

**SUPREME COURT OF NIGERIA**  
21ST JANUARY, 2005 SC. 253/2000  
**CORAM:- S. U. ONU, A. O. EJIWUNMI, N. TOBI, D.**  
**MUSDAPHER, D. O. EDOZIE, JJSC**

NIGERIAN BANK FOR COMMERCE  
AND INDUSTRY  
AND

..... APPELLANT

1. INTERGRATED GAS (NIG.) LTD.  
2. S. A. ESSIEN

..... RESPONDENTS

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APPEALS - Finding - That is not appealed against - Remains correct -  
Role of a respondent - Is to support the judgment (H1)

PLEADINGS - Equitable defence of waiver - Manner of pleading - Should  
show reliance on waiver (H2)

ACTIONS - Defence - Waiver - Being a form of estoppel - The represen-  
tation - And fact of acting on it to one's prejudice - Must be pleaded and  
shown (H3)

COURTS - Parties - Case not made by the parties - Should not be intro-  
duced by the court (H4)

EVIDENCE - Admissions - In civil cases - Admission are not conclusive  
- As the party can explain them (H5)

CONTRACTS - Banking - Obligations binding on the parties - Are not  
discharged by exhibits X and Y - Which are irrelevant (H6)

BANKING - Contracts for loan - Allegation of breach may be justified by  
facts - That provide good reason for terminating the contract (H7)

BANKING - Contracts - Time for execution - Where not stipulated within

the mortgage - Delay of about seventeen days - Is not inordinate in the circumstances (H8)

### **FACTS**

The plaintiffs/respondents were bank customers of the defendant/appellant. Some time in 1983 the parties entered into a contract in which the appellant was to grant a loan of N500,000.00 to the respondents. The loan was for the purpose of establishing a Liquified Petroleum Gas Bottling Plant at Ikot-Ekpene in Akwa-Ibom State. Several conditions were specified before the respondent will be entitled to the loan. The parties executed a formal mortgaged agreement (exhibit V) and the appellant was to open a Letters of Credit in favour of respondents' overseas suppliers. In the process of the parties' negotiations, the cost of the machinery to be imported from Denmark rose to a higher amount. The respondent felt aggrieved, believed that it was the appellant's delay in opening the Letters of Credit that led to rise in the cost of the Liquified Gas plant machinery.

Respondents then filed an action against the appellant before the Lagos High Court. They claimed inter alia the sum of N4,081,361.00 being the increase in the cost of the L. P. G. project machinery. They also made alternative claim. The trial court found in favour of the respondents and awarded the sum of N1,612,512.42 to them and struck out their alternative claim. Appellants appeal to the Court of Appeal was dismissed. That court found that the respondents were in breach of clause seven of the mortgage agreement but it introduced the issue of Waiver which was not raised by the parties. It consequently held that appellant breached the agreement by not opening the Letters of Credit to enable the respondents import the machinery, and upheld the trial court's judgment. Being dissatisfied the appellant has further appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*“2.01. Is the doctrine of waiver an issue between the parties in this case?”*

*2.02 Can it be said that Exhibits “T” and “U” constitute a waiver in such a way as to make the appellant liable for breach of contract for*

*not disbursing the loan granted to the respondents and opening Letter of Credit for the purchase of the machinery and equipment before 29th September, 1986*

*2.03 If the appellant is liable for breach of contract between the parties, are the respondents entitled to the amount of N1,612,512.42 as damages?”*

**HELD** (Unanimously allowing the appeal per **EDOZIE JSC**)

***APPEALS - Finding - That is not appealed against***

1. From the above passages, the Court of Appeal held that the respondents having not paid the overrun cost were in breach of clause 7 of Exhibit “V”. There being no appeal or cross-appeal against that finding, its correctness or otherwise cannot be questioned in this appeal. Where a party has not appealed against a finding of the trial court or Court of Appeal, he cannot be heard to question that finding on appeal: See *Ijale v. Leventis and Co. Ltd.* (1959) SCNLR 255; (1959) 4 FSC 108; *Dabup v. Kolo* (1993) 9 NWLR (Pt.317) 254 at 269. With great respect to learned counsel for the respondents, it was not open to him to submit, as he did at p. 13 of his brief that the question of breach of clause 7 of Exhibit “F” is most irrelevant. The role of a respondent is to support the judgment appealed against and not to criticize it. (p. 109 B)

***PLEADINGS - Equitable defence of waiver***

2. As rightly pointed out at p. 11 of the respondents’ brief, it is not necessary to plead an equitable defence in a special form so long as it is stated in a manner to show that it is relied upon.

Thus if, in the instant case, the respondents were relying on a waiver by the defendant of its right on the contract to insist on the payment of cost overrun, the averment and particulars would have been couched in a manner such as this:-

*“If the defendant is relying on the payment of overrun cost by the plaintiffs as stipulated in the contract, the plaintiffs shall contend that the defendant had waived its right thereto.*

***PARTICULARS***

*The waiver is contained or is to be inferred from the letters of the defendant dated..... or alternatively from the conduct of the defendant in that it represented that the overrun cost would be borne by it and thereby induced the plaintiff to believe that the contract*  
 B *still subsisted and acting upon that belief, the plaintiff .....*”

See Bullen & Leake & Jacobs, Precedents of Pleadings 13th Edition Art 1342 page 1499.

It is my view that the averments in paragraphs 25 and 26 of the  
 C Amended Statement of Claim are a far cry from raising anything even remotely suggesting a waiver. (p. 110 C)

### ***ACTIONS - Defence - Waiver***

3. It can be seen from the foregoing that waiver is a form of estoppel and  
 D a plaintiff relying on it must plead that the defendant made a representation to him in consequence of which he acted to his prejudice. In the instant case, Exhibits “T” and “U” contained no representation by the appellant bank that it was not insisting that the plaintiffs should pay the  
 E cost overrun. This is apart from the fact that the said Exhibits “T” and “U” were not addressed to the plaintiffs, rather, they are correspondence exchanged inter se by officials of the appellant Bank. There is no evidence the respondents were induced to act to their prejudice by reason of  
 F the said Exhibits. It is, therefore, my considered view that Exhibits “T” and “U” could not by any stretch of the imagination constitute a waiver to warrant the shifting of liability for the breach of the contract to the appellant Bank. (p. 113 F)

### ***COURTS - Parties - Case not made by the parties***

4. With much respect to the learned Justices of the Court of Appeal, neither of the parties introduced or relied on waiver in their case and I am unable to hold that in the circumstances of this case, Exhibits “T” and  
 H “U” constituted a waiver. A court is not competent to make a case for the parties different from the case they made for themselves. (p. 114 A)

***In civil cases - Admission are not conclusive***

5. It is trite law that in civil cases, admissions by a party are evidence of facts asserted against but not in favour of such a party although they are not estoppels or conclusive against the party against whom they are tendered.

Admissions are therefore no estoppels and are not conclusive against a party against whom they are tendered. The party has right to explain the circumstance and show that the admissions were due to misconception or ignorance of the real facts or other circumstances which sufficiently explain them. (p. 115 B)

***Banking - Obligations binding on the parties***

6. Still in support of the judgment in their favour, the respondents' counsel referred to Exhibits "X" and "Y" being letters they addressed to the appellant whereby they proposed that the cost overrun be shared by both parties or treated as a loan to the respondents. The appellant made no response to those letters and by implication rejected the proposals which was an attempt to vary the binding obligations which both parties had voluntarily entered into. In my view, Exhibits "X" and "Y" are completely irrelevant as they could not be said to have dispensed the respondents' obligation to pay the cost overrun as provided for in the contract Exhibits "F" and "V". (p. 116 D)

***BANKING - Contracts for loan***

7. Respondents' counsel had contended that with the execution of Exhibit "V" by both sides, all the preconditions had been met for the disbursement of the loan and therefore that the appellant had no defence whatsoever. It is a well established principle, that if a party, alleges breach of contract for the wrong reason or for no reason at all, he may yet justify his action if there were in existence at the time facts or causes which would have provided a good reason for terminating the contract. In *British and Beningtons Ltd. v. North Western Cacher Tea Company Ltd.* (1923) AC 48 at p. 71, Lord Summer stated the principle of law applicable as follows:-

“.....*I do not think that the case, as reported, lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly. If he has repudiated, given no reason at all, I suppose all reasons and all defences in the action, partial or complete, would be open to him. His motives certainly are immaterial and I do not see why his reasons should be crucial.*”

In the present case, even if the respondents had thought that the appellant did not attach any importance to the payment of the overrun cost, the appellant Bank was perfectly entitled to rely on that condition as a defence to the action. (p. 116 F)

***BANKING - Contracts - Time for execution***

8. Where a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance, the law implies an engagement that it shall be executed within a reasonable time having regard to all the circumstances of the case. In the case in hand, the Investment and Mortgage Agreement dated 12th September, 1986 which incorporated the terms contained in the ‘Letter of Intent’ of 25th March, 1986 (Exhibit F) did not stipulate expressly any date for the performance of the contract except that it provided “*disbursement is to be made from the Head Office after signing the Investment and Mortgage Agreement depending on actual requirements and payable directly to the Suppliers/Civil Contractors/ Creditors on production of confirmed invoices/certificates.*”

The words “*after signing the Investment and Mortgage Agreement*” has no time limit. It is my view that no time was fixed for the disbursement of the loan let alone any such time fixed being of the essence of the contract. Since the contract was silent as to time being of the essence of the contract, the appellant was only required to act within a reasonable time. From 12th September 1986 to 29th September 1986 when SFEM came into operation is a period of 17 days. In my humble view, a delay of about 17 days can hardly be regarded as inordinate in the circumstances of the case. (p. 120 D)

**NOTABLE POINTS OF INTEREST****EDOZIE JSC***1. Contracts - Instances when time would be of the essence*

Time is said to be of the essence of the contract in the following instances:-

(1) Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with: *Brickles v. Small* (1916) AC 599.

(2) Where the circumstances of the contract or the nature of the subject-matter indicate that the fixed date must be exactly complied with e.g. the purchase of a leasehold house required for immediate occupation. *Titely v. Thomas* (1867) LR 3 Ch App 61.

(3) Where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time: *Parkin v. Thorold* (1852) 16 Beav 59, *Green v. Sevin* (1879) 13 Ch.D 589. (p. 120 A)

*2. Damages - Measure of in a breach of contract for loan*

I have deliberately quoted extensively from Chitty on Contracts and Mayne and McGregor on Damages to emphasize the point that the measure of damages in a breach of a contract for a loan is not necessarily limited to the higher interest at which the borrower can obtain a substitute loan. The borrower may be entitled to other consequential losses which he is able to establish as flowing naturally from the breach or which was within the contemplation of the parties.

In the instant case, if the parties had agreed on a fixed date for the disbursement of the loan and due to the appellant's default, the cost of the importation had escalated far beyond the cost price at the fixed date for the disbursement, I think that the plaintiffs would have been entitled to recover as damages the excess amount it cost them to import the machinery and even if they were unable to import the goods, they would have been entitled to damages for breach of contract. However, as already demonstrated, there was no fixed date for the disbursement of the

loan; the respondents were in breach of the contract by their default in the payment of the cost overrun without which Letter of Credit could not be opened. (p. 122 E)

**TOBI JSC**

*3. Pleadings - Parties are not to introduce fresh point of appeal*

In view of the fact that the issue was not pleaded in the Statement of Defence coupled with the fact that it was not raised in the High Court, the respondents cannot raise it here, and I so hold. Litigation is not a game of tricks and traps but one where the parties must sincerely and unequivocally place their case before the court for purpose of full and total adjudication. Parties are not allowed to litigate in instalments of possible defence at the appellate level when they have not made a case at the trial. This is not acceptable as it will spring surprise at the opposite party. However, the law allows parties to introduce fresh point on appeal, if the appellate court is satisfied of the conditions for allowing such evidence to be led, but this should be with leave of the court. (p. 126 C)

E

*4. Concept of waiver and admission are different*

In one breath, counsel submitted that Exhibits T and U constitute waiver and in another breath, he submitted that they are admission against interest. The concept of waiver and that of admission against interest are different and should not be taken together as if they mean the same thing. While waiver is a complete defence to an action, admission against interest may be used against the party who admits, but may not invariably come to his aid by way of obtaining judgment. The court will have to consider the relevance and weight of the admission in the case. (p. 127 A)

G

**REPRESENTATION**

H J. A. Badejo Esq., with Soji Olowoolape Esq. and Miss Okedo, for the Appellant.

Nasiru Tijani Esq., for the Respondents.



**CASES REFERRED TO**

Ajomale v. Yaduat (No.2) (1991) 5 NWLR (Pt. 191) 266 at 285  
Ijale v. Leventis and Co. Ltd. (1959) SCNLR 255; (1959) 4 FSC 108  
Dabup v. Kolo (1993) 9 NWLR (Pt.317) 254 at 269  
Adebanjo v. Brown (1990) 3 NWLR (Pt. 141) 661 at pp. 677 - 678 B  
Spasco Vehicle and Plant Hire Co. v. Alrine (Nig.) Ltd. (1995) 8 NWLR  
Pt. 416 at 667  
Castlegate Shipping Co. Ltd. v. Dempsey (1892) 1 QB 854  
Niger Insurance v. Abey Bros (1976) 7S.C. 35  
Mazin Eng. Ltd. v. Tower Aluminium (1993) 5 NWLR (Pt.295) 526 at 528 C  
Brickles v. Small (1916) AC 599  
Manchester and Oldham Bank v. Cook (1883) 49 LT 674

D

**LEAD JUDGMENT BY EDOZIE JSC**

At the instance of the respondents, a company and its managing director respectively, who were the plaintiffs at the trial court, the appellant Bank, therein defendant, in 1983, offered to grant the former a term loan of N500,000 (Five Hundred Thousand Naira) for the purpose of establishing a Liquified Petroleum Gas Bottling Plant at Ikot-Ekpene, Akwa-Ibom State. The loan, though denominated in local currency was to cover the foreign currency component to be used for the importation of the machinery and accessories from the manufacturers, Kosan Crisplant in Denmark. The offer of the loan was conveyed to the plaintiffs in the defendant's "*Letter of Intent*" dated 25th March, 1986, (Exhibit F), which stipulated several conditions, to be fulfilled by the plaintiffs before the actual disbursement of the loan. It was stipulated that the disbursement of the loan would be made from the Head office of the defendant after the parties had executed a formal agreement, to wit, the Investment and Mortgage Agreement (Exhibit V) and the disbursement was to be in the form of the defendant Bank opening a Letter of Credit in favour of the overseas suppliers and the manufacturers of the required machinery. F

By a letter of acceptance dated 14th April, 1986 (Exhibit G), the plaintiffs wrote to the defendant accepting the offer transmitting to it G

several documents made in compliance with the terms of the offer. It is the plaintiffs' case that despite the fact that they had complied with the conditions stipulated in Exhibit F and have executed on 4th September, 1986, the Investment and Mortgage Agreement, Exhibit V, the defendant neglected to open the Letter of Credit for the importation of the machinery. As evidence that they had fulfilled the conditions precedent for the disbursement of the loan, the plaintiffs tendered several documentary Exhibits and in particular Exhibits "T" and "U" which were internal memoranda of the defendant in which its officials were alleged to have admitted that the plaintiffs had satisfied the conditions for the opening of the Letters of Credit on their behalf. At the time the plaintiffs accepted the defendant's offer, the cost of the machinery to be imported from Denmark was 951,310 DM as per proforma invoice dated 26th June, 1985 D (Exhibit M).

But by 26th June, 1986, the price had escalated to 1,045,247 DM vide the proforma invoice, Exhibit N. With the introduction of the Second Tier Foreign Exchange Market Scheme (SFEM) on 29th September, 1986, resulting in the devaluation of the naira, the cost of importing the machinery, according to the plaintiffs had risen to over N4 Million. It is the plaintiff's contention that due to the defendant's delay in opening the 'Letter of Credit' timeously, it was responsible for excessive cost in the importation of the machinery. Upon the foregoing scenario, the plaintiffs by a Writ of Summons in Suit No. LD/48/87 filed in the Lagos High Court, on 12th January, 1987 commenced action against the defendant. In paragraph 30 of their amended Statement of Claim, their reliefs were formulated thus:-

"30. Whereof the plaintiffs claim against the defendant as follows:-

(i) The sum of N4,081,361.00 being the increase in the cost of the L.P.G. project machinery and equipment to be imported by the plaintiffs under the finance of the defendant which increase was occasioned by the defendant's delay in opening the relevant Letter of Credit for the importation of the said machinery and equipment.

OR IN THE ALTERNATIVE

	N :	K	
(a) Fee for Import Licence not valid for Foreign Exchange	100		
(b) Front End Fee paid to the defendant	7,500		
(c) Legal Fees for the Agreement	7,830		B
(d) Stamp Duty and Registration Fees for Agreement	4,445.75		
(e) Equipment Price increase due to delay	236,576.00		
(f) Equipment cost overrun due to SFEM	3,844,945.00		
(g) Interest at 15% on N200,000 equity call ups	30,000.00		C
(h) Document and Administration Expenses	2,000.00		
(i) Travel and Hotel Expenses	<u>2,080.00</u>		
Total	<u>N4,136,416.75</u>		D

In its reaction, the defendant denied liability for the plaintiffs' claim alleging inter alia, that the plaintiffs did not comply with the terms in clause 7 of Exhibit F incorporated in the Investment and Mortgage Agreement (Exhibit V) with respect to the plaintiffs' undertaking that any over-run in project cost or shortfall in sources of finance (difference between the new cost of the machinery and loan approved) shall be borne by them without recourse to the defendant for financial assistance. By defendant's letter of 29th April, 1986 (Exhibit H), the overrun cost of the project as at that date was calculated to be N208,871.00 which amount ought to have been paid by the plaintiffs before the 'Letter of Credit' could be opened. F

At the trial, each party called four witnesses to advance its respective standpoints and at the conclusion of the case, the learned trial Judge, Fafiade J., in a judgment delivered on 25th January, 1996, held that the defendant was in breach of the terms of the contract in that it failed to open the "*Letter of Credit*" even after all conditions stipulated had been complied with. Accordingly, she entered judgment against the defendant in sum of N 1,612,512.42 being the amount payable to bring in the equipment less the agreed amount of the loan which was N500,000. The alternative claim was struck out. G H

Dissatisfied with the judgment, the defendant lodged an appeal to

the Court of Appeal, Lagos Division. Both parties, the defendant/appellant and the plaintiffs/respondents, through their counsel, filed and exchanged briefs and after hearing the appeal, the Court of Appeal, in a unanimous decision delivered on 31st May, 1999, while holding that the respondents were in breach of the agreement for failing to pay the overrun cost, it held that the appellant as per Exhibits "T" and "U" had waived its right to insist on the overrun cost and consequently had breached the agreement by not opening the 'Letter of Credit' for the importation of the machinery. It accordingly affirmed decision of the court of first instance both on liability for breach of contract and quantum of damages flowing therefrom.

This is a further appeal by the appellant. Its notice of appeal dated 30th June, 1999 contains three grounds of appeal and based on them, the appellant has in its brief of argument raised the following three issues:-

*"2.01. Is the doctrine of waiver an issue between the parties in this case?"*

*2.02 Can it be said that Exhibits "T" and "U" constitute a waiver in such a way as to make the appellant liable for breach of contract for not disbursing the loan granted to the respondents and opening Letter of Credit for the purchase of the machinery and equipment before 29th September, 1986*

*2.03 If the appellant is liable for breach of contract between the parties, are the respondents entitled to the amount of N1,612,512.42 as damages?"*

On their part, the respondents identified two issues, viz:-

*" 1. Whether the Court of Appeal was right in affirming the decision of the trial court that the appellant was liable for breach of the contract between the appellant and the respondents.*

*2. Whether the Court of Appeal was right in not interfering with the award of N 1,612,512.42 (One Million, Six Hundred and Twelve Thousand, Five Hundred and Twelve Naira, Forty Two Kobo) as damages against the appellant?"*

The appellants' 1st and 2nd issues relate to respondents' 1st issue all of which deal with the appellant's liability for breach of contract. The

contention of the learned counsel for the appellant both in his brief and reply brief is that the Court of Appeal having found that the respondents had failed to pay the overrun cost, it was wrong to have held that the appellant was in breach of the contract on the ground that it had waived its right to insist on that payment stressing that the equitable plea of B waiver was not pleaded nor was it canvassed at the court of first instance. It was further contended that the internal memoranda of the appellant (Exhibits “T” and “U”) contained no representation to the respondents that the payment of overrun cost was not to be insisted upon. C Learned counsel argued that the plea of waiver was completely irrelevant to the proceedings and that since it was not specifically pleaded, it went to no issue citing in support the cases of Odekilekun v. Hassan (1997) 12 NWLR (Pt. 531), 56 at 72; Ibeawalu v. Lawal (1971) 1 ANLR 23 and Oniah v. Onyia (1989) 1 NWLR (Pt. 99) 514. Referring to the contents D of Exhibits “T” and “U”, learned counsel emphasized again that the facts stated therein could not support a plea of waiver. The following cases were alluded to :- Ariori v. Elemo (1983) 1 S.C. 13; Ukaegbu v. Orji (1991) 6 NWLR (Pt. 196 to 127); Yoye v. Olubode (1974) 1 ANLR (Pt.2) E p. 18 and Ude v. Osuji (1998) 13 NWLR (Pt. 586) p. 1.

Responding, learned counsel for the respondents submitted in his brief that there was a binding contract between the parties as evidenced by Exhibit “F” and Exhibit “V” and that the appellant was in breach of F that contract by failing to open ‘Letter of Credit’ for the disbursement of the loan after the respondents had executed Exhibit V on 4th September, 1986 although dated 12th September, 1986. Counsel pointed out that in keeping with Order 16 Rule 11 of the High Court of Lagos State (Civil G Procedure) Rules, the plea of waiver was raised in paragraphs 23,24,25, 26 and 27 of the Amended Statement of Claim. He argued that it was immaterial that the word “waiver” was not used in the said paragraphs of the Amended Statement of Claim and for this contention, reference was made to the cases of Adebajo v. Brown (1990) 3 NWLR (Pt. 141) 661; H Hassan v. Maiduguri Management Committee (1991) 8 NWLR (Pt.212) 738 at 747; Prospect Textile Mills v. I. C. I. Plc. England (1996) 6 NWLR (Pt. 457) 668 at 684. Learned counsel was of the view that the Court of

Appeal was right in treating Exhibits “T” and “U” as a waiver adding that they amounted to an admission against interest under Section 23 of the Evidence Act pointing out that appellant did not complain about the 2nd respondents’ letters Exhibits “X” and “Y” in which the respondents made  
B a proposal for the sharing of the overrun cost between the parties.

It was further contended that the question of the breach of Clause 7 of Exhibit “F” was most irrelevant since the entire agreement had crystallized into Exhibit “V”, the execution of which by both parties presupposed that all the conditions precedent had been complied with. Learned  
C counsel canvassed that there is concurrent findings of the two lower courts that the appellant was in breach of the contract and that there is no reason advanced to interfere with the findings relying on the cases of Ojengbede v. Esan (2001) 12 S.C. (Pt.II) 1; 18 NWLR (Pt.746) 771;  
D Abimbola v. Abatan (2001) 4 S.C. (Pt. I) 64; 9 NWLR (Pt.717) 66.

Finally, learned counsel citing the case of Oroyinyin v. Raman (1997) 2 NWLR (Pt.489) 613 argued that where a contract is silent as to time of performance, the law implies an obligation that the act should be  
E performed within a reasonable time. He however, submitted that in the circumstances of this case in which the import licence had a limited life span and the Second Tier Foreign Exchange Market was impending, time was of the essence of the contract and that the appellant by failing to  
F open Letter of Credit timeously was rightly adjudged to have been in breach of the contract.

In dealing with the various points canvassed above, I will as a convenient starting point refer to a passage in the judgment of the Court of Appeal at p. 324 line 34 es seq where it held:-

*“There is no evidence that the overrun cost or the short fall was paid by the respondents. That is a clear breach of clause 7 of Exhibit “V”. However, the respondents further argued in their brief that Exhibits “T” and “U” both of which were written by official of the appellant*  
H *constitute a waiver or an admission against interest.....”*

(Underlining for emphasis)

And after discussing the principle or the doctrine of waiver, the court, at p. 326, line 34 et seq concluded thus:-

*“Ordinarily, I would have said that there was no obligation on the appellant to open Letters of Credit since the 1st respondent had failed to comply with the provisions of Clause 7 in Exhibit F, but from what I have discussed above, both Exhibits “T” and “U” constitute a waiver. The trial Judge was therefore right in holding that having failed to open Letter of Credit, the appellant on the face of Exhibits “T” and “U” have breached the contract.”*

**From the above passages, the Court of Appeal held that the respondents having not paid the overrun cost were in breach of clause 7 of Exhibit “V”. There being no appeal or cross-appeal against that finding, its correctness or otherwise cannot be questioned in this appeal. Where a party has not appealed against a finding of the trial court or Court of Appeal, he cannot be heard to question that finding on appeal: See *Ijale v. Leventis and Co. Ltd.* (1959) SCNLR 255; (1959) 4 FSC 108; *Dabup v. Kolo* (1993) 9 NWLR (Pt.317) 254 at 269. With great respect to learned counsel for the respondents, it was not open to him to submit, as he did at p. 13 of his brief that the question of breach of clause 7 of Exhibit “F” is most irrelevant. The role of a respondent is to support the judgment appealed against and not to criticize it: see *Ajomale v. Yaduat* (No.2) (1991) 5 NWLR (Pt. 191) 266 at 285.**

Since the Court of Appeal had found that the respondents were in breach of clause 7 of Exhibit “V” by not paying the overrun cost, all that remains to be examined is its treatment of Exhibits “T” and “U” as constituting a waiver, thus shifting liability for the breach of contract from the respondents to the appellants.

The appellant has contended that the doctrine of waiver was not pleaded and was not an issue before the court of first instance but the respondents have stated the contrary. Exhibits “T” and “U” were pleaded in paragraphs 25 and 26 of the Amended Statement of Claim at page 29 of the record as follows:-

“25. The plaintiffs aver that on 17th September, 1986, the Assistant Legal Adviser of the defendant wrote to the defendant’s Managing Director confirming that the loan granted to the plaintiffs was due for

disbursement. Notice to produce the said letter Ref. LPG 533/039 is hereby given to the defendant.

26. The plaintiffs further aver that on 29th September, 1986, the General Manager (operations) of the defendant also wrote to the defendant's Controller of Investigation Supervision drawing the defendant's attention to the undue delay attending the opening of the Letter of Credit in respect of the plaintiffs' L.P.G. Project. The plaintiffs will rely on the said defendant's Internal Memorandum Ref. No. FM(07)/FUP/4. Notice to Produce, which is hereby given to the defendant.

**As rightly pointed out at p. 11 of the respondents' brief, it is not necessary to plead an equitable defence in a special form so long as it is stated in a manner to show that it is relied upon.** This view was expressed by this court in the case of Adebajo v. Brown (1990) 3 NWLR (Pt. 141) 661 at pp. 677 - 678 thus:-

*"While it is the rule, as stated by this court in Ibenwelu v. Lawal (1971) 1 All NLR 23 at p.24 that all equitable defences must be pleaded fully and with full particulars, it is my view that in this case, the defendant sufficiently complied with the requirement....."*

*It is not necessary to plead estoppel in any special form so long as the matter constituting estoppel is stated in such a manner as to show that the party relies upon it as defence or answer. See Bullen and Leake's Precedent of Pleadings, 6th Edition, page 646."*

See also Ezewani v. Onwordi (1986) 4 NWLR (Pt.32) 37; Asiri v. Ekwealor (1992) 6 NWLR (Pt.302) 643. **Thus if, in the instant case, the respondents were relying on a waiver by the defendant of its right on the contract to insist on the payment of cost overrun, the averment and particulars would have been couched in a manner such as this:-**

*"If the defendant is relying on the payment of overrun cost by the plaintiffs as stipulated in the contract, the plaintiffs shall contend that the defendant had waived its right thereto."*

#### **PARTICULARS**

*The waiver is contained or is to be inferred from the letters of the defendant dated..... or alternatively from the*



*conduct of the defendant in that it represented that the overrun cost would be borne by it and thereby induced the plaintiff to believe that the contract still subsisted and acting upon that belief, the plaintiff.....”*

See Bullen & Leake & Jacobs, Precedents of Pleadings 13th Edition Art 1342 page 1499. B

It is my view that the averments in paragraphs 25 and 26 of the Amended Statement of Claim are a far cry from raising anything even remotely suggesting a waiver. And as will be demonstrated anon, the contents of the documents, Exhibits “T” and “U” can hardly be construed as constituting such a plea. C

In Exhibit “T” dated 17th September, 1986, D.W.2, Assistant Manager, Legal of the appellant Bank, in an internal memorandum addressed to the appellant’s Managing Director wrote as follows: - D

*“We wish to confirm to the Managing Director that the Investment and Mortgage Agreement in respect of the approved loan of N500, 000 on the above named company has been duly stamped and submitted for registration at the Cross River State Lands Registry. E*

*Accordingly, there is therefore a legal basis for the disbursement of the loan. The Managing Director may therefore wish to authorize the appropriate departments i.e. Supervision/Accounts to take further action on the matter.” F*

Exhibit “IT” is another internal memorandum dated 29th September, 1986, addressed by the appellant’s General Manager to its Controller of Investment Supervision. It reads in part:-

*“Further to our numerous discussions on the above subject matter, I wish to remind you once more about the need to speed up the disbursement of funds under the World Bank Line of Credit..... G*

*It is surprising that the following four projects in respect of which documentation has been completed over six weeks ago have still not had their Letters of Credit established. H*

*These are:-*

*1. ....*

2. *Intergrated Gas*

3. ....

4. ....

*Progress towards early disbursement in respect of the remaining ones also doesn't appear to have been made. Lack of progress in making disbursement to the World Bank Projects is causing very serious concern to Management..... The above unsatisfactory situation therefore should not be allowed to continue.*

*By this memo therefore, your Department and Merchant Banking Operations Department are hereby given two weeks i.e. up to 10th October, 1986 to ensure that documentation in respect of the Projects whose assessment of sponsor's contributions have been completed and accepted by the Managing Director are finalized for disbursement (i.e. Letters of Credit are established within this deadline)....."*

As is evident from the two exhibits partly reproduced above, there is no mention whatsoever of payment of cost overrun let alone any suggestion that the appellant was going to waive its right to insist that the respondents should pay same. In the case of *Barret Bros (Taxis) Ltd. v. Davis* (1966) 1 WLR 1334 at 1339, Lord Denning, MR., expounded the principle of waiver thus:-

*"Secondly, the letter..... was a waiver of the condition. The principle of waiver is simply this: If one party by this conduct leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on It, then the first party will not afterwards be allowed to insist on the strict rights when It would be inequitable for him so to do....."*

The principle enunciated above was adopted with approval by this court in the case of *United Calabar & Co. v. Elder Dempster Lines Ltd.* (1972) All NLR 681 at 690. Discussing the principle of waiver as a ground of defence, the learned authors of *Bullen and Leake and Jacobs*, 23rd Edition at p. 1455 have this to say:-

*"Where the defendant relies upon the failure of the plaintiff to perform a condition of the contract as to the precise time or mode of*

performance fixed by the contract as a ground for canceling or repudiating the contract or as justifying his own refusal to perform his own obligations, the plaintiff may reply that the defendant has waived his right to insist that the contract should be or have been performed according to its original tenor. “Waiver is not a cause of action, but a man may be de- B  
barred by the doctrine of waiver from asserting that an original condition precedent is still operative and binding” (see *Hartley v. Hyman* (1920) 3 KB 475 per MC Cardie, J., p. 495). A waiver may be oral or written or inferred from conduct (*Bremar Handelsgesellschaft v. C  
Vanden-Avenne Izegem P.V.B.A* (1978) 2 *Lloyds Rep* 109)

It arises where one party leads the other to believe that he will not insist on the precise stipulation in the contract e.g. as to time of performance, and the other party has acted on that belief and has thereby prejudiced his position, the first party cannot afterwards insist on the D  
terms of the original contract e.g. as to time or otherwise (see *Levey & Co. v. Goldberg* (1922) 1 KB 688 request to withhold delivery). “Whether it is called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his E  
conduct he evinced an intention to affect their legal relations. He made in effect a promise not to insist on his strict legal rights. That promise was intended to be acted on and was in fact acted on. He cannot afterwards go back on it (*Charles Richards Ltd. v. Oppenheim* (1950) 1 KB F  
616 per Denning, U., p. 623)”.

**It can** be seen from the foregoing that waiver is a form of estoppel and a plaintiff relying on it must plead that the defendant made a representation to him in consequence of which he acted to his prejudice. In the instant case, Exhibits “T” and “U” contained G  
no representation by the appellant bank that it was not insisting that the plaintiffs should pay the cost overrun. This is apart from the fact that the said Exhibits “T” and “U” were not addressed to the plaintiffs, rather, they are correspondence exchanged inter se H  
by officials of the appellant Bank. There is no evidence the respondents were induced to act to their prejudice by reason of the said Exhibits. It is, therefore, my considered view that Exhibits “T” and

**“U” could not by any stretch of the imagination constitute a waiver to warrant the shifting of liability for the breach of the contract to the appellant Bank. With much respect to the learned Justices of the Court of Appeal, neither of the parties introduced or relied on waiver in their case and I am unable to hold that in the circumstances of this case, Exhibits “T” and “U” constituted a waiver. A court is not competent to make a case for the parties different from the case they made for themselves.** This principle was recently restated by this court in the case of *Spasco Vehicle and Plant Hire Co. v. Alrine (Nig.) Ltd.* (1995) 8 NWLR Pt. 416 at 667 where Iguh, JSC., observed-

*“It is an elementary and fundamental principle of the determination of disputes between parties that judgment must be confined to the issues raised by the parties in their pleadings. It is not competent for the trial court suo motu to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before him: See Commissioner for Works Benue State & Anor. v. Devcon Development Consultants Ltd. & Anor. (1988) 3 NWLR (Pt.83) 401; Ochonma v. Ashiri Unosi(1965) NMLR 321 at 323; Nigerian Housing Dev. Society Ltd. & Anor. v. Yaya Mumuni (1977) 2 S.C. 57; Adeniji & Ors. v. Adeniji & Ors. (1972) 1 All NLR (Pt.1) 298; A.C.B. Ltd. v. A-G. of Northern Nigeria (1967) NMLR 231. This principle of law is, without doubt, in accordance with common sense as to permit trial courts to wander out of issues raised by the parties in their pleadings and to found their judgment on such issues could not only take the parties by surprise and make nonsense of pleadings, it might well result in the denial to one or the other of the parties of the right to fair hearing pursuant to the audi alteram partem rule as enshrined in the 1979 Constitution of Nigeria (see Metalimpex v. A. G. Leventis & Co. Ltd. (1976) 2 S.C. 91; Kalio v. Kalio (1977) 2 S.C.; George v. Dominion Flour Mills Ltd. (1963) 1 S.C. NLR 242; Shell B. P. Ltd. v. Abadi (1974) 1 All NLR (Pt.1) 13; Alhaji Ogunlowo v. Prince Ogundere (1993) 7 NWLR (Pt.307) 610 at 624.”*

Had the learned Justices of the Court of Appeal borne the above

principle in mind, they might not have fallen into the error of construing Exhibits “T” and “U” as a waiver.

Respondents’ counsel in supporting the judgment of the court below has argued strenuously that Exhibits “T” and “IT amounted to an admission on the part of the appellant that all the conditions precedent for the disbursement of the loan had been satisfied by the respondents. **It is trite law that in civil cases, admissions by a party are evidence of facts asserted against but not in favour of such a party although they are not estoppels or conclusive against the party against whom they are tendered.** Speaking on the place of admissions in civil cases, Beoku-Betts, J., in *Okoi II v. Ayikoi II* (1946) 12 WACA 3, had this to say:-

*“The place of admission in civil cases is admirably stated in Halsbury’s Laws of England, 2nd Edition Vol. 13 pages 574 and 575 thus:-*

*‘In civil cases, statements made otherwise than by way of testimony in court by a party to the proceedings are evidence of the truth of the facts asserted but not in favour of such party. Although what a party has said on some former occasion may, without injustice be presumed to be true as against himself, yet no presumption of truth arises when such statements are tendered in evidence in his favour. As the value of an admission depends on the circumstances in which it was made, evidence of such circumstances is always receivable to affect the weight of the admission. Thus, the party against whom it is tendered may show that it was made under an erroneous view of the law or in ignorance of the facts, or when his mind was in an abnormal condition.’*

**Admissions are therefore no estoppels and are not conclusive against a party against whom they are tendered. The party has right to explain the circumstance and show that the admissions were due to misconception or ignorance of the real facts or other circumstances which sufficiently explain them:** see the case of *Insurance Brokers of Nigeria v. Atlantic Textiles Manufacturing Company Ltd.* (1996) 8 NWLR (Pt.466) 316 at 329.

In the instant case, Mr. Alfred Oritshagbemi Erelu, D.W.3, the

appellant's Assistant General Manager, in part of his evidence stated at p. 101 of the record:-

*"We did not disburse the money for the import licence as plaintiff had to meet some preconditions....."*

B As at 25/9/86 there was the required valid liquits (sic). Exhibit 'F' is a Letter of in tent provides (sic) additional payment. This was the reason we did not open Letter of Credit. Besides there was no valid import licence as at 25/9/86. Besides the amount on the import licence does not meet the amount on the invoice; again the difference in amount of  
C money was not provided by the plaintiff."

The substance of the above extract is that plaintiffs had not met the preconditions for the appellant to open Letter of Credit and if Exhibits "T" and "U" conveyed a contrary information, it was an error.

D **Still in support of the judgment in their favour, the respondents' counsel referred to Exhibits "X" and "Y" being letters they addressed to the appellant whereby they proposed that the cost overrun be shared by both parties or treated as a loan to the respondents. The appellant made no response to those letters and by implication rejected the proposals which was an attempt to vary the binding obligations which both parties had voluntarily entered into. In my view, Exhibits "X" and "Y" are completely irrelevant as they could not be said to have dispensed the respondents' obligation to pay the cost overrun as provided for in the contract Exhibits "F" and "V".**  
E  
F

Finally, **respondents' counsel** had contended that with the execution of Exhibit "V" by both sides, all the preconditions had been  
G met for the disbursement of the loan and therefore that the appellant had no defence whatsoever. It is a well established principle, that if a party, alleges breach of contract for the wrong reason or for no reason at all, he may yet justify his action if there were in  
H existence at the time facts or causes which would have provided a good reason for terminating the contract. In *British and Beningtons Ltd. v. North Western Cacher Tea Company Ltd. (1923) AC 48* at p. 71, Lord Summer stated the principle of law applicable as follows:-

*“.....I do not think that the case, as reported, lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly. If he has repudiated, given no reason at all, I suppose all reasons and all defences in the action, B partial or complete, would be open to him. His motives certainly are immaterial and I do not see why his reasons should be crucial.”*

**In the present case, even if the respondents had thought that the appellant did not attach any importance to the payment of the C overrun cost, the appellant Bank was perfectly entitled to rely on that condition as a defence to the action.**

For all the foregoing reasons, I will resolve the issues under consideration in favour of the appellant.

The appellant's 3rd issue for determination which covers the re- D spondents' 2nd issue relates to the quantum of damages awarded for the alleged breach of contract by the appellant. It will be recalled that the trial court awarded and the Court of Appeal affirmed the sum of N 1,612,512.42 as damages to the respondents representing the loss occa- E sioned by the breach of the contract. The contention of the learned counsel for the appellant in his briefs is that the amount so awarded cannot be justified in law and in the circumstances. He pointed out that the amount represents the shortfall or overrun cost as at 29th September, 1986 which F the Court of Appeal found to be the respondents' responsibility to provide under the agreement between the parties.

It was stressed that the respondents incurred no loss as it never purchased the machinery on the ground that it could no longer afford the high cost notwithstanding that the appellant was still willing to go ahead G with its own undertaking. Learned counsel referred to the cost of the machinery as calculated by the learned trial Judge at p. 157 of the record where she said:-

*“4th plaintiff witness an Assistant Manager in Central Bank of H Nigeria, Foreign Operations Department told the court he worked in the exchange rate section. He therefore gave evidence of exchange rate at various times relevant ‘ to the quotations Exhibits “M” and “N” for*

*plaintiffs' project. Cross examined by counsel for defence, witness said as at 12/9/86 one Dutch Mark sold for N2.3378 which related to 1,045,240 Dutch Mark will be N2,414,052. One Dutch Mark as at 26/9/86 when SFEM started was sold for N2,26920 (therefore) 1,045,250 DM then exchanged for N2,112,512.42K and this was what plaintiffs would have paid to bring in the equipment if they had decided to import the equipment after SFEM. This evidence as to the exchange rate remains unchallenged"*

It is based on that calculation that the trial court awarded to the respondents the sum of N2,112,512.42 less the value of the loan of N500,000 amounting to N1,612,512.42k. It is not clear why the assessment of damages was reckoned as at 29th September, 1986 for the normal date of assessment of damages is the date of breach: see *Miliangos v. George Frank Textile (Ltd.)* (1976) AC 443 at 468. This is by the way as there is no appeal on that. In attacking the award by the trial court which was affirmed by the court below, learned counsel for the appellant argued to the following effect:-

If, in fact, the obligation to disburse the loan arose on 12th September, 1986, then the amount required to open Letter of Credit would have been N2,414,052 whereas on 29th September, 1986 (which was the lower court's yardstick) it would have been N2,112,512.42. This shows that the amount required to import the equipment on 29th September, 1986 was, in fact, N301,549.58 less than it would have been on 12<sup>th</sup> September, 1986 or early September when the lower court found that the appellant's obligation arose. Thus, the plaintiff would have suffered no loss in the sense that from uncontroverted evidence, naira appreciated slightly in value on 29th September, 1986 as compared to 12th September, 1986. Learned counsel, therefore, submitted that when no damage is suffered, a breach of contract does not attract any compensation citing in support the following authorities:- *Uwa Printers v. Investments Trust Limited* (1988) 5 NWLR Pt. 92, p. 110; *Mayne and McGregor on Damages* 14th Edition pages 595-596 para. 862. *Ijebu-Ode Local Government v. Adedeji Balogun & Co. Ltd.* (1991) 1 NWLR (Pt. 166) p. 136; *Nigerian Supplies Manufacturing Company v. Nigerian Broadcasting Cor-*



poration (1967) 1 ANLR p. 35; National Investment and Properties Co. Ltd. v. Thompson Organization Limited (1969) 1 ANLR p. 138.

Responding, learned counsel for the respondents canvassed that to be entitled to an award of damages, the plaintiff has no burden to show that he actually purchased the equipment. Counsel drew attention to the fact that there is concurrent findings by the two lower courts on the amount assessed as damages and argued that it is not the practice to interfere with such findings. He craved in aid the following authorities:- Nigeria Engineering Works Ltd. v. Denap Limited (2001) 12 S.C. (Pt.II) 136; (2001) 18 NWLR (Pt.746) 726; Ojengbede v. Esan (2001) 12S.C. (Pt.II) 1;(2001) 18 NWLR (Pt.746) 771 and Abimbola v. Abatan (2001) 4 S.C. (Pt.I) 64; (2001) 9 NWLR (Pt.717) 60. He pointed out that there had been fluctuations in the value of the naira from 26th June, 1985 to 8th January, 1988 adding that it would be erroneous to contend as the appellant had done that the respondents would have suffered no loss as the naira had appreciated in value on 29th September, 1986. Finally, learned counsel urged that as the damages awarded were neither manifestly too low or excessive nor based on wrong principles, it ought not to be interfered with. He cited and relied on the following authorities:- Ofoboche v. Ogoja L. G. (2001) 7 S.C. (Pt.III) 107; (2001) 16 NWLR (Pt. 739) 458 at 491, A. C. B. Ltd. v. Apugo (2001) 2 S.C. 215; (2001) 5 NWLR (Pt.707) 483 at 499; Ojini v. Ogo Oluwa Motors (Nig) Ltd. (1998) 1-2 S.C. 1; (1998) 1 NWLR (Pt.534) 353 at 362-363.

The whole basis of the respondents' claim is that as a result of the appellant's delay in disbursing the loan, the cost of the importation of the machinery had escalated far beyond the loan contracted for, due to rising costs and depreciation in value of local currency. Fluctuation in prices of commodities is a natural phenomenon in export trade transactions and unless an importer settles for the price at a fixed date, he must be prepared to bear the cost of the commodity as at the time of actual payment. The reference to the 12th September, 1986 by the trial court as the date the appellant's obligation to open Letter of Credit raises the question as to whether there was a fixed date for the performance of the contract and if there was such a fixed date, whether that date was of the essence of the

contract. Time is said to be of the essence of the contract in the following instances:-

(1) Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with: *Brickles v. Small* (1916) AC 599.

(2) Where the circumstances of the contract or the nature of the subject-matter indicate that the fixed date must be exactly complied with e.g. the purchase of a leasehold house required for immediate occupation. *Titely v. Thomas* (1867) LR 3 Ch App 61.

(3) Where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time: *Parkin v. Thorold* (1852) 16 Beav 59, *Green v. Sevin* (1879) 13 Ch.D 589.

**Where a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance, the law implies an engagement that it shall be executed within a reasonable time having regard to all the circumstances of the case:** *Castlegate Shipping Co. Ltd. v. Dempsey* (1892) 1 QB 854; *Niger Insurance v. Abey Bros* (1976) 7S.C. 35; *Mazin Eng. Ltd. v. Tower Aluminium* (1993) 5 NWLR (Pt.295) 526 at 528. **In the case in hand, the Investment and Mortgage Agreement dated 12th September, 1986 which incorporated the terms contained in the ‘Letter of Intent’ of 25th March, 1986 (Exhibit F) did not stipulate expressly any date for the performance of the contract except that it provided “disbursement is to be made from the Head Office after signing the Investment and Mortgage Agreement depending on actual requirements and payable directly to the Suppliers/Civil Contractors/ Creditors on production of confirmed invoices/certificates.”**

The words “*after signing the Investment and Mortgage Agreement*” has no time limit. It is my view that no time was fixed for the disbursement of the loan let alone any such time fixed being of the essence of the contract. Since the contract was silent as to time

**being of the essence of the contract, the appellant was only required to act within a reasonable time. From 12th September 1986 to 29th September 1986 when SFEM came into operation is a period of 17 days. In my humble view, a delay of about 17 days can hardly be regarded as inordinate in the circumstances of the case.**

On the quantum of damages awarded assuming there was a breach of contract by the appellant which is not conceded, it must be borne in mind that the agreement between the parties was that of a loan. On the measure of damages for breach of such a contract, the learned authors of Chitty on Contract, 23rd Edition, Volume 11 p.54 para. 1106 had this to say;-

*“If a person contracts to lend money, and then, in breach of contract, refuses or fails to advance the money, the borrower cannot sue for the money agreed to be loaned as a debt, for this would be tantamount to a decree of specific enforcement and such a decree will not normally be granted for a contract of loan. But the borrower can claim damages for the failure to advance the money. The damages may, of course, be merely nominal but if expense has been reasonably incurred in procuring the loan elsewhere, that expense is recoverable as special damage, and so can any other loss which was within the contemplation of the parties. If the borrower can only procure the loan from other sources at a higher rate of interest than that agreed under the contract, and this was reasonably foreseeable at the time when the contract was made, it seems that the borrower can recover the additional interest he will have to pay as damages from the lender. If the borrower is unable to raise the money from other sources at all, and he is consequently unable to enter with or complete some transaction for which the money was required, it is theoretically possible that the lender might be liable for loss of profit on such a transaction or other consequential loss.”*

Similar views were expressed in Mayne & McGregor on Damages, 12th Edition P. 553 paragraph 553 thus:-

*“In contracts for the loan of money, the normal measure of damages for the lender’s failure to provide the money is the amount required by the borrower to go into the market and effect a substitute loan for*

*himself less the amount the contractual loan had required.*

.....  
*There may also be consequential losses. Thus the damages may include the cost of raising the money elsewhere.....*

*B Further, the plaintiff may recover for the loss of any contract which hinged upon the loan if the defendant was aware of the purpose for which the plaintiff was entering into the loan. The authority for this is the decision in Manchester and Oldham Bank v. Cook (1883) 49 LT 674. C The plaintiff asked the defendant bank for loan to enable him to purchase an interest in a colliery. The defendant agreed but failed to find the money, and the plaintiff was unable, apparently to obtain the money elsewhere and so unable to complete the purchase. It was held that he D court stressing that “the bank had express notice of the purpose for which the money was required”. And In Astor Properties v. Tunbridge Wills Equitable Friendly Society (1936) 1 All ER 531, where the money to be lent was to be used by the plaintiff for a purchase-money mortgage, E damages were allowed for the estimated loss of the rents that the plaintiff would have obtained from the property for the period of delay before the plaintiff obtained the property by means of a substitute loan.”*

*I have deliberately quoted extensively from Chitty on Contracts F and Mayne and McGregor on Damages to emphasize the point that the measure of damages in a breach of a contract for a loan is not necessarily limited to the higher interest at which the borrower can obtain a substitute loan. The borrower may be entitled to other consequential losses which he is able to establish as flowing naturally from the breach or G which was within the contemplation of the parties.*

*In the instant case, if the parties had agreed on a fixed date for the disbursement of the loan and due to the appellant’s default, the cost of the importation had escalated far beyond the cost price at the fixed date H for the disbursement, I think that the plaintiffs would have been entitled to recover as damages the excess amount it cost them to import the machinery and even if they were unable to import the goods, they would have been entitled to damages for breach of contract. However, as al-*

ready demonstrated, there was no fixed date for the disbursement of the loan; the respondents were in breach of the contract by their default in the payment of the cost overrun without which Letter of Credit could not be opened. Above all, it has been demonstrated that the cost of the importation of the machinery was cheaper as at 29th September, 1986 than it was as at 12th September, 1986 due to the slight appreciation of the naira at the former date, the implication being that the plaintiffs would have incurred no loss on the importation of the equipment on the latter date. I will also resolve the issue under consideration in favour of the appellant.

In the event, this appeal is meritorious and is accordingly allowed. The judgments of the two lower courts are hereby set aside and the respondents' claims are dismissed with costs to the appellant assessed at N10,000.

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**ONU JSC**

I am in entire agreement with the judgment just delivered by my learned brother, Edozie, JSC., that the appeal is meritorious and it accordingly succeeds with costs to the appellant in the sum of N 10,000.00.

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**EJIWUNMI JSC**

As I have had the privilege of reading before now the judgment just read by my learned brother, Edozie, JSC., I am quite satisfied that all the issues raised in the appeal have been carefully considered. I therefore agree entirely with the conclusion reached in the judgment that the appeal has merit. For the reasons given in the said judgment, the appeal is also allowed by me, and I therefore set aside the judgments of the two lower courts.

I abide with the other orders made as to costs in the lead judgment.

**TOBI JSC**

The main quarrel in this appeal is related to delay. While the respondents allege delay on the part of the appellant, the appellant denies that there was any delay on its part. As far as the respondents are concerned, the delay on the part of the appellant caused or occasioned a breach of contract.

Let me first tell the story of the contractual relationship between the parties. The respondents were the plaintiffs in the High Court. The appellant was the defendant. The respondents were granted a loan of N500,000 to finance the importation of a Liquefied Petroleum Gas Bottling Plant. The loan was said to be under the World Bank Line of Credit. It is the case of the respondents that the appellant delayed the opening of the Letters of Credit until the Second Tier Foreign Exchange Market Scheme (SFEM) came into effect, which caused a decline in the value of the naira and resulted in the rise in cost of the machineries. It is the case of the appellant that there was neither delay nor any step on its part that is tantamount to a breach of contract. To the appellant, the respondents did not comply with all the conditions necessary for the Letters of Credit to be opened, particularly on the responsibility to pay overrun cost.

After hearing evidence and address of counsel, the learned trial Judge believed the story of the respondents. She did not believe the story of the appellant. She therefore gave judgment to the respondents.

In the judgment, the learned trial Judge said at page 155 of the Record:

*“Did defendant commit a breach of the contract between the defendant and the plaintiffs? There is no other conclusion than answering the above question in the positive. Defendant in no ambiguous way failed to perform its part of the contract in spite of the plaintiffs’ efforts to secure this loan and the plaintiffs as a result of this non-performance were precluded from processing with the project and hence therefore committed a breach of contract between them and the plaintiffs which they had more than 24 days from 4th September, 1986 to perform.”*

The appellant’s appeal to the Court of Appeal was dismissed. That court agreed with the judgment of the learned trial Judge. Dismissing the

appeal, the Court of Appeal said at page 324 of the Record:

*“There is no evidence that the overrun cost or the short fall was paid by the respondents. That is clear breach of clause 7 of Exhibit V”.*

Dissatisfied, the appellant has come to this court. Three issues were formulated in the brief of the appellant as follows: B

*“2.01. Is the Doctrine of Waiver an issue between the parties in this case?*

*2.02. Can it be said that Exhibits T and U constitute a waiver in such a way as to make the appellant liable for breach of contract for not disbursing the loan granted to the respondent and opening Letters of Credit for the purchase of the Machinery and Equipment before 29th September, 1986?* C

*2.03. If the appellant is liable for breach of contract between the parties, are the respondents entitled to the amount of N 1,612,512.42 as damages?”* D

The respondents formulated the following two issues for determinations:

*“ 1. Whether the Court of Appeal was right in affirming the decision of the trial court that the appellant was liable for breach of the contract between the appellant and the respondents.*

*2. Whether the Court of Appeal was right in not interfering with the award of N1,612,512.42..... as damages against the appellant.”* F

One issue raised by the appellant in this appeal is waiver hinged on Exhibits T’ and ‘U’. The argument of learned counsel for the appellant is that as waiver was neither pleaded nor an issue in the trial court, the Court of Appeal was wrong in deciding the appeal on it. He submitted, apparently in the alternative, that Exhibits T’ and ‘U’ did not constitute waiver. G

Learned counsel for the respondents submitted that by Exhibits ‘F’ and ‘G’, there was a valid contract between the parties and that there was a breach of that contract as the appellant failed to disburse money to the overseas suppliers of the LPG equipment. On the issue of waiver, learned counsel submitted that waiver as a word need not be used in pleadings if the application of the doctrine can be deduced or ascertained H

from the entire pleadings in the case. He submitted that Exhibits T' and 'U' constituted waiver.

It is the law of pleadings that waiver, as an equitable remedy, should be specifically pleaded. The word "*waiver*" need not appear in the pleadings but the party relying on it must plead sufficient facts to enable the court come to the conclusion that the opposite party has clearly exhibited a conduct of waiver in the matter or transaction. Was the issue of waiver pleaded in the Statement of Defence? Did the issue arise in the High Court? I have carefully gone through the 3rd Amended Statement of Defence and I cannot place my hands on a defence of waiver, either directly or by the use of descriptive and associated revealing language. It does not appear to me that the issue of waiver was even raised in the High Court. In view of the fact that the issue was not pleaded in the Statement of Defence coupled with the fact that it was not raised in the High Court, the respondents cannot raise it here, and I so hold. Litigation is not a game of tricks and traps but one where the parties must sincerely and unequivocally place their case before the court for purpose of full and total adjudication. Parties are not allowed to litigate in instalments of possible defence at the appellate level when they have not made a case at the trial. This is not acceptable as it will spring surprise at the opposite party. However, the law allows parties to introduce fresh point on appeal, if the appellate court is satisfied of the conditions for allowing such evidence to be led, but this should be with leave of the court.

Learned counsel for the respondents submitted in his brief that Exhibits T and U constitute waiver. He contended that Exhibits T and U were properly pleaded and admitted in evidence. Exhibits T and U may properly be pleaded and admitted. It is quite a different consideration whether they were pleaded in the context of waiver. If exhibits were pleaded as mere exhibits qua documentary evidence without iota of waiver, a court of law will reject the submission of counsel that the exhibits pleaded waiver. Both Exhibits T and U emanated from the appellant. While the subject matter of Exhibit T is "*Integrated Gas Nig. Ltd.*", the subject matter of Exhibit U is "*Letter of Credit for World Bank Project.*" As I indicated earlier, it is not possible for me to come to the conclusion on the



bare wordings of the exhibit without more that they constitute waiver.

In one breath, counsel submitted that Exhibits T and U constitute waiver and in another breath, he submitted that they are admission against interest. The concept of waiver and that of admission against interest are different and should not be taken together as if they mean the same thing. B While waiver is a complete defence to an action, admission against interest may be used against the party who admits, but may not invariably come to his aid by way of obtaining judgment. The court will have to consider the relevance and weight of the admission in the case. C

Let me take Exhibits F and G. Exhibit F commences as follows:

*“I am pleased to inform you that after due consideration of your application, the Nigerian Bank for Commerce and Industry has approved an investment in Intergrated Gas Nigeria Limited by way of term loan of N500,000 under the World Bank Line of Credit on the terms and conditions stated hereunder and other usual conditions contained in the Investment and Mortgage Agreement.”* D

One of the special terms and conditions is stated in paragraph 9 in the following terms: E

*‘The Bank also reserves its right to withdraw this within six (6) months from the date of this letter, necessary documents are not executed/ predisbursement conditions have not been completed with effective steps have not been taken to implement project.’* F

In reply to Exhibit F, the respondent sent Exhibit G to the appellant. It reads in part:

*“We refer to and thank you for your letter of intent dated the 25th March, 1986 offering us a term of loan of N500,000 under the World Bank Line of Credit. We have carefully studied the terms and conditions of the loan and to indicate our acceptance, we return herewith two copies of the letter of intent duly signed by us. We confirm that the balance of N200,000 (Two Hundred Thousand Naira) previously unpaid by sponsors have been called up and received. This brings sponsors contribution to a total of N450,000 (Four Hundred and Fifty Thousand Naira.)”* G H

As it is, Exhibit F is an offer and Exhibit G is an acceptance. There is consideration and there is clearly an intention to create legal relation-

ship as the two exhibits show. There is capacity on the part of the parties to contract, they being Incorporated Companies.

There is concurrent findings of the two lower courts that there was a breach of contract in this matter. I do not see my way clear in  
B interfering with the findings because it is not perverse.

In the light of the above and the more detailed reasons given in the leading judgment by my learned brother, Edozie, JSC., I too allow the appeal. I set aside the judgment of the High Court and the Court of Appeal  
C and dismiss the respondents' claims. I award N10,000.00 costs to the appellant.

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**MUSDAPHER JSC**

D I have had the honour to read in advance the judgment of my Lord Edozie, JSC., with which I entirely agree. For the same reasons very lucidly set out in the judgment, which I adopt as mine, I too, allow the appeal and set aside the decisions of the lower courts. The respondents'  
E claims before the trial court are hereby dismissed in their entirety.

I abide by the order for costs contained in the aforesaid leading judgment.

F

G

H