pleaded by the cross-appellants and observed: F

*"Which of the rates this court will believe? Is it the prevailing bank rate, or the 11.5% as pleaded; or the 11% per annum stated in the appellant's brief of argument?"* G

The court eventually failed to accept any. I do not think that can be right. The 11.5% per annum can safely be the used as the relevant interest rate. Entitlement to interest was pleaded by the cross-appellants in paragraph H 13 of their further amended statement of claim as follows:

*"The plaintiffs in line with the customs and usages of International Trade claim interest from maturity date at the rate of ;*

(a) *11.5 percent per annum on the principal sum of DM 540,000 from date of maturity being 1st day of May, 1992 to 31st (sic) April, 1995= DM 186,300.*

(b) *11.5 percent per annum from 1st May, 1995 up to date of judgment or settlement of the claim.*

(c) *10 percent per annum from the date of judgment until settlement of the judgment debt."*

The above averments were not specifically denied in the statement of defence. Ordinarily, since the averments already referred to were not traversed, no evidence would have been necessary. However, in the cross-respondent's brief, the following argument is advanced:

*"The court below found the evidence led unsatisfactory especially as no evidence was led to prove how the interest accrued and how it was calculated. The available evidence was also in conflict with the facts pleaded hence the question by the court;*

*'Which of these rates this court will believe? Is it the prevailing bank rate, or 11.5% as pleaded.....?'*

*Of course, it is trite (law) that where evidence is led on fact which are not pleaded, or which are in conflict with the pleading, the court must not act on such evidence."*

I do not see any merit in the above argument in the circumstances of the present case. **There is an admission by appellant's counsel that 11% is payable on LC but there is no evidence of that in the LCs tendered in the present case. It is clear on the undenied averment in the statement of claim that interest of 11.5% was pleaded and claimed. It would simply have been a matter of course for the court below to accept 11.5% which is the rate admitted on the pleadings. That is what conforms with justice and not a total rejection of interest rate just because the court below found difficulty, when really there was none, with interest in the circumstances. There was never any dispute that the cross-appellants were entitled to interest. This was clearly admitted in the evidence of d. w.1 and stated in exhibit P13. I therefore hold that the cross- appellants are entitled to interest of 11.5% per annum which was admitted upon**



**the rules of pleadings and this is to be calculated on DM 540,000 as claimed in paragraph 13 of the further amended statement of claim up to the day judgment ought to have been given to the cross-appellants (as plaintiffs) in the trial court i.e. from May 1, 1992 to 12 October, 1998. They are also entitled to interest of 10% per annum on the total judgment debt until it is settled.**

Now, the aspect of transport costs of DM 25,000 claimed by the cross-appellant must be viewed against the legal effect of exhibit P13. That document, as I have earlier indicated, was meant to settle the indebtedness arising from this transaction to the cross-appellants. That indebtedness was that of Fimsenod Holdings Nigeria Limited, namely the 2nd defendant/respondent in this appeal. The opening part of exhibit P13 put it thus:

*"Sequel to the meeting held today with your officials from Germany in respect of the outstanding indebtedness of Fimsenod Holdings Nigeria Limited, we (CBA) write to confirm our commitment to remit the balance of debt owed to yourselves....."*

The balance of debt did not include DM 25,000. In other words, the present appellant cannot be made liable to pay this money.

However, the learned trial judge gave judgment against the 2nd defendant for a sum of money which included DM 25,000. The 2nd defendant did not appeal against the judgment. In the appeal filed by the plaintiffs (now cross-appellants) against that judgment, the reliefs sought were for-

*"1. Order allowing the Appeal and setting aside the order of dismissal of the appellant's claims against the 1st respondent.*

*2. Judgment against the 1st respondent as claimed."*

**The Court of Appeal allowed the appeal to include the 1st respondent (i.e. present appellant) in the liability but excluding the DM 25,000. But the 2nd defendant/respondent is still liable to that amount by virtue of the judgment of the trial court which 2nd defendant did not appeal. In effect, therefore, The 2nd defendant/respondent is still bound by the judgment of the trial court in respect of the sum of DM 25,000.**

**In the result, I dismiss the appeal and allow the cross-appeal as indicated.** It is ordered that all the amounts stated in these proceedings in DM shall be calculated in US dollars value as at the date of judgment by the trial court as sought by the cross-appellants since DM has now ceased to be legal tender. The cross-appellants are awarded N10,000.00 cost against the appellant.

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**KUTIGI JSC**

I read in advance the judgment just delivered by my learned brother Uwaifo, J.S.C. I agree with his reasoning and conclusion. Consequently the appeal is dismissed while the cross-appeal is allowed. I endorse the orders made in the judgment.

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**KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment delivered by my learned brother Uwaifo JSC. I agree with it, and for the reasons which he gives I too would dismiss the appeal and allow the cross-appeal with =N=10,000.00 costs to the cross-appellants.

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**KALGO JSC**

I read in draft before now the judgment just delivered by Uwaifo JSC in this appeal. I entirely agree with his reasoning and conclusion which I adopt as mine. I agree that the main appeal is devoid of merit and ought to be dismissed, and the cross-appeal is meritorious and should be allowed. According, the main appeal is hereby dismissed and the cross-appeal is allowed. I abide by the order of costs made in the leading judgment.

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**EDOZIE JSC**

I was privileged to read in advance the draft of the lead judgment of my learned brother Uwaifo J.S.C. Just delivered. I agree entirely with his reasoning and conclusions in dismissing the appeal and allowing the cross-appeal with cost of N10,000.00 to the cross- appellant against the appellant.