

SUPREME COURT OF NIGERIA
7TH JANUARY, 2005. SC. 77/2002
CORAM:- I. L. KUTIGI, S. O. UWAIFO, N. TOBI, D.
MUSDAPHER, D. O. EDOZIE, JJSC

OMEGA BANK NIGERIA PLC DEFENDANT/APPELLANT
AND
O. B. C. LIMITED PLAINTIFF/RESPONDENT

CONTRACTS - Courts - Agreement - To be in existence - Means there is a valid offer - And unqualified acceptance - Court is not to make the contract (H1)

BANKING - Loan contract - Oral agreement - The Document (Exhibit P6) is no acceptance of the loan contract - And no oral agreement can be rightly inferred (H2)

CONTRACTS - Banking - Formation of contract - Refusal of the contractual terms - Means no contract between the parties (H3)

CONTRACTS - Courts - Documents - Fairness of court in construing documents - Cannot make a worthless document efficacious in law (H4)

CONTRACTS - Damages for breach - Purpose of - Where there is no contract - Issue of damages and interest will not arise (H5)

EVIDENCE - Admissibility - Exhibited document - Not marked without prejudice - Is legally admissible (H6)

EVIDENCE - Appeals - Admissibility - Fresh issue of - Raised without leave - Is incompetent (H7)

FACTS

Before the Ondo State High Court, Akure, the plaintiff/respondent

filed an action against the defendant/appellant. The respondent maintained a current account with the appellant. In 1991, respondent applied to the appellant for N5 million Nigerian Export and Import (NEXIM) Bank revolving loan for a period of three years to enable her purchase and export cocoa to its foreign customer in the UK. NEXIM, designed to promote trade in the non-oil sector is a Federal Government facility processed through the Central Bank. The commercial Bank that processes the loan for its customers remains primarily responsible to repay the loan to NEXIM for which reason it must be cautious and ensure an agreement between it and that customer. The appellant processed and secured N6 million NEXIM loan for the respondent's use. The respondent's application for the loan Exhibit P5 was replied in Exhibit P7, in which appellant stated the conditions respondent must fulfil before it could utilize the facility. Respondent rejected the condition as being too onerous. It felt Exhibit P6, which it went and collected from the appellant's head office amounted to an acceptance of the contract for grant of the NEXIM loan. But the said Exhibit is an unsigned internal memo of the appellant which was addressed to appellant's staff and not the respondent.

The loan facility was not made available to the respondent as the parties could not reach a contractual agreement. Respondent suffered some financial losses in its business which it felt was as a result of appellant's failure to release the loan facility already approved by the Central Bank for its business. Respondent then filed this action claiming inter alia, a total sum of N71 million from the appellant. The appellant's Amended Statement of Defence contained a counter-claim for the sum of N2,169,930.10. The trial court found in favour of the respondent save that it reduced the post judgment interest rate. It awarded the sum of N640,593.53 to appellant as its proved counter-claim. Appellant appealed to the Court of Appeal and respondent cross appealed in respect of the counter-claim. The court dismissed appellant's appeal and allowed the cross appeal in part. Being aggrieved appellant has further appealed to the Supreme Court under 18 grounds of appeal and raised 10 issues for determination. The apex court frowned at this proliferation of issues.

ISSUES FOR DETERMINATION

“(1) Whether the learned trial Justices of the Court of Appeal rightly or wrongly admitted and relied on Exhibit P6, which is unsigned internal memo of the appellant whose alleged makers/authors, were not called as witnesses.

(2) Whether the learned Justices of the Court of Appeal rightly or wrongly held that there was a concluded NEXIM loan Agreement between the appellant and the respondent which was breached by the appellant.

(9) Were the learned Justices of the Court of Appeal right or wrong in rejecting Exhibit P29 in evidence on the ground that it is a privileged document?

Whether the negotiations between the parties eventually crystallized into a valid and enforceable agreement for which damages may be recoverable for the breach of the contract.

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

Courts - Agreement - To be in existence

1. It is manifest that the trial court found the existence of an oral contract for the NEXIM facility entered into between the parties, which finding is affirmed by the Court of Appeal. It is now settled law that it is not the function of the court to make contracts between the two parties, but it is the court's duty to construe the surrounding circumstances including written and oral statements as to effectuate the intention of the parties. In order to decide whether the parties have reached an agreement, it is usual to inquire whether there has been a definite offer by one party and unqualified acceptance of that offer by another. (p. 177 D)

Loan contract - Oral agreement

2. In my view, the court below was in error to have held that Exhibit P6 was the acceptance of exhibit P5. There is no correlation or connection between Exhibit P5 and Exhibit P6. The latter made no reference to the former. It is the law of contract that the letter of acceptance must unqualifiedly accept a particular offer.

The lower court was therefore in error to have placed reliance to Exhibit P6 and P11 and to find an oral agreement between the respondent's Managing Director and the appellant's Mr. Ali on the NEXIM Loan. The lower court affirmed the finding of the trial court on the existence of an oral agreement made with Mr. Ali which clearly was not the case of the respondent. Both in its evidence and pleadings, the respondent never relied on any oral agreement. (p. 178 A)

Banking - Formation of contract

3. The appellant clearly, in my view, replied the respondent's application for the facility (Exhibit P5) in its letter addressed to it in Exhibit P7. There is no dispute whatever that the respondent rejected the terms contained in Exhibit P7. When negotiations are in progress between the parties intending to enter into a contract, the whole of those negotiations must be considered as to determine, whether, if at all, the contract came into being. The parties here intended to have a written contract and by their rejection of Exhibit P7, the respondent must be taken to have refused to enter into the contract with the appellant. Accordingly, there was no contract entered between the parties. (p. 178 E)

Fairness of court in construing documents

4. Although courts may not make contract for the parties where none exists, the courts will seek to uphold bargains made commercially, wherever possible, recognizing that they often record the most important agreements in crude and summary fashion and will seek to construe any document fairly and broadly without being too astute or subtle in finding defects. See *Brown v. Goold* (1972) Ch 53, *Hillas & Co. Ltd. v. Arcos Ltd.* (1932) 147 LT 503. After due consideration of all the circumstances and if satisfied that there was an ascertainable and determinate intention to contract, the courts will strive to give effect to that intention looking at the intent and not the mere form. But in the instant case there is no sufficient certainty as to the acceptance of the terms offered by the appellant in Exhibit P7, rather it was manifest that the respondent rejected the offer made by the appellant in Exhibit P7. It is impossible under all the

circumstances of this case to take Exhibit P6 as an offer or acceptance of an offer. It is a document not signed nor addressed to the respondent, it is a worthless document which does not have any efficacy in law. (p. 179 A)

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CONTRACTS - Damages for breach

5. Damages for breach of contract are a compensation to the plaintiff for the damage, loss or injury suffered through that breach. It is meant, as far as money can do it, for the plaintiff to be placed in the same position as if the contract has been performed. But there must be a contract and its breach before the issues of damages and interest can arise. Accordingly, under the circumstances and having regard to my finding that there was no contract entered into by the parties, the respondent having rejected the offer made by the appellant, the question of damages becomes a non-issue in this appeal and is struck out. (p. 179 G)

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D

Admissibility - Exhibited document

6. Exhibit P. 29 was not marked “without prejudice” the Court of Appeal in its judgment refused to act on Exhibit P. 29 because according to it, it was a privileged document.

The law is settled that a court can only act upon evidence that is legally admissible. It cannot, and it has no discretion to admit and act upon evidence which is legally inadmissible, even with the consent of the parties. See *Kale v. Coker & Ors.* (1982) 12 S.C. (Reprint) 118. But in my view, there is nothing in the Evidence Act that makes Exhibit P. 29 inadmissible, it is a written statement made by the respondent adverse to its interest. See *S.S.N.L v. Eyuafe* (1976) 9-10 S.C. (Reprint) 86. Where no objection is raised when a document is offered in evidence, the document will be admitted and acted upon and the opposing party cannot later complain on its admissibility unless the document is inadmissible by law. See *Etim v. Ekpe* (1983) 1 SCNLR 120. (p. 180 E)

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Appeals - Admissibility - Fresh issue of

7. In any event, the inadmissibility of the Exhibit P. 29 was a fresh issue

in the Court of Appeal for which no leave was sought and obtained. It was therefore incompetent. On that ground alone, I resolve the issue in favour of the appellant. (p. 181 A)

B NOTABLE POINTS OF INTEREST

MUSDAPHERJSC

1. Appeals - Proliferation of issues

This court has on several occasions condemned the proliferation of issues in briefs of argument. It is not the number of issues for determination formulated that determines the quality of a brief or that determines the success of an appeal. The issues formulated in this case have the effect to obscure the fundamental and core issue in this case, that is, whether the negotiations between the parties eventually crystallized into a valid and enforceable agreement for which damages may be recoverable for the breach of the contract. For, it is only when there is a valid and enforceable contract, that the issues, for example, of damages, may become relevant and important. Accordingly, from the stand of the parties and with particular reference to the exhibits referred to above and reproduced, in my view the central and crucial issue is first to determine whether there was a binding contract entered into by the parties. (p. 174 D)

F TOBIJSC

2. Grounds of appeal - Need not be too many

It is certainly not part of our adjectival law that every “sneeze” or “sniffle” of the lower court must give rise to a ground of appeal. A ground of appeal should complain of the live issues in the matter which will determine the fortunes of the appeal one way or the other. Where grounds of appeal do not properly relate to or fit into the decision of the court, they gallivant in the appeal, thus serving no useful purpose.

Where grounds of appeal are unwieldy, issues formulated from such grounds will certainly be unwieldy. That is the situation in this appeal. As the appellant formulated eighteen grounds, he had to ‘justify’ them by formulating ten issues. With respect, I do not see the need for

eighteen grounds of appeal and ten issues in this matter. (p. 183 D)

EDOZIE JSC

3. Document pleaded to establish a particular fact

It ought to be borne in mind that although a document may be admissible B in evidence under the provisions of evidence Act, the weight to be attached to its content is another matter, for every piece of evidence that has been admitted in the course of proceedings is subject to be tested for credibility, weight or cogency by the trial court before it becomes acceptable documentary evidence: See Ayeni v. Dada (1978) 3 S.C 35 at 61. Furthermore, where a document is pleaded to establish a particular C fact, it can only be used to establish that fact and cannot be used to prove another fact which is not an issue in the pleadings: See Onwumere v. Agwunede (1987) 3 NWLR (Pt. 62) 673 at 681-682. (p. 188 H) D

4. Definition of an offer

An offer is a definite undertaking made with the intention that it shall become binding on the person making it as soon as it is accepted by the E person to whom it is addressed: see Chitty on Contract 23rd Edition Vol. 1 p. 22 paragraph 43. Since Exhibit 6 was not a final copy and not addressed to the respondent by the Akure branch of the appellant Bank, it could not rely on it as an offer of the loan agreement. This being the case, F the oral agreement purportedly made by the officials of both parties to amend Exhibit 6 was to no avail as an amendment cannot hang on what does not exist. (p. 189 H)

REPRESENTATION

Prof. Taiwo Osipitan, SAN., (with him, A. M. Kayode), for the Appellant. G

L. O. Fagbemi, SAN, (with him, H. O. Afolabi, K. O. Fagbemi and A. O. Popoola), for the Respondent. H

CASES REFERRED TO

Onwumere v. Agwunede (1987) 3 NWLR (Pt. 62) 673 at 681-682

- Kale v. Coker & Ors. (1982) 12 S.C. (Reprint) 118; (1982) 12 S.C. 252
Agu v. Ikewide (1991) 3 NWLR (Pt. 180) 385
Alade v. Olukade (1976) 2 S.C 183
S.S.N.L v. Eyuafe (1976) 9-10 S.C. (Reprint) 86; (1976) 9-10 S.C. 135
B Etim v. Ekpe (1983) 1 SCNLR 120
Torti v. Ukpabi (1984) 1 SCNLR 214
Ayeni v. Dada (1978) 3 S.C 35
Hillas & Co. Ltd. v. Arcos Ltd. (1932) 147 LT 503
C Igbodim v. Obianke (1976) 9-10 S.C. (Reprint) 108 (1976) 9-10 S.C. 179

LEAD JUDGMENT BY MUSDAPHER JSC

D In the High Court of Justice of Ondo State, in the Akure Judicial Division and in Suit No. Ak/305/94, the plaintiff as per paragraph 94 of its Amended Statement of Claim claimed against the defendant as follows:-

“94. *Whereof the plaintiff claims from the defendant as follows:*

E (i) *A sum of N71,000,000.00 (Seventy One Million Naira) as follows:*

F (a) *A sum of 47,000.00 being anticipated profit which the plaintiff lost due to the refusal and or failure to release to the plaintiff a sum of at least N5 Million Nexim fund, three year revolving export finance facility or arose from the refusal and or failure on the part of the defendant to process the plaintiff’s application for N5 Million Nexim three years revolving export finance facility for 1991/92, 1992/93 and 1993/94.*

G (b) *A sum of N12 Million as damages from the refusal of the defendant to release to the plaintiff letter’s pledged securities with the Defendant but for which no fund was made available for the year 1994/95.*

H (c) *The further sum of N12 Million as damages arising from the refusal of the defendant to release to the plaintiff, the plaintiff’s securities with the defendant but for which no fund was made available as well as crippling the plaintiff’s access to alternative funds for the year 1995/*

96.

(ii) \$114,100.00 Pound Sterling being additional expenses incurred by Messrs. Minstrel Limited of England on purchase of N1,100 metric tons of cocoa beans which the plaintiff had, to the knowledge of the defendant, contracted to supply Messrs. Minstrel Limited but which the plaintiff could not supply as a result of the failure and or refusal of the defendant to make available or process plaintiff's application for NEXIM three years revolving export finance facility. B

(ii) \$38,250.00 being additional expenses incurred by Messrs. Minstrel Limited of England on purchase of 450 Metric tons of cocoa beans which the plaintiff had, to the knowledge of the defendant, contracted to supply Messrs. Minstrel Limited but which the plaintiff could not supply as a result of the failure and or refusal of the defendant to make available or process plaintiff's application for NEXIM three year revolving export finance facility. C D

(iv) The sum of \$1,730,25 (US dollars) being the balance of the plaintiff's dollars account with the defendant.

(v) An order that the defendant shall pay to the plaintiff Reliefs II, III and IV above at the rate of exchange prevailing as at the time the defendant satisfies this judgment on Reliefs (ii), (iii) and (iv) above. E

(vi) An order for the immediate release of the securities Deeds pledged for the properties mentioned in Paragraphs 8 and 71 above. F

(vii) Interest at the rate of 10% on each of the items of claim mentioned above until date of judgment and thereafter until whole judgment debt is liquidated."

The defendant's Amended Statement of Defence contained a Counter Claim whereby it sought the following reliefs:- G

"21. Whereof the defendant claims from the plaintiff the sum of N2,169,930.10 with banking interest from the 9th February, 1995, until the sum is finally liquidated."

In reaction, the plaintiff filed a reply to the Statement of Defence H and a defence to the Counter-Claim. At the hearing of the matter, the plaintiff called 4 witnesses and tendered 38 Exhibits (Exhibits P1-P38). The defendant called one witness and tended one document, Exhibit 1.

By leave of court the parties filed written addresses. In his judgment delivered on the 13/1/1998; the learned trial Judge found for the plaintiff. He held (1) there was a concluded NEXIM loan agreement for 3 years running in the sum of 6 Million Naira for each cocoa season. (2) the defendant breached that loan agreement and (3) that the plaintiff was entitled to all the reliefs recited above except the rate of interest post judgment fixed at 71/2%. The learned trial Judge also awarded the defendant the sum of N640,593.53 as its proved Counter-Claim.

The defendant felt unhappy with the decision and appealed to the Court of Appeal. Thirteen issues for determination of the appeal were submitted to the Court of Appeal.

The plaintiff also felt unhappy with the decision on the Counter-claim and also filed a cross-appeal.

After the consideration of the issues in the appeal and the issue raised in the cross-appeal, the Court of Appeal, per Rowland, JCA., who read the lead judgment and agreed to by Ibiyeye and Akaahs, JCA., dismissed in its entirety the defendant's appeal and allowed in part the cross-appeal, by reducing the award made to the defendant from N640,593.53 to N389,947.09. The defendant hereinafter called the appellant felt disgruntled and has now appealed to this court. The plaintiff shall hereinafter be called the respondent.

It is with the leave of this court that the appellant filed an amended Notice of Appeal containing 18 grounds of appeal. It is also with the leave of the court that the appellant filed appellant's Amended Brief on the 17/6/2004 while the respondent's brief was filed on 16/7/2004. Before the examination of the grounds of appeal and the issues distilled therefrom, it shall be convenient at this stage to sketch out the facts. The facts put shortly are: The appellant is a commercial bank where the respondent in the normal course of business kept a current account. In September, 1991, the respondent applied to the appellant for N5 Million NIGERIAN EXPORT AND IMPORT BANK (NEXIM) revolving loan for a period of three years to enable the respondent purchase and export cocoa to its foreign customer namely MINSTREL LIMITED of the UNITED KINGDOM. The NEXIM credit facility is grantable to an importer or exporter

of goods through a commercial bank. The facility is designed to promote trade in the non-oil sector. The interest rate charged on the NEXIM loan is lower than the rate charged by commercial banks. The scheme is only available to an importer or exporter, by an application to a commercial bank. The commercial bank processes the application and sends it to NEXIM for approval. The commercial bank however, remains primarily responsible to repay the loan to NEXIM. Therefore, the commercial bank has the duty to protect itself and to ensure that an applicant for the NEXIM credit will not default in repayment. So, there must be an agreement between the applicant and a commercial bank.

The appellant processed and secured N6 Million NEXIM LOAN for the use of the respondent. It is common ground that the appellant was not merely an intermediary to this loan, but was the primary obligor to NEXIM. In the event of any default, the appellant is duty bound to refund the loan plus interest to NEXIM. According to the appellant, the respondent's application for the loan, Exhibit P5, was replied in Exhibit P7, a letter dated 10/1/1992, in which the appellant conveyed the approval of the application with conditions which the respondent must fulfil before it could utilize the facility. The respondent on the other hand insisted that Exhibit P6, an Internal Memorandum, unsigned and emanating from the Head Office of the appellant and addressed to its Akure branch Controller was the reply to its application. The learned trial Judge found that Exhibit P6 concluded the loan agreement. The relevant Exhibits, that is, Exhibits 5, P6 and P7 are hereunder reproduced so that their impact may be properly appreciated.

"EXHIBIT P5

16th September, 1991

*The Manager,
Owena Bank Nigeria Plc.,
17, Oyemekun Road,
Akure.*

Dear Sir,

*APPLICATION FOR A THREE YEAR REVOLVING EXPORT
FINANCE FACILITY OF FIVE MILLION (5.000.000.00) UNDER CEN-*

TRAL BANK REFINANCING

We shall be very much obliged if you will approve a *THREE YEAR REVOLVING FACILITY* of Five Million Naira under the Central Bank of Nigeria Refinancing Scheme for us, to enable us embark on a very dynamic export of Cocoa Beans, Butter and other Process Cocoa Products. As you will notice from your record, we have been on the export business for years and we have always used facilities from Merchant Bank in Lagos through your Akure Branch and we obtained an overdraft of Seven Hundred and Fifty Thousand Naira from you last season out of which we exported One Hundred and Sixty Metric Tonnes of Cocoa with total value of US Dollar of One Hundred and Fifty-Two Thousand (\$152,000.00).

The export business requires sufficient funds and continuously and this is why we are now applying for a three year facility of Five Million Naira backed by Central Bank refinancing scheme. Your Apapa Office is already handling our application to the Central Bank of Nigeria and we are very optimistic of the success of our application with an initial contract for Six Hundred Metric Tonnes of Cocoa from MINSTREL LIMITED of ENGLAND.

We await your immediate approval of this application to enable us make a good start.

Yours faithfully,

SIGNED

CHIEF OLAIYA BAMIDELE (Managing Director)”

“EXHIBIT P6

CFE-.EEO: 003:91

2nd December, 1991

The Controller,

Owena Bank (Nigeria) Plc.,

Akure.

Dear Sir,

RE: EXPORT FINANCE FACILITY RRF OF N6,000,000.00

We refer to your application No. 11 CR:O3:FFA:91 dated 21st

October, 1991 in respect of the above application and hereby convey Central Office approval and conditions stipulated below:

NATURE AND AMOUNT

Enhancement of existing Export Finance Facility of N750k to N6,000,000.00 under no circumstance should this limit be exceeded without the prior approval of the Central Office.

PRICING

(a) Interest rate at CBN Refinancing and Rediscounting rate of 18% per annum.

(b) COT and other charges as per existing CBN rules and regulations.

(c) Arrangement fee - 1% of N6,000,000.00 flat. SECURITIES:

(1) Existing Legal Mortgage on Property located 168, Oyemekun Road, Akure, valued at N 1 .8M to be upstamped.

(2) Legal Mortgage on Block IX Plot 3 Ondo State Government Commercial Layout, Ilesa Road, Akure, valued at N805,83.00.

(3) Legal Mortgage on Properties at No. 1, Olaiya Close, Off Bank, Akure, valued at N600,480.00 and No. 9 Sowole Street, Off Dopemu Road, Agege.

(4) Confirmed Irrevocable letter of credit from a first class overseas Bank.

(5) Lien on Export proceeds.

(6) Against Warehouse Warrants.

REPAYMENT/EXPIRY:

Facility to revolve but must be fully adjusted after a period 150 days as CBN refinancing is only for 150 days.

To be reviewed after every 3 months.

OTHER TERMS AND CONDITIONS:

(1) OBC Motors Limited will produce confirmed irrevocable letter of credit for Nigeria Cocoa Beans.

(2) All shipment will be on FOB basis.

(3) Disbursements must be fully monitored and must be in tranches against Warehouse receipts.

(4) Draw down to be in tranches depending on value of Ware-

house receipt and/or stocks purchased. After the first draw down, the warehouse receipt will be deposited with the Bank to facilitate the second draw down Draw down will only be by Bank cheques in the name of the vendors for purchasing the product.

B (5) *Paid up capital should be increased to at least N5 Million latest by 30/4/92. Submission of latest audited financials to determine the exact position of the company latest by 31/1/92.*

(6) *Security perfection to be completed before disbursement.*

C (5) *All other terms and conditions stipulated in our Sanction Letter No. CFE/EO/FTD/1127/90 dated 8th August, 1990 remain unchanged.*

Please find enclosed a copy of CBN approval for RRF of N5,000,000.00 and note that disbursements would only be effected from Export Refinance Account as this facility should not affect our credit ceiling position.

Yours faithfully,

J. O. O.

MIRZA NAZIM ALO

E. E. ODUGBESAN

E (MRS.)

CONTROLLER

MANAGER

CENTRAL FOREIGN

CENTRAL FOREIGN

EXCHANGE

EXCHANGE"

F "EXHIBIT P7

The Managing Director, OBC Motors Limited, 168, Oyemekun Road, P. O. Box 577. Akure.

Dear Sir,

G RE: *YOUR APPLICATION FOR EXPORT FINANCE FACILITY RRF OF (N5,000,000.00) FIVE MILLION UNDER CENTRAL BANK REFINANCING*

H *We refer to your application dated 16th September, 1991, in respect of the above application and hereby convey Bank's approval subject to the terms and conditions stipulated below:*

NATURE AND AMOUNT

Enhancement of existing Export Finance Facility of N750k to

N6,000,000.00.

PRICING

(a) *Interest rate at CBN Refinancing and Rediscounting rate of 18% per annum.*

(b) *COT and other charges as per existing CBN rules and regulations.* B

(c) *Arrangement fee -1% of N6,000,000.00 flat. SECURITIES:*

(1) *Existing Legal Mortgage on Property located 168, Oyemekun Road, Akure, valued at N1.8M to be upstamped.*

(2) *Legal Mortgage on Block IX Plot 3 Ondo State Government Commercial Layout, Ilesa Road, Akure, valued at N805,83.00.* C

(3) *Legal Mortgage on Properties at No. 1, Olaiya Close, Off Bank Road, Akure, valued at N600,480.00 and No. 9 Sowole Street, Off Dopemu Road, Agege.* D

(4) *Confirmed Irrevocable letter of credit from a first class overseas Bank.*

(5) *Lien on Export proceeds.*

(6) *Against Warehouse Warrants.* E

REPAYMENT/EXPIRY:

Facility to revolve but must be fully adjusted after a period 150 days as CBN refinancing is only for 150 days.

To be reviewed after every 3 months. F

OTHER TERMS AND CONDITIONS:

(1) *OBC Motors Limited will produce confirmed Irrevocable letter of credit from first class Overseas Bank for Nigeria Cocoa Beans.*

(2) *All shipment will be on FOB basis.*

(3) *Disbursements must be fully monitored and must be in tranches against Warehouse Receipts.* G

(4) *Draw down to be in tranches depending on value of Warehouse Receipt and/or stocks purchased. After the first draw down, the Warehouse Receipt will be deposited with the Bank to facilitate the second draw down, Draw down will only be by Bank Cheques in the name of the vendors for purchasing the produce* H

(5) *Under no circumstances should this limit be exceeded without*

the prior approval of the Central Office.

(6) Paid up capital should be increased to at least N5 Million latest by 30th April, 1992, submission of latest audited financial to determine the exact position of the economy latest by 31st January, 1992.

B *(7) Security perfection to be completed before disbursement.*

(8) All other terms and conditions stipulated in our Sanction Letter No. CFE/EO/FTD/1127/90 dated 8th August, 1991 remain unchanged.

C *(9) All legal and other expenses in respect of perfection of securities/documents and as may be incurred from time to time in conduct of the facilities will be borne by you and debited to your account. Also, the cost of valuation of properties charged as security to the bank by an outside appraiser, charges incurred in connection with inspection security at periodical intervals by the Bank's staff etc., will be recovered from you*
D *from time to time.*

10. In case this offer is acceptable to you, please indicate by appending your signature on the copy of this letter and return same to the undersigned.

E *Yours faithfully,*

SIGNED

E. A. FALUYI

PRINCIPAL MANAGER

SIGNED

C. O. OLANIYAN (MRS.)

SENIOR MANAGER-CREDIT"

F In any event, the respondent rejected the conditions contained in Exhibit 7 as being too onerous consequent upon which the good relationship broke down and the facility could not fall through. Bad blood generated over this, resulting into the exchange of correspondence and the intervention by both NEXIM and the CENTRAL BANK OF NIGERIA.
G The respondent on the other hand claimed and insisted that the appellant was wrong to have imposed impossible conditions as contained in Exhibit 7.

H The respondent further claimed that the conditions imposed by the appellant in Exhibit 7 amounted to breaching the contract which was claimed to have been concluded before the appellant applied for and received the funds from NEXIM. The respondent further contended, and such contention found favour with the courts below that the loan agree-

ment could be inferred from the surrounding circumstances including Exhibits P11, P6 and P21 and the oral discussions between one Ali and P.W.1 showed that the parties agreed orally to amend the terms and conditions contained in Exhibit P6 due to protestations of the respondent.

Now the appellant has identified, formulated and submitted to this court the following issues as arising for determination of the appeal. The issues are:-

“(1) Whether the learned trial Justices of the Court of Appeal rightly or wrongly admitted and relied on Exhibit P6, which is unsigned internal memo of the appellant whose alleged makers/authors, were not called as witnesses.

(2) Whether the learned Justices of the Court of Appeal rightly or wrongly held that there was a concluded NEXIM loan Agreement between the appellant and the respondent which was breached by the appellant.

(3) Whether the Court of Appeal was right or wrong when it held that the issue of parol evidence not being used to contradict written document was a new issue requiring leave of the court?

(4) Whether on the state of the pleadings, the learned Justices of the Court of Appeal correctly or wrongly, held that the appellant admitted the existence of NEXIM Loan Agreement between the parties and that there was an agreement between the parties and that there was an agreement to delete objectionable part of Exhibit P6.

(5) Assuming the appellant was rightly held liable for breach of the NEXIM Loan Agreement, whether the Court of Appeal correctly assessed/awarded special damages of N47 Million in favour of the respondent, as loss of anticipated profit is for 1991/1992, 1992/93 and 1993/94 cocoa seasons.

(6) Whether the learned Justices of the Court of Appeal rightly or wrongly held the appellant liable for detinue in respect of the title deeds of properties which the respondent had submitted to the appellant.

(7) Were the learned Justices of the Court of Appeal right or wrong in confirming the award of damages of N24 Million against the appellant on account of the alleged detinue?

(8) *Were the learned Justices of the Court of Appeal right or wrong in their decision to award N114,100.00 and US Dollars 38,250.00 in favour of the respondent on account of the damages allegedly suffered by her overseas buyers Messrs. Minstrel Limited in procuring tons of cocoa beans from alternative sources in 1991/92; 1992/93 and 1993/94 cocoa seasons?*

(9) *Were the learned Justices of the Court of Appeal right or wrong in rejecting Exhibit P29 in evidence on the ground that it is a privileged document?*

(10) *Whether the Court of Appeal was right or wrong in confirming interest of 7 1/2% per annum made by the trial Judge on the judgment debt."*

In his brief for the respondent, the learned counsel formulated more or less the same number of issues. It is my view that the issues are unwieldy, prolix and verbose. This court has on several occasions condemned the proliferation of issues in briefs of argument. It is not the number of issues for determination formulated that determines the quality of a brief or that determines the success of an appeal. See *Iwuoha v. NIPOST Ltd. (2003) 4 S.C (Pt.II) 37; (2003) 8 NWLR (Pt. 822) 803*. The issues formulated in this case have the effect to obscure the fundamental and core issue in this case, that is, whether the negotiations between the parties eventually crystallized into a valid and enforceable agreement for which damages may be recoverable for the breach of the contract. For, it is only when there is a valid and enforceable contract, that the issues, for example, of damages, may become relevant and important. Accordingly, from the stand of the parties and with particular reference to the exhibits referred to above and reproduced, in my view the central and crucial issue is first to determine whether there was a binding contract entered into by the parties.

The lower courts arrived at the decision that there was a NEXIM loan agreement entered into by the parties and that the appellant breached the loan agreement by the interpretation of Exhibit P5, Exhibit P6, Exhibit P7 and Exhibit P11.

The case of the appellant was that although it sourced the NEXIM

facility, it had to protect itself of ensuring the repayment of the loan, that was why it communicated its conditions to the respondent in Exhibit P7 which was also in answer to the respondent's application as contained in Exhibit P5. It is submitted that the respondent rejected the offer in Exhibit P7. The appellant, hence argued that there was no contract. It is argued that the learned Justices relied on Exhibits P5, P6, P11 and the alleged oral agreement to find the existence of a contract. It is further submitted that the lower court was in error to have found the existence of the NEXIM contract by reference to the conduct of the appellant when it allowed the respondent to draw on its account. It is again submitted the overdrawing of the account simpliciter does not justify the inference of an admission of a concluded NEXIM agreement, because where a customer of a bank whose account is insufficiently funded, draws a cheque over and above the funds in his account, such drawing is regarded as an application to the bank for an overdraft. See *ACB Ltd. v. Egbunike* (1988) 4 NWLR (Pt. 88) 350; *Brooks & Co. v. Blackburn Benefit Society* (1884) AC 857, at 864; *Cuthbert v. Roberts, Lubbock & Co.* (109) 2 CHD 226 at 233.

It is submitted that Exhibit P6 was not addressed to the respondent, it was an internal memo, meant to be sent to an organ of the appellant, somehow the respondent highjacked it and prematurely replied it in Exhibit P.11 even before it received the reply to its application for the loan which the appellant made in Exhibit P7. Exhibit P11 clearly was a reply to Exhibit P6 which was not addressed to the respondent. It is submitted that the respondent rejected the terms properly addressed to it in Exhibit P7. The reaction of the respondent to Exhibit P7 was a rejection of the terms of the loan. P.W.I for the respondent testified thus:

“There was no way we could accept the offer in Exhibit P7. (Page 123 lines 26-30 of the Records). D.W. 1 corroborated the stand of the respondents in their rejection of the terms. It is submitted that the learned Justices of the lower court were in error to have treated Exhibit P7 as a letter of breach of contract rather than a letter of offer to the respondent. It is submitted that the duty of the court is to give effect to the agreement of the parties. Learned counsel referred to (I) *Alfotrin Ltd. v. A-G. Fed-*

eration (1996) 9 NWLR (Pt. 475) 634 at 647; Fakorede & Ors. v. A.G. Western State (1972) 1 All NLR (Pt. 1) 178 at 189.

It is submitted that the Court of Appeal was in error to have held that a contract existed before Exhibit 7 was issued in breach of that B contract.

It is submitted that “*it is trite law that an offer and unqualified acceptance of the offer together with consideration are essential for existence of any contract*”. See *Toskwa Motors Ltd. v. UBN Ltd.* (1996) 9 C NWLR (Pt. 471) 129; *PTI v. Uwamu* (2001) 5 NWLR (Pt. 705) 112; *Faggol Instrument Ltd. v. National Bank of Nigeria Ltd.* (1993) 1 NWLR (Pt. 271) 586; *Neka v. ACB Ltd.* (2004) 3 MJSC page 118; *Harvey v. Facey* (1893) AC 552; *Clifton v. Palumbo* (1944) 2 All ER 97.

It is again submitted that Exhibit P6 could not be a reply to the D application in Exhibit P5 as there is a complete absence of connection between the two. The latter made no reference to the former and was not addressed to the respondent.

The learned counsel for the respondent on the other hand argued E that whether there was a NEXIM Loan agreement and whether the loan agreement is breached by the appellant centers on the interpretation to be given to Exhibits P5, P6, P7 and P11. It is submitted that NEXIM loan by its special nature, the facility is applied by a bank only after the bank has F satisfied itself with the application made by a customer. It is submitted that once NEXIM approved the facility, the commercial bank has no right or business of imposing conditions on the exporter - who is the beneficiary. It is submitted that the contract became concluded even before the commercial bank applies for loan. In the instant case, the appellant applied for the loan for the benefit of the respondent and received it G on the 19/12/ 1991 and refused to disburse it.

It is again submitted that Exhibit P5 is the application for the facility made by the respondent. Exhibit P6 was the letter the appellant notified the respondent of the approval and Exhibit P7 is a fresh offer made H by the appellant. It is submitted again that the contract is consummated by Exhibits P5 and P6. It is again submitted that the appellant had failed to show that the two lower courts were wrong to conclude that an agree-

ment had been established by Exhibit P6.

It is again submitted that the contention of the appellant that Exhibit P7 was the offer of the contract for the NEXIM LOAN which was rejected by the respondent by Exhibit P1 cannot be correct because while Exhibit P7 is dated 10/1/1992, Exhibit P11 is dated 6/1/1992 and this Exhibit P11 predated Exhibit P7 and could not therefore be correct to insist that Exhibit P11 is a reply to Exhibit P7. On the contrary, Exhibit P11 was a follow up of the discussion between P. W. 1 and one Mr. Ali which was held pursuant to Exhibit P. 6 and which discussion culminated into the contract the lower courts held to have been entered into by the parties. It was argued that the appellant was therefore manifestly in error to insist that Exhibit P. 11 was a reply to Exhibit P. 7. It was further argued that Exhibit P.11 clearly reveals the agreement entered by the parties (P.W. 1 and Mr. Ali) including the agreement to delete the objectionable conditions contained in Exhibit P.6.

It is manifest that the trial court found the existence of an oral contract for the NEXIM facility entered into between the parties, which finding is affirmed by the Court of Appeal. It is now settled law that it is not the function of the court to make contracts between the two parties, but it is the court's duty to construe the surrounding circumstances including written and oral statements as to effectuate the intention of the parties. In order to decide whether the parties have reached an agreement, it is usual to inquire whether there has been a definite offer by one party and unqualified acceptance of that offer by another. Now, the respondent applied for the loan facility through Exhibit P5 to the Akure branch of the appellant. Without waiting for a reply from Akure branch, the respondent went to the head office of the appellant and there obtained Exhibit P6, an unsigned internal memorandum not addressed to the respondent, but to an official of the appellant. It relied on Exhibit P6 as the reply to its letter of application for the loan in Exhibit P5. In my view, this cannot be correct, Exhibit P6 is not and cannot be the reply to its letter of application for the loan simply because it was not addressed to it. Indeed in its negotiations for the loan facility, the respondent was dealing with

the Akure branch of the appellant. It is very clear that the respondent jumped the gun and began to act on Exhibit P6 which was not addressed to it and which clearly referred to an earlier correspondence between the “Controller” Akure branch and the head office. The respondent was not dealing with the appellant’s head office. **In my view, the court below was in error to have held that Exhibit P6 was the acceptance of exhibit P5. There is no correlation or connection between Exhibit P5 and Exhibit P6. The latter made no reference to the former. It is the law of contract that the letter of acceptance must unqualifiedly accept a particular offer.**

The lower court was therefore in error to have placed reliance to Exhibit P6 and P11 and to find an oral agreement between the respondent’s Managing Director and the appellant’s Mr. Ali on the NEXIM Loan. The lower court affirmed the finding of the trial court on the existence of an oral agreement made with Mr. Ali which clearly was not the case of the respondent. Both in its evidence and pleadings, the respondent never relied on any oral agreement. The respondent relied on Exhibit P6 as the acceptance of its application in Exhibit P5. As mentioned above, Exhibit P6 was not addressed to it. It was an internal memorandum for the consumption and use of the staff of the appellant. The respondent applied for the facility to the Akure branch of the appellant and not to the head office of the appellant. **The appellant clearly, in my view, replied the respondent’s application for the facility (Exhibit P5) in its letter addressed to it in Exhibit P7. There is no dispute whatever that the respondent rejected the terms contained in Exhibit P7. When negotiations are in progress between the parties intending to enter into a contract, the whole of those negotiations must be considered as to determine, whether, if at all, the contract came into being. The parties here intended to have a written contract and by their rejection of Exhibit P7, the respondent must be taken to have refused to enter into the contract with the appellant. Accordingly, there was no contract entered between the parties.**

Before I part with this issue, I think I need to emphasize and reit-

erate that **although courts** may not make contract for the parties where none exists, the courts will seek to uphold bargains made commercially, wherever possible, recognizing that they often record the most important agreements in crude and summary fashion and will seek to construe any document fairly and broadly without being too astute or subtle in finding defects. See *Brown v. Goold* (1972) Ch 53, *Hillas & Co. Ltd. v. Arcos Ltd.* (1932) 147 LT 503. After due consideration of all the circumstances and if satisfied that there was an ascertainable and determinate intention to contract, the courts will strive to give effect to that intention looking at the intent and not the mere form. But in the instant case there is no sufficient certainty as to the acceptance of the terms offered by the appellant in Exhibit P7, rather it was manifest that the respondent rejected the offer made by the appellant in Exhibit P7. It is impossible under all the circumstances of this case to take Exhibit P6 as an offer or acceptance of an offer. It is a document not signed nor addressed to the respondent, it is a worthless document which does not have any efficacy in law. Accordingly, any agreement entered into by Mr. Ali and P.W.1 to amend it does not qualify it to be an agreement initiated by the respondent in Exhibit P5. Thus issues 1,2,3 and 4 all broadly relating to the existence of a binding contract between the parties are deemed to have been discussed under this issue and the end result being that there is no enforceable contract proved by the respondent. The respondent clearly rejected the offer of the appellant in Exhibit P7, it cannot claim the existence of any other contract, written or oral.

Now issues 5,6,7, 8 and 10 relate to the question of damages and interest, recoverable for the breach of the contract. **Damages for breach of contract** are a compensation to the plaintiff for the damage, loss or injury suffered through that breach. It is meant, as far as money can do it, for the plaintiff to be placed in the same position as if the contract has been performed. But there must be a contract and its breach before the issues of damages and interest can arise. Accordingly, under the circumstances and having regard to my finding that there was no contract entered into by the parties, the re-

spondent having rejected the offer made by the appellant, the question of damages becomes a non-issue in this appeal and is struck out. I shall now deal with issue No.9.

ISSUE NO. 9

B This relates to the admission of Exhibit P. 29 which the learned trial Judge utilized in awarding the appellant the sum of N640,593.00 on the counter-claim. The Court of Appeal held that Exhibit P. 29 was inadmissible being a privileged document and reduced the counter-claim to N389,947.09. It is submitted that the privilege status of Exhibit P. 29 in which the respondent admitted its indebtedness to the appellant was not an issue before the trial court. It was also not an issue in the cross-appeal and indeed Exhibit P. 29 was tendered without objection at the trial.

C The learned counsel for the respondent on the other hand argued that a privileged document remains in law inadmissible for all purposes and that even when the respondent did not object to it, it remains inadmissible.

D Now, there is no doubt that the issue of the privileged status of Exhibit P. 29 was not made an issue in the cross-appeal of the respondent in the court below. At the trial, Exhibit P. 29 was tendered in evidence and there was no objection on the part of the respondent. In it, the respondent admitted “*balance due for payment by us, N640,593.53*”. **Exhibit P. 29 was not marked “without prejudice” the Court of Appeal in its judgment refused to act on Exhibit P. 29 because according to it, it was a privileged document.**

F The law is settled that a court can only act upon evidence that is legally admissible. It cannot, and it has no discretion to admit and act upon evidence which is legally inadmissible, even with the consent of the parties. See *Kale v. Coker & Ors. (1982) 12 S.C. (Reprint) 118; (1982) 12 S.C. 252; Alade v. Olukade (1976) 2 S.C 183. But in my view, there is nothing in the Evidence Act that makes Exhibit P. 29 inadmissible, it is a written statement made by the respondent adverse to its interest. See *S.S.N.L v. Eyuafe (1976) 9-10 S.C. (Reprint) 86; (1976) 9-10 S.C. 135. Where no objection is raised when a document is offered in evidence, the document will be admitted and acted upon and the opposing party cannot later**

complain on its admissibility unless the document is inadmissible by law. See Etim v. Ekpe (1983) 1 SCNLR 120. In any event, the inadmissibility of the Exhibit P. 29 was a fresh issue in the Court of Appeal for which no leave was sought and obtained. It was therefore incompetent. On that ground alone, I resolve the issue in favour of the appellant. B

On the whole, the appeal of the appellant is allowed. The judgment and orders of the court below in respect of the plaintiff/respondent's claims are set aside and in their place, the claims of plaintiff/respondent shall be and are hereby dismissed. The decision of the Court of Appeal in relation to the counter-claim be and is hereby set aside and the decision of the trial court is restored. C

The appellant is entitled to costs in the trial court, of Court Appeal and this court, respectively assessed at N7,500.00, N7,500.00 and N10,000.00. D

KUTIGI JSC

I have had the privilege of reading in advance the judgment just rendered by my learned brother, Musdapher, JSC. I agree with him that the appeal has merit which ought to succeed. The crucial issue is whether or not there was a valid, binding and enforceable contract between the parties herein. While there was an offer made by the defendant to the plaintiff (See Exhibit P. 7), there was no acceptance by the plaintiff of that offer anywhere at all. In fact, both P.W. 1 and D.W. 1 for the plaintiff and defendant respectively, confirmed the rejection of Exhibit 7 by the plaintiff. There was therefore no contract and consequently there could not have been any breach of the contract. The plaintiff's claims therefore fail and are accordingly dismissed. This shall be the order of the lower courts. E F G

As for the defendant's counter-claim, the decision of the Court of Appeal awarding N389,947.09 as money admittedly owed by the plaintiff to the defendant is set aside while the award of N640,593.53 made by the trial High Court in favour of the defendant against the plaintiff is restored. H

I endorsed the order for costs.

UWAIFO JSC

B (Editor's Note)- He was a member of the panel that heard the appeal and agreed with the lead judgment. He however retired from the Supreme Court on Friday, 7th day of January, 2005.

C **TOBI JSC**

I have read in draft the judgment of my learned brother, Musdapher, JSC., and I agree with him. I will take issues 1 and 2 only.

D The appellant was the defendant. The respondent was the plaintiff. The appellant is a licensed commercial bank. The respondent is a Limited Liability Company. The respondent's former name is OBC Motors Limited. It has dropped "Motors" as part of the name. It now simply bears O.B.C. Limited.

E In September, 1991, the respondent applied to the appellant for N5 Million NEXIM revolving loan. The loan was to enable the respondent export tons of cocoa to her foreign customer, Minstrel Limited of England. The appellant succeeded in procuring a NEXIM loan of N6 Million. The appellant was intermediary and a primary obligor to NEXIM. It was a condition that in the event of default by the respondent, the appellant was obliged to refund the loan to NEXIM. Following some disagreement, the respondent sued the appellant for breach of contract. He claimed three reliefs involving different amounts of naira and sterling.

G The learned trial Judge heard evidence and gave judgment in favour of the respondent. The appellant's appeal to the Court of Appeal was dismissed. The Court of Appeal affirmed the decision of the trial Judge. The court held that the parties entered into a NEXIM loan/agreement H which was breached by the appellant. The court also affirmed the award of damages for breach of contract, detinue/wrongful detention of respondent's title deeds and post judgment interest of 7 1/2% per annum made by the trial Judge. The Court of Appeal, however, reduced the

award of damages by the trial Judge in the counter claim by the appellant from N640,593.53 to N389,947.09 the amount the respondent admitted.

Aggrieved by the judgment, the appellant has come to this court. Briefs were filed and duly exchanged. The appellant formulated ten issues for determination. The respondent formulated six issues; four less than those of the appellant. I want to say that I do not see the need for ten issues in this appeal. They are rather prolix, verbose and unwieldy. This court has condemned proliferation of issues in briefs. See *Agu v. Ikewide* (1991) 3 NWLR (Pt. 180) 385; *A.G. Bendel State v. Aideyan* (1989) 9 S.C. 127(1989) 4 NWLR (Pt. 118) 646; *Ugo v. Obiekwe* (1989) 2 S.C. (Pt.II) 41; (1989) 1 NWLR (Pt. 99) 566; *Adelaja v. Fanoiki* (1990) 2 NWLR (Pt. 131) 137; *Adisa v. The State* (1991) 1 NWLR (Pt. 168) 490.

The original grounds of appeal were three. This was increased to eighteen in the Amended Notice of Appeal. I find it equally difficult to see what eighteen grounds of appeal have to do in this matter. It is certainly not part of our adjectival law that every “sneeze” or “sniffle” of the lower court must give rise to a ground of appeal. A ground of appeal should complain of the live issues in the matter which will determine the fortunes of the appeal one way or the other. Where grounds of appeal do not properly relate to or fit into the decision of the court, they gallivant in the appeal, thus serving no useful purpose.

Where grounds of appeal are unwieldy, issues formulated from such grounds will certainly be unwieldy. That is the situation in this appeal. As the appellant formulated eighteen grounds, he had to ‘justify’ them by formulating ten issues. With respect, I do not see the need for eighteen grounds of appeal and ten issues in this matter.

As Exhibit P. 6 is material to this appeal, I shall take it first. Exhibit P. 6 is an unsigned internal memo of the appellant to the Controller Owena Bank (Nigeria) Plc., Akure. The exhibit was purportedly written by J. O. O. Mirza Nahim Ali, Controller Central Foreign Exchange and E. Odugbesan (Mrs.), Manager Central Foreign Exchange. It was not signed by any of the makers or writers.

The main plank of the submission of learned Senior Advocate for the appellant, Professor Taiwo Osipitan, is that Exhibit P. 6 was not signed

and therefore inadmissible in law. He cited *Ojo v. Adejobi & Ors.* (1978) 3 S.C. (Reprint) 47; (1978) NSCC Vol. 11 161 at 165 and *A-G. Abia State v. Agbaranya* (1999) 6 NWLR (Pt. 607) 362 at 371. He also submitted that the exhibit was not tendered through the makers. To learned Senior Advocate, the case of *Torti v. Ukpabi* (1984) 1 SCNLR 214 relied upon by the Court of Appeal is inappropriate as it was based on the signed copy of election results.

Learned Senior Advocate for the respondent, Mr. L. O. Fagbemi did not agree with the submission of Professor Osipitan. He submitted that the requirements that a document must be signed by the maker and that in deserving situations, a document to be admitted in evidence must be tendered by the maker are all to ensure the genuineness of the document and not leaving any matter in doubt. He relied on paragraphs 19 and 23 of the Amended Statement of Claim and submitted that the cases relied upon by Professor Osipitan are not relevant. He did not cite any authority in support of his argument.

Let me first take the issue of signing a document In *Ojo v. Adejobi* (supra) cited by learned counsel for the appellant, the court said at page 165:

“The court cannot in any event ex debit justitiae, ignore a situation in which the foundation of a claim to a preparatory legal interest are based on a worthless, unsigned and inadmissible document”

In *A-G. Abia State v. Agbaranya* (supra) also cited by learned counsel for the appellant, the court said at page 371:

“It is well settled that an unsigned document is worthless and void”

Learned counsel for the respondent tried to distinguish the above cases from the present one. With respect, he did not succeed. It is my view that where a document is not signed, it may not be admitted in evidence. Even if it is admitted in evidence, the court should not attach any probative value to it. This is because a document which is not signed has no origin in terms of its maker. In view of the fact that the two makers or writers of Exhibit P. 6 did not sign the exhibit, it was not available to the two courts to attach probative value to it.

Dealing with the exhibit, the Court of Appeal said at page 663 and

I will quote the court in extenso:

“I hold the strong view that admissibility is governed by the pleadings that will state the fact upon which evidence and document will be admitted. What the respondent pleaded in this case is an unsigned document. That therefore to my mind takes it outside the provisions of Section 91(4) of the Evidence Act which requires signature. The document no doubt is relevant to the respondent’s case and it sought to rely on it. Whether it would attract the needed weight or not because it was not signed is another matter. It seems to me that in so far as what was pleaded was an unsigned document, it is relevant and therefore admissible. It must be said that relevancy governs admissibility. See Torti v. Ukpabi (1984) 1 SCNLR 427; (1984) 1 S.C. 370. It must be mentioned also that though not signed, Exhibit P. 6 is efficacious in the circumstances of this case, especially in view of the oral discussion which Ali and P.W. 1 had and in view of paragraphs 19 and 23 of the Statement of Claim.”

The Court of Appeal got it right up to the citation of the case. With respect, the court got it entirely wrong thereafter. A document which is not signed does not have any efficacy in law. As held in the cases examined, the document is worthless and a worthless document cannot be efficacious. I hold that Exhibit P6 was wrongly admitted and given probative value. To me, Exhibit P. 6 has no probative value.

Assuming I am wrong, (and I do not think so), let me take the issue of non-maker of the document tendering it. It is the general principle of law that a maker of a document is expected to tender it in evidence. There are two basic exceptions to this principle of law: (1) The maker is dead. (2) The maker can only be procured by involving the party in so much expenses that could be outrageous in the circumstances of the case. The rationale behind this principle of law is that while a maker of a document is in a position to answer questions on it, the non-maker of it is not in such a position. In the latter situation, a court of law will not attach any probative value to the document and a document that a court does not attach any probative value is as good as the mere paper on which it is made. After all probative value is the root of admissibility of evidence. I should not be understood as saying that documentary evi-

dence cannot be admitted in the absence of its maker. As a matter of law, documentary evidence can be admitted in the absence of the maker. See *Igbodim v. Obianke* (1976) 9-10 S.C. (Reprint) 108 (1976) 9-10 S.C. 179. After all relevance is the key to admissibility. In the hierarchy of our B adjectival law, probative value comes after admissibility. And so a document could be admitted without the court attaching probative value to it. That is the point I am making. Basically, admissibility and weight to be attached to the document admitted are two different things. See *Ayeni v. C Dada* (1978) 3 S.C. (Reprint) 24; (1978) 3 S.C. 35.

As a matter of law, I regard Exhibit P6 as hearsay as it relates or affects P.W. 1 who tendered it. It could not have been hearsay if it was tendered by either of the two makers or writers. In *Uwa Printers (Nig.) Limited, v. Investment Trust Company Ltd.* (1988) 12 S.C. (Pt. II) 31; D (1988) 5 NWLR (Pt 92) 110, the trial Judge admitted Exhibit 29, the Auditors Report on profits the plaintiff would have earned for a certain period, without the input of the Federal Ministry of Justice. The Court of Appeal rejected the exhibit. On further appeal, the Supreme Court held E that Exhibit 29 which was prepared by an expert was based on hearsay evidence reduced into writing as the projected figures of pupils of both primary and post primary schools for the years 1978/79 by the Federal Ministry of Education Lagos, as no one was called from the Ministry F who was concerned in the production of the figures to prove the truth of those facts. Exhibit 29 was therefore inadmissible, the Supreme Court held in a majority decision.

I do not think I can reject Exhibit P. 6. The case law will not allow me to do so. This is because Exhibit P. 6 is relevant in the circumstances G of the case. That notwithstanding the case law allows me not to attach any probative value to it and that is what I do now.

The next issue I should take is whether there was a concluded NEXIM loan agreement between the appellant and the respondent which H was breached by the appellant. The Court of Appeal invoked Exhibits P. 5, P. 6, P. 7 and P. 11 in coming to the conclusion that there was a concluded NEXIM loan agreement between the parties.

Let me quickly examine the exhibits and I will do so seriatim.

Exhibit P. 5 is the application for the facility made by the plaintiff. It does not appear that the Court of Appeal dealt specifically with Exhibit P5. Learned Senior Advocate for the respondent submitted that the application in Exhibit P5 was approved vide Exhibit P6. I entirely agree with the submission of learned Senior Advocate for the appellant that Exhibit P5 B cannot be an offer but at best an invitation to treat. I say so because the application is a mere declaration of willingness to enter into negotiation with a view to entering into a contract. See Orient Bank of Nigeria Plc, v. Bilante International Limited (1997) 8 NWLR (Pt. 515) 37. In the light of C my decision on Exhibit P6, the submission of learned Senior Advocate for the respondent does not arise. This is because as I do not attach probative value to Exhibit P6, it lacks legal capacity to approve Exhibit P5.

Since I have already taken Exhibit P. 6., I shall move to Exhibit P. D
7. P.W. 1 in his evidence said as follows:-

“Exhibit P. 7 was the offer letter but I did not accept the offer because of the conditions contained therein. The conditions were not practicable hence we wrote asking the defendant to amend them, without E which there was no way we could accept the offer in Exhibit P. 7.”

It is clear that Exhibit P. 7 is an offer. For there to be a valid contract between the parties, there must be an acceptance, consideration, intention to create legal relationship and capacity to contract F The present appeal raises two of the ingredients. They are offer and acceptance. See Orient Bank of Nigeria Plc, v. Bilante International Limited (supra).

That takes me to Exhibit P. 11. It is the case of the appellant that G Exhibit P. 11 rejected Exhibit P. 7. This will be a very abnormal situation. Exhibit P. 7 is dated 10th January, 1992, and Exhibit P11 dated 6th January, 1992. It is clear that Exhibit P. 11 was first in time as it was written four days earlier than Exhibit P. 7. How can Exhibit P. 11 be said to be a H reply to Exhibit P. 7? It cannot be so.

Does that metamorphose Exhibit P. 7 as a contract between the parties? No. In my view, Exhibit P. 7 remains an offer which was neither accepted nor rejected. In so far as the contract is not concluded, Exhibit

P7 is inchoate. The evidence of P.W. 1 on the exhibit looks to me to be a counter offer.

Finally, Exhibit P11. I have taken so much of it. I do not think I have more to say. Perhaps I should say that Exhibit P. 11 does not add
B any colour to a possible contractual relationship between the parties. In my view, there was no valid contract between the parties.

I think I can stop here. It is for the above and the fuller reasons given by my learned brother, that I too allow the appeal. I abide by the
C orders made by my learned brother, Musdapher, JSC., as to costs.

EDOZIE JSC

I had a preview of the judgment just read by my learned brother,
D Musdapher, JSC., and I agree with his reasoning and conclusion in allowing the appeal.

The case arose out of negotiations between both parties for a N5 Million NEXIM loan to be granted to the respondent, a cocoa exporter,
E by the appellant Bank under funds made available by NEXIM which attracted a low rate of interest. The central question in this appeal is whether the negotiations between the parties eventually crystallized into a valid and enforceable agreement for which damages are awardable for its
F breach. It is trite law that there are three essential ingredients of a valid contract viz:- an offer, an unqualified acceptance of that offer and a consideration: see Cheshire and Fifoot Law of Contract 9th Edition pp. 27, 31, Tsokwa Motors Ltd. v. UBN Ltd. (1996) 9 NWLR (Pt. 471) 129
G at 145; PTI v. Uwamu (2001) 5 NWLR (Pt. 705) 112 at 222. Controversy, in this appeal centres on the first and second essential elements of contract, that is, offer and acceptance. The respondent in maintaining that a valid contract subsisted, relied heavily on its application for the loan, Exhibit 5, and the unsigned letter of the appellant (Exhibit 6) the
H evidential value of which is doubtful. The respondent also relied on an oral agreement between it and an official of the appellant whereby Exhibit 6 was allegedly amended by the deletion of objectionable conditions therein.

It ought to be borne in mind that although a document may be

admissible in evidence under the provisions of evidence Act, the weight to be attached to its content is another matter, for every piece of evidence that has been admitted in the course of proceedings is subject to be tested for credibility, weight or cogency by the trial court before it becomes acceptable documentary evidence: See *Ayeni v. Dada* (1978) 3 S.C 35 at 61. Furthermore, where a document is pleaded to establish a particular fact, it can only be used to establish that fact and cannot be used to prove another fact which is not an issue in the pleadings: See *Onwumere v. Agwunede* (1987) 3 NWLR (Pt. 62) 673 at 681-682.

In the case in hand, the respondent's pleadings show what Exhibit '6' was intended to serve. Paragraphs 19,21 and 23 of the respondent's amended statement of claim are apposite and they read in part thus:-

'19. defendant showed and gave to the plaintiff's Managing Director an unsigned sanction letter written by the defendant dated 2nd December, 1991 asking for the following conditions to be satisfied before the disbursement of the fund which later turned out to have been collected on behalf of the plaintiff, without confirming it:___

21. Some of the conditions, especially conditions iii, iv, viii, x, xi, xii which the defendant wanted the plaintiff to satisfy were unwarranted, belated and impossible for the following reasons ___

23. The conditions mentioned above were given to the plaintiff's Managing Director by showing to him a draft sanction letter to be sent to the defendants' Akure Branch Manager to inform the plaintiff of the conditions mentioned in the said letter, which conditions were to form the basis upon which the plaintiff would be allowed to draw the facility'.

It is crystal clear from the above averments, that the defendant's/appellant's letter of 2nd December, 1991 (Exhibit 6) under reference was merely a draft (not a final copy); it was written by the appellant's head office and addressed not to the respondent but to its Branch Manager, Akure Branch; it contained conditions proposed to be communicated by the Akure Branch Manager to the respondent. In those circumstances, it seems to me invidious to suggest that Exhibit 6 qualifies as an offer or an acceptance of an offer. An offer is a definite undertaking made with the intention that it shall become binding on the person making it as soon as

it is accepted by the person to whom it is addressed: see Chitty on Contract 23rd Edition Vol. 1 p. 22 paragraph 43. Since Exhibit 6 was not a final copy and not addressed to the respondent by the Akure branch of the appellant Bank, it could not rely on it as an offer of the loan agreement. This being the case, the oral agreement purportedly made by the officials of both parties to amend Exhibit 6 was to no avail as an amendment cannot hang on what does not exist.

On the part of the defendant/appellant, its case is simple and straightforward. By Exhibit 7, containing the terms and conditions of the loan, it made an offer to the respondent. That offer was rejected by the respondent as borne out from the evidence of respondent's P.W. 1 who testified thus:-

"Exhibit 7 was the offer letter but I did not accept the offer because of the conditions contained therein. The conditions were not practicable hence we wrote asking the defendant to amend them without which there was no way we could accept the offer in Exhibit 7". See p. 123 lines 26-30 of the record.

The appellant's D.W. 1 corroborated that evidence at p. 135 lines 8-13 of the record when he stated thus:-

"He did not sign the letter Exhibit 7 to show that he accepted the offer. This means that the plaintiff rejected the offer."

From the foregoing, it is evident that the negotiations between the parties had not crystallized into a binding contract, and a fortiori, there could have been no breach of contract to justify the damages awarded to the respondent. For these and the fuller reasons stated in the leading judgment with which I am in complete agreement, I allow the appeal with costs as assessed in the said judgment.

H