

SUPREME COURT OF NIGERIA
16TH DECEMBER, 2005. SC. 49/1997
CORAM:- S. U. ONU, A. I. KATSINA-ALU, G. A.
OGUNTADE, M. MOHAMMED, I. F. OGBUAGU, JJSC

AUTO IMPORT EXPORT APPELLANT
AND
1. J. A. A. ADEBAYO
(Receiver/Manager, Continental
Motors & Engineering Co. Ltd. RESPONDENTS/
2. A. O. OBIKOYA & SONS LTD. DEFENDANTS
3. NATIONAL BANK OF NIG. LTD.

ACTIONS - Contracts - Waiver - Bill of exchange - Guarantee - Courts
- Where plaintiff accepted bills drawn contrary to contract - It is deemed
to have waived its right - As found by the 2 lower courts - But to an extent
(H1)

ACTIONS - Waiver - Pleadings - A party's duty is to plead relevant facts
- And leave the court - To determine the consequences in law (H2)

BANKING - Bill of Exchange Act - Liability thereunder - Makes the 1st
respondent also liable - Together with 2nd respondent - To pay the total
value of the dishonoured bills (H3)

BANKING - Bill of Exchange Act - Banks liability under the Act - Where
the clause "without recourse" - Is endorsed on the bill - The Bank is not
liable - Under s.16 of the Act (H4)

BANKING - Courts - Guarantee contract - Though 3rd respondent is not
liable under Bill of Exchange Act - For the dishonoured cheques - It is liable
under the Contract of Guarantee - Contrary to wrongful findings of the
lower courts (H5)

ACTIONS - Banking - Guarantee - Liability - Waiver - Pleadings - As the plaintiff's action is based on two planks - It succeeds against the 3rd respondent - On the basis of the Deed of Guarantee (H6)

FACTS

Before the High Court of Lagos, the plaintiff/appellant issued a writ of summons against the defendants/respondents and claimed inter alia, jointly and severally the sum of N1,089,743.50 (US \$1,700,000.00) being the balance (plus interest) of the price of motor vehicles, spare parts and machinery. The Appellant, a Romanian Company engaged in the business of exportation of motor vehicles and spare parts from Romania reached an agreement with Continental Motors and Engineering Company Ltd. a company incorporated in Nigeria, who took delivery of the goods. A written agreement was entered into with the 3rd respondent, National Bank of Nigeria which gave 100% Cover of guarantee to the appellant for the credit granted to the Nigerian Buyer. The Nigerian buyer defaulted in its obligation to fully pay for the goods. In the process of settling the matter of the balance due, bill of exchange (3 bank drafts) bearing the clause "*without recourse*" were issued in the appellant's favour for the balance due to it. But the cheques were dishonoured upon presentation.

Appellant's claim was based on the dishonoured cheques, and the contract of guarantee by which the 3rd respondent guaranteed the entire contract sum. The trial Court held that only the 2nd respondent remains liable to the appellant for payment of the sum as claimed in the writ and entered judgment in favour of the appellant. The 2nd respondent, dissatisfied with this judgment brought an appeal to the Court of Appeal. The appellant also brought a cross appeal. The Court of Appeal struck out the 2nd respondent's appeal and dismissed that of the appellant, thereby affirming the trial court's judgment. The two lower courts in finding waiver against appellant by which they rightly found 3rd respondent not liable for the dishonoured drafts, failed to consider the implication of the Contract of Guarantee. Dissatisfied with the judgment, the appellant has further appealed to the Supreme Court.

ISSUES OF DETERMINATION

“(1) Whether the appellant had waived its right of recovering the balance of the debt of \$1.7million and interest from the 3rd respondent and whether the 3rd respondent can validly rely on the defence of waiver where such was not pleaded.

(2) Whether upon a proper construction of exhibit 5, the endorsement of the three (3) drafts, exhibits 8, 8A, 8B by the 3rd respondent was a mere formality or a recognition of the 3rd respondent’s continued indebtedness to the appellant and a duty under the Bills of Exchange Act to pay the said sum of \$1.7million plus interest to the appellant.

(3) Whether upon a proper construction of exhibit 5, the appellant’s right to payment against the 3rd respondent should be determined on the basis of the three (3) irregularly drawn drafts, exhibits 8, 8A and 8B or its further amended statement of claim.

(4) Given the circumstances of this case and upon a proper construction of exhibit 5, whether the words ‘without recourse’ indorsed on the three drafts, exhibits 8, 8A and 8B operate to exclude the 3rd respondent from liability of paying the sum of \$1.7 million plus interest.

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

Where plaintiff accepted bills drawn contrary to contract

1. The trial court and the court below rightly held in my view that it was open to the plaintiff/appellant to have refused to accept the bills exhibits 8, 8A and 8B on the ground that they were not drawn in the manner agreed in exhibit 5; and that not having so refused them had waived its right to complain that the bills were not validly issued. It is however important to understand the nature of the right that the plaintiff/appellant waived by such non-objection. The deep error into which both courts below fell was to assume that the plaintiff/appellant by negotiating the bills had thereby agreed to forfeit its right of action against the 3rd respondent on the contract of guarantee.

But first let me deal with the argument by the plaintiff/appellant’s counsel that ‘waiver’ was not an issue on the pleadings. It must be understood that the law applicable to bills of exchange is largely statutory,

and in Nigeria, the applicable law is the Bills of Exchange Act, Cap.35, 1990 Laws of the Federation. Once a bill of exchange which ex-facie fulfils all the essential pre-requisites as stipulated under the Act has come into existence, the determination of the liabilities of the parties to the bill must
B be determined as laid down under the Act. The plaintiff/appellant by negotiating the bills in the form in which they were drawn gave them the appearance of bills validly drawn under the Law. If the plaintiff had rejected the bills and insisted that they be drawn in accordance with exhibit
C 5, it would not have become an issue in the proceedings that the bills were improperly issued. Having agreed that the bills were validly drawn by negotiating them, the plaintiff/appellant could not stop the courts below from treating the said bills otherwise than as provided under the Bills of Exchange Act. It is only to that extent that the plaintiff/appellant could be
D said to have waived its right.

Surely, the plaintiff/appellant in that case could not have expected the courts below not to treat the bills as valid bills of exchange when ex-facie they comply with the requirements of the Law under the Bills of
E Exchange Act, Cap.35. In that narrow sense, it is my view that the two courts below were right in holding that the plaintiff/appellant by negotiating the bills had waived its right to complain as to the manner the bills were drawn. (pp. 3049 C/ 3052 B)

F
Waiver - Pleadings - A party's duty is to plead relevant facts

2. Given the circumstances of this case, it was only necessary for the 3rd respondent to plead the facts which estopped the plaintiff/appellant from
G contesting that the bills were not issued in accordance with the terms of exhibit 5. And precisely, this was what the 3rd respondent did in paragraphs 7(e) and (8) of its Further amended Statement of defence earlier reproduced.

What the 3rd defendant pleaded above was that the plaintiff, having
H received and negotiated exhibits 8, 8A and 8B in the form in which they were drawn could no longer argue that they were not validly issued. I think that the argument of plaintiff/appellant's counsel that the 3rd respondent did not plead waiver is not well founded. A party's duty is to plead relevant

facts and to leave the court to apply the law or determine the consequences in law upon the facts pleaded. (p. 3050 B)

Bill of Exchange Act - Liability thereunder

3. Under the Bills of Exchange Act the 1st and 2nd respondent as drawer and acceptor respectively of the bills should have been held jointly and severally liable to pay the total value of the bills which is US\$1.7million. There was no basis to exclude the 1st respondent from liability as the two courts below did. Their liability is as prescribed under sections 54 and 55 of the Bills of Exchange Act above. (p. 3053 C)

Bill of Exchange Act - Banks liability under the Act

4. The liability of the 3rd respondent under the Bills of Exchange Act is however a different matter. Section 16 of the Act permits an endorsee to limit or negative its liability under a bill of exchange. The plaintiff/appellant having negotiated the bills, which carried the endorsement “*without recourse*”, would appear to have accepted that it had no right of action against the 3rd respondent under the Bills of Exchange Act. The meaning of the phrase is as explained in the passage of the judgment of the trial court which I reproduced earlier. Put simply, the phrase conveys to subsequent endorsees and holders in due course that the 3rd respondent was not liable on the bills.

The conclusion is inevitable that the 3rd respondent having negatived its liability on the bills of exchange could not be held liable on the said bills. The two courts below, in so far as they relied on Section 16 of the Bills of exchange Act were right in their conclusion that the 3rd respondent could not be held liable under exhibits 8, 8A and 8B. (p. 3053 E)

BANKING - Courts - Guarantee contract

5. But was the 3rd respondent entitled to walk away free from liability under plaintiffs suit? I think not. The two Courts below viewed plaintiffs claim rather too narrowly. They both assumed that plaintiffs claim against the 3rd respondent was based exclusively on the dishonoured bills of exchange. But a perusal of plaintiff's pleadings reveals that plaintiffs case

was more broadly based than appreciated by the two courts below. Plaintiffs claim was founded on two planks namely (1) the dishonoured bills of exchange exhibits 8, 8A and 8B and (2) the deeds of guarantee, which the 3rd respondent executed in order to get the plaintiff grant credit
B to the Nigerian buyer.

It seems clear to me that the dishonour of the bill was as much an injury to the plaintiff as it was to the 3rd respondent since it destroyed the only lifeline thrown to the 3rd respondent to extricate itself from the obligations it entered into under the deeds of guarantee for the debts owed
C by the Nigerian buyer.

It would in my view amount to a monumental failure of justice to allow the 3rd respondent who guaranteed the re-payment of the credit granted by the plaintiff to the Nigerian buyer to walk away free from
D liability while the debt, the re-payment of which it guaranteed remained unpaid. The two courts below should have seen that the recourse to exhibit 5 and the drawing of bills of exchange was the culmination of the attempts made by the plaintiff to force the 3rd respondent to honour its obligation
E under the deeds of guarantee rather than an escape route for the 3rd respondent. Indeed, it would have turned out to be a true escape route had the 2nd respondent honoured the bills of exchange it accepted.
(pp. 3054 A/ 3056 F)

F ***Pleadings - As the plaintiff's action is based on two planks***

6. It seems to me also that the error of the two courts below was in treating plaintiffs case as solely an action under a dishonoured bill of exchange. If the plaintiff had elected to base its claim solely on the Bills of Exchange Act,
G there would have been no need for it to plead the transactions between it and the Nigerian buyer pursuant to which the 3rd respondent executed deeds of guarantee in its (plaintiff's) favour. The plaintiff would only have pleaded the facts, which enabled the liabilities of the parties to the bills to
H be determined under the Bills of exchange Act. This is because, consideration, an important element under the Law of contract is generally presumed in an action brought under the Bills of Exchange Act. Further, in the manner the two courts below treated the issue of waiver, it was

assumed that what the plaintiff waived was the right to be paid the balance due to it under the deeds of guarantee executed in its favour by the 3rd respondent. It is however manifest that the right, which the plaintiff could be deemed to have waived is not to contest that the liabilities under the bills be determined otherwise than as provided under the Bills of Exchange Act. B

In the final conclusion, the judgments of the two courts below are set aside. In its place, judgment is given against the 1st, 2nd and 3rd defendants jointly and severally for the sum of US \$1.7 million. The judgment sum shall attract interest at the rate of 12% per annum from 2/12/77 until 16th July 1986 when the judgment of the trial court was given and thereafter interest at 6% per annum until the judgment debt and interest are fully paid. (p. 3057 B) C

NOTABLE POINTS OF INTEREST D

ONU JSC (Concurring on a different reasoning)

1. As waiver is not pleaded - Counsel's address cannot be evidence

Finally, I agree with the Appellant's submission that the defence of waiver is not pleaded and the trial court and the court below were wrong in holding otherwise since parties and Court are bound by pleadings proved at the trial. See *Adesanya v. Otuewu*- (Supra). Mindful of the fact that the court cannot raise the issue of waiver suo motu and place reliance on it in reaching a decision, adding that this Court has always held that courts should refrain from making out a case for a party which he does not make himself. See per Kawu, J.S.C in *Adebanjo v. Brown* (Supra) at page 675. F

It is a trite principle of law, emphasized by the Appellant, that parties are bound by the pleadings and evidence while a matter not pleaded goes to no issue. G

Furthermore, since no defence of waiver was pleaded, the court cannot rely on it to find in favour of the Defendant. It is note worthy, to point out that the only time when the issue of waiver was raised at the trial of this action was during address by the counsel to the 3rd Respondent qua 4th defendant, adding that the Counsel's oral address or brief of argument, however sound, cannot be a substitute for credible evidence upon which the court is obliged to rely upon in reaching a decision. In fact, the address H

of Counsel is supposed to deal only with the evidence before the court and not to supplant the inadequacy of evidence given at the trial. (p. 3068 A)

2. Bank is liable for dishonoured drafts as an endorser

B However, the learned Justices of the Court below went ahead, erroneously in my view, to absolve the 3rd Respondent of liability by holding that it was not an acceptor. Thus, I agree with the Appellant that even though the 3rd Respondent may not be liable to it (Appellant) as an acceptor of the bills, C it still remains liable as an endorser of the bills. Had the two courts below considered the above section, they would have reached a different conclusion. Therefore, I agree with the Appellant further that pursuant to section 55 (c) Bills of exchange Law, it does not lie in 3rd Respondent's D mouth to raise any issue as to the genuineness or regularity of the drafts since it is an endorser of the bills.

Further, I hold that the endorsement by the 3rd Respondent on the three drafts cannot be superfluous because under Section 27(2) of the Bill of Exchange Act, Cap. 21 (ibid) the 3rd Respondent is a party to the bill E having signed it or endorsed it. This fact entitles the Appellant to be a holder for value not only as regards the acceptor but all parties to the bill, including the 3rd Respondent. Thus, even if the 3rd Respondent had signed the bill as a stranger, it still assumes the liability of an endorser. See Sections 27 F (2) and 50 of the Act (ibid), the killer which provides:

“Where a person signs a bill otherwise, than as a drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course.”

G Also see the importance of Section 3 of the same Bill of Exchange Act which provides:

“Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.” (p. 3074 B)

H OGBUAGUJSC

3. Meaning of the legal concept of waiver

Let me briefly touch/deal with the principle of Waiver. The concept of waiver, is said to be that a person who is under no legal liability and having

full knowledge of his right or interest conferred on him by law, and who intentionally, decides to give them (or some of them) up, cannot be heard to complain that he has not been permitted to exercise those right or that he has been denied the enjoyment of those interests.

Waiver is defined as the abandonment of a right. However, to B amount to a waiver - express or implied, two elements it is settled, must co-exist, namely -

i. The party against whom the doctrine is raised, must have knowledge or be aware of the act or omission which constitutes the waiver C and

ii. He must do some unequivocal act adopting or recognizing the act or omission.

In the case of Matthias v. Smallwood (supra), it was held that a right D to re-enter under a lease, is not waived by the lessor, unless, knowing the facts on which the right arises, he does something unequivocal which recognizes the continuance of the lease.

It need be stressed and this is settled, that waiver, is the intentional and voluntary surrender or relinquishment of a known privilege or right by E a party entitled to the same, which, at his option, he could have insisted upon. (p. 3086 A)

4. Implication of being a guarantor

I will now deal with who is a Guarantor and what a Guarantee means. In F the case of Trade Bank PLC v. Khalid Barakat Elami (2002) 13 NWLR (pt. 836) 158 cited and relied on by the Appellant, the Court of Appeal, stated/ held at page 216 as follows:

“A guarantor is technically a debtor because where the principal G debtor fails to pay a debt, the guarantor will be called upon to pay the loan so guaranteed. The guarantor can however, be absolved from liability if he can show that the principal debtor has paid the loan”. (The underlining mine] H

As rightly submitted by the learned counsel for the Appellant in their Reply Brief, in the instant case, the debt remains unpaid. In my respectful view and I so hold, that the 3rd Respondent as the Guarantor, is liable to

3036 Auto Import Export v. Adebayo (2005) 12 KLR Oguntade JSC

pay the same since the 2nd Respondent, is unable to pay, more so, as the said cheques/drafts, were dishonored by reason of the fact that the 2nd Respondent, did not have sufficient funds in its Account with its Bankers to take care of the indebtedness or for the sums stated in the said Cheques/Bills. (p. 3090 C)

REPRESENTATION

O. M. Sagay Esq. for the Appellant.

O. O. Delano Esq. for the 2nd Respondent.

C Mr. Alex A. Ajayi Esq. (Wasiu Ajibore and L. Tebira with him) for 1st and 3rd Respondents

CASES REFERRED TO

D Akpapuna v. Obi Nzeka (1983) 2 SCNLR 1

Trade Bank PLC v. Khalid Barakat Elami (2002) 13 NWLR (pt. 836) 158

Laguno v. Toku (1992) NWLR (Pt. 2233) 278

F.H.A v. Sommer (1986) 1 NMLR (Pt 17) 533

E Salawu Yoye v. Olubode & Ors. (1974) 10 SC. 209 at 215

Ariori & ors. v. Elemo & ors. (1983) 1 S.C. 13 at 48 -49; (1983) 14 NSCC. 1 at 20; (1985) 1 SCNLR 1 at 25

Ezomo v. Oyakhire (1985) 1 NWLR (pt.2) 195)

F Adegoke Motors Ltd. v. Dr. Adesanya & Anor. (1989) 3 NWLR (pt. 109) 250 at 292; (1989 5 SCNJ 80

Olatunde v. Awolowo University & Anor. (1998) NWLR 178

Fullers Theatre and Vandayike Co. Ltd. v. Rofo (1925) A.C. 435

G **STATUTES REFERRED TO**

Bills of Exchange Act (Cap. 35) L.F.N., 1990 ss. 3, 16, 27, 30(1) & (2), 38 and 56

Bills of Exchange Act 1882 s. 62(1)

H

LEAD JUDGMENT BY OGUNTADE JSC.

The appellant, a Romanian company was the plaintiff at the Lagos High Court. It had on 14-11-79 issued its writ of summons against three

defendants claiming for the following:

"The Plaintiffs claim against the defendants jointly and/or severally is for the sum of N1,089,743.50 (U.S.\$1,700,000.00) being the balance (plus interest) of the price of motor vehicles, spare parts and machinery (hereinafter called 'The Goods') sold and delivered by the Plaintiff in Lagos to Continental Motors and Engineering Company Limited now under the Management and Receivership of Mr. Basil Adenrele Adu Liquidator (hereinafter called 'The 1st Defendant') which said goods were by an agreement between the 1st Defendant and the 2nd Defendant transferred to the 2nd Defendant for reward, the payment of which said sum of N1,089,743.50 (U.S.\$1,700,000) having been guaranteed by the 3rd Defendant by virtue of a Memo-random in writing dated the 20th May, 1975 been to balance price of motor vehicles, spare parts and machinery - N990,448.00 (U.S.\$1,153,500)

To interest at 5%

per annum up to and including

20/5/75 as agreed - N9,9295.50 (U.S.\$153,500)

N1,089,743.50 (U.S.\$1,700,000)

The Defendants have refused to pay despite repeated demands, and the Plaintiff also claims interests on the said sum of N1,089,743.50 (U.S.\$1,700,000) at the rate of 12% per annum from 3/12/77 until the date of judgment and thereafter at the rate of 6% per annum until the judgment debt and costs have been fully paid."

In the course of the trial before the High Court, the plaintiff amended its Statement of claim; and another defendant, Mr. J. A. A. Adebayo (now the 1st respondent) was joined to the suit as the 2nd defendant. The plaintiff later withdrew its suit against Mr. Basil Adenrele Adu, who had at the inception of the suit been sued as 1st defendant.

Pleadings having been filed and exchanged, the suit was heard by Candide Johnson C. J. (of blessed memory). The plaintiff called one witness. The present 3rd respondent who was identified at the trial as the 4th defendant also called one witness. On 16-7-86, the learned Chief Judge in his judgment concluded thus:

"On the views above held, it is my judgment that the 3rd defendant

remains liable to the plaintiff for the payment of the agreed sum of \$1.7million dollars otherwise N1,089,743.50k as claimed in the writ.

I find no case made out against the 2nd and 4th defendants on the claim and the case is dismissed against both the 2nd and 4th defendants. I hereby enter judgment in favour of the plaintiff against the 3rd defendant in the sum of N1,089,743.50K with interest at 12% per annum from 2/12/77 until today and thereafter interest at 6% per annum until the judgment debt and interest are fully paid.”

It is necessary that I observe here that the 2nd defendant before the High Court is now described in this appeal as 1st respondent, the 3rd defendant as 2nd respondent and the 4th defendant as 3rd respondent. This observation becomes necessary in order to align the description of parties in the High Court with their description in the court below and this Court.

The 2nd respondent was dissatisfied with the judgment of the trial court. It brought an appeal against it. The plaintiff was also dissatisfied. It brought a cross-appeal of its own. The Court of Appeal (Lagos Division) heard the appeal. In its judgment on 1-7-96, the court below struck out the appeal by the 2nd respondent and dismissed the cross-appeal by the plaintiff. The result was that the judgment of the trial court remained undisturbed. The plaintiff, dissatisfied with the judgment of the court below, has come on a last appeal before this court. In its appellant’s brief, the issues identified as arising for determination in the appeal are these:

“(1) *Whether the appellant had waived its right of recovering the balance of the debt of \$1.7million and interest from the 3rd respondent and whether the 3rd respondent can validly rely on the defence of waiver where such was not pleaded.*

(2) *Whether upon a proper construction of exhibit 5, the endorsement of the three (3) drafts, exhibits 8, 8A, 8B by the 3rd respondent was a mere formality or a recognition of the 3rd respondent’s continued indebtedness to the appellant and a duty under the Bills of Exchange Act to pay the said sum of \$1.7million plus interest to the appellant.*

(3) *Whether upon a proper construction of exhibit 5, the appellant’s right to payment against the 3rd respondent should be determined on the basis of the three (3) irregularly drawn drafts, exhibits 8, 8A and 8B or*

its further amended statement of claim.

(4) Given the circumstances of this case and upon a proper construction of exhibit 5, whether the words ‘without recourse’ indorsed on the three drafts, exhibits 8, 8A and 8B operate to exclude the 3rd respondent from liability of paying the sum of \$1.7 million plus interest given the circumstances of the transaction.” B

The 1st and 3rd respondents through their counsel filed a joint brief wherein they identified the under-mentioned issues as arising for determination.

“(1) Whether the appellant, having taken advantage of the two benefits open to it i.e. by accepting the 3 drafts as drawn without protests or rejection (sic) could at a later date complain that the drafts were wrongly or irregularly drawn.” C

(2) Whether the 2nd respondent as the acceptor of the three bills of exchange is the person primarily liable on the bills as drawn to the appellant? D

(3) Was there any further liability attaching to the 1st and 3rd respondents when the 2nd respondent had admitted in writing owing the appellant the entire sum of US\$1,700,000.00 US (sic) dollars claimed in the action in its letter dated 12/12/75 pleaded in paragraph 35 of the further amended statement of claim? E

(4) Whether the phrase ‘without recourse’ inserted in the agreement exhibit 5 protected both the 1st and 3rd respondents from liability in the sum of US\$1,700,000.00.” F

The 2nd respondent by its counsel raised one solitary issue for determination thus:

“Whether the 1st and 3rd respondents have discharged their obligation to pay for goods sold and delivered to the 1st respondent.” G

It is appropriate for me to say at this stage that the 2nd respondent against whom the trial court and the court below gave judgment has not appealed to this court against the judgment of the court below. One would ordinarily wonder why the plaintiff had pursued this appeal to this Court, since there is in any case a judgment in its favour against the 2nd respondent. The plaintiff in its Notice of Appeal stated the reliefs being sought from this H

Court thus:

“An order setting aside the decision of the Court of Appeal dismissing the cross-appeal and entering judgment against the 2nd and 4th defendants jointly and severally for the sum of US\$1,700,000.00 (One million seven hundred thousand US Dollars) July, 1996 (sic).”

Since the plaintiff never withdrew its claim against the 2nd respondent and since there is in any case an extant judgment against the 2nd respondent, it is fair to conclude that what the plaintiff seeks by its appeal is a judgment against all of 1st, 2nd and 3rd respondents jointly and severally for the sum claimed.

The issues for determination raised by the 1st, 2nd and 3rd respondents are all amply accommodated under appellant’s issues. I shall therefore be guided by the appellant’s issues. These issues dovetail unto each other. I intend to discuss all four of them together. But before doing so, I intend to examine and expose the pleadings upon which the suit was tried. The facts pleaded by the parties may be summarized thus:

The plaintiff, a Romanian company engaged in the business of exportation of motor vehicles and spare parts from Romania reached an agreement on 18/10/69 with a company incorporated in Nigeria — Continental Motors and Engineering Company Ltd. (hereinafter referred to as the Nigerian buyer) to sell to the latter various motor vehicles and spare parts (hereinafter referred to as the goods). Written agreements were entered into as to the manner the Nigerian buyer was to pay for the goods. For the purpose of this case the relevant agreement that was entered into in May, 1971 stipulates that the 3rd respondent - National Bank of Nigeria would give 100% cover or guarantee to the plaintiff for the credit granted to the Nigerian buyer. It was agreed that 20% of the value of the goods would be paid for within six months of the delivery of the goods to the Nigerian buyer and the balance of 80% was to be paid within two years of delivery. The balance of 80% was to attract 5% interest per annum. The 3rd respondent on 4/5/71 and 27/6/70 duly gave to the plaintiff written guarantees for the credit extended to the Nigerian buyer. The appellant shipped goods worth US\$9,314,565.58 to the Nigerian buyer. The Nigerian buyer defaulted in its obligation to pay for the goods.

On 2-10-72, an extraordinary Resolution was passed winding up the Nigerian buyer. The plaintiff in an effort to recover the value of the goods shipped to the Nigerian buyer from the 3rd respondent under the deeds of guarantee instructed its solicitors to wind up the 3rd respondent bank. Meanwhile, the 3rd respondent appointed the 1st respondent as the Receiver/Manager of the Nigerian buyer. In the attempt to avert being wound up, the 3rd respondent agreed to pay the sum due to the plaintiff for the goods sold to the Nigerian buyer. The 3rd respondent actually paid a substantial portion of the amount due leaving a balance of \$1.7 million. Some of the assets of the Nigerian buyer were acquired by the 2nd Respondent. The assets were worth U.S. \$1.7million. On 20-5-95, a meeting was held between the plaintiff, 1st, 2nd and 3rd respondents. A written agreement was reached as to the manner the outstanding sum of \$1.7 million was to be liquidated through the issuance of three bills of exchange. The bills were later issued but not in the manner agreed. The bills were dishonoured upon presentment. The 2nd respondent agreed that it was indebted to the plaintiff for \$1.7 million. In these circumstances, the plaintiff issued its writ of summons claiming as earlier stated.

The 1st and 3rd respondents in their further amended Statement of defence denied plaintiffs claim. In particular they pleaded in paragraphs 2B, 2C, 2D, 4, 7(e) and 8 of the amended Statement of defence thus:

“2B. With further reference to paragraphs 26, 27 of the Further Amended Statement of Claim the 2nd and 4th Defendants admit the averment in these paragraphs to the extent that the sum of \$1.7 million dollars or (N1,089,741.50) owing by the 3rd Defendant to the Plaintiff by the 3rd defendant drawing three drafts on the 3rd Defendant Messrs. A. Obikoya & Sons Limited for-

(a) \$500,000.00 due on 1/12/75

(b) \$600,000.00 due on 1/12/76

(c) \$600,000.00 due on 1/12/77 and these drafts would be accepted by the 3rd Defendant and returned to the 4th Defendant Bank. The Plaintiff WITHOUT RECOURSE to the Bank as full and final payment for the balance of all amounts due to the words ‘WITHOUT RECOURSE’ inserted in the Memorandum of Agreement dated 20th May, 1975.

2C. With reference to paragraph 37 of the said Further Amended Statement of Claim dated 22nd December, 1983, these defendants admit paragraph 37 of the Statement of Claim to the extent that the 3rd Defendant failed and refused to make payment in breach of the Memorandum of Agreement of the 20th May, 1975 while the 2nd and 4th Defendants deny categorically any demand by the Plaintiff from them the recovery of the aid amount of \$1.7million dollars or (N1,089,743.50).

2D. The 2nd and 4th Defendants will rely on both legal and equitable defences at the trial of this action especially that these defendants are not liable since the 2nd defendant had transferred all the assets of the Continental motors and Engineering Company Limited to the 3rd defendant A. Obikoya & Sons Limited who have accepted liability to pay the outstanding bills amounting to \$1.7million U.S.Dollars or (N1,089,743.50).

4. The 4th Defendant will contend at the trial that he has discharged its obligations on the Memo-randum of Agreement dated 20/5/75 and has no further liabilities to discharge to the plaintiff, and the 2nd defendant will also contend that he will not be liable since he has transferred all assets of Continental Motors and Engineering Company Limited to the 3rd Defendant A. Obikoya & Sons Limited who then accepted liability for the sum of \$1.7million U.S. Dollars in accordance with the Agreement dated 20/5/75.

7(e). The 3rd Defendant having accepted the three drafts i.e.:-

(1) \$500,000.00 due on 1/12/75

(2) \$600,000.00 due on 1/12/76

(3) \$600,000.00 due on 1/12/77

G drawn by the 2nd defendant and accepted by the 3rd Defendant A. O. Obikoya & Sons Limited and endorsed by the 4th Defendant to the Romania Bank without recourse to the 4th Defendant denies any liability to the Plaintiff in the said sum of \$1.7million dollars with interest claimed H (N1,089,743.50) nor in any sum or at all.

8. In further answer to paragraph 33 of the Further Amended Statement of Claim, the 4th Defendant Contends that the said 3 drafts amount to \$1.7million dollars were regularly drawn in compliance with

the provisions of the Memorandum of Agreement dated 20th May, 1975. In the alternative the 2nd and 4th Defendants contend that, the 3rd Defendant having accepted to provide funds for payment of the DRAFTS will be liable to dishonouring the Bills.”

The 2nd respondent in paragraphs 1 to 4 of its Amended Statement of defence pleaded thus:

“1. Save except as are hereinafter specifically admitted the 3rd Defendant denies each and every allegation of fact contained in the Further Amended Statement of Claim as if each were set out seriatim and separately denied.

2. The 3rd defendant denies paragraphs 1-4, 7-42 of the Further Amended Statement of Claim.

3. If (which is not admitted) the 3rd defendant is under a contractual obligation to pay any sum of money to the plaintiff such obligation cannot be performed without the consent of the Federal Minister of Finance given pursuant to the Exchange Control Act, 1962.

4. Neither the Federal Minister of Finance nor the Central Bank (to whom the Minister’s powers have been duly delegated) have given his permission or consent to the transaction giving rise to the alleged obligations of the 3rd defendant to pay money to the Plaintiff.”

At the trial, the plaintiffs only witness testified in support of plaintiffs case. The witness called by the 3rd respondent also testified. At page 311 of the record, the only defence witness testified thus:

“There is an agreement by the parties for 3rd defendant to pay the amount claimed. Exhibit 5 shown to the witness. I identify exhibit 5 as the agreement. The three drafts were endorsed by all the parties and sent to Romanian Company. In Banking, ‘without recourse’ discharge the endorser from liability. All assets of the Continental Motors were duly transferred to Obikoya & Sons as agreed.”

It is apparent that the only defence which the 3rd respondent canvassed at the trial was that as the three bills of exchange were endorsed by all the parties and sent to the plaintiff in accordance with the terms of the agreement, exhibit 5, the 3rd respondent was discharged from further liability to the plaintiff because the bills of exchange were endorsed

‘without recourse’ to it the 3rd respondent.

The first matter to be considered is exhibit 5. Did the terms of exhibit 5 extend enough to absolve the 3rd respondent from liability to the plaintiff on the outstanding sum of \$1 .7 million? The trial court in its judgment almost exclusively relied on exhibit ‘5’ and the futile attempts by parties to comply with its terms. At pages 368-369 of the record, the trial court in its judgment said:

“All the agreed terms except those in paragraph 4(ii) gave no cause for dispute. The drafts were issued but not by the bank as agreed. They were accepted by the 3rd defendant and the plaintiff also accepted the endorsement without complaint and negotiated it. The complaint arose because the proceeds of the bills of exchange were not paid to the plaintiff. The drafts exhibits 8-8a were dishonoured and duly protested by exhibits 9-9B. The amount of \$1.7million dollars due on the said bills remain unpaid hence this action.

It is not and cannot be disputed that the basis of this action is the agreement in exhibit 5. The question which I believe the court is called upon to decide is, which of the defendants 2-4 is liable to make good the sum due?” (Underlining mine)

From the question which the trial court framed in the passage underlined above, one gets the impression that the trial court believed that the plaintiffs case was solely based on the dishonoured bills of exchange. I shall later in this judgment discuss the correctness of that approach. The trial court went further at pages 371-373 of the record to express the views, which spelt the death knell to the plaintiff’s case thus against 3rd respondent thus:

“There is no doubt that the plaintiff was entitled to insist on the issue of the drafts in the terms of Exhibit 5. When however it accepted and negotiated the drafts as issued though wrongly, it is deemed by at least conduct to have waived its insistence on its right to the proper mode of issue.

Is the obligation of the 4th defendant we may ask discharged by that act of waiver? To this end we have recourse to the term ‘without recourse’ to the bank in Exhibit 5. Can the plaintiff come back again to the 4th

defendant after accepting the drafts as issued on the failure to realize the proceeds? The answer would appear to be no. But let us examine it fully. The 4th defendant had got the drafts prepared though wrongly and endorsed it to the Romanians, 'without recourse' to it i.e. the Bank. At that stage the 4th defendant's obligation would appear to have been fully discharged on acceptance by the plaintiff without protest or rejection. The full import and meaning of the words 'without recourse' is again providing in Black's Dictionary (*supra*) when in defining recourse it states:-

'To recur. The right of a holder of a negotiable instrument to recover against a party secondarily liable, e.g. prior endorser. Therefore, if a prior endorser signs without recourse, he exempts himself from liability for payment.'

Again the same author defined the phrase 'without recourse' thus:-

'This phrase, used in making a qualified endorsement of a negotiable instrument, signifies that the endorser means to save himself from liability to subsequent holders, and is a notification that, if payment is refused by the parties primarily liable, recourse cannot be had to him. An endorser 'without recourse' specially declines to assume any responsibility for payment. He assures no contractual liability by virtue of the endorsement itself, and becomes a mere assignor of the title to the paper, but such an endorsement does not indicate that the endorsee takes with notice of defects, or that he does not take on credit of the other parties to the note.'

Is the discharge of the 4th defendant complete as between the parties primarily liable? 3rd defendant is the person primarily liable to discharge the outstanding debt.'

The court below took the same view with the trial court when at pages 553-554 of the record it said in its judgment:

"In this case, waiver was not specifically pleaded by any of the parties at the trial. The nearest of this was in paragraph 2D of the Statement of Defence of the 1st and 3rd respondents where they pleaded reliance on both legal and equitable defences. But from the pleadings of the parties and the evidence at the trial, it is not in dispute that there was an irregularity or breach of the terms and conditions of Exhibit 5 by which

the parties were bound, in drawing up the three drafts Exhibits 8, 8A and 8B. The pleading and evidence has shown that despite this irregularity, the Plaintiff, Respondent accepted the drafts and acted on them accordingly. Under this situation, the trial court, in my respectful view, is entitled to
B *assume from the conduct of the plaintiff/respondent, that having failed to raise any objection at the time the drafts were presented to it, has decided to abandon its right to have the drafts correctly drawn up in compliance with the provisions of Exhibit 5. I agree with the learned Chief Judge*
C *when, in his judgment at p.371 of the record said:-*

“There is no doubt that the plaintiff was entitled to insist on the issue of the drafts in terms of Exhibit 5. When however it accepted and negotiated the drafts as I said though wrongly, it is deemed by at least
D *conduct to have waived its insistence on its right to the proper mode of issue.”*

Since waiver was the central basis upon which the two courts below decided the case, it is necessary to examine closely exhibit 5 in relation to exhibits 8, 8A and 8B in order to ascertain whether or not the
E plaintiff had by accepting and negotiating exhibits 8, 8A and 8B waived its right to insist on performance by the 3rd respondent of the terms of exhibit 5. The relevant part of exhibit 5 provides:

“4. Agreement has today been reached at this meeting as follows:-
F *(i) The Bank has agreed to pay to the Romanians by giving instructions to the Central Bank of Nigeria and/or the Bank’s Foreign Correspondents within 48 hours to pay the sum of U.S.\$5,293,781.97.*
(ii) The Bank would draw three drafts on Messrs. A. Obikoya & Sons Limited for-
G *(a) \$500,000.00 due 1/12/75*
(b) \$600,000.00 due 1/12/76
(c) \$600,000.00 due 1/12/77.

totalling U.S.\$1,700,000.00. These drafts would be accepted by
H *Messrs. A. Obikoya & Sons Limited and returned to the Bank within 7 days from the date of this agreement. The Bank will endorse these drafts to the Romanians, without recourse to the Bank, as full and final payment for the balance of all amounts due to the Romanians.*

(ii) In consideration of (ii) above, the bank has agreed to transfer to Messrs. A. Obikoya & Sons Limited, all the assets of Continental Motors and Engineering Company Limited taken over by the Receiver and Manager, excluding freehold landed properties, as at 14th October, 1974 subject to the following conditions:-

(a) all debts due to the continental Motors and Engineering Company Limited as at 14th October, 1974 will be collected by Messrs. A. Obikoya & Sons Limited for account of and on behalf of the Receiver and Manager and/or the Bank, after deducting commission at the agreed rate.

(b) The Receiver and Manager and/or Bank will account to A. Obikoya & Sons Limited for proceeds of all assets sold from 14th October, 1974 up-to-date, less expenditure incurred.

(c) The Bank will not pay any custom duty, rents, N.P.A charges or any other expenses whatsoever in respect of the goods.

(d) The Bank will not be responsible for payment of any expenses in respect of, or incurred by, Continental Motors and Engineering Company Limited in any respect Whatsoever after 21st May, 1975 with the Exception of the salaries and wages of staff who are on the register of the Company as at 20th May, 1975 and in respect of such staff, the Bank's liability would be limited to salaries, wages and allowances up to 4th June, 1975 plus where necessary, salary in lieu of notice for a period not exceeding one month from that date."

Under the terms of exhibit 5 above in paragraph 4(ii), the 3rd respondent was to draw three drafts on the 2nd respondent for a total sum of U.S.\$1,700,000.00. The sum of U.S.\$500,000.00 was due on 1/12/75, U.S.\$600,000.00 due on 1/12/76 and U.S.\$600,000.00 due on 1/12/77. These drafts were to be accepted by the 2nd respondent and returned to the 3rd respondent within 7 days. The 3rd respondent would then endorse the drafts to the plaintiff without recourse to itself. It was in an attempt to satisfy the terms of the agreement between the parties that the bills exhibits 8, 8A and 8B were made. Whereas, under exhibit 5, the 3rd respondent was to draw the bills of exchange, the bills exhibits 8, 8A and 8B were in fact drawn by the 1st respondent. The bills were accepted by the 2nd defendant and later they were endorsed by the 3rd respondent to the plaintiff. The 3rd

respondent which had not drawn the bill as was required of it under exhibit 5 then endorsed the bills “without recourse” to itself. The bills when later negotiated were dishonoured. The plaintiffs protested them and later sued.

Both the trial court and the court below took the view that since the bills exhibits 8, 8A and 8B were not drawn in accordance with the terms of exhibit 5, the plaintiff was at liberty to return the drafts and ask that they be redrawn; and that having negotiated the bills in the form in which they were drawn, the plaintiff had thereby waived its right to contest that the bills were improperly issued.

The 1st and 3rd respondents’ counsel in his brief of argument before this Court argued that since the plaintiff/appellant accepted the bills without protesting that they were irregularly drawn or issued, it had waived its right to complain later. Counsel relied on *Ariori v. Elemo* [1983] 1 SC. 13 at 18; *Adegoke Motors Ltd. v. Dr. L. Adesanya* [1989] 3 NWLR (Pt.109) 250 at 255; *Smyth (Ross J.) & Co. Ltd. v. Banley, Son & Co.* [1940] 3 ALLER 69; *Odu ‘a Investment Co. Ltd. v. Talabi* [1997] 10 NWLR (Pt.523) 1 at 50-57.

Plaintiff/Appellant’s counsel for his part argued that waiver, being an equitable defence could not be relied upon to defeat or over-ride a party’s right to property. He relied on *Ogboru v. Ibori*, a decision of the Court of Appeal, Benin division on 13/7/05. Counsel further argued that in any case parties did not raise ‘waiver’ on their pleadings.

Now in *Ariori & Ors. v. Elemo & Ors.* [1983] N.S.C.C. 1 at page 8, this Court per Eso J.S.C. discussed the nature of waiver thus:

“In the context of this appeal therefore, the first question that one asks is “what is waiver”? Rather than define the word, it is probably appropriate just to describe its concept. For as Pollock said, waiver is a simple and wholly untechnical concept perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence. The concept of waiver must be one that presupposes that the person who is to enjoy a benefit or who has the choice of two benefits is fully aware of his right to the benefit or benefits, but he either neglects to exercise his right to the benefit, or where he has a choice of two, he decides to take one but not both - see Vyvyan v. Vyvyan 30 Beav 65 as per Sir John Romilly M.R.

at p. 74 (reported also in 54 E.R. 817). The exercise has to be a voluntary act. There is little doubt that, a man who is not under any legal disability, should be the best judge of his own interest. If therefore, having full knowledge of the rights, interests, profits or benefits conferred upon or accruing to him by and under the law, but he intentionally decides to give up all these, or some of them, he cannot be heard to complain afterwards that he has not been permitted the exercise of his rights, or that he has suffered by his not having exercised his rights. He should be held to have waived those rights. He is, to put it in another way, estopped from raising the issue. See also Halsbury Laws of England 3rd Edn. Vol. 14 para. 1175."

The trial court and the court below rightly held in my view that it was open to the plaintiff/appellant to have refused to accept the bills exhibits 8, 8A and 8B on the ground that they were not drawn in the manner agreed in exhibit 5; and that not having so refused them had waived its right to complain that the bills were not validly issued. It is however important to understand the nature of the right that the plaintiff/appellant waived by such non-objection. The deep error into which both courts below fell was to assume that the plaintiff/appellant by negotiating the bills had thereby agreed to forfeit its right of action against the 3rd respondent on the contract of guarantee.

But first let me deal with the argument by the plaintiff/appellant's counsel that 'waiver' was not an issue on the pleadings. It must be understood that the law applicable to bills of exchange is largely statutory, and in Nigeria, the applicable law is the Bills of Exchange Act, Cap.35, 1990 Laws of the Federation. Once a bill of exchange which ex-facie fulfils all the essential pre-requisites as stipulated under the Act has come into existence, the determination of the liabilities of the parties to the bill must be determined as laid down under the Act. The plaintiff/appellant by negotiating the bills in the form in which they were drawn gave them the appearance of bills validly drawn under the Law. If the plaintiff had rejected the bills and insisted that they be drawn in accordance with exhibit 5, it

would not have become an issue in the proceedings that the bills were improperly issued. Having agreed that the bills were validly drawn by negotiating them, the plaintiff/appellant could not stop the courts below from treating the said bills otherwise than as provided under the Bills of Exchange Act. It is only to that extent that the plaintiff/appellant could be said to have waived its right.

Given the circumstances of this case, it was only necessary for the 3rd respondent to plead the facts which estopped the plaintiff/appellant from contesting that the bills were not issued in accordance with the terms of exhibit 5. And precisely, this was what the 3rd respondent did in paragraphs 7(e) and (8) of its Further amended Statement of defence earlier reproduced. Once more I reproduce it:

7(e). The 3rd Defendant having accepted the three drafts i.e:-
(1) \$500,000.00 due on 1/12/75
(2) \$600,000.00 due on 1/12/76
(3) \$600,000.00 due on 1/12/77

drawn by the 2nd defendant and accepted by the 3rd Defendant A. O. Obikoya & Sons Limited and endorsed by the 4th Defendant to the Romania Bank without recourse to the 4th Defendant denies any liability to the Plaintiff in the said sum of \$1.7million dollars with interest claimed (N1,089,743.50) nor in any sum or at all.

8. In further answer to paragraph 33 of the Further Amended Statement of Claim, the 4th Defendant Contends that the said 3 drafts amount to \$1.7million dollars were regularly drawn in compliance with the provisions of the Memorandum of Agreement dated 20th May, 1975. In the alternative the 2nd and 4th Defendants contend that, the 3rd Defendant having accepted to provide funds for payment of the DRAFTS will be liable to dishonouring the Bills.”

What the 3rd defendant pleaded above was that the plaintiff, having received and negotiated exhibits 8, 8A and 8B in the form in which they were drawn could no longer argue that they were not validly issued. I think that the argument of plaintiff/appellant’s counsel that the 3rd respondent did not plead waiver is not well founded. A party’s duty is to plead relevant facts and to leave the

court to apply the law or determine the consequences in law upon the facts pleaded.

In *Nwadiaro v. Shell Development Co. Ltd.* [1990] 5 NWLR (part 150) 322 at 333-334, Kolawole JCA (of blessed memory) when confronted with a similar position observed:

“The settled principle of law which is of great antiquity and which has been restated in many authoritative decisions of the courts was stated by Farwell, L.J., thus-

‘But, as the point of pleading is of some importance and was strenuously argued, I propose to state my opinion on it. Order xi. r.4, provides that - ‘every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies.....’ - i.e., the pleader must plead facts, not law, and must not plead the evidence in support of his acts.’

(See *North-Western Salt Company Ltd. v. Electro-Lytic Alkali Co. Ltd.* (1913) 3 KB 422 at 425.)

There is a vital distinction between pleading law, which is not permitted, and raising a point of law in a pleading, which is permitted under rule 1 of Order 29 aforementioned. Pleading law obscures or conceals the facts of the case; raising a point of law defines or isolates an issue or question of law on the facts as pleaded.

Scrutton, L.J., put it in another way. He observed in *Lever Brothers Ltd. And others v. Bell and Another* (1913) 1 K.B. 557.

‘The practice of the courts is to consider and deal with the legal result of pleaded facts, although the particular result alleged is not stated in the pleading.’

The inferences of law to be drawn from the pleaded facts need not be stated in pleadings. Thus, if the material facts are alleged, it is not necessary to plead an implied warranty. (Per Denning, L.J., in *Shaw v. Shaw* (1954) 2 Q.B. 429 page 441).

(See also *The Supreme Court Practice 1985 Volume 1* pages 261- 262”).

Similarly in *Re Vandervells Trusts No. (2)* (1974) 3 All E.R 205 at 213) Lord Denning M.R. said:

“It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument any legal consequence of which the facts permit. The pleadings in this case contained all the material facts.”

Surely, the plaintiff/appellant in that case could not have expected the courts below not to treat the bills as valid bills of exchange when ex- facie they comply with the requirements of the Law under the Bills of Exchange Act, Cap.35. In that narrow sense, it is my view that the two courts below were right in holding that the plaintiff/appellant by negotiating the bills had waived its right to complain as to the manner the bills were drawn.

Sections 16, 54 and 55(1)(a) and (b) of the Bills of Exchange Act Cap 35 provide:

“ 16. The drawer of a bill and any endorsee may therein insert an express stipulation -

(a) negating or limiting his own liability to the holder;

(b) waiving as regards himself some or all of the holder's duties.”

54. The acceptor of a bill by accepting it -

(a) engages that he will pay it according to the tenor of his acceptance

(b) is precluded from denying to a holder in due course -

(i) the existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill.

(ii) in the case of a bill payable to drawer's order, the then capacity of the drawer to endorse, but not the genuineness or validity of his endorsement.

(iii) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to endorse but not the genuineness of the validity of his endorsement.

55(1) The drawer of a bill by drawing it -

(a) engages that on due presentment it shall be accepted and paid according to its tenor and that if it be dishonoured he will compensate the holder on any endorser

who is compelled to pay it provided that the requisite proceedings on dishonour be duly taken.

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.”

The relevant facts of this case which were undisputed are these:

(1) That the 1st respondent drew the bills exhibits 8, 8A and 8B.

(2) That the 2nd respondent was the acceptor of the said exhibits 8, 8A and 8B and that the acceptance was unqualified.

(3) That the 3rd respondent negated his liability on the bills by endorsing it “without recourse.”

(4) That the bills on presentment were dishonoured.

Under the Bills of Exchange Act the 1st and 2nd respondent as drawer and acceptor respectively of the bills should have been held jointly and severally liable to pay the total value of the bills which is US\$1.7million. There was no basis to exclude the 1st respondent from liability as the two courts below did. Their liability is as prescribed under sections 54 and 55 of the Bills of Exchange Act above.

The liability of the 3rd respondent under the Bills of Exchange Act is however a different matter. Section 16 of the Act permits an endorsee to limit or negative its liability under a bill of exchange. The plaintiff/appellant having negotiated the bills, which carried the endorsement “*without recourse*”, would appear to have accepted that it had no right of action against the 3rd respondent under the Bills of Exchange Act. The meaning of the phrase is as explained in the passage of the judgment of the trial court which I reproduced earlier. Put simply, the phrase conveys to subsequent endorsees and holders in due course that the 3rd respondent was not liable on the bills.

The conclusion is inevitable that the 3rd respondent having negated its liability on the bills of exchange could not be held liable on the said bills. The two courts below, in so far as they relied on Section 16 of the Bills of exchange Act were right in their conclusion that the 3rd respondent could not be held liable under exhibits 8, 8A and 8B.

But was the 3rd respondent entitled to walk away free from liability under plaintiffs suit? I think not. The two Courts below viewed plaintiffs claim rather too narrowly. They both assumed that plaintiffs claim against the 3rd respondent was based exclusively on the dishonoured bills of exchange. But a perusal of plaintiff's pleadings reveals that plaintiffs case was more broadly based than appreciated by the two courts below. Plaintiffs claim was founded on two planks namely (1) the dishonoured bills of exchange exhibits 8, 8A and 8B and (2) the deeds of guarantee, which the 3rd respondent executed in order to get the plaintiff grant credit to the Nigerian buyer. In paragraphs 13, 14, 15, 24, 25, 26, 27 and 28 of the Further amended Statement of Claim, the plaintiff pleaded thus:

"13. By a guarantee in writing dated 4th May, 1971, given by the 4th Defendant to the Plaintiff, the 4th defendant guaranteed to the Plaintiff payment of the value of the various tractors and spare parts supplied by the plaintiff to the said Continental Motors and Engineering Company Limited in accordance with the said Agreement dated 27th June, 1970 and the additional sales contract dated 4th May, 1971, and under the terms and conditions therein expressed.

14. It was further a term of the said Guarantee that the said Guarantee shall be a continuing guarantee for all moneys due and payable and to become due and payable to the Plaintiff as above. The Plaintiff will at the trial of this action rely on the said Guarantee for its full terms and effect.

15. In pursuance of the said Agreement the said Continental Motors and Engineering Company Limited got the 4th Defendant to provide the necessary respective irrevocable Bank Guarantee and, upon the 4th defendant opening the necessary respective irrevocable Letters of Credit in favour of the said Branch, the various vehicles and spare parts as a reed under the said Agreements shipped by the Auto-Tractor Bucharest to the said Continental Motor and Engineering Company Limited in Lagos which took delivery of the same in Lagos, between 1970 and 1972 at the total invoice price of US \$9,314,565.58"

XX

"24 The 4th Defendant Bank then appointed Mr. J. A. A. Adebayo, as the receiver and Manager of the said Continental Motors and Engineering Company Limited (the 2nd Defendant) and called a meeting of the representatives of the Plaintiff, A. Obikoya and Sons Limited (the 3rd Defendant) and the said Receiver and Manager to explore the possibilities of settling the outstanding account. B

25. The meeting was held in Lagos on the 20th day of May 1975 and a Memorandum of Agreement dated 20th May, 1975 was drawn up and signed by the representatives of the Plaintiff, A. Obikoya and Sons Limited, the 4th Defendant Bank and the said Receiver and Manager. C

26. Under the said Agreement, the 4th Defendant agreed to pay the sum of US\$9,314,565.58 representing the invoice value only of all the vehicles, spare parts and components shipped to the said Continental Motors and Engineering Company Limited by the 4th Defendant, and also less an amount to be agreed for which a draft was to be drawn by the 4th Defendant on 3rd Defendant and to be accepted by the 3rd Defendant and endorsed by the 4th Defendant in favour of the Plaintiff in full and final settlement of the outstanding account. D E

27. It was further agreed under the said agreement, inter alia, as follows:-

(1) The 4th Defendant agreed to pay to the Plaintiff by giving instructions to the Central Bank of Nigeria and/or the 4th Defendant's Foreign Correspondents the sum of US \$293,781.97. F

(2) The 4th Defendant should draw three drafts on the 3rd Defendant for; G

(a) US \$500,000.00 due on 1st Dec. 1975

(b) US \$600,000.00 due on 1st Dec. 1976 &

(c) US \$600,000.00 due on 1st Dec. 1977

Totalling US\$1,700,000.00.

These drafts should be accepted by the 3rd Defendant and returned to the 4th Defendant which endorse them to the Plaintiff in full and final settlement of the outstanding account. H

The Plaintiff will at the trial of this action, rely on the said drafts

for their full terms and effect.

28. *The said sum US\$ 1,700,000.00 represents the value put on all the assets of the said Continental Motors and Engineering Company Limited excluding freehold landed properties which the said Receiver and B Manager of Continental Motors and Engineering Company Limited would transfer to the 3rd Defendant under the said agreement.”*

In the above paragraphs, the plaintiff pleaded that it granted credit to the Nigerian buyer on the basis of deeds of guarantee executed in its C favour by the 3rd respondent. A default did occur when the Nigerian buyer could not pay for the goods supplied it by the plaintiff. In accordance with the terms of the deeds of guarantee, the 3rd respondent agreed to pay the whole of the money owed to the plaintiff by the Nigerian buyer. Indeed, the 3rd respondent did pay about US\$7.5million dollars out of the money D leaving a balance of US\$1.7million.

It was in order to lessen or remove the burden on the 3rd respondent that exhibit 5 was made. The underlying assumption upon which the terms of exhibit 5 were agreed as made manifest by events leading to the making E of exhibit 5 was that the bills exhibits 8, 8A and 8B when drawn and paid would release the 3rd respondent from further liability to the plaintiff on the deeds of guarantee. The reality underlying exhibit 5 was that the identified assets of the Nigerian buyer worth US\$1.7million would be acquired by F the 2nd respondent so that a release could be secured by 3rd respondent for that amount upon payment of the bills of exchange exhibits 8, 8A and 8B. As it turned out the bills were dishonoured. **It seems clear to me that the dishonour of the bill was as much an injury to the plaintiff as it was to the 3rd respondent since it destroyed the only lifeline thrown to the G 3rd respondent to extricate itself from the obligations it entered into under the deeds of guarantee for the debts owed by the Nigerian buyer.**

H **It would in my view amount to a monumental failure of justice to allow the 3rd respondent who guaranteed the re-payment of the credit granted by the plaintiff to the Nigerian buyer to walk away free from liability while the debt, the re-payment of which it guaranteed remained unpaid. The two courts below should have seen that the**

recourse to exhibit 5 and the drawing of bills of exchange was the culmination of the attempts made by the plaintiff to force the 3rd respondent to honour its obligation under the deeds of guarantee rather than an escape route for the 3rd respondent. Indeed, it would have turned out to be a true escape route had the 2nd respondent B honoured the bills of exchange it accepted.

It seems to me also that the error of the two courts below was in treating plaintiffs case as solely an action under a dishonoured bill of exchange. If the plaintiff had elected to base its claim solely on the Bills of Exchange Act, there would have been no need for it to plead the transactions between it and the Nigerian buyer pursuant to which the 3rd respondent executed deeds of guarantee in its (plaintiff's) favour. The plaintiff would only have pleaded the facts, which enabled the liabilities of the parties to the bills to be determined under the Bills of exchange Act. This is because, consideration, an important element under the Law of contract is generally presumed in an action brought under the Bills of Exchange Act. Further, in the manner the two courts below treated the issue of waiver, it was assumed that what the plaintiff waived was the right to be paid the balance due to it under the deeds of guarantee executed in its favour by the 3rd respondent. It is however manifest that the right, which the plaintiff could be deemed to have waived is not to contest that the liabilities under the bills be determined otherwise than as provided under the Bills of Exchange Act. C D E F G

In the final conclusion, the judgments of the two courts below are set aside. In its place, judgment is given against the 1st, 2nd and 3rd defendants jointly and severally for the sum of US \$1.7 million. The judgment sum shall attract interest at the rate of 12% per annum from 2/12/77 until 16th July 1986 when the judgment of the trial court was given and thereafter interest at 6% per annum until the judgment debt and interest are fully paid. The appellant is entitled to costs against the 3rd respondent which I fix at N10,000.00. H

ONU JSC

Having been privileged to read before now the judgment just delivered by my learned brother Oguntade, JSC, I entirely agree with him
B that the appeal is meritorious and it is therefore allowed by me.

By way of brief expatiation I wish to add as follows:-

Four issues were formulated as arising, for determination and it is
my desire to consider them together as an embodiment with emphasis on
only issues 1 and 2 as being sufficient to dispose of the appeal. The two
C issues taken together are set out hereunder as follows: :

ISSUES 1 AND 2 CONSIDERED TOGETHER:

(1) Whether the Appellant had waived its right of recovering the
balance of the debt from the 3rd Respondent and whether the 3rd
D Respondent can rely on the defence of waiver when such was not pleaded
(Ground 1)

(2) Whether or not the endorsement of the three (3) drafts, Exhibits
8, 8A and 8B by the 3rd Respondent was a mere formality or a recognition
E of the 3rd Respondents' continued indebtedness to the Appellant (Grounds
2 and 3).

The learned trial Judge at pages 370 - 371 of the Record, dealt with
the general meaning of waiver and came to the conclusion that when the:
F Appellant accepted and negotiated the wrongly issued drafts, it had
at least by conduct waived its insistence on its right to the proper mode of
issuance. We were then referred to pages 129 and 130 of BYLES ON
BILLS OF EXCHANGE, 23RD EDITION of M. Megrah and E. R. Ryder
to the effect that:

G *“the Code contains the following provisions in reference to the
renunciation by the holder of his rights on a bill or note, S.62(1) when
the holder of a bill at or after its maturity absolutely and unconditionally
renounces his rights against the acceptor the Bill is discharged. The
H renunciation must be in writing unless the Bill is delivered up to the
acceptor”*

It is next submitted on Appellant's behalf that from the above
opinion and the provision of the law which is in pari materia with S.62 of

the Nigerian Bill of Exchange Act, it becomes obvious that waiver as it relates to Bills of Exchange which will amount to a renunciation of one's right in that bill must be in writing. Appellant further submitted that from the facts of this case, one of the holder's rights on the Bill was that it should be drawn by the 3rd Defendant. The plaintiff it is pointed out, did not renounce this right in writing. Thus, the 3rd Defendant by its letter dated 15th October, 1974 (Exhibit 4) had accepted liability and responsibility for the payment of the outstanding amount and proposed that 30% of that amount which represented the price of the goods transferred to the 2nd Defendant/Appellant would be settled in the following way:

“a draft or drafts would be drawn by Continental Motors on the Mr. Obikoya's Company, accepted by that Company and endorsed To you (Plaintiff) without recourse to Continental Motors or the Bank.”

That this proposal has been altered by the Plaintiff, it further added, is obvious when one looks at Clause 4(ii) of the Memorandum of Agreement. The 3rd Defendant by failing to prepare the drafts properly, it is emphasized, has clearly breached the provisions of the Memorandum of Agreement.

The Appellant therefore contended that ordinarily, it would appear that since the Appellant went ahead to negotiate the irregularly drawn three (3) drafts immediately they were sent to it that the Appellant has waived its rights of having the drafts properly drawn; noting that under the Bills of Exchange Act Cap.21 (ibid), renunciation of a holder's rights must be in writing for such a waiver to afford a discharge to the other parties unless the bill is delivered up to the acceptor.

It is further submitted that under the Bill of Exchange Act Cap.21, the conduct of that plaintiff which will be sufficient to constitute a waiver is for the Plaintiff to renounce its rights unconditionally to the Bill. Ordinarily, it is further contended, such renunciation must be in writing. Otherwise, the mere acceptance and negotiation of the Bill even though they were improperly drawn without more, is with great respect, insufficient to be construed as a waiver of the Plaintiff's right to the Bill.

Section 62 of the Bills of Exchange Act Cap.21. Laws of the

federation whose Sub-Sections (1) and (2) are in pari materia with Section 62 Bills of Exchange Act, 1882 which in pari passu states:-

“62 (1) *When the holder of a Bill or after its maturity absolutely and unconditionally renounces his right against the acceptor the Bill is discharged. The renunciation must be in writing unless the Bill is delivered up to the acceptor.* S.62 (2) *The liability of any of the party to a Bill may in like manner, be renounced by the holder before at or after its maturity, but nothing in this section shall affect the right of the holder in due course without notice of the renunciation.*” (Underlining is for emphasis).

See the case of RIMAL V. CARTHRIGHT (1924) W.N. 229 (C.A.) which dealt with S.6.2 of the Bills of Exchange Act 1882, in which it was held that in an action on a Bill of Exchange, evidence could not vary its terms nor in view of S.62 of the Bills of Exchange Act, 1882 could a parole agreement be a discharge.”

I therefore agree with the Appellant’s submission that, for a holder of a bill to waive or renounce his right under the bill, the same must be in writing. An oral agreement is not sufficient, let alone a waiver by conduct. Such a renunciation or such evidence of writing should be that of the holder, in this case, the Plaintiff and not that of the 3rd Defendant. See RE: GEORGE FRANCIS V. BRUCE (1890) 44 CH.D. 62.

The fact that the Plaintiff on sighting the wrongly drawn bills, presented them to the Bank for payment without an immediate protest that the Hills were wrongly drawn, does not and cannot mean that the Plaintiff (Appellant) has waived or renounced it right as to the mode of issue. Section 59- 64 of the Bill of Exchange Act Cap.21, it must be emphasized, deal with the issue of discharge of bills; express waiver being, the mode by which a lull is discharged. Full compliance with the mode of waiver, it must be pointed out, is very imperative for the rest provisions dealing with that kind of discharge to apply.

In this wise, I agree with the Appellant’s submission that the 3rd Defendant must bear its responsibility to pay either under the continuing guarantee or as indorser under the Bills of Exchange Act (Cap.21) (ibid).

The Appellant further argued that assuming without conceding that S.62 (1) of the Act does not apply to the circumstances of this case in

respect of the 3rd Respondent, as it (3rd Respondent) was not an acceptor of the 3 Bills, by virtue of the agreement of 20th May, 1995, (Exhibit 5) and the 3rd Respondent assumed the position of the principal debtor. For this reason, I am in agreement with the Appellant that it falls on its shoulders primarily to settle all the outstanding debts owing to the B Appellant including the \$1.9 million dollars now in dispute. I am therefore in agreement with the Appellant that any person who is acting in any manner howsoever to pay or defray the balance of the indebtedness is doing so is an agent of the 3rd Respondent. According to the agreement, C the Respondent was to draw the drafts on Messrs. Obikoya & Sons Limited, which will accept and return same to the 3rd Respondent which will then endorse it “*without recourse*” to the Appellant. Rather than sticking to the above mode, the drafts were drawn by Mr. J. A. A. Adebayo (2nd Defendant) in the trial Court) and the Receiver/Manager of the D Continental Motors & Engineering Company which later endorsed to Messrs Obikoya & Sons Limited, who by the agreement was to take over the assets of the Continental Motors & Engineering Company.

I agree with the Appellant’s submission to the effect that since the E drafts were irregularly drawn and the 3rd Respondent did not query it but rather went ahead to endorse, it to the Appellant and having assumed the position of a principal debtor in recognition of the original guarantorship agreement it should assume the responsibility expected of a disclosed F principal.

I agree with the Appellant’s submission therefore that the liability of a drawer of a defective bill to the holder is not in doubt and since the Continental Motors and Engineering Company Limited, drew the bills as G agents of the 3rd Respondent is the drawer of the bills and waiver of right against it must be expressly done in accordance with S.62 (1) of the Bill of Exchange Act (ibid). Also, note should be taken of the fact that S.30 (2) of Bill of Exchange Act has made every holder of a bill a holder in due H course by S.38 (2) of the Act, a holder in due course can enforce payment against all parties liable on the bill while S.30 (1) had made every party, whose signature appears on a bill parties to the bill. Hence, every party whose signature appears on a bill is a party to the bill. Thus, in the

alternative, the Appellant being a holder in due course can recover the value of the Bill from all the Respondents jointly and severally, especially from the 3rd Respondent if not as drawer then as a party to the bills.

From the foregoing, it goes without saying that the Appellant is
 B entitled to be compensated by all the parties to the bills especially the 3rd
 Respondent being the last indorser. The amount of compensation should
 be the amount disclosed on the face of the bills, which in this case, is
 N1,700,000. Be it noted that as an indorser of the bill to Appellant, the 3rd
 C Respondent has the same liability as the drawer of the bill. This is because
 every indorser of a bill is in the nature of a new drawer, and is liable to
 every proceeding holder in default of acceptance or payment by the
 drawer. See BYLES ON BILLS OF EXCHANGE 23RD ED. PAGE 168 and
 MC CALL v. HARGREAVES (1932) 2 K.B. 423. Also MC DONALD v.
 D MASH (1924) A.C 625 and NATIONAL SALE CORPORATION v.
 BERNADI (1931) 2 K.B. 188.

From the foregoing, I hold that the Court below with due respect,
 was grossly in error when it upheld the general definition of waiver as
 E adopted by the trial court instead of confining itself to the mode stipulated
 in Section 62 (1) and (2) of the Bill of Exchange Act. The Court below by
 failing to consider subsection 2 of Section 62 rather became ill-equipped
 and arrived at a wrong conclusion that the whole of Section 62, which
 F provides in mandatory terms for express waiver, does not apply in this
 case. It is for this that I arrive at the conclusion that the whole of Section
 62, which provides in mandatory terms for express waiver does not apply
 in this case. It is for this reason that I agree with the Appellant's reason
 that in order for a party to a bill may be liable as provided in Section 55 of
 G the Act, the holder must have expressly waived his right or denounced the
 liabilities of the parties. As I agree that this is not the case in the matter under
 consideration, there is therefore no iota of waiver by the Appellant vide
 RIWAL vs. CARTHRIGHT (1924) 1 N.N. 229 (C.A.) where it was
 H held that in an action on a Bill of Exchange, evidence could not vary the
 terms neither can a parole agreement be a discharge. It was next contended
 that assuming without conceding that S.62 of the Bill of Exchange Act has
 no application to the matter under consideration whether it can be that the

conduct of the Appellant in this case amounts to a waiver in the ordinary sense of the word? The contention of the Respondent is that the attitude of the Appellant amounted to a waiver when in sighting the wrongly drawn bills, it did not immediately protest, it rather presented same to the bank for payment and only protested it when it could not be accepted for payment in the bank due to insufficiency of funds. I am of the view that this cannot amount to waiver. In the first place, there is no time limit stipulated in the agreement of 20th May, 1975 (Exhibit 5) as to the protestation of irregularity in the mode of drawing the bills.

Secondly, I agree that the irregularity in drawing the bill amounts only to a breach of the contract comprised in the agreement (Exhibit 5) and the limiting period in breach of contract cases being six years and that this period has not lapsed before the protestation was made neither has it lapsed before protestation was made neither has it lapsed before the present action was instituted. I agree that it can be argued that the Appellant delayed protesting the irregular issue of the bills, the delay without more does not constitute waiver. While it may be evidence tending to establish it, such evidence is by no means conclusive. See AFRICAN PETROLEUM V. OWODUNNI (1991) 8 NWLR (Pt.210) 391 at 416, paras. E-F where this Court (per Nnaemeka - Agu) JSC defined waiver as an abandonment of a right and showing by words or conduct not to insist on the right, and went on further to state as follows:

"I do not even agree that there has (sic) delay on the part, of the defendant to raise the invalidity of the notice. But assuming but not agreeing that there was delay, such a delay of itself, does not constitute a waiver. At best, it may be some evidence tending to establish it, but is not conclusive." See JELESYN V. GORFIT 38 CH. D. 873 per Bowen L.J.

In that regard, I agree with the Appellant's contention that the mere fact that it waited for the bills to be dishonored before coming back to demand the payment of the debt from the Respondents. Even if the Appellant proceeded to waive its right of insisting that the bills be of Exhibit 5, it has not waived its right arising from the exhibit, that is the right of being paid the balance of \$1,700,000 jointly or severally by the Respondents. In ARUBO V. AIYELERU (1993) 3 NWLR (Pt. 280) 126 at 145 - 146 Paras

G-B, this Court considered the case of a defendant who securing a final judgment in Court went back and submitted himself to a Tribunal of Inquiry which sought to enquire into the subject-matter of the action that led to the judgment. The contention of the opposing party in a later suit was that the defendant had waived his right, having taken part in the proceedings of the Tribunal of Inquiry. Nnaemeka-Agu, JSC there held as follows:

“*Definitely mere participation in the inquiry cannot per se constitute a waiver. But assuming but not agreeing that a judgment of court could be waived in such a way as to bar the successful party from insisting upon Of jurisdiction is so conclusive and binding upon the parties and their privies. I have my doubts as to whether a right arising from it can be waived*” (Underlining for emphasis supplied by me)

Appellant next pointed out how the above-cited case dealt with the issue of waiver of right to rely on a judgment of the court while the case in hand is dealing with waiving the right to insist on an agreement. Appellant opined there upon that the agreement provided for its right to be paid for the goods supplied for which the 3rd Respondent was a guarantor and provides also the mode of paying the debt. Such that if the method of payment provided in the agreement fails or is waived by the Appellant, the right to be paid still subsists the more so, it is added, when it that the three bills be re-issued in accordance with the position of Exhibit 5, the Appellant’s contention and claim having all along been that the balance of \$1,700,000 be paid to it.

The Court below went ahead to hold that the trial Court was right in assuming that the Appellant has waived its rights to have the drafts drawn in accordance with the provisions of Exhibit 5, the court not having held that the Appellant has lost its right to insist that the balance of US \$1,700,000 be paid to it jointly and severally by all the Respondents as per its Statement of Claim especially in relation to the 3rd Respondent which originally guaranteed the debt and by Exhibit 5 had undertaken to play a substantial role in paying the debt to the Appellant. Furthermore, it was pointed out, the circumstances that led to Appellant to sue the Respondent were that the drafts bounced due to insufficiency of funds. It was Appellant’s further contention that no person can be said to have

abandoned his right of being paid a debt owing to him simply because he negotiated a worthless Cheque which ordinarily would have entitled the drawer and the endorser to some kind of penal reward.

The issuance of a dud Cheque, it was therefore further contended, being a criminal offence and consequently against, the Nigerian Public Policy and as such, no person is endowed with the competence to waive a right that is not only for his personal enjoyment the Appellant's right to insist that the Respondents be made to pay their indebtedness to the Appellant which it had failed to do through a method which is both morally questionable and/or legally objectionable, is not a right that crystallizes for the sole benefit of the Appellant but the larger society. See where this Court held in *ARIORI V. ELEMO* (1983) 1 SCNLR 1 at 13, Para D - E to the effect that

"When a right is conferred solely for the benefit of an individual there should be no problem as to the extent to which he would waive such right."

This Court further went on to hold at page 15 of the same Report with approval in another case of *A-G OF BENDEL STATE v. A-G OF THE FEDERAL AND 22 ORS* (1981) 10 S.C 1 at 54 where it opined that:

"The law does not permit a person to contract himself out of a waiver as the effect of a rule of public policy"

It was further contended that since the issuance and or endorsement of a dud cheque has been made a crime by the State, an individual has nothing at all to waive in that respect, adding that this Court rested the matter when it held as follows:

"Once the act is completely within the competence of either the State or the Court, the party to the case has nothing to waive."

It is submitted further that no person should be said to have waived his or her right to complain that any or all the parties that played fraud on him should not be made to regularize the irregularity especially when the irregularity has been made by the state to attract a criminal sanction as in the instant case. Waiver, it is emphasized, should be a voluntary action as no party should be tricked into waiving its right and conclusively the waiving of right should not be such that can embarrass the administration

of the law nor made to defeat public justice. See STATE V. MC TAQUE (1927) 173 MIN 153. The defence of waiver being a defence available to the defendant must be clearly raised in the Statement of Defence.

See CARIBBEAN TRADING AND FIDELITY CORPORATION v. NNPC (1992) 7 NWLR (Part 252) 161 at 185 para A, B (per Tobi, JCA) as he then was, when he observed thus:

“Waiver, being a defence available to a defendant must be clearly raised in the statement of defence. Where it is not raised, then the defendant cannot lead evidence on it. This is borne out from the elementary rule of pleadings that a party is bound by his pleadings. He cannot, as of general principle, raise a matter either in the course of trial or on appeal to embarrass the opponent.” (Underlining is for emphasis)

The Court below at page 23 vide page 553 lines 13-27 of the Records found that none of the parties pleaded waiver specifically and that the nearest to that was in paragraph 2D of the Statement of Defence of the 1st and 3rd Respondents (in the trial court) where they pleaded reliance on both legal and equitable defences and that the issue of waiver was the assumption of the learned trial Judge. The Appellant further pointed out that since there are many legal and equitable defences, for a party to plead as they 1st and 3rd Defendants namely, the 2nd and 3rd Respondents herein did, in the trial Court, is to say the least, engage in a very wide traverse, so general that it becomes neither here nor there. It has in fact the potency of taking the opposing party by surprise vide *George & Ors v. Flour Mills Ltd.* (1963) 1 All NLR 71 at 77 and indeed runs contrary to the spirit and provision of Order 16 Rule 11 of the High Court of Lagos Civil Procedure Rules, 1972 which provides as follows:

“The defendant or plaintiff (as the case may be) must raise by his pleading all matters which shows the action or counterclaim not to be maintainable or that the transaction is either Void or Voidable in point of law, and all such grounds of defences or reply as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Limitation Decree 1966, release, payment, performance, facts showing illegality either by an enactment or by common law, or by the Law

Reform (Contracts) Act 1961.”

The courts have established over time and beyond contest it is argued and that the purpose of pleading is to narrow down the notice of parties what they are to face in court. See the cases *Emegokwue v. Okadigbo* (1973) 4 S.C. 113 and *Lewis & Peat (NRI) Limited v. Akhimien* B (1976) 7 S.C 157 were cited in support. The defence it is the Appellant’s contention that, there is the need for the respondent to plead it specifically with adequate particularizations. See this Court’s decision in *Adebanjo v. Brown* (1990) 3 NWLR (PT. 141) 661 and if it is a legal defence, it becomes a demurrer with the consequence that the Respondents have C admitted it in its totality the case of the Appellant but rely on the point of law. In the instant case, the Respondents are enjoined by law to plead it. See *FADARE v. A-G OYO STATE* (1982) 4 S.C 1; *F.C.D.A. v. NAIBI* D (1990) 3 NWLR (Pt.138) 270 at 281 PARAS E-F, where this Court cited with approval the *FADARE* case (Supra) (per Nnamani, J.S.C.) thus:

“It is also settled that some cases such as cases of demurrer, the defendant need not lead any evidence, he is in such a case taken to accept all the facts as established by the plaintiff but perhaps relies on some point E of law. See FADARE v. A-G of Oyo State (1982) 4 S.C 1. Where the Defendant relies on a special defence it is trite that such a defence has to be specifically pleaded” Underling for emphasis).

The pleading of the Respondents especially the 3rd Respondent that F they will rely on all legal and equitable defences, I agree is too vague and general and amounts to no traverse at all. In *ADESANYA v. OTUENU* (1993) 1 NWRL (Pt.270) 414 at 455 paras 1) - F.

This Court had occasion to comment on the weight of a general G traverse as follows:

“But I must ask myself: what is the value of such a general denial of important and material allegation of facts. The answer is of course, nil. In saying so, I shall reiterate that this Court had to say per Idigbe, JSC about general denials in the case of Messrs Lewis Peat (NRI) Ltd. v. H Akhimien (1976) 7 S.C. 157 at 163-4 where he stated: “We must observe, however, that in order In raise an issue of fact in these circumstances there must be made a proper traverse, and a traverse must he made either by a

denial or non-admission either expressly or by necessary implication. So that if a defendant refuses to admit a particular allegation in the statement of claim, he must state so specifically”

Finally, I agree with the Appellant’s submission that the defence of waiver is not pleaded and the trial court and the court below were wrong in holding otherwise since parties and Court are bound by pleadings proved at the trial. See *Adesanya v. Otuewu* (Supra). Mindful of the fact that the court cannot raise the issue of waiver suo motu and place reliance on it in reaching a decision, adding that this Court has always held that courts should refrain from making out a case for a party which he does not make himself. See per Kawu, J.S.C in *Adebanjo v. Brown* (Supra) at page 675.

It is a trite principle of law, emphasized by the Appellant, that parties are bound by the pleadings and evidence while a matter not pleaded goes to no issue vide *Akpapuna v. Obi Nzekwa* (1983) 2 SCNLR 1; *Laguno v. Toku* (1992) NWLR (Pt. 2233) 278; *F.H.A v. Sommer* (1986) 1 NMLR (Pt 17) 533.

Furthermore, since no defence of waiver was pleaded, the court cannot rely on it to find in favour of the Defendant. It is note worthy, to point out that the only time when the issue of waiver was raised at the trial of this action was during address by the counsel to the 3rd Respondent qua 4th defendant, adding that the Counsel’s oral address or brief of argument, however sound, cannot be a substitute for credible evidence upon which the court is obliged to rely upon in reaching a decision. In fact, the address of Counsel is supposed to deal only with the evidence before the court and not to supplant the inadequacy of evidence given at the trial. See *SALAWU YOYE v. OLUBODE & ORS* (1974) 10 SC. 209 at 215, where Ibekwe, JSC held thus: -

“We would only point out however, that as far as the facts of any given case are concerned, the address of counsel is supposed to deal only with the evidence before the Court. But the mere mention of a matter in the course of such address is never a substitute for the evidence that has not been led. Nor can it supplant the inadequacy of the evidence given at the trial.”

See also *BELLO v. N.B.N.* (1992) 6 NWLR (Pt.246) 206 at 220,

Para. B-C wherein Achike, JCA, as he then was had this to say:

“It must be stressed that mere submission of counsel no matter how alluring can never serve as substitute for the evidence oral or to documentary- necessary to construe the law.”

See also the two similar Supreme Court decisions of NIGER B
CONSTRUCTION LIMITED v. OKUGBENI (1987) 4 NWLR (Pt. 670,
687 cited in support thereof by Edozie, JCA, as he then was in IGWE v.
A.I.C.E. (1994) 8 NWLR (Pt. 368) 459 at 481, Para. B. I therefore share
the Appellant’s view that since the Respondents qua defendants in the trial C
court did not plead “waiver” no evidence was given in support thereof and
counsel cannot provide such a serious missing link by way of oral address.
Consequently, the trial court and the Court of Appeal lack the requisite
competence to rely on the submission of counsel to anchor their judgments
on the unpleaded defence of a waiver since waiver must be specifically’ D
pleaded.

ISSUE NO. 2:

Whether or not the endorsement of the three (3) Drafts, Exhibits 8,
8A and 8B by the 3rd Respondents to the Appellant was a mere formality E
or a recognition of the 3rd Respondent’s continued indebtedness to the
Appellant. (Grounds 2 and 3)

By a letter dated the 21st day of May, 1975, the 3rd Respondent
Bank (3rd Respondent has accepted to pay to the Appellant the sum of F
\$5,293,781.97 and obtain the acceptance of the 2nd Respondent (A. O.
Obikoya & Sons Limited) to the three (3) drafts-Exhibit, 8, 8A and 8B
totalling \$1,700,00 which was also to be paid to the Appellant. These were
to be the final sums which the Appellant was entitled to from the contract G
of supply of motor spare parts which it had with Continental Motors and
Engineering Company Limited now under receivership of the 1st Respon-
dent. Be it noted that at all material times, the 3rd Respondent was the
guarantor of the contact sum, the letter under reference was received in
evidence in the trial Court as Exhibit 6 (see pages 407 - 408 of the Records). H
The said letter was predicated upon the Deed of Agreement executed on
20th May, 1975 by the representatives of the Appellants, the 2nd and the 3rd
Respondents. Be it noted that in the said Deed of Agreement, Appellant was

to forego the winding up of the 3rd Respondent who in turn was to take absolute responsibility of paying the indebtedness of the Continental Motors and Engineering Company Limited to the Appellant vide Exhibit 5 at pages 402 - 407 of the Records. By clause 4 of the Deed of Agreement B 3rd Respondent unequivocal substituted the contract of guarantee for personal liability. The legal consequence of Exhibit 5, particularly clause 4 thereof is that 3rd Respondent is to all intents and purposes now the principal debtor to the Appellant or that its liability as a guarantor will C continue or be reinforced since it is now under taking to pay the contract sum even by itself. The law is settled that the creditor will not discharge a surety if he has ceased to be a surety and become himself the principal debtor, or has previously paid part of the debt given as security for the remainder. See Halsbury's Laws of England, 4th Edition. Vol.20, para-D graph 158 paragraph 291 where the learned authors state as follows:

"A release of the principal debtor by the creditor will not discharge the surety and become himself a principal debtor, or has previously paid part of the debt and given as security for the remainder, or has in E consideration of an extension of time to himself by the creditor, bound himself without the principal debtor's concurrence to pay the whole sum for which he was originally surety only, or has expressly agreed to remain liable, so that there is then no ground for the presumption that he is F impliedly discharged."

It is then stressed and I agree, that in the case in hand, the 3rd Respondent has become personally liable though flowing from the reason of its (guarantorship) to the Appellant when it signed Exhibit 5. Furthermore, the 3rd Respondent had paid part of the debt and promised to G complete same by issuance of three drafts endorsed to the Appellant and by this, the 3rd Respondent expressly undertook to remain liable. From Exhibit 5, it is also evident that the former principal debtors to wit, continental Motor & Engineering Company Limited, were not parties to H the agreement and this should mean that their involvement in the issuance of the three (3) drafts should not affect the liability of the 3rd Respondent to the Appellant.

I agree with the 3rd Respondent's (*sic*) submission that since it in

effect assumed personal liability of the debt to the Appellant, it cannot in any way be exempted from, liability when the indebtedness has not been satisfied, the obligation imposed on it by Exhibit 5 being to pay the sums of US \$5,293,781.97 and US\$1,7000.000. Two modes, it was stressed were stipulated by the agreement for the payment of the two sums by 3rd Respondent giving instructions to the Central Bank of Nigeria and or the 3rd Respondent giving instructions to the Central Bank of Nigeria and/or the 3rd Respondent's Foreign correspondents within 48 hours of the meeting where the agreement was made to pay Appellant.

This, it was demonstrated, was complied with by the Applicant as evidenced by Exhibit 6.

The second mode adopted by the agreement which was to be for payment of the remaining sum i.e. US\$1,700,000 it is added, was slated in Exhibit 5 page 404 of the Records as follows:

"The bank would draw three drafts on Messrs A. Obikoya & Sons Limited for

(a) \$500,000 due 1/12/75

(b) \$600,000 due 1/12/70

(c) \$600,000 due 1/12/77

totalling US\$1,700,000. These drafts would be accepted by Messrs A. Obikoya & Sons Limited and returned to the Bank within 7 days I ruin the dale of this agreement. The bank will endorse these drafts to the Romanians, without recourse to the bank as full and final payment for the balance of all amounts due to the Romanians."

Appellant further submitted that in trying to pay the above sum this stipulated mode was not followed. Rather, it was added, the drafts were redrawn by the Receiver/Manager of the 1st Respondent. The three (3) drafts, having been drawn on the Continental Motors and Engineering Limited having been endorsed to 2nd Appellant who in turn endorsed same to 3rd Appellant which in compliance with the initial plan contained in Exhibit 5 then endorsed it "without recourse" to the Appellant. In addition, it was submitted that the mere fact that a stipulated mode or method of payment of debt fails does not dispose of the debt, neither will it have the effect of discharging the obligation on the debtor. It is therefore contended

that the obligation on the debtor can only be discharged when the debt has been settled.

The fact that the creditor wailed to see whether the method adopted in trying to pay him will or will succeed does not mean that he has waived his right of being paid by (those who are jointly and severally liable to him). This is significantly the more so when the 3rd Respondent is now the principal debtor by virtue of Exhibit 5.

The Court below and the court of first instance, it would appear clear, placed much emphasis on the mode of payment instead of the payment of the debt itself. Significantly, it is not equitable in the least to discharge a debtor only on the ground that the method by which he intended to pay as per an earlier arrangement which was not adopted which led to the debt not being satisfied. What is more, it is the 3rd Respondent which caused the confusion by not following the terms of Exhibit 5 but in thus having suffered no damage as a result of reliance on the so called waiver by the Appellant. Moreover, 3rd Respondent has not complained of being overreached by the action of the Appellant in trying to recover the debt. Neither has the 3rd Respondent complained of being overreached by the action of the Appellant in trying to recover the debt. Neither, in my view has the 3rd Respondent been in any way, a victim of the so called forbearing conduct of the Appellant. The Lower Court was not correct, in my view, to absolve the 3rd Respondent of responsibility in respect of the debt. In this regard, I agree with the Appellant that it is only when the act of the Appellant is aimed at overreaching or the 3rd Respondent has fallen victim of the purported forbearing conduct of the Appellant that the Appellant can be restrained by equity to insist on its right. See *R. E. A. N Limited v. Aswani Textile Industries* (1991) 2 NWLR (Part 176) 639 at 666 para E - F where Tobi JCA as he then was said:

“There are however instances where in the interest of justice and fair play, a court of law can infer the existence of a forbearing conduct which has developed into a compromise. One of such instances in which the forbearer wants to take advantage of his own forbearing conduct with a view to overreaching his opponent who is already the victim of the forbearing conduct. In such a situation, a court of law as a court

of equity, is entitled to invoke the well established principles of estoppel by conduct.”

I am therefore in agreement with the Appellant’s submission that in view of the fact that by Exhibit 5, the 3rd Respondent had assumed the position of the principal debtor due to initial guarantorship agreement, its liability remains until the total debt due to the Appellant is liquidated. I agree with Appellant also that it was in recognition of this fact that the 3rd Respondent endorsed the drafts to the Appellant which drafts the Appellant would not have been entitled to act upon if the 3rd Respondent had not so endorsed. It is for this reason that I agree with learned counsel for Appellant’s submission that the Court below was wrong to hold that the endorsement by the 3rd Respondent on the drafts in favour of the Appellant were a surplusage. As a matter of fact, 3rd Respondent endorsed the three (3) drafts (Exhibits 8, 8^A and 8^B to Appellant because it has legal and contractual duty to do so in accordance with the agreement contained in paragraph 4(ii) of Exhibit 5.

Furthermore, I agree with Appellant’s submission that the 3rd Respondent is personally liable to the Appellant under section 65(2) of the Bills of Exchange Act in that the 3rd Respondent is an endorser of the three bills. This is because section 55(2) provides:

“[2] The endorser of a bill by endorsing it

(a) engages that on due presentation it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it provided that the requisite proceedings on dishonour be duly taken.

(b) Is precluded from denying to a holder in due course the genuineness and regularity, in all respects of the drawer’s signature and all previous endorsements.

(c) Is precluded from denying to him immediately or subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill, and that he had then good title thereto.”

Be it noted that the Appellant promptly protested the non payment of the drafts after the dishonour through a Notary Public, Mr. Ladosu Ladapo Esq. as earlier pointed out and as required by law, after which the

Appellant commenced this action in the High Court. In any case, it has never been the case of the Respondents that the requisite proceedings were not taken by the Appellant on dishonour of the drafts.

In the case in hand, it is not in dispute that the Appellant is a holder of the bills. The Court below so held on page 2-1 paragraphs 10 - 15 of its judgment (page 554 of the Record of Appeal).

However, the learned Justices of the Court below went ahead, erroneously in my view, to absolve the 3rd Respondent of liability by holding that it was not an acceptor. Thus, I agree with the Appellant that even though the 3rd Respondent may not be liable to it (Appellant) as an acceptor of the bills, it still remains liable as an endorser of the bills. Mad the two courts below considered the above section, they would have reached a different conclusion. Therefore, I agree with the Appellant further that pursuant to section 55 (c) Bills of exchange Law, it does not lie in 3rd Respondent's mouth to raise any issue as to the genuineness or regularity of the drafts since it is an endorser of the bills.

Further, I hold that the endorsement by the 3rd Respondent on the three drafts cannot be superfluous because under Section 27(2) of the Bill of Exchange Act, Cap. 21 (ibid) the 3rd Respondent is a party to the bill having signed it or endorsed it. This fact entitles the Appellant to be a holder for value not only as regards the acceptor but all parties to the bill, including the 3rd Respondent. Thus, even if the 3rd Respondent had signed the bill as a stranger, it still assumes the liability of an endorser. See Sections 27 (2) and 50 of the Act (ibid), the killer which provides:

"Where a person signs a bill otherwise, than as a drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course."

Also see the importance of Section 3 of the same Bill of Exchange Act which provides:

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

From the foregoing, it is evident therefore that the 3rd Respondent is a party to the bills having endorsed them, to the Appellant and if the Appellant has waived its right against the 3rd Respondent, it must be by

the mode provided under S.62 (2) of the Bills of Exchange Act.

The Court below failed to consider S.62 (2) of the Bills of Exchange Act when it held that the entire section did not apply to this case in that the 3rd Respondent was not the acceptor of the bill. Had the learned Justices of the Court of Appeal considered sub-section 2 of S.62 thereof, they B would have held 3rd Respondent liable as a party to the bill (not as an acceptor) and consequently, they would have also held that for the holder in this case, (the Appellant) to renounce its right under the bill with respect to any party to the bill, such renunciation must be in writing as provided C in sub-section 1 of section 62 (ibid) which applies to acceptors.

In the alternative, the Appellant argued that Continental Motors Limited acted as the agent of the Respondent in drawing the three (3) drafts. This fact was admitted at page 15 of the Respondent's Brief in answer to the Cross -appeal reproduced at page 502 of the Records where D the Respondents submitted

“(i) Since in this case, the Continental Motors & Engineering Company Limited was shown to have issued the drafts instead of the Respondent bank, it is submitted that the former being an agent of the Respondent bank, there is, in our considered opinion, no breach of the E agreement dated 20th May, 1975 as what the agent did by issuing the drafts was deemed to have been done by its principal, the National Bank of Nigeria Limited, but in this case both were protected from liability having F regard to the Provision in the section “without recourse”

The Appellant then contended that the phrases “without recourse” cannot avail any of the parties especially the principal (National Bank of Nigeria the 3rd Respondent) for which the Continental Motors were acting because it is against all known tenets of justice, rules of equity and notions G of public policy for a party in crime (payment of the Appellant with dud drafts) to be protected by any form of exclusion clause however wisely inserted not even by agreement of parties, since parties cannot by agreement amend to amend the criminal laws of the country by way of H excluding a criminal party from liability. Accordingly, I agree with the Appellant that since the 3rd Respondent did not draw the drafts in accordance with the agreement (Exhibit 5) as found by the two courts

below, it cannot be aided by the exclusion clause “*without recourse*” being the party in breach. See SUISSE ATLANTIQUE SOCIETY D’ARAMENT SAVN V. ROTTERDAMSELIA KOLEN CENTRALE (1967) 1 A.C 361; CHARTERHOUSE CREDIT CO. LIMITED V. TOLLY (1963) 2 ALL E.R

B 432;

KARSALES (HARROW LIMITED) V. WALLIS (1956) 2 ALL E.R 866 AT 868;

BOSHALI V. ALLIED COMMERCIAL EXPORTERS (1961) 1 ALL NLR 917.

C See also Halsbury’s Law of England 4th EDITION P. 253 PARA 378.

It was next argued on Appellant’s behalf that since the exclusion clause “*without recourse*” cannot avail the 3rd Respondent, it means that it is liable as it would have been without the clause and if Continental Motors was acting as agent to the 3rd Respondent in drawing the drafts, its action binds the bank (National Bank of Nigeria) wholly especially as it is a disclosed principal. The bank will then be directly responsible for the liability incurred by its agents when it turned out that there is insufficiency of fund to satisfy the three (3) drafts. It is for this reason that I agree with the Appellant that the Court below was in grave error when it absolved the bank (3rd Respondent) of responsibility in the whole transaction the trial court on page 373 paragraphs 10 -15 of the record of Appeal which holding was not appealed against that although there was an irregularity in the mode of issue of drafts, that irregularity does not discharge the debt unless there are clear terms in the agreement that an acceptance of a defective draft absolves the parties liable and discharges the debtor from obligation to pay.

G It is in the same wise that I agree with the Appellant’s submission that since there is no such clear agreement to absolve the debtors of their responsibility in case of any irregularity, the Respondents who are jointly and severally liable to pay the debt are still very much obliged to settle the bill of the Appellant, and further to this is that the courts below are in grave error to have relied on the unpleaded doctrine of waiver to absolve the 3rd Respondent for the liability incurred by its agents when it turned out that there is insufficiency of fund to satisfy the three (3) drafts. It is for this

reason that I also agree with the Appellant's submission that the Court below was in grave error when it absolved the bank (3rd Respondent) of responsibility in the whole transaction. The trial court had held that although there was an irregularity in the mode of issue of drafts, that irregularity does not discharge the debt unless there are clear terms in the B agreement that an acceptance of a defective draft absolves the parties liable and discharges the debtor from obligation to pay.

Since there is no such clear agreement to absolve the debtors of their responsibility in case of any irregularity. Appellant asserts, the Respondents who are jointly and severally liable to pay the debt are still much obliged to settle the bill of the Appellant. Further to this is the fact that the courts below are in grave error to have relied on the unpleaded doctrine of waiver to absolve 3rd Respondent of responsibility in respect of the payment of the outstanding US\$1.7 million, when there is no agreement to the effect that any of the parties to the agreement (Exhibit 5) will be discharged when there is an irregularity in issuance of the bills. D

The Appellant finally submits and I agree with it that the words "without recourse" cannot be an escape route as held by the courts below E for the 3rd Respondent because the Clause cannot be taken out of the contract for the purpose of interpretation. I am in agreement with the Appellant that it should be interpreted having regard to oilier parts of the agreement (Exhibit 5) and that when this is done, it will be seen that the F clause cannot have any meaning when other stipulations of the agreement are not complied with.

For the foregoing reasons and the fuller ones given in the judgment just delivered by my learned brother Oguntade, JSC with which I am in entire agreement, I too allow the appeal and make similar consequential G orders as to costs as contained therein.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Oguntade JSC.

I agree with it and, for the reasons which he gives, I, too would

H

allow the appeal and set aside the judgments of the two courts below. In their place, I enter judgment against the 1st, 2nd and 3rd defendants jointly and severally for the sum of US\$1.7million. The judgment sum shall attract interest at the rate of 12% per annum from 2/12/77 until 16th July, 1986
B when the judgment of the trial court was given and thereafter interest of 6% per annum until the judgment debt and interest are fully paid. The appellant is entitled to costs of N10,000.00 against the 3rd respondent.

C

MOHAMMEDJSC

This appeal is against the judgment of the Court of Appeal Lagos Division delivered on 1-7-1996. In that judgment the appellant's cross-appeal against the judgment of the Lagos State High Court of Justice of 16-
D 7-1986, was dismissed. Aggrieved by this dismissal of its cross-appeal, the appellant, which was the plaintiff at the trial High court and cross-appellant at the court below has now appealed to this court.

In the appellant's brief of argument, the following four issues were
E distilled from the grounds of appeal;

*"1. Whether the appellant had waived its right of recovering the balance of the debt of \$1.7 million and interest from the 3rd respondent and whether the 3rd respondent can validly rely on the defence of waiver
F where such was not pleaded.*

*2. Whether upon a proper construction of Exhibit 5, the endorsement of the three (3) drafts, Exhibits 8, 8A and 8B by the 3rd respondent was a mere formality or a recognition of the 3rd respondent's continued indebtedness to the appellant and a duty under the Bills of Exchange Act
G to pay the said sum of \$1.7 million plus interest to the appellant.*

*3. Whether upon a proper construction of Exhibit 5, the appellant's right to payment against the 3rd respondent, should be determined on the basis of the three (3) irregularly drawn drafts, Exhibits 8, 8A and 8B or
H its further amended statement of claim.*

4. Given the circumstances of this case and upon a proper construction of Exhibit 5, whether the words 'without recourse' endorsed on the three drafts, Exhibit 8, 8A and 8B operate to exclude the 3rd

respondent from liability of paying the sum of \$1.7 million plus interest given the circumstances of the transaction.”

A close scrutiny of the four issues above shows that a complaint touching on the liability of the 3rd respondent to pay the appellant the remaining balance of the sum of \$1.7 million debt, formed the kernel of the B dispute for resolution in all the four issues concerned. In other words, this appeal can be easily disposed off by the resolution of a simple and single issue of whether having regard to the obligations of the parties in this appeal under the deed of guarantee executed by the 3rd respondent and the later C agreement in Exhibit 5 between the parties, the 3rd respondent has discharged its obligation to pay the appellant for the goods sold and delivered by it to the 1st respondent.

Starting with the obligation of the parties under the contract of D guarantee executed by the 3rd respondent in favour of the appellant, the record of this appeal particularly the further amended statement of claim of the appellant as the plaintiff at the trial High Court, shows quite clearly that the appellant’s reliefs sought in that court were partly grounded upon that deed of guarantee. Paragraphs 13, 14, 15, 24, 25, 26, 27 and 28 of the E plaintiffs further amended statement of claim at pages 261-262 and 267-268 respectively of the record of the appeal which are instructive on the basis of the claim of the appellant against the 3rd respondent in particular, are quoted below:

“13. By a guarantee in writing dated 4th May, 1971, given by the F 4th defendant to the plaintiff, the 4th defendant guaranteed to the plaintiff payment of the value of the various tractors and spare parts supplied by the plaintiff to the said Continental Motors and Engineering Company G Limited in accordance with the said Agreement dated 27th June, 1970 and the additional sales contract dated 4th May, 1971, and under the terms and conditions therein expressed.

14. It was further a term of the said Guarantee that the said H guarantee shall be a continuing guarantee for all moneys due and payable and to become due and payable to the plaintiff as above. The plaintiff will at the trial of this action rely on the said Guarantee for its full terms and effect.

15. In pursuance of the said agreement the said Continental Motors and Engineering Company Limited got the 4th defendant to provide the necessary respective irrevocable Bank guarantee and, upon the 4th defendant opening the necessary respective irrevocable Letters of Credit in favour of the said Auto-Tractor Bucharest at the 4th defendant's London Branch, the various vehicles and spare parts as agreed under the said. Agreements shipped by the Auto-Tractor Bucharest to the said Continental Motors and Engineering Company Limited in Lagos which took delivery of the same in Lagos, between 1970 and 1972 at the total invoice price of US \$9,324,565.58. xxx

24. The 4th defendant Bank then appointed Mr. J. A. A. Adebayo, as the Receiver and Manager of the said Continental Motors and Engineering Company Limited (the 2nd defendant) and called a meeting of the representatives of the plaintiff, A. Obikoya and Sons Limited (the 3rd defendant) and the said Receiver and Manager to explore the possibilities of settling the outstanding account.

25. The meeting was held in Lagos on the 20th day of May, 1975 and a Memorandum of Agreement dated 20th May, 1975 was drawn up and signed by the representatives of the plaintiff, A. Obikoya and sons Limited, the 4th defendant bank and the said receiver and Manager.

26. Under the said Agreement, the 4th defendant agreed to pay the sum of US \$9,314,565,58 representing the invoice value only of all the vehicles, spare parts and components shipped to the said Continental Motors and Engineering Company Limited by the 4th defendant, and also less an amount to be agreed for which a draft was to be drawn by the 4th defendant on 3rd defendant and to be accepted by the 3rd defendant and endorsed by the 4th defendant in favour of the plaintiff in full and final settlement of the outstanding account.

27. It was further agreed under the said agreement, inter alia, as follows:-

- (1) The 4th defendant agreed to pay to the plaintiff by giving instructions to the Central Bank of Nigeria and/or the 4th defendant's Foreign Correspondents the sum of US \$293,781.97.
- (2) The 4th defendant should draw three drafts on the 3rd defendant

for:-

- (a) US \$500,000 due on 1st December, 1975
 - (b) US \$600,000 due on 1st December, 1976 and
 - (c) US \$600,000 due on 1st December, 1977
- Totaling US \$1,700,000.

These drafts should be accepted by the 3rd defendant and returned to the 4th defendant which should endorse them to the plaintiff in full and final settlement of the outstanding account. The plaintiff will at the trial of this action, rely on the said drafts for their full terms and effect.

28. The said sum US \$1,700,000 represents the value put on all the assets of the said Continental Motors and Engineering Company Limited excluding freehold landed properties which the said Receiver and Manager of Continental Motors and Engineering Company Limited would transfer to the 3rd defendant under the said agreement.”

The obligation of the 3rd respondent to the appellant in relation to the payment of the entire debt incurred by the 1st respondent is not at all in doubt taking into consideration the evidence of the appellant in support of those paragraphs of its further amended statement of claim adduced at pages 302-303 by the only witness who testified for the plaintiff/appellant when he said-

“In 1975, 4th defendant (Now 3rd respondent in this appeal) issued some bank guarantees. We called on the 4th defendant to pay up when Continental Motors (now 1st respondent in this appeal) failed to pay. We instructed a lawyer to take action to wind up the Bank. The Bank then gave us a payment proposal in a letter. This is the letter tendered no objection admitted and marked Exhibit ‘4’. When the Bank defaulted on the proposal we gave our lawyer further instruction to wind up the bank for \$40 million dollars. As a result of this step a meeting was held on 20/5/75 when a final agreement was reached and signed between representatives of our company, Eurhanmy Manager/Receiver Continental Motors. Obikoya and the N.B.N. Limited. This is memo of agreement tendered No objection admitted and marked Exhibit 5. 4th defendant paid about 5 million dollars after Exhibit 5 and we were informed in writing letter tendered no objection admitted and marked Exhibit 6. We accepted the

terms in Exhibit 5 by a letter to the 4th defendant. No objection admitted and marked Exhibit 7. We are now waiting for the payment of 1.7 million dollars. xxxxx”

Although this witness was crossed examined at page 304 of the
B record, his evidence in chief as to the liability of the 4th defendant which
is now the 3rd respondent in this court, to pay the outstanding debt to the
appellant, remained virtually unchallenged. No wonder, the agreement
between the parties for the settlement of the debt in Exhibit 5 in order to
C keep the 3rd respondent as a bank afloat, shows that the 3rd respondent had
already paid the sum of 7.5 million dollars of the appellant’s debt leaving
a balance of only 1.7 million dollars. In this respect, from the part of the
pleading of the appellant earlier quoted in this judgment and the evidence
adduced in support thereof, it is not at all in doubt that the 3rd respondent
D as the bank which guaranteed the payment of the entire debt to the
appellant, remained liable to pay the debt as long as the 1st respondent the
main debtor, was in default of payment. See *Fortune International Bank Plc*
v. Fimsenod Holdings Nigeria Ltd. (2004) 4 NWLR (pt.863) 369 at 389
E and *African Insurance Development Corporation v. Nigeria Liquefied*
Natural Gas Ltd. (2000) 4 NWLR (pt.653) 494 at 505-506.

The next question for determination regarding the liability of the 3rd
respondent to pay the remaining balance of the debt of 1.7 million dollars
F to the appellant, is whether the appellant had waived the liability of the 3rd
respondent by accepting and agreeing with the mode of payment through
three separate bank drafts endorsed by the 3rd respondent ‘without
recourse’ to it in satisfaction of full and final payment to the appellant when
these drafts were returned unpaid because there were no funds in the
G account of the 2nd respondent on which the drafts were drawn? The trial
court and the court below relied heavily on the interpretation of the term
“*without recourse*” used by the 3rd respondent on each of the bank drafts,
in *JOWITT’S Dictionary of English Law* and *BLACK - Dictionary of*
H *English Law*, which gave the meaning of the term as, “*without further*
liability”. This interpretation was upheld by the trial court and affirmed by
the court below in exonerating the 3rd respondent from further liability in
paying the remaining sum of 1.7 million dollars to the appellant. To me, the

appellant's complaint that the stand taken by the lower court was wrong in law, appears to be well founded. The transaction involved in the implementation of the terms of the agreement between the parties in this appeal in Exhibit 5, involved a mode of payment in bank drafts spanning over a period of two years. There is no doubt at all that the transaction was carried out under the Bills of Exchange Act which contains relevant provisions on the respective rights of the parties. Sections 16 and 62 of this Act which are relevant in the determination of whether or not the appellant was deemed to have waived its right to have recourse to the 3rd respondent for the payment of the remaining debt when the 2nd respondent failed to pay, are as follows:-

“16. The drawer of a bill and any endorser may insert therein an express stipulation -

- (a) negating or limiting his own liability to the holder;*
- (b) waiving as regards himself some or all of the holder's duties*

xxxxxxxxxxxxxxxxxxxxxxxxxxxx

62(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged and the renunciation must be in writing unless the bill is delivered up to the acceptor.

(2) The liability of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section shall affect the rights of the holder in due course without notice of the renunciation.”

Taking into consideration the above provisions of the Bills of Exchange Act and the evidence on record on the transaction between the parties in this appeal towards implementing the provisions or terms of the agreement in Exhibit 5, in the absence of clear evidence in writing signifying express waiver of rights, I am not prepared to agree that the appellant had waived its rights to resort the 3rd respondent for the payment of the sum of 1.7 million dollars. This is because the evidence is quite clear from the record that the 2nd respondent which assumed the new liability and responsibility of paying this remaining sum of 1.7 million dollars to the appellant upon taking over the assets and liabilities of the 1st respondent

which was the principal debtor, is certainly not in a position to pay this sum with virtually nothing in its account in the bank.

For the foregoing reasons and the fuller reasons in the lead judgment of my learned brother Oguntade JSC, I will also allow this appeal.

B Accordingly this appeal is hereby allowed. The judgments of the trial court of 16-7-1986 and that of the Court below of 1-7-1996, are hereby set aside. In place of those judgments, judgment in the sum of 1.7 million dollars being part of the remaining balance of debt, shall be entered for the plaintiff
C now appellant against the 2nd, 3rd and 4th defendants who are now 1st, 2nd and 3rd respondents respectively. I abide by the remaining orders on interest and costs as contained in the lead judgment.

D

OGBUAGUJSC

The facts in this case as presented by the Appellant, are agreed to and adopted by the Respondents. In other words, the facts are not in dispute as painstakingly treated in the lead judgment of my learned brother
E - Oguntade, JSC.

There is no doubt in my mind and as rightly held by the court below, at pages 547 and 548 of the Records, that;

F *“Unfortunately, the three drafts Exhibits 8, 8^A and 8^B, were drawn by the 3rd Respondent on the Continental Motors, were accepted by the Appellant, endorsed them to the 3rd Respondent who then endorsed them “without recourse” to the plaintiff/respondent “in complete breach of the provisions of Exhibit 5, clause 4(ii). When Exhibits 8, 8^A and 8^B were presented for payment, they were dishonoured as the appellant failed to
G supply the necessary funds to pay for them” {the underlining mine) -*

What becomes plain to me, are:

- H *i. That the said Drafts/Bills were dishonoured. Reason: Because of insufficient funds in the Account of the 2nd Respondent in Wema Bank.*
ii. The 3rd Respondent GUARANTEED Payment,
iii. The 1st Respondent, is still having or enjoying the goods supplied.
iv. That the amount of \$1.7 million dollars remain unpaid”.

Sincerely, the justice of this case, has compelled the Appellant, to cry out to the high heavens and to this Court for justice. This is because, the Appellant is entitled to the money admitted by the 1st. 2nd and 3rd Respondents, belongs to it. This is having regard to the undisputed findings of fact by the trial court at page 369 of the Records, that the drafts Exhibits B 8, 8^A and 8^B, were dishonoured and that the Appellant, duly protested by Exhibits 9 and 9^B and that - “*The amount of \$1.7 million dollars due on the said Bills remain unpaid hence this action*”.

The learned trial Judge at the same page 369; had this to say, inter alia: C

“*The complaint arose because the proceeds of the bills of exchange were not paid to the plaintiff. It is not and cannot be disputed that the basis of this action is the agreement in Exhibit 5. The question which I believe the court is called upon to decide is, which of the D defendants 2-4 is liable to make good the sum due?*

All of them deny liability. By Exhibit 5 I do not see what action the 2nd defendant is expected to perform towards the payment of the sum due. The assets of the Company in liquidation have been transferred to and E accepted by the 3rd defendant who also admitted indebtedness to the plaintiff in the sum of \$1.7 million dollars. Besides the uncontradicted oral evidence on this issue, the acceptance of the 3rd defendant in Exhibits 8 - 8^B is fully supportive of that fact admission. It is equally not disputed F that the bills of Exchange were issued contrary to the terms in Exhibit 5. Instead of the Bank i.e. the 4th defendant issuing the drafts, they were issued by the 2nd defendant of course under the agreement 2nd defendant had no obligation on to issue the drafts. Those drafts were therefore, wrongly issued” [the underlining mine] G

Of course, these are all findings of fact by the learned trial Judge. The lower court, indeed and in clear language at page 557 lines 13 to 17, stated as follows:

“.....*The 3rd respondent, is not now turning back to claim the H value of the three drafts, nor is he (sic) running away from liability as a result of committing any deliberate mistake. There is no evidence to that effect”.* (the underlining mine]

Let me briefly touch/deal with the principle of Waiver. The concept of waiver, is said to be that a person who is under no legal liability and having full knowledge of his right or interest conferred on him by law, and who intentionally, decides to give them (or some of them) up, cannot be heard to complain that he has not been permitted to exercise those right or that he has been denied the enjoyment of those interests. See *Ariori & ors. v. Elemo & ors.* (1983) 1 S.C. 13 at 48 -49; (1983) 14 NSCC. 1 at 20; (1985) 1 SCNLR 1 at 25 - per Eso, JSC; *Ezomo v. Oyakhire* (1985) 1 NWLR (pt.2) 195; *Adegoke Motors Ltd. v. Dr. Adesanya & Anor.* (1989) 3 NWLR (pt. 109) 250 at 292; (1989 5 SCNJ 80- per Karibi-Whyte, JSC.

Waiver is defined as the abandonment of a right. However, to amount to a waiver - express or implied, two elements it is settled, must co-exist, namely -

i. The party against whom the doctrine is raised, must have knowledge or be aware of the act or omission which constitutes the waiver and

ii. He must do some unequivocal act adopting or recognizing the act or omission, See *Olatunde v. Awolowo University & Anor.* (1998) NWLR 178; (1998) 4 SCNJ. 59 at 79- per Iguh, JSC, in which the cases of *Matthias v. Smallwood* (1910) 1 Ch. 777 at 786; *Fullers Theatre and Vandayike Co. Ltd. v. Rofe* (1925) A.C. 435 (P.C.) and *Ariori & ors. v. Elemo & ors.* (supra) were referred to.

In the case of *Matthias v. Smallwood* (supra), it was held that a right to re-enter under a lease, is not waived by the lessor, unless, knowing the facts on which the right arises, he does something unequivocal which recognizes the continuance of the lease.

It need be stressed and this is settled, that waiver, is the intentional and voluntary surrender or relinquishment of a known privilege or right by a party entitled to the same, which, at his option, he could have insisted upon.

As a matter of fact, it is said that waiver is not all that simple. See *Fawehinmi Construction Co. Ltd. v. Obafemi Awolowo University* (1998) 5 SCNJ 44 at 54; . It is also said to be, a curious phenomenon. That it can, in certain circumstances, be available to a plaintiff as well as to a defendant.

That when available to a plaintiff, it is always that he needs not to plead it as such. That he can simply rely on the failure of the defendant, to insist on a right to which he is entitled. See *Prince Fasade & 5 ors. v. Prince Babalola & anor.* (2003) 4 SCNJ 287 at 302;

Thus, in order to establish a waiver, it must be shown, that some B step has been taken which is only necessary or only useful if the objection, has been actually waived or has never been entertained. See *Dr. Saraki v. Kotoye* (1990) 4 NWLR (Pt. 143) 144; (1990) 6 SCNJ. 31.

In the case of *Ariori & ors. v. Elemo & ors.* (supra) referred to in C the case of *Odu'a Investment Co. Ltd. v. Talabi* (1997) 10 NWLR. (pt. 523) 1; (1997) 7 SCNJ. 600. Idigbe, JSC. at page 22 of the NSCC Report, defining the word waiver, had this to say.

“By way of a general definition, waiver - the intentional and D voluntary surrender or relinquishment of a known privilege and a right, it therefore, implies a dispensation or abandonment by a party waiving of a right or privilege which at his option, he could have insisted upon”.

Obaseki, JSC, on his part at page 25 of the same Report, opined E as follows:

“Waiver is according to Words and Phrases legally defined, Vol. 5 p. 301 1969 Edt- reprinted 1874 defined as the abandonment of a right. A person who is entitled to the benefit of a statutory provision, may waive it and allow the transaction to proceed as though the provision did not F exist.”

In the case of *Bank of the North Ltd. v. Alhaji Bala Yau* (2001) 5 SCNJ 168(5) 192 - *Karibi-Whyte, JSC.* stated thus;

“It is well settled that waiver is an abandonment of a right. Two G elements must co-exist to constitute a waiver - First the party against who the doctrine is invoked must have knowledge or be aware of the act or omission which constitutes the waiver and secondly, there must be on the part of the person against who the doctrine is invoked, some unequivocal act adopting or relinquishing the act or omission. See Olatunde v. H Obafemi Awolowo University (1998) 5 NWLR 178”.

See also recently, the case of *Chief Eze v. Dr. Okechukwu & 7 ors.* (2002) 12 SCNJ 258 @ 271.

It must always be borne in mind and this is also settled, that a waiver, may be inferred/implied by the courts from a conduct that is inconsistent with the continuance of a right on minimum or slight evidence. For instance, Section 50 (2) (b) of the Bills of Exchange Act, B Cap. 15 Laws of the Federation, 1990, provides for right of waiver. See Bank of the North Ltd. v. Alhaji Bala Yau (2001) 5 SCNJ. 168 @ 184- per Achike, JSC (of blessed memory).

In the case of Boss I. Smith & Co. Ltd. v. T. D. Bailey Son & Co. (1940) 3 All E.R. 60 at 70 referred to in Chief Eze v. Dr. Okechukwu C (supra), Lord Wright, observed as follows:

“The word “waiver” is a vague term used in many senses, it is always necessary to ascertain in what sense and with what restrictions it is used in any particular case. It is sometimes used in the sense of election D as where a person decides between two mutually rights..... It is also used where a party expressly or impliedly gives up a right to enforce a condition or rely on a right to rescind a contract or prevents performance, or any right by laches”.

E Tobi, JCA (as he then was) in the case of Carribean Trading & Fidelity Corporation v. NNPC (1992) 7 NWLR (pt.252) 161 @ 185; (in the Appellant’s Reply Brief at page 7, the part is erroneously stated to be 25), stated thus:

F *“Waiver carries some element of abandonment of a known legal right. By his conduct, the person gives a clear impression that he is not ready to pursue his legal right in the matter. He may not say so in specific words. He may not say so at all. But once his conduct shows that trend, a court of law will hold that he has waived his right”.*

G See also the definition of waiver in Black’s Law Dictionary, 15th Edt. (sic) (it is 5th Edt.) reproduced at pages 370 - 371 of the Records. See also the definitions contained in the 6th Edt, page 1580 and now in the 7th Edt, at page 1574

H I respectfully, concede and agree, with the finding of my learned brother, Oguntade, JSC, in the Lead Judgment, that there are facts duly pleaded by the 1st and 3rd Respondents in paragraphs 7(e) and 8 of their Further Amended Statement of Defence as appear at pages 327 to 339 of

the Records which constitute/amount to the defence of Waiver.

It seems to me, with respect, that all the other issues - Nos. 2, 3 and 4 of the Appellant, deal with its same issue No. 1. I will however, make some additional contribution by way of emphasis. I have already stated hereinabove, that the payment of the said debt, was guaranteed by the 3rd Respondent. B

Firstly, the purpose or why Exh. 5, was entered into by the parties, is quite clear and not in doubt. Secondly, the 3rd Respondent had made a part-payment of the sum of \$5,293,781.92. Clause 3 of Exh. 5 reads as follows: C

“A Testament tripartite agreement although not reduced into writing and signed by all the parties, had previously been reached by ail the parties whereby the BANK (i.e. the 3rd Respondent) would pay only U.S.\$ 9,314,565 - 58 representing the invoice value only of goods shipped to Continental Motors and Engineering Company Limited less a total of U.S.\$2,320,783.61 already paid by the Sank, and receipt of which was acknowledged by the Rumanian”. (the underlining mine). D

It is noted by me, that from Clause 1 of Exh. 5, the said meeting of all the parties, was convened at the instance of the 3rd Respondent. The purpose of the said meeting, E

“was to explore further, the possibilities of reaching agreement in respect of the settlement of all the indebtedness of Continental Motors & Engineering Company to the Rumanians which transaction was guaranteed by National Bank of Nigeria Limited”. (i.e. the 3rd Respondent)”. (the underlining mine). F

Exhibit 5, was signed by all the parties and therefore, in law, the contents, were binding on all of them. It is therefore, surprising to me, why the parties, especially the 1st and 3rd Respondents, are equivocating and shifting the buck, so to speak/as it were, in respect of the balance which appears to me, to be a smaller amount. It is noted by me, that even the trial court, found as a fact that the 3rd Respondent guaranteed the payment of H the indebtedness.

At page 366 of the Records, the learned trial Judge at lines I to 15 stated thus:

B “The history of the case reveals the facts that the Continental Motors and Engineering Company Limited imported some goods from the Plaintiff for which no payment was made. That transaction was guaranteed by the 4th defendant the National Bank of Nigeria Limited. When in spite of several demands for payment no settlement was reached, the plaintiff instructed it’s (sic) (its) solicitor who commence (sic) (meaning to) commence winding up proceedings against the 4th defendant. Consequent on the threat posed by that proceedings, a meeting, was held between all the parties concerned in the transaction and an agreement was reached which was committed to writing and evidenced by Exhibit 5. It is that agreement Exhibit 5 which is the basis of the present action”. (the underlining mine)

D I will now deal with who is a Guarantor and what a Guarantee means. In the case of Trade Bank PLC v. Khalid Barakat Elami (2002) 13 NWLR (pt. 836) 158 cited and relied on by the Appellant, the Court of Appeal, stated/held at page 216 as follows:

E “A guarantor is technically a debtor because where the principal debtor fails to pay a debt, the guarantor will be called upon to pay the loan so guaranteed. The guarantor can however, be absolved from liability if he can show that the principal debtor has paid the loan”. (the underlining mine]

F As rightly submitted by the learned counsel for the Appellant in their Reply Brief, in the instant case, the debt remains unpaid. In my respectful view and I so hold, that the 3rd Respondent as the Guarantor, is liable to pay the same since the 2nd Respondent, is unable to pay, more so, as the said cheques/drafts, were dishonored by reason of the fact that the 2nd Respondent, did not have sufficient funds in its Account with its Bankers to take care of the indebtedness or for the sums stated in the said Cheques/Bills.

H In the case of Fortune International Bank Plc. v. Pegasus Trading Office (Gmbh) & 2 ors., also reported in (2004) 1 SCNJ 292 and (2004) 1 S.C. (pt II) 164, (Not Fortune International Bank Plc v. Fimseno Holdings Nig. Ltd. as cited by the Appellant in its Brief. Although, it is also reported in (2004) 4 NWLR (pt. 563), the page is 369 and the ratio or

reference, is at page 339), this Court -per Uwaifo, JSC, stated/held that the tendency, is that the law appears to have moved to the centre to make the right of the creditor less conditional. That the creditor is now entitled to proceed against the guarantor, without or independent of the incident of the default of the principal debtor. The learned Jurist referred to the views expressed in Andrew & Millet, Law of Guarantees, 1st Edt, pages 762 - 163. The said principle or view, was approved by this Court in the case of African Insurance Dev. Corporation v. Nigeria (LGN) Liquefied Natural Gas Ltd. (2000) 4 NWLR (pt. 653) 494 at 505 - 506; (2000) 2 SCNJ 119; (2000) 2 S.C. 57 - per Ayoola, JSC, to the effect that,

“The fact that the obligation of the guarantor arise only when the principal has defaulted in his obligation to the creditor does not mean that the creditor has to demand payment from the principal or from the Surety, or give notice to the Surety before the creditor can proceed against the Surety. Nor does he have to commence proceedings against the principal, whether criminal or civil unless there is an express term in the contract requiring him to do so”. (the underlining mine)

Once again, by way of emphasis and this is also settled, the liability of a/the Guarantor, becomes due and mature, immediately the debtor/borrower, becomes unable to pay its/his outstanding debt. The Guarantor's liability, is then said to have, crystallized. See Royal Exchange Assurance (Nig.) Ltd. v. Aswani Textiles Ltd. (1992) 3 NWLR (pt. 227) 1; (1992) 2 SCNJ 346; Eboni Finance & Securities Ltd. v. Wale-Ojo Technical Service Ltd. & 2 ors. (1996) 7 NWLR (pt. 461) 464 @ 476 C.A. and Salawal Motor House Ltd. & anor. v. Hajji B. Lawal & anor. (1999) 9 NWLR (pt. 620) 692, @ 706 , C.A.

I am aware and this is also settled, that a question arises as to the manner a Surety or Guarantor, becomes bound only to the letter of his engagement - i.e. the Guarantee Agreement. The answer is said to be that he/it, has no further liability outside the Agreement, because, he/it, normally, receives no benefit or compensation. See the case of Gurara H Securities & Finance Ltd. v. T. I. C. Ltd. (1999) 2 NWLR (pt. 589) 29 at 47 C.A. In other words, the Surety/Guarantor, is bound merely, according to the proper meaning and effect of the written agreement. See also

Rowlatt on Principal & Surety - (3rd Edt.) page 102 and Chitty on Contract, Vol 2 24th Edt.

From the above principles of law, I hold that The 3rd Respondent, certainly, is liable to discharge its obligations under the said Guarantee. The
B 2nd Respondent and his learned counsel are right in not opposing this appeal. Their stance, is not surprising to me. It is as expected. Afterwards, its appeal to the Court below, was struck out and it has not appealed against it in this Court. As I stated earlier in this Judgment, the said goods were
C sold and delivered to the 1st Respondent and the goods - were or are still in their possession.

In its Brief, it is stated/submitted at page 2, inter alia, thus:

“..... As it relates to the 2nd Respondent the success of this appeal does not discharge it of liability but only means that the 1st and 3rd Respondents are jointly liable together with it”. (the underlining mine)
D

This, in my view, is an honest admission, that the Appellant, is entitled to be paid the balance of the debt owed to it. The payment of the entire debt have been guaranteed by the 3rd Respondent.

E Learned Counsel in the Conclusion in their said Brief, stated as follows:

“In conclusion, this Honourable Court is urged to allow the appeal and hold that the 1st and 3rd respondents remain liable to pay for the
F balance of the goods sold and delivered to the 1st respondent”.

So be it. My answer therefore, to the lone issue of the 2nd Respondent, is rendered in the Negative.

Finally, although there are concurrent judgments of two lower courts, there is again, the attitude of an Appellate Court such as this Court
G in respect thereof which is now firmly established in a line of decided authorities to the effect, that concurrent findings of fact of two lower Courts, will not be upheld, unless they can be justifiably defended from available evidence. See recently, Mojekwu v. Mrs. Iwuchukwu (2004) 4
H SCNJ 180 at 196 - per Uwaifo, JSC.

In other words, the principle is said to have long been crystallized, that an Appellate Court, will not interfere with the concurrent findings of two courts on issue of fact except there is established, a miscarriage of

justice from perverse findings or violation of some principle of law or procedure. See *Alhaji Ndayako & Jikantoro & 6 ors. v. Alhaji Dantoro & 6 ors.* (supra) @ 170 ; (2004) 5 S.C. (pt. II) 1 - per Edozie, JSC, citing several cases therein; *Francis C. Arinze v. First Bank of Nig. Ltd.* (2004) 5 SCNJ 183 at 188; (2004) 12 NWLR (pt.888) 663 (5) 673; (2004) 5 S.C. B 160 - per Belgore, JSC, citing also several cases therein and *Alhaji Mainagge v. Alhaji Gwamna* (2004) 7 SCNJ 361 (a) 372; (2004) 7 S.C. (pt. II) 86 - per Akintan, JSC also citing several cases therein. See earlier cases of *Oladoye & 2 ors. v. The Administrator, Osun State & 3 ors* (1996) 12 SCNJ 192 @ 207; *Charles Ume v. Okoronkwo & anor.* (1996) 12 C SCNJ. 404 (5) 413; *Alhaji Usman v. Garba* (2003) 7 SCNJ. 38 @ 55 and *First African Trust Bank Ltd. v. Partnership Investment Co. Ltd.* (2003) 2 SCNJ 1 @ 20 just to mention but a few.

Therefore, since the said practice of the Court, is not to disturb or D interfere with the concurrent findings of two lower Courts, unless there are particular circumstances dictating otherwise - See *Chief Sarbah v. Karikari* (1938) 5 WACA 34; *Chikwendu Mbamalu* (1980) NSCC 128; *Ibodo & ors. v. Enarofia & ors.* (1990) NSCC 195; *Enang & ors. v. Adu E* (1981) 11 S.C. 25 and many others, the instant case leading to this appeal, in all the circumstances, is one of those, with respect, that this Court will and must interfere with the said Judgments of the two lower courts. The said judgment of the lower court - the Court of Appeal, affirming the F decision/judgment of the High Court, is hereby set aside by me. I hold that the 3rd Respondent, is liable to pay the balance of \$1.7 million dollars of the price/cost of the goods sold and delivered to the 1st Respondent.

It is from the foregoing and the fuller detailed Judgment of my, G learned brother, Oguntade, JSC, that I too, allow the appeal which is meritorious. I abide by the consequential orders including those in respect of costs.