

SUPREME COURT OF NIGERIA
20TH MAY, 2005. SC. 237/2001
CORAM:- M. L. UWAI S CJN, I. L. KUTIGI, S. U. ONU,
A. O. EJIWUNMI, D. O. EDOZIE, JJSC

A. I. C. LIMITED PLAINTIFF/APPELLANT
AND
NIGERIANNATIONAL
PETROLEUM CORPORATION DEFENDANT/RESPONDENT

CONTRACTS - Illegality - Pleadings - Where a respondent relies on illegality as a defence - The facts are to be stated in his pleadings (H1)

APPEALS - Issues - Where fresh - Must be a substantial point of law - And leave of Court must be obtained (H2)

COURTS - Judgments - Manner of writing - Ratio decidendi - Is the binding part of a decision - Obiter dicta - Is not necessary for the decision (H3)

COURTS - Orders - Interim injunction - Duration - Where order of dismissal - Is set aside on appeal - Restoration of interim injunction is not implied (H4)

COURTS - Orders - Mareva injunction - Is granted - Against defendant - Or persons in possession of defendants assets - From disposing them - Pending determination of the case (H5)

EVIDENCE - Proof - Facts - Burden of proof - Is on Plaintiff - And is based on the strength of his case - Not weakness of defendant's case (H6)

COURTS - Orders - Injunction - Is an Equitable Remedy - And can only be granted - In support of rights known to law or equity (H7)

APPEALS - Courts - Decision of - Where right - But based on wrong reasons - Will not be set aside - By appellate court (H8)

FACTS

Before the Lagos High Court, the Plaintiff/appellant filed a suit against Mannesmann a German Company and the defendant/respondent. The appellant, a Nigerian company, entered into an agreement with Mannesmann to assist in the award of construction projects. The appellant was to be paid a commission of 5% of the Contract sum in respect of any contract awarded to Mannesmann by the respondent. The respondent thereafter awarded the Escravos - Lagos Pipelines and Compressor Station Project to Mannesmann who received instalmental payments due but failed to pay the appellant its commission. The appellant sued Mannesmann in a court in Germany and the suit was dismissed. But while an appeal in Germany was pending, the appellant commenced this suit before the Lagos State High Court. The appellant made claims for 5% of the Escravos - Lagos Pipeline Project and an injunction restraining the respondent from paying Mannesmann the amount claimed.

The trial court granted an ex parte order withholding the respondent from paying Mannesmann pending hearing of the motion. Mannesmann also filed an application seeking striking out of the suit for lack of jurisdiction and the application was granted. Dissatisfied with the ruling, the appellant appealed to the Court of Appeal where it was allowed on the question of res judicata. The case was subsequently retried by the Chief Judge of the Lagos State High Court where judgment was given in favour of the appellant. The respondent lodged an appeal against the judgment before the Court of Appeal which allowed the appeal. The appellant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the court below in its judgment in Appeal No. CA/L/78/2000 delivered on 24th May, 2001 overruled, reversed or reviewed its earlier decision in Appeal No. CA/L/262/89 in its judgment dated 14th December, 1993 .

2. *Whether the court below properly construed and applied Section 14 of the High Court Law of Lagos State in the circumstance of this case.*

3. *Whether the pronouncements of the court below as to the effect of its earlier decision dated 14th December, 1993, in Appeal No. CA/L/262/89 on the interim order made by Ayorinde, J, (as he then was), is wrong or occasioned miscarriage of justice.*

4. *Whether the court below predicated the incompetence of the injunction granted by the trial court on wrong principle."*

“ 1. *Whether, on the footing that the appellant had funds in the custody of the respondent, an injunction was grantable to restrain the respondent from disbursing the funds to Mannesmann.*

2. *Whether, in actual fact the respondent had in its custody money that had accrued to the appellant."*

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

CONTRACTS - Illegality - Pleadings

1. On the hallowed principle encapsulated in the Latin maxim *ex turpi causa non oritur actio* (an action does not arise from a base cause), a court of law does not generally enforce a contract or transaction tainted with illegality or contrary to public policy. ‘A contract may be *ex facie* illegal or the illegality may depend on a combination of facts. In the former case, the illegality need not be specifically raised in the pleadings but in the latter case the general rule is that it must be raised in the pleadings. This appears to be the outcome of the decision of this court in the case of *Ekwunife v. Wayne (W.A.) Limited* (1989) 12 S.C. 92; (1989) 5 NWLR (Pt.122 at 456) to the following effect:

“.... *where a contract is not ex-facie illegal and the question of illegality depends on a number of facts - probabilities or possibilities or contingencies - to be hammered out by evidence and forensic logic, the general rule is that illegality must be raised in the pleadings.*”

This view is exemplified by a passage in another decision of this court in the case of *Onwuchekwa v. N.D.I.C.* (2002) 2 S.C. (Pt. II) 28; (2002) 5 NWLR (Pt. 766) 371 at 388, to wit,

“A defendant who relies upon defence of illegality should state

facts on which he relies in his pleadings. The law is well put in Bullen and Leake and Jacob's Precedents of Pleadings p. 1188 that:

'where the defendant relies upon the defence of illegality, he should distinctly raise the defence by his pleading and should state the facts or
 B *raise the facts already stated in the Statement of Claim so as to show clearly what the illegality is: if a man intended to charge illegality, he must state facts for the purpose of showing what the illegality is: Bullivant v. Attorney-General for Victoria (1901) AC 196 per Lord Davey at 204'*
 C (p. 1297 E)

Issues - Where fresh

2. The position of the law on raising of fresh issue on appeal is quite clear. It is that no substantial point of law which has not been taken in the court
 D below will be allowed to be raised for the first time before the Supreme Court except under special circumstances: Makanjuola v. Balogun (1989) 5 S.C. 82; (1989) 3 NWLR (Pt. 108) 192 at 206. For such a point of law to be entertained, it must be shown to be a substantial point of law
 E substantive or adjectival and that no further evidence which could have been called in the court below if it was raised there could have affected the decision one way or the other. Furthermore, to canvass such an issue, leave of court must be sought and obtained. See Obiako v. State (2002)
 F 6 S.C. (Pt. II) 33; (2002) 10 NWLR (Pt. 776) 612 at 616. These conditions have not been complied with in this appeal. (p. 1299 B & E)

Judgments - Manner of writing

3. In considering whether the Court of Appeal in its later decision,
 G reviewed or reversed its earlier decision, a distinction has to be drawn between a ratio decidendi and obiter dictum of a case. The ratio decidendi of a case represents the reasoning or principle or ground upon which a case is decided. Obiter simply means in passing, incidental, cursory. Obiter
 H dicta reflect, inter alia, the opinions of the Judge which do not embody the resolution of the court. The expression of a judge in a judgment must be taken with reference to the facts of the case which he is deciding, the issues calling for decision and answers to those issues. These are what

should be looked for in any judgment. The manner in which the judge chooses to argue the case is not all important thing. Rather it is the principle he is deciding.

In the case of Afro-Continental Nigeria Ltd. v. Joseph Ayantuyi & Ors. (1995) 9 NWLR (Pt. 420) 411 at 439 this court, per Iguh, JSC., decided thus:

“It is indisputable that in the judgment of a court, the legal principle formulated by that court which is necessary in the determination of the issues raised in the case that is the binding part of the decision is its ratio decidendi as against the remaining parts of the judgment which merely constitute obiter-dicta, that is to say, what is not necessary for the decision.” (p. 1303 C)

Orders - Interim injunction - Duration

4. It is settled law that an order of interim injunction is a temporary form of injunction which remains in force until a named day and date. By its nature, it is expected to last for a very short period. When, therefore, Ayorinde, J., dismissed the suit on ground of res judicata, the ex parte order of injunction was thereby discharged.

The setting aside of the order of dismissal by the Court of Appeal did not imply the restoration or revival of the interim order of injunction. The contention by the appellant to the contrary is misconceived. The case of Attamah v. Bishop of Niger (supra) cited and relied upon by the appellant is irrelevant. In that case, an application to set aside an interim order of injunction earlier made was refused by the court but in the instant case the entire suit was dismissed. I will equally resolve the issue under consideration in favour of the respondent. (p. 1306 B & D)

Orders - Mareva injunction

5. The doctrine of mareva injunction operates to stop a defendant against whom a plaintiff has a good arguable claim from disposing of or dissipating his assets pending the determination of the case or pending payment to the plaintiff. The injunction can also be granted against anybody who is in possession of the defendant's assets. In support of this proposition, I refer

to the case of Sotuminu v. Ocean Steamship (1992) 5 SCNJ 17-22; (1992) 5 NWLR (Pt. 239) 1 where this court held, per Nnaemeka-Agu, JSC, that the High Court of Lagos State has the jurisdiction and power to entertain and in appropriate cases grant a mareva injunction as was developed by the High Court of Justice in England in 1975. (p. 1309 F)

Burden of proof - Is on Plaintiff

6. It is an elementary principle of law, for which citation of authority is not necessary, that the onus is on a plaintiff to prove his case and he must do so on the strength of his own case and not on the weakness of that of the defendant subject to some exceptions. A court of law acts on facts and not on guess or speculation. (p. 1311 A)

Injunction - Is an Equitable Remedy

7. It is not until the first and second conditions are complied with that the appellant's right to 5% commission will accrue. There is nothing on record to show that the above 1st and 2nd conditions had been met. I am of the view that until they are met the appellant's claim against the respondent for an order of injunction is not maintainable. This is so because an injunction is an equitable remedy and it can only be granted in support of a right known to law or equity. (p. 1313 G)

APPEALS - Courts - Decision of

8. In the light of the foregoing, the decision of the court below in setting aside the order of injunction made against the respondent cannot be faulted. Its reason for doing so may not be right but it is settled law that an appellate court will not set aside the decision of a lower court which is right and just merely because the lower court gave wrong reasons for the decision. The paramount consideration for the appellate court is whether the decision is right, not necessarily what the reasons are. (p. 1314 B)

REPRESENTATIONS

Prof. A. B. Kasumu, SAN, (with him K. J. Turaki, SAN, A.J. Owonikoko and Miss O. M. Lewis), for the Appellant.

Adetunji Oyeyipo, SAN, (with him, O. O. Soyebbo Esq., and Rotimi Oguneso Esq., for the respondent.

CASES REFERRED TO

Sodipo v. Lemminkainen OY (1985) 2 NWLR (Pt. 8) 547 at 557-558 B
Alao v. A.C.B. Limited (1998) 1-2 S.C. 177; (1998) 3 NWLR (Pt. 542) 339
at 355

Onwuchekwa v. N.D.I.C. (2002) 2 S.C. (Pt. II) 28; (2002) 5 NWLR (Pt.
760) 371

Savannah Bank of Nigeria Ltd. v. Pan Atlantic Shipping & Transport C
Agencies Ltd. (1987) 1 NWLR (Pt. 49) 212 at 259

Ekwunife v. Wayne (W.A.) Limited (1989) 12 S.C. 92 (1989) 5 NWLR
(Pt. 122 at 456)

Makanjuola v. Balogun (1989) 5 S.C. 82 (1989) 3 NWLR (Pt. 108) 192 D
at 206

American International Insurance Co. v. Ceekay Traders Ltd. (1981)
ANLR 62 at 80

Governor of Lagos State v. Ojukwu (1986) 1 NWLR (Pt. 18) 621 at 636 E
U.T.C. (Nig.) Ltd. v. Pamotei (1989) 3 S.C. (Pt. I) 79; (1989) 2 NWLR
(Pt. 343) 244

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, s. 233(1) F
High Court Law of Lagos State 1994, s.14

LEAD JUDGMENT BY EDOZIE JSC

In 1980, the appellant, a Nigerian company entered into an agree- G
ment with a German company (Mannesmann - Anlagebau A.G). Under the
terms of the agreement, Exhibit ‘B’ (hereinafter referred to as ‘Commis-
sion Contract’) the appellant was to facilitate or assist in the award of
construction projects which the German company (hereinafter referred to H
as Mannesmann) was bidding for with the respondent. In consideration of
the undertaking, the appellant was to be paid a commission of 5% of the
contract sum in respect of any contract awarded to Mannesmann by the

respondent. The 5% commission was to be calculated on the basis of the amount of the contract sum transferred to a German Bank and credited to Mannesmann excluding freight, packing costs and customs.

Sometime in 1984, the respondent awarded to Mannesmann the
B Escravos - Lagos Pipelines and Compressor Station Project (hereinafter referred to as the 'Project Contract'). According to the appellant, when Mannesmann started receiving instalmental payments due, it failed to pay to the appellant its commission in respect thereof. In consequence, the
C appellant sued Mannesmann in a court in Germany in respect of the commission due on the amount of the instalmental payments made.

The suit was dismissed but while an appeal in Germany was pending, the appellant, as plaintiff by a writ of summons in Suit No. LD/264/88 filed on 12/2/88 commenced another action in the Lagos High
D Court, against Mannesmann and the respondent as 1st and 2nd defendants respectively. In the said action apart from two other alternative reliefs, the claim against Mannesmann is:

'5% of the various sums set out in the schedule to this writ less the
E amount claimed by the plaintiff in Suit No. 390/224/84 now pending before the District Law Court No. 9 in Dusseldorf (particulars of which are set out in the Statement of Claim) being the amount of commission payable to the plaintiff pursuant to an agreement entered into in Lagos and dated
F 14th March, 1990 for undertaking all necessary efforts in assisting the 1st defendant in securing the contract for (sic) the 2nd defendant Escravos - Lagos Pipeline and Compressor Station.'

The only claim against the respondent was an injunction:

'restraining the 2nd defendant from paying over to the 1st respon-
G dent the amount being claimed in paragraph 1 hereof and an order that the amount be deducted from the contract sum and withheld by the 2nd defendant pending the determination of this action.'

On 22nd February, 1988, the Lagos High Court (coram Ayorinde,
H J,) granted an ex parte order, to wit:

"That the 2nd defendant (respondent herein) shall withhold pending the hearing of the motion on notice from payments due to the 1st defendant on the project which is the subject-matter of this litigation an amount not

exceeding the following in Schedule 'D' namely,

US\$1,220,185.40

£547,185.00

DM 22,270,922.00 and

N2,764,785.40 respectively, being the value of commission due to the plaintiff in event of the court's finding in its favour.' B

The motion on notice was made returnable on 16th May, 1988. On this date, Mannesmann filed an application to strike out or dismiss the suit for lack of jurisdiction, *res judicata* etc. The application was heard and granted and the suit was on 23/3/89 dismissed as against both defendants. C

Dissatisfied with the ruling the appellant appealed to the Court of Appeal, Lagos Division, and while the appeal was pending, the appellant's counsel by a letter dated 19/1/91 (Exhibit M) warned the respondent not to pay over the money to Mannesmann. Subsequently, the Court of Appeal in a unanimous judgment delivered on 14th December, 1993, (*coram* Sulu-Gambari, JCA., Kalgo and Uwaifo, JJCA, (as they then were), allowed the appeal on the question of *res judicata*, being the only issue canvassed and considered. The case was subsequently re-tried by Segun, CJ., of the Lagos State High Court. Mannesmann did not participate at the re-trial nor did it file a Statement of Defence. The respondent filed a Statement of Defence and participated at the trial through its counsel although it led no evidence. In a considered judgment delivered on 25th January, 2000, the learned CJ., entered judgment in favour of the appellant against the respondent and Mannesmann jointly and severally for: D

"1. \$1,220,185.40 (US Dollars)

2. £547,185.00 (Sterling)

3. DM 22,270,922.00 (Dutch Marks)

4. N2,764,785.40 (Naira)

5. \$750,999.00 being 5% commission on contract D."

The trial court further granted an order of injunction against the respondent on the following terms: H

"Again an injunction is granted against the 2nd defendant restraining them from paying over to the 1st defendant the amount claimed herein (sic) until the plaintiff is fully paid the 5% commission enumerated

Against that judgment, the respondent lodged an appeal to the Court of Appeal, Lagos Division. In a bid to execute the judgment, the appellant commenced garnishee proceedings against the respondent and obtained a garnishee order of the respondent’s funds at CBN and DBA on 10/5/2000. In its judgment delivered on 24th May, 2001, the Court of Appeal held that as there was no privity of contract between the appellant and respondent with respect to the Project Contract, there was no basis for the judgment entered against the respondent jointly and severally with Mannesmann. It further held that since an order of injunction is an ancillary relief which is rarely granted on its own, the trial court was wrong to have granted the injunction against the respondent in respect of whom no allegations were made in the appellant’s pleadings. Since Mannesmann did not appeal against the judgment of the High Court, as it affected it, that aspect of the judgment was left untouched by the Court of Appeal.

The appellant has lodged the instant appeal against that judgment of the court below particularly the portion reversing the order of injunction granted by the trial court restraining the respondent from paying over to Mannesmann the amount adjudged due from Mannesmann to the appellant as agreed commission. Pursuant to the hearing of the appeal, parties by their counsel filed and exchanged briefs of argument some of which were subsequently amended, the relevant briefs being the appellant’s Amended Brief, the respondent’s Amended Brief and the appellant’s Amended Reply Brief.

The respondent raised a preliminary objection against the hearing of the appeal and this was countered by another preliminary objection by the appellant against the respondent’s preliminary objection and briefs were ordered and filed in respect of these objections. I consider it appropriate to dispose of these objections before, if necessary, returning to the substantive appeal.

The respondent’s preliminary objection is predicated on its motion on notice dated and filed on 21/5/2004 supported by an affidavit of 9 paragraphs to which were annexed Exhibits A, B and C. The prayer sought in the motion paper is for the dismissal of the substantive appeal on the

ground that it arose from a suit founded upon a base cause tainted with illegality and contrary to public policy, in that the appellant pleaded in paragraphs 10, 11 and 12 of its Statement of Claim filed at the trial court and led evidence through P.W.1 and P.W.2 that it helped Mannesmann to vet documents to delete all references in those documents to apartheid South Africa, which references would have led to the automatic disqualification of Mannesmann for the award of the contract. In the respondent's brief in support of the objection, the sole issue identified for determination is:

“Whether having regard to the facts disclosed in the pleadings and the evidence on record, the transaction which formed the basis of the appellant's claim is one which this Honourable Court can lend its hand to enforce.”

In arguing this solitary issue, reference was made to paragraphs 10, 11, 12 and 13 of the appellant's Statement of Claim and the evidence of P.W.1 and P.W.2 thereon. It was submitted that the totality of those averments and evidence reveals that the appellant helped Mannesmann to procure contract from the respondent, an agency of Nigerian Government; that in the process of assisting Mannesmann, it had to lie and deceive the Nigerian Government officials by concealing vital information which if such information had come to the knowledge of the relevant government officials, Mannesmann would not have been awarded the contract and that the appellant wanted payment for the 'assistance' it rendered to Mannesmann as agreed and consequently sued. It was further submitted that the courts will generally refuse to enforce a contract for the commission of a legal wrong; they will generally also adopt the same attitude to a contract whereby one party may claim a benefit from the commission of a crime or a tort or may claim to be indemnified against the consequences of such an act.

In support of the proposition that no court ought to enforce an illegal contract whether or not the illegality is pleaded, the following authorities were relied upon: *Sodipo v. Lemminkainen OY* (1985) 2 NWLR (Pt. 8) 547 at 557-558; *Alao v. A.C.B. Limited* (1998) 1-2 S.C. 177; (1998) 3 NWLR (Pt. 542) 339 at 355; *Ekwunife v. Wayne (W.A.) Limited* (1989) 12 S.C.

92; (1989) 5 NWLR (Pt. 122) 422 at 450. The respondent conceded that the issue of illegality was not pleaded and is being raised for the first time in this court but submitted that illegality is an overriding consideration which cannot be glossed over if not pleaded provided it is brought to the attention of the court: vide the case of *Ogwuru v. Co-operative Bank* (1994) 8 NWLR (Pt. 365) 685 at 302. On the foregoing premises, this court is urged to strike out or dismiss the appellant's appeal as its claims are based on a base cause, are tainted with illegality and contrary to public policy.

In response to the respondent's preliminary objection by way of motion on notice dated 21/5/2004, the appellant filed on 29/6/2004 a preliminary objection to the respondent's said motion and a counter-affidavit to the affidavit in support of the respondent's motion. Annexed to the counter-affidavit are four exhibits - Exhibits AIC 1, AIC 2, AIC 3 and AIC 4. The appellant's preliminary objection is to the effect that the respondent's motion dated 21/5/2004 is misconceived and incompetent on eight grounds.

In the appellant's brief in respect of its preliminary objection, two issues were formulated for determination, viz:

"1. Having regard to appellant/objector's eight grounds of preliminary objection dated 21st June, 2004, is the respondent/applicant's motion raising without leave and for the first time a fresh allegation that the case in the trial court revealed ex-facie illegality when no issue has arisen in respect thereof in the appeal jurisdictionally competent as a basis for striking out or dismissing the appeal herein?"

2. Has respondent/applicant established any ex-facie illegality that will warrant the striking out or dismissal of the appeal?"

In relation to the first issue, it was submitted that on the question of illegality unlike that of lack of jurisdiction of court, it cannot be raised in the manner the respondent has sought to raise it by motion. It was submitted that except in cases of ex-facie illegality, a party relying on illegality ought to raise it in its pleadings and in support of the proposition, the following cases were craved in aid: *Galadima v. Tambai* (2000) 6 S.C. (Pt. I) 196; (2000) 11 NWLR (Pt. 677) 1 at 15; *Onwuchekwa v. N.D.I.C.*

(2002) 2 S.C. (Pt. II) 28; (2002) 5 NWLR (Pt. 760) 371; Savannah Bank of Nigeria Ltd. v. Pan Atlantic Shipping & Transport Agencies Ltd. (1987) 1 NWLR (Pt. 49) 212 at 259.

Learned counsel for the appellant reasoned that as the respondent was a total stranger to the ‘Commission Contract’ it was not competent B to complain about illegality in respect of that contract. It was stressed that the relief sought by the respondent is prejudicial to the merit of the substantive appeal and therefore not tenable. In respect of the appellant’s second issue on the preliminary objection posing the question whether any ex-facie illegality had been established, it was submitted, firstly, that no C specific law or public policy was stated to have been contravened nor does the evidence on record bear out any violation of public policy, secondly, it is not clear whether the alleged illegality - violation of public policy, relates to the “Commission Contract” or the “*Project Contract*” and D thirdly, that the authorities cited by the respondent in respect of whether or not illegality should be pleaded are not apposite to the instant appeal.

The issue vigorously canvassed by both parties in this appeal is whether or not there is any particular method of raising a question of E illegality in a case before a court could consider it and whether in the instant appeal, there is evidence to substantiate the allegation that any of the two related contracts in this case is tainted with illegality or is contrary to public policy. **On the hallowed principle encapsulated in the Latin maxim F ex turpi causa non oritur actio (an action does not arise from a base cause), a court of law does not generally enforce a contract or transaction tainted with illegality or contrary to public policy. ‘A contract may be ex facie illegal or the illegality may depend on a combination of facts. In the former case, the illegality need not be G specifically raised in the pleadings but in the latter case the general rule is that it must be raised in the pleadings. This appears to be the outcome of the decision of this court in the case of Ekwunife v. Wayne (W.A.) Limited (1989) 12 S.C. 92; (1989) 5 NWLR (Pt.122 at H 456) to the following effect:**

“.... where a contract is not ex-facie illegal and the question of illegality depends on a number of facts - probabilities or possibilities or

contingencies - to be hammered out by evidence and forensic logic, the general rule is that illegality must be raised in the pleadings.”

This view is exemplified by a passage in another decision of this court in the case of *Onwuchekwa v. N.D.I.C. (2002) 2 S.C. (Pt. II) 28; (2002) 5 NWLR (Pt. 766) 371 at 388, to wit,*

“A defendant who relies upon defence of illegality should state facts on which he relies in his pleadings. The law is well put in *Bullen and Leake and Jacob’s Precedents of Pleadings* p. 1188 that:

‘where the defendant relies upon the defence of illegality, he should distinctly raise the defence by his pleading and should state the facts or raise the facts already stated in the Statement of Claim so as to show clearly what the illegality is: if a man intended to charge illegality, he must state facts for the purpose of showing what the illegality is: Bullivant v. Attorney-General for Victoria (1901) AC 196 per Lord Davey at 204’

The learned senior counsel for the respondent conceded that there was no allegation of illegality raised in the respondent’s Statement of Defence. He however, relies on the averments in paragraphs 10, 11 and 12 of the Statement of Claim and the evidence of P.W.1 and P.W.2 to the effect that the appellant assisted (Mannesmann) to scrutinise documents used for bidding for the ‘project contract’ to ensure that all references to apartheid South Africa were deleted as such references would have been detrimental to the award of the contract. Curiously, these averments that the respondent is relying upon now were denied in paragraphs 2 and 3 of its Statement of Defence. At any rate the appellant’s pleadings and evidence in support did not show that at the material time it was a government policy to discriminate against foreign companies that had links with South Africa. As reported in the *Guardian Newspaper* of 24th February, 1987 edition, annexed as Exhibit AIC 2 to the appellant’s counter affidavit, there was a public policy announcement made by the Attorney-General of the Federation which was directed at foreign companies seeking government contract. That announcement was made in 1987 and was not retrospective as to affect the contracts the subject-matter of this case which were concluded long before the announcement. It is clear to

me that the evidence on record fell far short of establishing that the contract the subject-matter of the appeal were illegal or contrary to public policy. As I also earlier noted, the respondent did not raise the issue of illegality in its pleadings nor was that issue canvassed and pronounced upon before the lower courts. It, therefore, becomes a fresh issue in this court. **The position of the law on raising of fresh issue on appeal is quite clear. It is that no substantial point of law which has not been taken in the court below will be allowed to be raised for the first time before the Supreme Court except under special circumstances: Makanjuola v. Balogun (1989) 5 S.C. 82; (1989) 3 NWLR (Pt. 108) 192 at 206. For such a point of law to be entertained, it must be shown to be a substantial point of law substantive or adjectival and that no further evidence which could have been called in the court below if it was raised there could have affected the decision one way or the other.** See on this, *Stool of Abinabina v. Chief Koje Enyimadu* (1953) 12 WACA 171; *Shonekan v. Smith* (1964) 1 AII NLR 168 P. 173; *K. Apene v. Barclays Bank of Nig. Ltd. & Anor.* (1977) 1 S.C. (Reprint) 30; (1977) 1 S.C. 47; *Niger Prowess Ltd. v. N.E.L. Corp.* (1989) 4 S.C. (Pt. II) 164; (1989) 3 NWLR (Pt. 109) 68 at p. 100. **Furthermore, to canvass such an issue, leave of court must be sought and obtained. See *Obiako v. State* (2002) 6 S.C. (Pt. II) 33; (2002) 10 NWLR (Pt. 776) 612 at 616. These conditions have not been complied with in this appeal.**

Since the respondent has not, in a proper manner, raised the issue of illegality and there being no evidence to establish that the contracts the subject matter of this appeal were tainted with illegality or made contrary to public policy. I will uphold the appellant's preliminary objection and overrule and dismiss the respondent preliminary objection contained in its application for dismissal of the appeal. Having disposed of the preliminary objections, I will now advert to the substantive appeal.

In the appellant's brief of argument, the following three issues were distilled for determination:

"1. Whether the injunction sought and granted against the respondent was set aside by the Court of Appeal on a wrong view of the remedy of injunction and in disregard of the decision of the Supreme Court in

Governor of Lagos State v. Ojukwu (1986) 1 NWLR (Pt. 18) 621 at 636 and the provision of Section 14 of the High Court Law, Laws of Lagos State, 1984.

2. Whether the exclusive appellate jurisdiction of the Supreme Court under Section 233(1) of the 1999 Constitution was usurped and breached when the earlier and subsisting decision of the Court of Appeal in CA/L/262/89 (coram: Sulu-Gambari, Uwaijo and Kalgo, JJCA (as they then were), upholding joinder of the respondent in this suit for the purpose of the injunction sought against it and ordered retrial on the merit was reviewed and reversed by the decision of a differently constituted Court of Appeal (coram Oguntade, (as he then was), Chukwumah-Eneh and Aderemi, JJCA.), presently appealed against holding that the respondent “was joined without any basis” and was not in any way ‘impleaded on the basis of the same pleadings that the previous panel considered to hold in plaintiff’s favour.

3. Whether their Lordships in the court below acted without jurisdiction (and thereby occasioned a miscarriage of justice) when they held that the pre-trial interim injunction granted against the respondent in this case was not restored by the decision of their learned brothers in the earlier appeal in the suit notwithstanding that the same was not challenged by the respondent either in the trial court or by way of an appeal.”

On its part, the respondent formulated four issues, to wit:

“1. Whether the court below in its judgment in Appeal No. CA/L/78/2000 delivered on 24th May, 2001 overruled, reversed or reviewed its earlier decision in Appeal No. CA/L/262/89 in its judgment dated 14th December, 1993 (formulated from Ground 1 of the Amended Notice of Appeal.)

2. Whether the court below properly construed and applied Section 14 of the High Court Law of Lagos State in the circumstance of this case (formulated from Ground 2 of the Amended Notice of Appeal)

3. Whether the pronouncements of the court below as to the effect of its earlier decision dated 14th December, 1993, in Appeal No. CA/L/262/89 on the interim order made by Ayorinde, J, (as he then was), is wrong or occasioned miscarriage of justice (formulated from Ground 4 of the

Amended Notice of Appeal)

4. Whether the court below predicated the incompetence of the injunction granted by the trial court on wrong principles (formulated from Grounds 3, 5 and 6 of the Amended Notice of Appeal)”

As I consider the respondent’s issues adequately formulated with clarity and precision, I will adopt same in the consideration of this appeal while relating them to the relevant issues formulated by the appellant.

The respondent’s issue No. 1 which relates to appellant’s issue No. 2 is whether the court below overruled, reversed or reviewed its earlier decision in this case contained in its judgment dated 14th December, 1993. For a better appreciation and resolution of the issue, it is necessary to narrate, albeit briefly, the background facts relating thereto. On 23/3/89, Ayorinde, J., (as he then was), gave a considered ruling of this case on the basis of a preliminary objection filed by Mannesmann against the competency of the suit on the ground that (a) the court lacked jurisdiction (b) res judicata and (c) abuse of process of court. He upheld the objection and struck out the appellant’s claim hence the appeal to the lower court. The Court of Appeal in Appeal No. CA/L/262/89 (coram: Sulu Gambari, JCA., E Uwaifo, Kalgo, JJCA., (as they were then), in considering the appeal, stated at p. 183:

‘The only issue postulated by the learned counsel for the appellant which I also accept as appropriate, and in the absence of any other suggestion by the respondents is sufficient to determine and dispose of the appeal. It reads:-

‘Whether or not the trial Judge was right in applying doctrine of res judicata to bar the plaintiff from prosecuting the present claim in Nigeria.’”

In resolving that issue and allowing the appeal, the Court of Appeal held at p. 191 thus:

“In the result, I am of the firm view that the learned trial Judge was wrong to have held, as he did, that the plaintiff/appellant was precluded from bringing the suit against the 1st and 2nd defendants in Lagos, having prosecuted a suit against the 1st defendant in Dusseldorf in Germany.”

Thus, it is quite clear, that the only issue decided and upon which the appeal was allowed was whether or not the doctrine of res judicata,

was applicable. But in a passage in its judgment at p. 188 of the record, the court appeared to have made some observations on the joinder of the respondent herein, in the proceedings. It said:-

“In the case before the trial court, parties are not the same. A 2nd
B defendant was joined so as to secure the payment of the commission due
from 1st defendant to the plaintiff in a situation in which commission
would become due as and when payment becomes payable. It might have
also helped to secure the judgment debt being paid by the 1st defendant
C who was not ordinarily resident in Nigeria if any money accruing to be paid
to the 1st defendant was not paid by the 2nd defendant until the matter
between the plaintiff and the 1st defendant is determined and disposed of.”

By the above observation, the Court of Appeal appeared to have
opined that the respondent, herein, was properly joined in the suit as 2nd
D defendant.

However, after the appeal was allowed a retrial was conducted
before Segun, CJ., who entered judgment in favour of the appellant against
Mannesmann and the respondent. On appeal by the latter, the matter went
E back to the Court of Appeal a second time in Appeal No. CA/L/78/2000
(coram Oguntade, JCA., (as he then was), Chukwuma-Eneh, Aderemi,
JJCA.). That court identified 5 issues for determination, but it held at P.
292 thus:

“These issues in unison clearly raise one fundamental question of
F whether issues of any kind were joined as between the 2nd defendant/
appellant and the plaintiff/respondent in the pleadings that is the
crux of the matter.”

By that statement, the court focused attention on the question as to
G whether the respondent was properly joined as 2nd defendant at the trial.
In resolving the issue negatively and allowing the appeal in its judgment
dated 24/5/2001, the court reasoned that the final:

“order of injunction from its terms was directed against the
H appellant (i.e. the 2nd defendant/respondent); it was not made against the
defendant thus giving credence to the assertion that the only reason
appellant/2nd defendant/respondent was joined without any basis as party
to the suit is to bind it in terms of the amount claimed against the 1st

defendant.”

Flowing from this decision, the appellant has now submitted that the Court of Appeal had reversed its earlier decision which it lacked jurisdiction to do. It was submitted that under Section 233(1) of the Constitution of the Federal Republic of Nigeria, 1999, the jurisdiction to review or reverse decisions of the Court of Appeal rests in the Supreme Court to the exclusion of all other courts. On the authority of the case of *Cardoso v. Daniel* (1986) 2 NWLR (Pt. 20) 16, it was submitted that once an issue has been raised and distinctly decided between parties, as a general rule, neither party can be allowed to fight the issue all over again whether in the same or subsequent proceedings.

In considering whether the Court of Appeal in its later decision, reviewed or reversed its earlier decision, a distinction has to be drawn between a ratio decidendi and obiter dictum of a case. The ratio decidendi of a case represents the reasoning or principle or ground upon which a case is decided. Obiter simply means in passing, incidental, cursory. Obiter dicta reflect, inter alia, the opinions of the Judge which do not embody the resolution of the court. The expression of a judge in a judgment must be taken with reference to the facts of the case which he is deciding, the issues calling for decision and answers to those issues. These are what should be looked for in any judgment. The manner in which the judge chooses to argue the case is not all important thing. Rather it is the principle he is deciding. See *U.T.C. (Nig.) Ltd. v. Pamotei* (1989) 3 S.C. (Pt. I) 79; (1989) 2 NWLR (Pt. 343) 244.

In the case of *Afro-Continental Nigeria Ltd. v. Joseph Ayantuyi & Ors.* (1995) 9 NWLR (Pt. 420) 411 at 439 this court, per Iguh, JSC., decided thus:

“It is indisputable that in the judgment of a court, the legal principle formulated by that court which is necessary in the determination of the issues raised in the case that is the binding part of the decision is its ratio decidendi as against the remaining parts of the judgment which merely constitute obiter-dicta, that is to say, what is not necessary for the decision.”

See also American International Insurance Co. v. Ceekay Traders Ltd. (1981) ANLR 62 at 80.

In this appeal, it has been pointed out that the sole issue identified by the Court of Appeal for determination in its earlier decision in Appeal B No. CA/L.262/89 was whether the appellant's suit was barred by the doctrine of res judicata. It decided that issue negatively and allowed the appeal. The ratio decidendi of that case which is therefore binding is based on res judicata. The other remarks the court proceeded to make about C joinder which was not necessary for the determination of the issue of res judicata was merely obiter dictum which is not binding. When, therefore, joinder of the respondent became a direct issue for resolution in its later judgment, the Court of Appeal was entitled to make a pronouncement therein as there was no binding decision on the issue in its earlier judgment. D By so doing, it was not reversing or reviewing its earlier decision. The case of Cardoso v. Daniel (supra), relied upon by the appellant is not apposite to the case in hand. In that case, the issue of res judicata was specifically raised and decided in the previous proceedings before Ademola, J., who E upheld the plea but on appeal, this court reversed the decision and sent the case back for retrial. The defendants again raised the issue contending that this court did not specifically decide the issue but this was rejected. In the instant appeal, the issue of the propriety of joining the respondent as 2nd F defendant was neither specifically raised by the proceedings before Ayorinde, J., or in Appeal No. CA/L.262/89 nor was it specifically decided in those proceedings. It is, therefore, my view that the court below did not review or reverse its earlier decision in Appeal No. CA/L/262/89. This issue is resolved against the appellant.

G It is convenient to defer the consideration of respondent's Issue No. 2 to deal with its Issue No. 3 which encompasses appellant's issue No. 3. As formulated by the respondent. Issue No. 3 for ease of reference is reproduced hereunder:

H *"Whether the pronouncements of the court below as to the effect of its earlier decision dated 14th December, 1993, in Appeal No. CA/L/262/89 on the interim order made by Ayorinde, J., is wrong or occasioned a miscarriage of justice?"*

As earlier narrated, when the suit was filed it was before Ayorinde, J., who granted an ex parte injunction against the respondent. On application by Mannesmann (1st defendant) to dismiss the suit on the grounds among other things, that the suit is res judicata, same having been litigated upon in Germany, the learned trial Judge in a considered ruling, B delivered on 23rd March, 1989, granted the application and dismissed the suit against Mannesmann and appellant (1st and 2nd defendants). This ruling was reversed by the Court of Appeal in Appeal No. CA/L/262/89 delivered on 14th December, 1993 and a retrial ordered. The retrial was conducted before Segun, CJ., who in his judgment granted the appellant's C claims. In an appeal by the respondent to the Court of Appeal, against the judgment of Segun, CJ., the Court of Appeal observed in relation to the effect of its earlier decision in CA/L/262/89 thus:

“Whereas the suit was struck out by the court below, its restoration D on appeal by order of retrial did not signify that the interim order of injunction was restored or revived. This is so because, an interim order in essence is normally restricted by time pending the determination of the motion on notice. It is not the case of the respondent that the appellate E court in ordering a retrial of the matter also granted the interim order to maintain the status quo. Let me also observe that the granting of interim order or order of injunction in this matter was based on different considerations so that the granting of interim injunction in the matter F should not make the order of injunction a conclusive matter.”

It is the above statement by the learned Justices of the Court of Appeal that the appellant is quarrelling with before this court. It is submitted that the proposition of the court below to the effect that the dismissal of the appellant's case at the court of first trial by Ayorinde, J., G even though reversed on appeal, did not revive or restore but rather was effective to have put to death permanently the interim injunction granted in 1989 by Ayorinde, J., against the respondent was patently misconceived. H

It was argued that it was merely by necessary implication that the ruling by Ayorinde, J., terminated the life of the interim injunction granted earlier and therefore, if the judgment in the first appeal was effective to

revive the substantive case that was expressly dismissed in the ruling of the trial court, it is legally incomprehensible that it will not also restore the interim injunction that was never sought to be discharged except by necessary implication. In support of the proposition, the appellant cited
B and relied on the decision of this court in the case of Attamah v. Anglican Bishop of Nigeria (1999) 9 S.C. 372; (1999) 12 NWLR (Pt. 633) 6 at p. 12.

The respondent has submitted, quite rightly, in my view, that the
C excerpt from the judgment of the court below quoted above represents the correct position of the law. **It is settled law that an order of interim injunction is a temporary form of injunction which remains in force until a named day and date. By its nature, it is expected to last for a very short period.** See Okechukeru v. Okechukwu (1989) 3 NWLR
D (Pt. 108) 234; Kotoye v. CBN (1989) 2 S.C. (Pt. I) 1; (1989) 7 NWLR (Pt. 83) 419; Enekwe v. I.M.B. Ltd. (1997) 16 NWLR (Pt. 562) 611. **When, therefore, Ayorinde, J., dismissed the suit on ground of res judicata, the exparte order of injunction was thereby discharged.**

**The setting aside of the order of dismissal by the Court of Appeal did not imply the restoration or revival of the interim order of injunction. The contention by the appellant to the contrary is misconceived. The case of Attamah v. Bishop of Niger (supra) cited
F and relied upon by the appellant is irrelevant. In that case, an application to set aside an interim order of injunction earlier made was refused by the court but in the instant case the entire suit was dismissed. I will equally resolve the issue under consideration in favour of the respondent.**

G The respondent's 2nd and 4th issues will be taken together as both of them relate to the appellant's 1st issue. For ease of reference, the respondent's 2nd and 4th issues are recited thus:

H "2. Whether the court below properly construed and applied Section 14 of the High Court Law of Lagos State in the circumstances of this case.

4. Whether the court below predicated the incompetence of the injunction granted by the trial court on wrong principles."

These issues relate to the validity of the grounds relied upon by the court below in allowing the respondent's appeal and setting aside the injunction slammed against it by the trial court not to pay over to Mannesmann the 5% commission of contract sum claimed by the appellant under the "commission contract". The court below had in several parts of its judgment in reaching to its conclusion noted that there was no privity of contract between the respondent and the appellant in respect of that "commission contract"; it further noted that from the pleadings, the appellant has no cause of action against the respondent and that the respondent was not a stakeholder in the legal sense of the money the appellant was claiming against the Mannesmann and finally, it construed Section 14 of the High Court Law of Lagos State, 1994, to see if in the circumstances of the case there was jurisdiction vested in the trial court to grant an injunction against the respondent. Section 14 of the said High Court Law provides:

"The High Court in the exercise of the jurisdiction vested on it by this law shall in every cause or matter grant either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them on the cause or matter so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters avoided."

The court below, in construing the above provision opined at p. 302 of the record, thus:

"The power conferred on the court by this provision has to be applied subject to the settled law that a court is not obliged to dispense reliefs not sought by parties as it is no charitable institution. Besides, where the power conferred on the court by Section 14 has to be relied upon, it must be to complement "any legal or equitable claim properly brought to them". It has been found that the appellant has in no way been impleaded in this matter. Recourse to Section 14 cannot avail in the circumstances as the claim of injunction could not be maintained against the appellant in the situation."

Learned senior counsel for the appellant has submitted in his brief of argument that an injunction is an equitable remedy not dependent on contractual relationship and that a mareva injunction was appropriate to secure the interest of the appellant in respect of the commission contract of which the respondent was well aware of through the “commission contract” Exhibit B and the letter from appellant’s solicitor Exhibit “M”. It was contended that by its origin mareva injunction is normally asserted against both the principally liable party in the substantive claim and a third party who has in its possession assets or property of the party against whom the principal relief is either contemplated or has been adjudged due. In support of these propositions, the following cases were cited and relied upon: Williams & Ors v. Marac Australian Ltd. & Ors. NWLR Vol. 5 1985-1986, 529 at 533 said to be a decision of Australian High Court following several decisions of English House of Lords: Attorney-General, Federation v. A.I.C. Limited (2000) 10 S.C. (Pt. 1) 175 at 185 and Mercantile Group (Europe) A.G. v. Aiyela (1994) 1 All ER 113 and Adenuga v. Odumeru (2001) 1 S.C. (Pt. I) 72; (2001) 2 NWLR (Pt. 696) 184. Citing the case of Governor of Lagos State v. Ojukwu (1986) 1 NWLR (Pt. 18) 621 at 636, it was submitted that as the respondent was warned through Exhibit M about the appellant’s claim and the pending appeal against the dismissal of its suit, if in disregard of the warning it (respondent) paid out the money, it did so at its own peril. Finally, it was stressed that the amount in question, that is, the judgment debt which is in the sum of US 41 Million Dollars had been garnisheed absolutely against the account of the respondent with the United Bank for Africa Plc since 2/11/2000 long before the decision of the lower court delivered on 24/5/2001.

In his reply, the learned senior counsel for the respondent submitted that the reasoning and conclusion of the court below with respect to the interpretation of Section 14 of the High Court Law of Lagos State cannot be faulted, pointing out that the relief sought by the appellant against the respondent at the trial court was different from that granted by the trial court while the relief which ought to have been in the form of a perpetual injunction was couched in the form of an interlocutory injunction. Learned counsel contended that an injunction is an ancillary relief granted after the

establishment of a right and submitted that as the appellant had not in the suit established any right against the respondent, an order of injunction could not lie against it on the authority of the case of Okebule v. Abaah (1988) 2 NWLR (Pt. 77) 496 at 503. It was conceded that the trial court was invested with the jurisdiction to grant a mareva injunction, adding that in the circumstances of this case in which it was not established that Mannesmann's funds were in the custody of the respondent, there was no basis for the grant of a mareva injunction. It was further submitted that the funds garnisheed by the appellant since 2/11/2000 are the funds of the respondent and not money due to Mannesmann. Finally, learned counsel submitted that the authorities relied upon by the appellant, to wit. Governor of Lagos State v. Ojukwu supra, Attorney-General v. A.I.C. Ltd. supra, Williams & Ors v. Marac Australia Ltd. and Ors. (supra) and Mercantile Group (Europe) AG v. Aiyela (supra) have no application to the instant case.

Following from what has been canvassed above, two questions arise for determination, viz:

“ 1. *Whether, on the footing that the appellant had funds in the custody of the respondent, an injunction was grantable to restrain the respondent from disbursing the funds to Mannesmann.*

2. *Whether, in actual fact the respondent had in its custody money that had accrued to the appellant.*”

The first question is a legal one and can be answered in the affirmative. **The doctrine of mareva injunction operates to stop a defendant against whom a plaintiff has a good arguable claim from disposing of or dissipating his assets pending the determination of the case or pending payment to the plaintiff. The injunction can also be granted against anybody who is in possession of the defendant's assets. In support of this proposition, I refer to the case of Sotuminu v. Ocean Steamship (1992) 5 SCNJ 17-22; (1992) 5 NWLR (Pt. 239) 1 where this court held, per Nnaemeka-Agu, JSC, that the High Court of Lagos State has the jurisdiction and power to entertain and in appropriate cases grant a mareva injunction as was developed by the High Court of Justice in England in 1975.** The second question is

one of fact and requires a careful appraisal of the pleadings, evidence and the judgment of the trial court. A perusal of the appellant's Statement of Claim reveals that there is no averment alleging that the appellant's funds were in the custody of the respondent. Equally, there was paucity of evidence in that regard. P.W.2 who gave evidence seemingly touching on the issue testified on 18/6/99 and said, inter alia -

"Segun Aderedolu: Male. Christian I am a legal practitioner and company secretary to the plaintiff/Company. I joined the company on 2/12/91. That was long after the transaction that led to this litigation has taken place. I obtained my information from the company's documents in my duty as the secretary of the company

The 1st defendant is not a Nigerian Company and has no presence in this country. As at 1988 when this action was filed they have (sic) funds outstanding with the 2nd defendant I don't know if the 2nd defendant have made all payments in their hands to the 1st defendant.

Cross-Examination

"I don't know if the jobs had been completed or not. Payments are made after certification of the work done. We are entitled to 5% of any money accruable to the 1 st defendant from the 2nd defendant.....We are aware that the 2nd defendant was making payments to the 1 st defendant all along."

The evidence of this witness to the effect that the 1st defendant (Mannesmann) in 1988 had funds outstanding with the respondent, not having been pleaded, went to no issue. Furthermore, he, P.W.2 not being an employee of either Mannesmann or the respondent could not have been in the position to know whether the former had funds outstanding with the latter on which the appellant's 5% commission had accrued. His evidence, in my view, is based on speculation, so too in the finding of the learned trial Judge who in his judgment at p. 52 of the record said:-

"In the Statement of Defence of the 2nd defendant, they have not claimed and they are not claiming that they have made any payment to the 1st defendant. I therefore assume that the payment of the money is still with the 2nd defendant. If they have paid it out they must say so

specifically in their Statement of Defence which they have not done.”

With profound respect, the above finding is tenuous and speculative. **It is an elementary principle of law, for which citation of authority is not necessary, that the onus is on a plaintiff to prove his case and he must do so on the strength of his own case and not on the weakness of that of the defendant subject to some exceptions. A court of law acts on facts and not on guess or speculation.** See Ferdinand George v. U.B.A, Ltd. (1972) 8-9 S.C (Reprint) 158; (1972) 8-9 S.C. 4 at 280, Carien (Nig.) Ltd. v. Unijos (1994) 1 NWLR (Pt. 323) 631 at 668; Siesmograph Services (Nig.) Ltd. v. Ogbeni (1976) 3 S.C (Reprint) 18; (1976) 4 S.C 85 at 101 and Overseas Construction Ltd. v. Creek Enterprises Ltd. (1985) 3 NWLR 407. The appellant did not consider it necessary to obtain admission from the respondent by way of interrogatories. In the absence of such admission, it is difficult to see how the appellant can establish that the respondent had Mannesmann’s funds from which the appellant’s 5% commission had accrued. Indeed, if Mannesmann had completed its job, the presumption is that it had been fully paid but the appellant does not know whether the job had been completed. In my view, from the evidence on record, it has not been established that the appellant had funds in the custody of the respondent for which an order of mareva injunction could be granted to restrain respondent from paying over to Mannesmann.

I am strengthened in this view by the ruling of this court dated 24/6/2002, made on application by the appellant for certain injunctive reliefs. The ruling in part reads thus:

“I find no merit whatsoever in this application. The evidence before us is that N.N.P.C. is not now owing the 1st defendant any amount as the 1st defendant has been fully paid in 1993 and 1994 in respect of contracts 1 and 2 respectively. Furthermore, there is evidence before us that the 1st defendant is no more in existence.”

The subsequent ruling of this same court on 23/9/2002, allowing the appellant to amend its notice of appeal did not alter the position. It was submitted at page 32 of the appellant’s brief, and quite rightly, in my view, that once the Court of Appeal has decided an issue in a particular way, the

same court cannot reach a different decision in the same case as it would have become *functus officio* in the matter. By the same token, since this court had earlier decided, as per the ruling of 24/6/2002, that Mannesmann (1st defendant) had been fully paid in 1993 and 1994, it would be wrong
 B for the court to now reverse that finding there being no evidence or suggestion that it was made without jurisdiction. In the face of the ruling in question, it would not be correct to contend as the appellant had done, that the money in the account of the respondent at the UBA Plc which was
 C garnisheed by the appellant represents the amount due to the appellant as commission in respect of its undertaking with Mannesmann.

The appellant has cited and relied on several authorities particularly the case of *Mercantile Group (Europe) A.G. v. Aiyela* (*supra*), the facts of which may be summarized thus: Aiyela, a Nigerian, was a man of
 D enormous influence. He often negotiated lucrative contracts for foreign corporations in Nigeria in return for large commissions. In 1983, he negotiated contract in favour of plaintiff for a large consignment of oil. For the purpose, the plaintiff put him in substantial funds to pay the purchase
 E price. He underpaid the sellers and refused to return the difference save a small portion thereof leaving outstanding 1.6 Million US Dollars. In 1984, plaintiff sued him joining alongside his wife and two other companies although none of the latter was party to the contract between Aiyela and
 F plaintiff. The only basis of their joinder was that they had Aiyela's funds which had mixed up with theirs and as such were constructive trustees of the said funds. After some compromises, Aiyela paid some amount leaving still outstanding a substantial amount and so judgment was entered against
 G him for the balance on due date. In trying to enforce the judgment no asset of Aiyela could be traced. It later emerged that a payment had been made into the account of Mrs. Aiyela from Nigeria on the instructions of Mr. Aiyela whereupon a *mareva* injunction was granted by Seville, J., in respect of any amount on which she could draw at the particular bank. It
 H can be seen from the facts of Aiyela's case that the fact that Mr. Aiyela had transferred his money into his wife's account was not disputed. That is not the situation in the instant case in which there is paucity of evidence as to whether the funds of Mannesmann was still in the custody of the

respondent, a doubt which the ruling of this court has resolved negatively. It is, therefore, my view that Aiyela's case is not on all fours with the case in hand.

Learned counsel for the appellant has in his reply brief complained that the only issue of fact considered by the court below related to Exhibit "M". My simple reply to that is that the doctrine of *mareva* injunction which has featured prominently in this appeal was not canvassed before the court below and since its applicability is dependent on the possession of a third party or nominal defendant the assets of the principal defendant, an enquiry in that regard is imperative.

But, even on the footing that the funds of Mannesmann were still in the custody of the respondent, it was incumbent for the appellant to establish that its right to 5% commission had accrued. In this regard, I bear in mind the terms of the commission contract, Exhibit 'B' which it entered into with Mannesmann. Part of Exhibit 'B' reads:

"In case an order is accepted by us on the basis of the offer submitted by us, we would grant you a commission of 5 percent, calculated on the basis of the amount transferred to a German bank and credited to Mannesmann Anlagenbau A.G., freight, packing costs and customs are not subject to a commission; they are to be deducted from the amount of cash payment before calculation of commission. Payment of the commission would be made in the same currencies as received from client."

From the above terms, it is evident that, firstly, the amount due to the appellant is only ascertainable after freight, packing costs and customs dues are deducted from the contract sum or part thereof; secondly, the 5% commission becomes due after money due to Mannesmann has been transferred to a German bank and credited to the account of Mannesmann and thirdly, the 5% commission is payable in the currency in which Mannesmann was paid. **It is not until the first and second conditions are complied with that the appellant's right to 5% commission will accrue. There is nothing on record to show that the above 1st and 2nd conditions had been met. I am of the view that until they are met the appellant's claim against the respondent for an order of injunction is not maintainable. This is so because an injunction is an equitable**

remedy and it can only be granted in support of a right known to law or equity. See *Yalaju-Amaya v. A.R.E.C. Ltd.* (1990) 4 NWLR (Pt. 145) 422; *Afrotec Technical Services Nig. Ltd. v. Mia & Sons Ltd.* (2000) 12 S.C. (Pt. I) 1; (2001) 1 SCNJ p. 1 at 3.

B **In the light of the foregoing, the decision of the court below in setting aside the order of injunction made against the respondent cannot be faulted. Its reason for doing so may not be right but it is settled law that an appellate court will not set aside the decision of**
C **a lower court which is right and just merely because the lower court gave wrong reasons for the decision. The paramount consideration for the appellate court is whether the decision is right, not necessarily what the reasons are.** See *U.B.A. Ltd. & Anor. v. Achoru* (1995) 7 SCNJ 17 at 18; *Oseni v. Dawodu* (1994) 4 NWLR (Pt. 339) 390; *Attorney-General of Bendel State v. Attorney-General of the Federation & Ors.* (1981) 10 S.C. (Reprint) (1981) 10 S.C 1 at pp 62-63; *P. A. Aboye Ebevuhe v. Ukpakar* (1996) 9 NWLR (Pt. 460) 254 at 269 at 269; *Ukejianya v. Uchendu* (1980) 13 WACA 45. The *Ojukwu's* case supra is
D
E irrelevant in the consideration of this case.

I will resolve the appellant's issue No. 1 and the respondent's issues 2 and 4 in favour of the respondent against the appellant.

As all the issues considered in the main appeal have been resolved
F in favour of the respondent, the appeal lacks merit and is consequently dismissed with N10,000.00 costs to the respondent against the appellant.

UWAIS CJN

G I have had the opportunity of reading in draft the judgment read by my learned brother, Edozie, JSC. I entirely agree with it. I too hold that the appeal has no merit.

Accordingly, the appeal is hereby dismissed with N10,000.00 costs
H against the appellant in favour of the respondent.

KUTIGIJSC

I have had the opportunity of reading in advance the judgment justrendered by my learned brother, Edozie. JSC. I agree with his reasoning and conclusions. He has meticulously dealt with all the issues B canvassed before us. The appeal has no merit. It is therefore dismissed with costs as assessed

ONUJSC

I have been privileged to read in draft the judgment of my learned brother, Edozie, JSC., just delivered. I agree with him to resolve appellant's issue No. 1 and respondent's issue Nos. 2 and 4 in favour of the respondent against the appellant. As all the issues considered in the main appeal have D been resolved in favour of the respondent, the appeal lacks merit and is consequently dismissed with N10,000.00 costs to the respondent.

EJIWUNMIJSC

This appeal is the cumulation of several steps taken by the plaintiff to recover its claims against the defendant. The first action it took in this regard, was commenced before Ayorinde. J., (as he then was), who F struck out the case upon application of the respondent. The plaintiff then appealed to the court below. That court, (coram Sulu-Gambari, Kalgo and Uwaifo, JJCA., as they once were), upheld the appeal. An order was therefore made that the case be commenced de novo before another Judge G of the Lagos High Court. The plaintiff therefore commenced a fresh action against the defendant. In making that order, Sulu-Gambari delivering the leading judgment, concluded his judgment thus:

“..... I am of the firm view that the learned trial Judge was wrong H to have held, as he did, that the plaintiff/appellant was precluded from bringing the suit against the 1st and 2nd defendants in Lagos, having prosecuted a suit against the 1st defendant in Dusseldorf in Germany. He was equally wrong to have dismissed the suit in its entirety. He peremp-

torily dismissed the suit before him without examining if the claims in the Lagos suit is the same as the one in the German Court.....”

Before this appeal reached this stage, the plaintiff took out a writ of summons. By the writ of summons, its claim against the 1st defendant is for 5% of the various sums set out in the Schedule to this writ less the amount claimed by the plaintiff from the defendant in Suit No. 390/224/84 pending before the District Law Court No. 9 in Dusseldorf (particulars of which are set out in the Statement of Claim) being the amount of commission payable to the plaintiff pursuant to an agreement entered into in Lagos and dated 14th March 1980, for undertaking and taking all necessary efforts in assisting the 1st defendant in securing the contract for the 2nd defendant Escravos-Lagos Pipeline and Compressor Station.

In the alternative, the plaintiff claims the said sum from the 1st defendant as upon a quantum meruit. In the further alternative, the plaintiff claims against the 1st defendant for an account to be taken for commission due to the plaintiff in respect of the agreement referred in paragraph 1 hereof and for an order for the payment of the monies found to be due to the plaintiff on the taking of the account less the amount already claimed in Suit 390/224/84 referred to above. In support of its claims, the plaintiff made several averments in its pleadings in its Statement of Claim but of immediate relevance is its averments at paragraphs 18, 19, 20 and 21, which read thus:

“18. The first defendant has been receiving payments from the 2nd defendant for the execution of the project but has refused to pay any commission to the plaintiff.

19. Consequent upon the failure of the 1st defendant to pay any commission as alleged above, the plaintiff in suit 39-0-224/84 filed before the District Law Court No. 9 in Dusseldorf sued the defendant for the following amount being commission due on sums already paid out to the defendant on the project:

(a) Pound Sterling	20,305.18
(b) Naira	163,074.03
(c) Naira	53.205.5
(d) DM	54,904.31

(e) Pound Sterling	113,772.17	
(f) USD	4,326.25	
(g) Naira	71,240.53	
(h) DM	890,287.09	
(i) Pound Sterling	17,222.62	B
(j) USD	29,976.20	

Consequent upon failure of the 1st defendant to pay any commis-
sion as stated in paragraph hereof the plaintiff claims from the 1st
defendant 5% of the following sums payable to the 1st defendant by the
2nd defendant being commission due to the plaintiff pursuant to the said
agreement of 14th March. 1980 as shown in Schedules A & B hereunder- C

SCHEDULE "A"

SCHEDULE "B"

CALCULATION OF COMMISSION DUE D

EXPECTED PAYMENT FROM 10/4/87	COMMISSION RATE 5%	COMMISSION DUE	
(a) \$24,403.78	"	\$1,220,185.40	E
(b) £10,943,700.03	"	£547,185.00	
(c) DM445,418,451.60	"	DM22,270,922.00	
(d) N55,295,708.92	"	N2,764,78.40	

21. The plaintiff shall at the trial of this action rely on all documents
and letters exchanged between the plaintiff and the 1st defendant and
between the defendants, particularly the priced tender by the 1st defendant
to the 2nd defendant dated 28/11/83, the unpriced Technical and Commer-
cial Tender of 29/7/83, invitations of 1/11/82, replies of 15/11/82, and 16/
3/83 between the defendants. F

The 1st defendant did not file any pleadings but the 2nd dcicndant
did file its uwn Statement of Defence. The matter subsequently went on
trial before Segun, J., of the High Court of Lagos State holden at Lagos. H
Three witnesses were called by the plaintiff in support of its case.
Documentary exhibits were also tendered through them. The 2nd defen-
dant who took part in the proceedings through its counsel did not call

witnesses nor call any oral evidence.

At the conclusion of the hearing, the learned trial Judge, C. O. Segun, CJ., delivered a considered judgment on the 25/1/2000 in favour of the plaintiff when he concluded his judgment, thus:

B “In the final result and for all the reasons given above and consequent upon the failure of the 1st defendant to pay any commission to the plaintiff as proved in the evidence I will give judgment in favour of the plaintiff against the 1st and 2nd defendants jointly and severally as follows as contained in Schedule B of their Statement of Claim:

- C
- (1) \$1,220,185.40 (US Dollars;
 - (2) £547,185.00 (Sterling)
 - (3) DM22,270,922.00 (Dutch Marks)
 - (4) N2,764,785.40(Naira)
 - D (5) \$750,000.00 being 5% Ccommission of Contract D.

The 1st and 2nd defendants shall pay interest on the above sums at the rate of 13% per annum from 10th April, 1987, until payment of all the sums.

E Again, an injunction is granted against the 2nd defendant restraining them from payment over to the 1st defendant the amount claimed herein until the plaintiff is fully paid the 5% commission enumerated above.

F The 1st and 2nd defendants shall pay the costs of this action jointly and severally assessed at N10,000.00 in favour of the plaintiff.”

From what can be gathered from the record of appeal compiled, it seems clear that it was only the 2nd defendant who appealed against the judgment and orders of the trial court (coram Segun, C.J.).

G However, it ought to be noted that before the appeal was heard by the court below, the plaintiff applied for a Garnishee Order Nisi against the 2nd defendant in respect of the judgment debt. The trial court by its ruling delivered on the 27th of October, 2000, ordered that the Garnishee Order be made absolute. And before the court below, coram (Oguntade JCA., (as H he then was), Galadima and Aderemi, JJCA.), the learned counsel for the parties on the 14th December 2000, submitted to a consent order in respect of the judgment debt secured by the Garnishee proceedings. It reads:

“By consent of the parties it is order (sic) that the judgment debt

ordered be deposited with Deputy Chief Registrar of this court within 14 days from today. The money when deposited shall be paid into an interest yielding account with any of the following bank (sic) (1) Union Bank or (2) First Bank the party ultimately winning on appeal before us will collect the money with accrued interest. Appeal will come up for February 28/2001.” B

The appeal was eventually heard by the court below upon the several issues raised before it. The appeal was unanimously allowed by the court below as Oguntade and Aminu Sanusi, JJCA., by their judgments agreed with the leading judgment of Chukwuma-Eneh, JCA., delivered on the 24th of May, 2001. Accordingly, all the issues raised by the 2nd defendant as the appellant were resolved against the plaintiff. And the court also stated that for the avoidance of doubt, as the 1st defendant did not appeal against the judgment of the trial court, that judgment against the 1st defendant remains unaffected. As the plaintiff, now referred to as the appellant was not satisfied with the judgment and orders of the court below, it has appealed to this court. D

Pursuant thereto, the appellant filed several original grounds of appeal. But by an amended notice of appeal, the appellant grounded its appeal upon six (6) grounds of appeal and also sought for these two reliefs:- E

“(1) An Order allowing the appeal and restoring (on such terms as may be adjudged fair and equitable) the injunction granted in the judgment of the trial court but which their Lordships in the court below set aside. F

(2) An Order directing that the money already absolutely gamisheed in the respondent’s account Nos. 100004216 containing a credit balance of US\$40,141,695.52 and 100004224 containing a credit balance of US\$1,420,649.15 both accounts maintained with United Bank for Africa Plc as at 25th October, 2000 pending this appeal (or so much of it as the court may deem equitable), be applied to satisfy the unchallenged judgment debt against the 1st defendant.” G H

Learned counsel for the parties adopted and placed reliance on the briefs filed. This means that learned senior counsel relied on the appellant’s

Amended Brief and the Reply Brief while the learned senior counsel for the respondent relied on the respondent's Amended Brief.

Now, the appellant has in its appellant's brief framed the following as issues for the determination of the appeal:

B 1. Whether the injunction sought and granted against the respondent was set aside by the Court of Appeal on a wrong view of the remedy of injunction and in disregard of the decision of the Supreme Court in Governor of Lagos State v. Ojukwu (1986) 1 NWLR (Pt. 18) page 621 at 636 and the provision of Section 14 of the High Court Law, Laws of Lagos State, 1984.

C 2. Whether the Exclusive appellate jurisdiction of the Supreme Court under Section 233(1) of the 1999 Constitution was usurped and breached when the earlier and subsisting decision of the Court of Appeal D in CA/L/262/89 (coram Sulu-Gambari, Uwaifo and Kalgo, JJCA.), (as they then were)) upholding joinder of the respondent in this suit for the purpose of the injunction sought against it and ordered retrial on the merit, was reviewed and reversed by the decision of a differently constituted E Court of Appeal (coram Oguntade, Chukwumah-Eneh and Aderemi, JJCA.), presently appealed against, holding that the respondent "was joined without any basis", and was not in any way "impleaded" on the basis of the same pleadings that the previous panel considered to hold in F plaintiff's favour.

3. Whether their Lordships in the court below acted without jurisdiction (and thereby occasioned a miscarriage of justice) when they held that the pre-trial interim injunction granted against the respondent in this case was not restored by the decision of their learned brothers in the G earlier appeal in the suit notwithstanding that the same was not challenged by the respondent either in the trial court or by way of an appeal.

The respondent also in the brief filed on its behalf by its learned counsel considered that the following issues are more germane for the H determination of the appeal. They read:-

"i. Whether the court below in its judgment in Appeal No. CA/L/78/2000 delivered on 24th May, 2000 overruled, reversed or reviewed its earlier decision in Appeal No. CA/L/262/89 in its judgment dated 14th

December, 1993. (Formulated from Ground 1 of the Amended Notice of Appeal).

2. Whether the court below properly construed and applied Section 14 of the High Court Law of Lagos State in the circumstances of this case (formulated from Ground 2 of the Amended Notice of Appeal). B

3. Whether the pronouncements of the court below as to the effect of its earlier decision dated 14th December, 1993, in Appeal No. CA/L/262/89 on the interim order made by Ayorinde, J., (as he then was), is wrong or occasioned miscarriage of justice (formulated from Ground 4 of the Amended Notice of Appeal). C

4. Whether the court below predicated the incompetence of the injunction granted by the trial on wrong principles (formulated from Grounds 3, 5 and 6 of the Amended Notice of Appeal).”

I will begin with the consideration of Issue 2 in the appellant’s brief D along with Issue 1 in the respondent’s brief. On Issue 1, learned counsel for the respondent has argued in its amended brief that the remarks of the court below in Appeal No. CA/L/262/89, particularly in Ground 1 of its Notice of Appeal is an obiter dictum. This is because it is the view of the E respondent that the only issue considered by the court in Appeal No. CA/L/262/89 was the issue of res-judicata. In support of this contention, reference was made to the following decisions of this court: Afro-Continental Nigeria Ltd. v. Joseph Ayantuyi & Ors (1995) 9 NWLR (Pt. F 420) 411 at 435; American International Insurance Co. v. Ceekay Traders Ltd. (1981) ANLR 62 at 80. The above contention made for the respondent is against that of the appellant under its issue (1) in its amended brief. In that brief, learned counsel has argued very strenuously that the court G below erred to have reversed the earlier decision of (he Court ol Appeal in CA/L/262/89. After a careful reading of that judgment, it is my view that the main issue that fell for consideration in that appeal was the issue of res-judicata raised before that court. On this issue. I prefer to adopt the reasoning of my learned brother, Edozie. JSC., in his leading judgment H wherein he resolved this issue against the appellant.

I now turn to consider Issue 1 in the appellant’s brief and Issue 2 in the respondent’s brief. From a perusal of the issues raised by the parties

to this appeal, it is manifest that the real crux of the appeal revolves around the jurisdiction of the court below to make the order it made with regard to its refusal to uphold the order of injunction made by the trial court. The appellant began his summation on this issue by posing this question and I

B quote:-

“It is permissible in law for A, who has a substantive cause of action against B alone, to join C as a co-defendant in the action for the purpose of securing his claim against B, although in law A ordinarily has no direct cause of action against C?”

C The answer to that question, according to learned counsel for the appellant should have been answered in the affirmative, as against the negative answer below. In support of his answer, he referred to a decision of the High Court of Australia, Williams & Ors v. Marac Australia Ltd. & D Ors NSWLR Vol.5 1985-1986, 529 at 533 and submitted that though the court below answered the question in the negative, reference was not made to any decided authority to justify their position. And in this regard, reference was also made to the pronouncement made by Mohammed, E JSC., in Attorney-General, Federation v. AIC Limited (2000) 6 S.C. (Pt. 1) 175 at 185.

Now, in order to properly focus the complaint of the appellant that the court below was wrong to have discharged the final injunction granted by the trial court, learned counsel for the appellant invited the reasoning of F the court below with regard to the questions posed by the respondent as appellant in the court below said at p. 299 of the Printed Record with regard to whether the respondent/appellant before that court was aware of the payment of the 5% commission and without authorisation from the 1st G defendant i.e. Mannesmann-Anlagenbau AG. It is also the contention of learned counsel to the appellant that after holding as it did at page 299 of it judgment, the court below was wholly wrong to have taken the view that this is not a case where injunction can be granted against a third party joined H to aid plaintiff’s/appellant’s recovery of the principal claim against the 1st defendant. The reasons given in support of that contention would be considered later in this judgment. It is sufficient to refer to the case cited in support of appellant’s contention. It is Adenuga v. Odumeru (2001) 1

S.C. (Pt. I) 72; (2001) 2 NWLR (Pt. 696) 184 at 195. It is also the contention of the appellant that the injunction granted to the appellant by the trial court is in the nature of a *mareva* injunction. And in support of this submission reference was made to *Mercantile Group (Europe) AG v. Aiyela* (1994) 1 All ER 113; *TSB Private Bank International SA v. Chabra* B (1992) 2 All ER 245, 1992 1 WLR 231; *Sotuminu v. Ocean Steamship (Nig.) Ltd.* (1992) 5 NWLR (Pt. 239) 1 S.C.; *Governor of Lagos State v. Ojukwu* (1986) 1 NWLR (Pt. 18) 621 at 636.

As part of the appellant's complaint against the judgment of the court below, it is the submission of its learned counsel that the court below misdirected itself in its judgment when it failed to appreciate as did the trial court that the appellant was in the context of the case regarded as "more or less a stakeholder". It is therefore argued for the appellant that the failure of the court below to appreciate the position of the appellant as did the trial court has occasioned a miscarriage of justice, *moreso*, argued learned counsel for the appellant, that there is evidence on record that the money, which is the subject matter of the suit was in the custody of the respondent. And according to learned counsel to the appellant, the pre-trial *Mareva* E injunction was recognised in the judgment and which effectively prevented the respondent from paying the money to the 1st defendant throughout the trial. He submitted further that the court below misconstrued the provisions of Section 14 of the High Court Law of Lagos State F when it held that the court cannot affirm the injunction granted by the trial court.

The argument of the respondent in response to that of the appellant in respect of Issue 1 may be summarised thus: attention was first drawn to the claim of the appellant against the respondent, followed by the resolution of the claim by the trial court. And after referring to the opinion of the court below on the provisions of Section 14 of the High Court Law of Lagos State, submitted that the opinion of the court with regard to the jurisdiction of the trial court to make an order of injunction in the matter H be upheld by this court. It is also the contention of the respondent that it is "incongruous" for the trial court to have granted an order of perpetual injunction in respect of the prayer of the appellant that was couched in the

form of an interlocutory injunction. An order of perpetual injunction learned counsel argued, being an ancillary order is only grantable as a post-trial relief. And cites in support *Adeniran v. Alao* (1992) 2 NWLR (Pt. 223) p. 350. It is his further submission that an injunction being an ancillary relief is only available to a party who has established a right against the other, the appellant who has not established a claim against the respondent is not entitled to the order of injunction. For that proposition, he cited *Okebule v. Abaah* (1988) 2 NWLR (Pt. 77) 496 at 503.

On the contention of learned counsel for the appellant that the injunction granted to the appellant is a specie of injunction known as a *Mareva* injunction, it is the view of learned counsel for the respondent that though it is a relief rooted in the equitable jurisdiction of the court, its grant is not appropriate in the instant case and referred to *Transbridge Co. Ltd. v. Survey Int. Ltd.* (1986) 4 NWLR (Pt. 37) 576 at 597.

Concluding his argument on this issue, learned senior counsel for the appellant submitted that the decision of the High Court of Australia in the case of *Williams & Ors. v. Marac Australia Ltd. & Ors.* NSLWR Vol. 5 1985-1986, 529 at 533 is inapplicable as the facts and the circumstances in the Australian case differ from what this court have to consider in the instant case. Also, it is argued for the respondent that having regard to the averments made in paragraphs 9 and 18 of the appellant's claim, it is manifest that the appellant's claim cannot be granted as two of the conditions for the payment of the money being claimed as set out in the said averments were not established by the appellant. Learned counsel therefore urged that this issue be resolved against the appellant.

Since the question raised in this issue revolves around the order of injunction, perpetual or interlocutory, it is useful to quote the provisions of Section 14 of the High Court Law, Laws of Lagos State that gives the jurisdiction to the court before referring to the reasoning of the court below thereon. Section 4 of the High Court Law reads thus:

"The High Court in the exercise of the jurisdiction vested in it by this law shall, in every cause or matter, grant either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any

legal or equitable claim properly brought forward by them in the cause or matter so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters avoided.”

Having set out the provisions of Section 14 of the High Court Law, B
Laws of Lagos State as above, the court below then interpreted the jurisdiction thus:

*“The power conferred on the court by this provision has to be applied subject to the settled law that a court is not obliged to dispense C
reliefs not sought by parties as it is no charitable institution. Besides, where the power conferred on the court by Section 14 has to be relied upon, it must be to complement “any legal or equitable claim properly brought by them”. It has been found that the appellant has in no way been D
impleaded in this matter. Recourse to Section 14 cannot avail in the circumstances as the claim of injunction could not be maintained against the appellant in the situation,”*

The reasoning of the court below leading to its conclusion that the claim of the appellant is not maintainable on the injunctive relief it sought E
is apparently premised on its understanding of the relief, stated earlier in the judgment. The court at page 298, said thus:

*“As stated above, the appellant being a stranger to the contract in Exhibit B, remained so and no terms of that contract could therefore be F
enforced by or against the appellant. Furthermore, there is no way even Exhibit M could be construed to give the appellant any such power even though the interim order of injunction while it lasted restrained the G
appellant from dealing with the 1st defendant’s funds without taking into account the commission of 5% due to the respondent. Exhibit M was written to remind the appellant of the said order.”*

On the argument presented to the court below that the appellant now respondent, be regarded as a stakeholder in the transaction was rejected by the court below per Chukumah-Eneh thus:- H

“I must have to observe that the plaintiff/respondent did not plead any facts to raise or support the issue of likening the position of the appellant to that of a stake holder and so warranting joining the 2nd

defendant/appellant to the suit at all. Exhibits B & M did not expressly or impliedly convey the impression. The facts of this matter vis-a-vis the scope and nature of stakeholdership are not only incongruent but far fetched. Even then the onus on the respondent to show that the appellant was at all materials times a stake holder was not discharged and therefore it is no use to be labour the issue. Therefore, the appellant was never constituted a stake holder in any sense of the term by the parties”.

The learned counsel for the appellant to this appeal has sharply attacked the reasoning of the court below with regard to the developed view of the court below that the respondent to this appeal was not constituted a stakeholder. It is his contention that the reasoning of the court below arose from a misreading of the judgment of the trial court. And submits that the respondent with regard to the payment of funds to the appellant ought to have been properly held as a stakeholder. And he further argued that that position is not based on the existence of a contractual relationship between the parties. Rather argued learned counsel for the parties, it is predicated on equitable stakeholdership. And therefore further argued, that the court below was wrong to have held that the claim for injunction was not available to the appellant. He premised his argument that an injunction of that kind is now classified as a mareva injunction.

May I also refer to the Australian decision in *Williams & Ors v. Marac Australia Ltd. & Ors* (1985) NSWLR 529 where the principles on the grant of Mareva injunction set out in *Z Ltd. v. A-Z* and *AA-LL* were adopted by the High Court of the Commonwealth of Australia.

Now, in order to appreciate the submission of learned counsel for the appellant that the concept of mareva injunction applies to resolve this question, I think it is desirable to discuss the principle of that concept, howbeit briefly. The ‘mareva injunction’ took its name from the case that came on appeal before the English Court of Appeal namely, *Mareva Compania Naviera SA v. International Burecarriers SA* *The Mareva* (1980) 1 All ER 213. In that case the plaintiffs are ship owners who owned the vessel *Mareva*. They let it to the defendants (“the charterers”) on a time charter for a trip out to the Far East and back in the event that later happened, the plaintiffs issued a writ claiming against the defendants

unpaid hire and damages for repudiation of a charter party. On an ex-parte application, an injunction was granted restraining the charterers from removing or disposing out of the jurisdiction moneys standing to the credit of the charterers account at a London Bank. The ship owners appealed against the refusal of the Judge to extend the injunction beyond the date earlier granted. In the course of the election on appeal, Denning, MR., after reviewing the earlier decisions of the English Courts on the grant of injunction in the peculiar circumstances of the case under consideration, then said at pages 214/215 thus:

“Now counsel for the charterers has been very helpful. He has drawn our attention not only to *Lister & Co. v. Stubbs* but also to Section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, which repeals Section 25(8) of the Judicature Act 1873. It says:

‘A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient....’

In *Beddow v. Beddow Jessel, MR.*, gave a very wide interpretation to that section. He said: ‘I have unlimited power to grant an injunction in any case where it would be right or just do so.....’

There is only one qualification to be made. The court will not grant an injunction to protect a person who has no legal or equitable right whatever. That appears from *North London Railway Co. v. Great Northern Railway Co.* But, subject to that qualification, the statute gives a wide general power to the courts. It is well summarised in Halsbury’s Laws of England ‘..... Now, therefore, whenever a right, which can be asserted either at law or in equity, does exist, then, whatever the previous practice may have been, the court is enabled by virtue of this provision in a proper case, to grant an injunction to protect that right.”

And at page 215, Denning, MR, then concluded by saying thus:-

“In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an

interlocutory judgment so as to prevent him disposing of those assets.”

This principle was in Z Ltd. v. A-Z and AA-LL (1982) 1 QB 558 also pronounced upon by Lord Denning MR., at p. 571 when he said thus:

“The Mareva injunction is now an established feature of English law. The principles applicable to it - as against the defendant - have been stated in numerous cases from 1975 to 1981. They have been given statutory force by Section 37(3) of the Supreme Court Act 1981, which says:-

The power of the High Court..... to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.”

Later in that judgment the jurisdiction to grant mareva injunction was extended to third parties with this pronouncement:

“The Mareva jurisdiction extends to cases where there is a danger that the assets will be dissipated in this country as well as by removal out of the jurisdiction. Hitherto the cases and the statutes have been concerned primarily with the injunction against the defendant. Now we have to consider the position of the banks or other innocent third parties who hold the assets.”

Now, the juristic principle for that extension of the jurisdiction was put thus by Lord Denning, MR., at page 174:-

“As soon as the bank is given notice of the Mareva injunction, it must freeze the defendant’s bank account. It must not allow any drawings to be made on it, neither by cheques drawn before the injunction nor by those drawn after it. The reason is because, if it allowed any such drawings, it would be obstructing the course of justice - as prescribed by the court which granted the injunction - and it would be guilty of a contempt of court. I have confined my observations to banks and bank account. But the same applies to any specific asset held by a bank for safe custody on behalf of the defendant, be it jewellery, stamps, or anything else. And to any other person who holds any other asset of the defendant.

If the asset is covered by the terms of the Mareva injunction, that other person must not hand it over to the defendant or do anything to enable him to dispose of it. He must hold it pending further order. The injunction does not prevent payment under a letter of credit or under a bank guarantee (see Intraco Ltd. v. Notis Shipping Corporation (1981) 2 Lloyd's Rep. 256 and Power Curbcr International Ltd. v. National Bank of Kuwait S.A.K (1981) 1 WLR 1233); but it may apply to the proceeds as and when received by or for the defendant. It does not apply to a credit card. The bank must honour all credit cards issued to the defendant and used by him, except when they have been used fraudulently or wrongly. It can debit the amount against the customer's account."

See also Etablissement Esefka International Anstalt v. Central Bank of Nigeria (1979) Vol. II Lloyd's Law Report 445.

It is to be noted that the principles with regard to Mareva injunction has also been accepted by this court where Nnaemeka-Agu, JSC, in adopting it said in Sotuminu v. Ocean Steamship Nig. Ltd. (1992) 5 NWLR (Pt. 239) p.1 at 25 said thus:-

"..... the appellant is basing his case, the subject of this appeal, on a Mareva Injunction. Such injunctions are novel and came on the firmament of injunctions only in 1975, in the case relied upon. The granting of such an injunction was a fundamental departure from the erstwhile general rule that a plaintiff would take his queue with other creditors of the defendant and if he obtained a judgment against the defendant he would simply, subject to the rules on priorities of debts, execute it on the defendant's available assets or on the person of the defendant. In 1975, the Court of Appeal in the judgment cited above introduced a more ubiquitous feature into the practice of injunctions. This introduced a limited exception to the general rule by granting ex-parte injunctions restraining defendant from disposing of or dealing with any other assets within the jurisdiction of the court or removing or disposing out of the jurisdiction monies standing against him. But as the case itself says, such will be granted only if it appears that the debt is due and owing."

From the several authorities to which I have referred above, it is manifest that mareva injunction applies in principle to a creditor who has

a right to be paid the debt owing to him, even before he has established his right by getting judgment for it, if it appears that the debt is due and owing, and therefore there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case B to grant an interlocutory judgment so as to prevent him disposing of those assets.

However, it is manifest that in this appeal, the appellant did not at the beginning of the action obtain an order of interlocutory injunction C against the defendant. But it is not in dispute that the appellant commenced the action against the respondent and the first defendant with whom it had an agreement for the payment of 5% commission of the various sums of money to be paid to the 1st defendant for services rendered to the 1st D defendant for the procurement of contracts from the respondent. The appellant indeed obtained judgment against the two defendants at the trial court for the sum claimed. The trial court then made an order of injunction restraining the 2nd defendant/respondent from paying over to the 1st E defendant the amount being claimed and further ordered that the amount be deducted from the contract sum and be withheld by the respondent pending the determination of the action.

The respondent alone appealed successfully against that judgment and orders of the trial court. As previously stated, the question is, whether F the court below was right to have discharged the order of injunction against the respondent. It seems to me from the facts in this appeal that the appellant was right in its argument that the injunction against the respondent should not have been discharged by the court below for the reasons given. It is manifest that under the principle of *mareva* injunction, G the respondent was properly restrained from releasing the funds of the 1st defendant held by it pending the determination of the action. The argument proffered that the appellant did not have a cause of action against the respondent does not in my view relieve the respondent of the duty fastened H upon it in equity not to dispose of the funds in its possession for the 1st defendant. Moreso, where the 1st defendant did not appeal against the order of the trial court. It is therefore my view, and I so hold that the order of injunction made by the trial court fall under the “*Mareva principle*”, and

should have been upheld by the court below notwithstanding the fact that the respondent was a third party to the agreement between the appellant and the 1st defendant. The respondent in equity is answerable to the appellant for the sum claimed by the appellant; Exhibit M and the Garnishee Order absolute were clear polices binding upon the respondent to honour B the claim of the appellant.

It is conceded though that this principle was not argued before the court below, as it was before this court, this is understandable as the appellant in this appeal was not the appellant before the court below. It is C my humble view however that the absence of the argument with regard to the “Mareva” principle should not affect its application in this appeal. I think it is only right to consider in this appeal, as I believe it is right and just so to do in the circumstance. It is therefore my humble view that if the lower court had considered the facts and the applicable law in the light of D what I had said above, the court below might have decided the matter differently.

That the garnishee order was made absolute by the High Court of Lagos State on the 2nd of November, 2000, was known to the respondent E cannot be disputed as its learned counsel. Chief Aderemi Odofin deposed to an affidavit of urgency to that effect. At paragraph 4, thereof, he deposed thus:-

‘The respondent (appellant) had obtained an order of Garnishee F Absolute from the Lagos High Court on the 2nd of November, 2000, directing United Bank for Africa to pay over the sum of US\$41 Million kept in the domiciliary account of the appellant at the said Bank.’

It is therefore not in doubt that by virtue of the above affidavit G evidence, the respondent knew that by December, 2000, a garnishee order absolute had been obtained by the appellant against the funds of the respondent with the United Bank for Africa Plc.

Following that order, the then learned counsel for the respondent H appealed to the court below against the order so made by the High Court of Lagos State. The respondent it would appear also asked for an order to stay the execution of the judgment of the trial court. It would however appear that on the 14th of December, 2000, the court below made an order

by the consent of the parties that the judgment debt ordered by the Lagos High Court be paid into an interest yielding account in the name of the Deputy Chief Registrar of the Court of Appeal at the First Bank of Nigeria Plc or Union Bank.

B As the respondent did not act in compliance with that order of the court below, learned senior counsel for the appellant, by a motion dated 30th March, 2001, then moved that court for an:

C *“Order directing that the money already absolutely garnisheed in the respondent’s account Nos. 10004216 containing a credit balance of US\$40,141,695.52 and 100004224 containing a credit balance of US\$ 1,420,649.15 both accounts maintained with the United Bank for Africa Plc as the 25th October, 2000 pending this appeal (or so much of it as the court may deem equitable), be applied to satisfy the unchallenged*
D *judgment debt against the 1st defendant.”*

Though this application was later withdrawn by the learned counsel for the appellant in support of that prayer, it is clear that appellant had by this prayer sought to obtain the sum totalling US\$40,141,695.52 (Forty
E Million, One Hundred and Forty One Thousand, Six Hundred and Ninety Five Dollars, Fifty Two Cents) and which had been garnisheed absolutely against the respondent’s deposit account with UBA. In this regard, see also paragraph 4 of the affidavit deposed to pursuant to the application:-

F *“Part 4*

That on the 23rd October, 2000, the Bank was served with a Garnishee Order Nisi dated 18th October, 2000, in which the Bank was ordered to attach the monies held in the credit of the judgment debtor with its branches including the Bank’s foreign branches (especially the London
G *and New York branches) in satisfaction of the judgment debt in the above suit as follows:*

- (a) \$3,283,885.98 (being judgment sum of \$1,220,185.40 plus adjudged interest as at 13th April, 2000).
- H (b) £1,472,431.10 (being judgment sum of £547,185.00 plus interest as at 13th April, 2000).
- (c) DM57,331,703.56 (being judgment sum of DM22,270,922.00 plus interest as at 13th April, 2000).

(d) N7,429,280.08 (being judgment sum of N2,764,785.40 plus interest as at 13th April, 2000).

(e) \$2,018,456.59 (being \$750,000 (5% Commission) plus interest as at 13th April, 2000).

(f) Cost of N10,000.00 in favour of the plaintiff.”

B

From the foregoing, it is apparent that the appellant believed that the sum being claimed remained intact with the United Bank for Africa Plc.

However, during the pendency of its appeal to this court, the appellant filed an interlocutory motion supported by a 31-paragraphed affidavit with 5 Exhibits, respondent filed a counter-affidavit of 27 paragraphs and exhibited thereto one exhibit - a fax message from Nigeria Gas Company, a subsidiary of the respondent and dated 25th August, 2000. Its content read thus:-

C

“ELPA”

D

The project was completed in October, 1990. There is no outstanding payment to be made to the contractor. The difference between the contract price and payment to date is due to unspent provisional sums. The final payment was made in November, 1993”.

E

“ELP A” Addendum 2

There is no outstanding payment to be made to the contractor. The difference between the contract price and payment to date due to unspent provisional sums. The final payment was made in October, 1994”.

F

The ruling of Ogundare, JSC., in respect of the application was delivered on 24th June, 2002. It reads in part as follows:

“I find no merit whatsoever in this application. The evidence before us is that N.N.P.C is not now owing the 1st defendant any amount as the 1st defendant has been fully paid in 1993 and 1994 in respect of contracts 1 and 2 respectively. Furthermore, there is evidence before us that the 1st defendant is no more in existence”.

G

Now, the appellant is contending that that decision of the Supreme Court, per Ogundare, JSC., was not only interlocutory but was not necessary in view of the application before the court. The appellant stated that what was before the court was an application to amend the notice of appeal of the appellant, which was granted. It is further argued for the

H

appellant that the facts so disclosed are not sufficient to ground the decision of the court.

Be that as it may, that argument of learned counsel for the appellant must however, be viewed against the background of the facts that had arisen in the proceedings. The main question to my mind and which the appellant has to overcome to succeed is, whether the appellant had at any time before 1993 obtained an order of “mareva” injunction against the total sum it was claiming from Mannesmann against the funds held by the respondent in relation to the funds payable to Mannesmann by the respondent.

In my humble view, this matter would have been free of difficulty if such an order had been obtained at the earliest opportunity when it was thought that the German Company, Mannesmann, may make away with the money that it would collect from the respondent, and therefore would fail to honour its obligations to the appellant. Had such an order been in terms of the mareva injunction made in favour of the appellant at the earliest opportunity, then the claim against the respondent would have been cognisable. But as that was not the case here, I must resolve this issue against the appellant.

For the above reasons and the fuller reasons given by my learned brother, Edozie, JSC., I would also dismiss this appeal and I abide with the order as to costs.

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