

SUPREME COURT OF NIGERIA
15TH DECEMBER, 2006 SC. 301/2003
**CORAM:- S. M. A. BELGORE CJN, S. U. ONU, A. I. KATSINA-
ALU, D. MUSDAPHER, F. F. TABAI, JJSC**

UNITED BANK FOR AFRICA PLC APPELLANT
AND
BTL INDUSTRIES LTD. RESPONDENT

ACTIONS - Jurisdiction - Negligence and breach of contract claim - Having nothing to do with marine navigation - Nor monetary policy of the government - State High Court has jurisdiction (H1)

ACTIONS - Limitation of - Statute Bar - Banking - Overseas remittance - Respondent's cause of action - To reclaim its unremitted money - Accrued only when it became aware of exhibit C (H2)

ACTIONS - Locus standi - Banking - Foreign exchange procurement - Where the Bank failed to procure the agreed foreign exchange - Plaintiff has the locus to sue (H3)

BANKING - Contracts - Failure of - Foreign exchange - Where appellant Bank agreed to procure foreign exchange - But failed to do so - Respondent is entitled to a return of its money (H4)

APPEALS - Concurrent findings - Based on properly evaluated evidence - Will not be disturbed - As no exceptional circumstance was shown (H5)

APPEALS - Leave - New issue - Raised before the Supreme Court - Without leave of court - And is not supported by evidence - Will fail (H6)

CONTRACTS - Breach - Damages - Essence of - Mitigation - Damages for loss of anticipated profits being too remote - Will be set aside (H7)

FACTS

The plaintiff/respondent was a valued customer of the defendant/appellant. Between 1981 and 1983, several bills and letters of credit from respondent's overseas suppliers were received by appellant on respondent's behalf. The price of each bill was denoted in foreign currency and the total amount of their Naira equivalent was N8,541,557.66. The respondent's account with the appellant was debited for the said amount. Appellant was to use the debited amount in securing foreign exchange from the Central Bank of Nigeria. By this action, the respondent claims that the appellant negligently failed to secure the foreign exchange despite persistent requests that appellant should remit the money to the overseas supplier. Respondent claimed return of the said amount in various foreign currencies, or alternatively that their naira equivalent be paid to the respondent at the prevailing exchange rate at time of payment by appellant. It also claimed anticipated loss of profits plus interests and several other alternative claims.

Appellant contended that the action is statute barred amongst other defences such as lack of jurisdiction which were not substantiated. Trial Court found that cause of action arose at the time respondent became aware of exhibit C, a document by which the CBN returned the respondent's money long ago which fact was concealed by the appellant. It gave judgment in favour of the respondent. Appellant's appeal to the Court of Appeal was dismissed. Being aggrieved, appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether in view of the pleadings of the respondent, the trial court has subject matter jurisdiction to adjudicate on the matter.

(ii) In the event that it is held that the trial court had subject matter jurisdiction, was the Court of Appeal right in confirming the decision of the trial court that the plaintiff's action is not statute barred.

(iii) If the respondent's action is not statute barred, does the respondent have the locus standi to prosecute this case?

(iv) Was the Court of Appeal right in refusing to set aside the judgment of the trial court on the ground that the said judgment is not

perverse?

(v) Whether or not the respondent's case should not have been dismissed by the lower courts having regard to the plea of the appellant and the evidence before court that the claim of the respondent runs contrary to public policy and Act of State doctrine.

(vi) Should the award of damages and interest by the trial court and confirmed by the Court of Appeal be allowed to stand?"

HELD (Unanimously dismissing the appeal but setting aside damages for loss of profits award per **MUSDAPHER JSC**)

Jurisdiction - Negligence and breach of contract claim

1. I have carefully examined the claims of the respondent and I am unable to find on the pleadings or the evidence that the plaintiff as the respondent was making a claim predicted on the non-issuance or otherwise of letters of credit or of failure or otherwise of goods shipped to Nigeria. In my view, this is a straight forward matter of a claim for negligence and for breach of contract and for the return of money. The claim has nothing to do with shipping marine commerce or marine navigation. In the CCB v. Mbakwe case supra at page 179, it was held:-

"Where a bank is engaged to transmit or remit money from a purchaser to an issuing bank without more, that singular act does not confer status of issuing bank on the remitting bank so as to deprive the purchaser of the right to maintain an action against the remitting bank in the event of a default in remitting the agreed sum to the designated party."

As mentioned above, the claim of the respondent before the trial court does not in any way relate to fiscal or monetary policy of the government neither does it relate to the revenue of the government. It is a claim essentially founded on negligence and breach of contract. I am of the view that the trial High Court has the necessary jurisdiction over the subject matter of the dispute. (p. 3758 A)

ACTIONS - Limitation of - Statute Bar

2. Now, this issue has been raised and considered by the lower courts. The trial Judge held at page 432 of the records:-

“The fact that between 1983 to 1994, the chairman of the plaintiff, P.W.4 was repeatedly assured by top officials of the defendant bank to wit: Its Managing Director and Chief Executive, Alhaji S. S. Baffa, Branch Managers, Mr. Adedeji and Mr. Oyebola that the money would be remitted to the overseas suppliers is established to my satisfaction. The defendant clearly does not dispute the above. If the plaintiff was constantly assured as late as 1994 that his money would be remitted to the overseas supplier, then how, may I ask, can a cause of action arise in 1994.”

The court also found the appellant did not cross examine the witness on this vital issue of concealment and deceit. I may add, that there was no appeal against such finding in Court of Appeal. The Court of Appeal also found that there was concealment of crucial fact and deceit. The cause of action only arose when the respondent accidentally stumbled on Exhibit C. The trial court found that the totality of the appellant’s conduct in this case is fraudulent and concealment of fraud and the Court of Appeal affirmed this finding.

Similarly in my view, the right of action in this matter clearly accrued in 1994 when the respondent became aware of the existence of Exhibit C. The respondent could not reasonably be expected to file an action against the appellant when the appellant was always giving him assurances that his bills and letters of credit were being processed by Central Bank. Indeed there could be no cause of action.
(pp. 3759 F/ 3760 G)

Locus standi - Banking

3. Now, the trial court at pages 428-429 rejected the argument of the appellant on the issue of locus standi. He stated thus:

“The plaintiff contracted the defendant to procure foreign exchange required to discharge its liabilities to foreign suppliers. The foreign suppliers shipped the goods to the plaintiff a long time ago, but the plaintiff has not paid for the goods till today. The liability of the plaintiff to the foreign suppliers remains. Having failed to carry out the plaintiff’s instructions, the only sane thing to do is return the money to the plaintiff.

The defendant says they are holding the money in trust (see Evidence of DWI) The defendant has held on to the plaintiff's money now for about 18 years. See also Exhibit V wherein the defendant informed the overseas suppliers that the failure to remit the money was because the plaintiff had not paid the naira cover when in fact the plaintiff had paid the money to the defendant, a fact admitted by the defendant but which he found convenient to deny to the overseas suppliers. Holding unto the plaintiff's money for 18 years is criminal. The defendant has no justification whatsoever. The plaintiff is entitled to a return or a refund of his money to enable him pay his overseas suppliers and restore his badly damaged name."

The Court of Appeal in my view, rightly confirmed the above finding of fact and held that the respondent has clearly the locus standi to institute the action. (p. 3761 F)

BANKING - Contracts - Failure of - Foreign exchange

4. In my view, the matter before the trial court was very simple. The appellant as bankers agreed to process and transmit to the overseas im- E
porters the value of the goods already shipped and collected by the re-
spondent. The respondent paid the naira equivalent of the foreign ex-
change involved. The appellant was negligent in processing for the for-
eign exchange. At page 779 of the Records of appeal, the Court of Appeal F
made the following finding:-

[illegible]

The plaintiff is entitled to a return or refund of his money to enable him pay his overseas suppliers and restore his badly damaged name.”

It is clear to me that the Court of Appeal was right to confirm the decision of the trial court because the appellant has woefully failed to produce any evidence of promissory note used to pay the overseas supplier or that any of the 331 bills was refinanced. At the oral hearing of this H appeal when counsel for the respondent submitted that none of the bills of respondent was refinanced in any of the documents referred to by the appellant, when asked, the appellant counsel was unable to show this

court where any of the bills was refinanced. (p. 3763 C/ G)

APPEALS - Concurrent findings

B 5. These fundamental and crucial findings of facts were concurrently
made by the two lower courts and the appellant has failed to convince
me that exceptional circumstances exist for me to disturb the findings. I
have carefully considered the judgments of the two lower courts and
their reasoning. I have also considered the argument of the learned counsel
C for both parties. I am convinced that the evidence before the trial
court was properly appraised and evaluated. I have no reason to disturb
the concurrent findings of facts made by the two lower courts. I am not
persuaded that the findings are perverse. (p. 3764 B)

D ***Leave - New issue - Raised before the Supreme Court***

6. This is concerned with the question whether or not the respondent's
case should not have been dismissed by the lower courts having regard
to the plea of the appellant that the evidence before the court that the
E claim of the respondent runs contradictory to public policy and Act of
State Doctrine. The submission of the learned counsel for the appellant is
that this case is linked to the Federal Government of obtaining debt relief
and it is linked with the fundamental objective of the State. In reply, the
F learned counsel for the respondent argued that this is a new special defence
raised for the first time in the Supreme Court and that there was no
pleading to support it. I agree with the learned counsel for the respondent
that this is a special defence which is raised for the first time in the
Supreme Court without leave. Further more, there is no evidence what-
G soever to support the argument. I find no merit whatever in the argument
of the appellant's counsel. I resolve the issue against the appellant.
(p. 3764 E)

H ***CONTRACTS - Breach - Damages - Essence of***

7. The essence of the respondent's claim which pervades the record and
indeed is the whole basis of the action is the failure of the appellant to
transmit money to the overseas suppliers for goods already imported into

Nigeria. If that money was duly remitted to the suppliers, there would be no need for the case at all. The essence of damages in breach of contract cases is based on *restitutio in integrum*. That is the award of damages in a case of breach of contract is to restore the plaintiff to a position as if the contract has been performed. In my view, since the respondent in this case has succeeded in his prayer No. 2, I do not think, it is proper to grant prayers 3 and 4. These are losses of anticipated profits (i) from 1985 - 1994 and (ii) from 1994 to date of judgment. The reason given was only because the foreign suppliers having not been paid refused to deliver goods to the respondent on credit. The respondent was duty bound to mitigate its losses and look for money elsewhere to resume trade with the usual suppliers or some other ones. I believe that the damages for loss of anticipated profits are too remote. The law imposes on a plaintiff in such a situation, the duty to take reasonable steps to mitigate the loss, consequent on the breach and debars from claiming for any remote damage which is due to his neglect or refusal to take other steps. The time factor is also very important, a plaintiff must as soon as he discovers that the defendant has breached his contractual obligation, he should immediately begin to mitigate the losses. In the instant case, even if there is no remoteness of the damage, the respondent became aware of the breach when the suppliers were continuously demanding for payment. The respondent clearly could not just sit down after knowing the situation on the ground, it is duty bound to avoid the loss of expected profits by redeploying its resources elsewhere.

In any event, since the money to be remitted to the foreign suppliers was not meant to be employed in their business, the failure to remit the money cannot affect and has no bearing on the refusal of the suppliers to sell goods on credit to the respondents. Indeed the respondents could deal with other suppliers if they so wished. I am accordingly of the view, that items 3 and 4 cannot be recovered against the appellants. (p. 3765 C)

NOTABLE POINTS OF INTEREST

ONU JSC

1. Banking - Jurisdiction - How determined

Indeed, it is trite that jurisdiction is determined by the plaintiff's claim before the court. Okoye & Ors. v. Nigerian Construction & Furniture Company Ltd. (1991) 7 S.C (Pt. III) 33; (1991) 2 NSCC (Vol. 22) 422 at B 436 where Akpata, JSC, pointedly laid down the position of the law to be:

“The legal position as to competence or otherwise of the trial court to entertain a case is arrived solely on the facts disclosed in the Statement of Claim.”

C See also Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt. 81) 129. This rather ingenious though untenable submission cleverly ignores the law that any issue of jurisdiction is founded on the plaintiff's Statement of Claim alone, not the defendant's defence or any other process. See M. V Scheep v. Araz (2000) 15 NWLR (Pt. 691) 662 at 668 para H.

D Be it noted that nowhere is it stated that the respondent is making a claim predicated on non-issuance or otherwise of letters of credit or of failure or otherwise of goods shipped into Nigeria. It is apparent that the appellant is labouring under a misconception of the purport and application of Section 1(i) (h) of the Admiralty Jurisdiction Act vis a vis the issues in this case. In effect, the respondent is neither complaining here about shipping nor non-shipping of goods by sea.

F As this is a claim of breach of contract by a customer against its bank, the Lagos State High Court has, in my firm view, jurisdiction to entertain the claim. Furthermore, as the appellant for its contention sought support by reliance on the Admiralty Jurisdiction Decree, I see no merit therein. (pp. 3768 D/ 3770 H)

G *2. New issues not pronounced upon by lower court - Are not competent*
Apart from not pleading Act of State Doctrine or public policy neither is any evidence led on or even address made on them before the two lower courts. Since there has not been any pronouncement on any of the issues, any appeal on them cannot be competent as appeal must be against H the decision of the lower court.

Since the issues are not part of the pleadings, the argument proffered on it at best, goes to no issue and should be struck out. (p. 3772 G)

3. *Rights & obligations of parties to the business of foreign transactions*

The contention of the appellant that since the respondent had collected the goods, it had no right to complain is a clear manifestation of lack of understanding of the case of the respondent as well as the rights and obligations of parties to the business of foreign transactions. It is undisputable that payment made to the appellant by the respondent was for remittance to foreign suppliers. Such that if no remittance was made for benefit of the suppliers, no one else can complain but the respondent that paid the money. What the position comes to is the fact that the suppliers remain strangers to the contract for remittance with no power to enforce it or claim refund vide *Ikeazu v. ACB* (1965) NMLR 374, 379. Be it noted that essentially, importation is mostly through bill of exchange by which payments will be made many days after collection of goods.

The appellant's contention that respondent lacks locus depicts total misconception of the nature of importation business or conduct.

This is because it is trite that international commercial transactions invariably involve four autonomous though interconnected contracts as spelt out in the case of *Nasaralia Enterprise Ltd. v. Arab Bank Nig. Ltd* (1986) 4 NWLR (Pt. 36) 409. (p. 3780 H)

TABAIJSC

4. *Banking - When Federal and State High Courts will have jurisdiction*

In *N.D.I.C. v. Okem Enterprises Ltd.*, this court construed the proviso to Section 251(1)(d) of the 1979 Constitution to have exempted the exclusive jurisdiction of the Federal High Court over the matters listed in the subsection if the dispute is between an individual customer and his bank and that in such cases both the Federal High Court and a State High Court enjoy concurrent jurisdiction. I do not think we have any cause whatsoever to depart from that construction. It appears to be the most rational construction to be accorded the provision and I have no other choice than to adopt the interpretation as to the purport and/or effect of Section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993. There is, in fact, no controversy between the

parties as to the effect of the provision.

The only controversy here is whether the present dispute is one between an individual customer and his bank in respect of transactions between them which falls within the concurrent jurisdiction of both the Federal High Court and a State High Court under the proviso to Section 230(1)(d) of Decree No. 107 of 1993. In my view, the present dispute is simply one arising from individual customer/banker relationship and falls squarely within the proviso to Section 230(1)(d) of Decree No. 107 of 1993 over which the Lagos State High Court shares concurrent jurisdiction with the Federal High Court. I hold, in consequence, that the trial court has subject matter jurisdiction. (p. 3791 B)

5. Pleadings - When burden of proof will rest on defendant

Going by these provisions therefore, there may arise situations where a defendant may be required, on the state of pleadings, to lead evidence to discharge the burden of proving the existence of a particular fact.

The respondent led evidence that it is entitled to be informed by the appellant about the settlement of any of its bills and that because none of its 333 bills was settled, no such information was given to him by the appellant. That it received no Debit Advice accompanied by schedule of payment (which alone constitutes evidence of payment) from the appellant.

On this state of the pleadings and evidence and having regard to the fact that the questions about the number of bills paid and those not paid and the Naira cover for every unmatched and unpaid bill for which Exhibit C was made are facts which existence is peculiarly within the knowledge of the appellant and the Central Bank of Nigeria, the burden of proof of the total number of bills not matched and not paid, and their Naira cover therefore lies squarely on the appellant. (p. 3806 G)

6. Award of general damages - Interference by appellate court

It is clear from the award that the N300,000,000.00 comes within general damages since it is not specifically tied to any item of special damage specifically pleaded and proved. It is settled law that general damages,

usually awarded to assuage loss suffered by a plaintiff from the acts of a defendant, is a matter of inference based on the trial court's discretion. And an appellate court ought not to interfere with such award of general damages unless:-

- (a) Where the trial court has acted under a mistake of law; or B
- (b) Where he has acted in disregard of principles; or
- (c) Where he has taken into account irrelevant matters or failed to take into account relevant matters; or
- (d) Where he has acted under a misapprehension of facts; or
- (e) Where injustice would result if the appellate court does not intervene; or C
- (f) Where the amount awarded is either ridiculously low or ridiculously high that it must have been a whole erroneous estimate of the damage. D

While considering the award of damages, the learned trial Judge laboured under the misapprehension of fact that the appellant had used the money for 18 years.

Besides, the award is unreasonably excessive. Although the respondent adduced some evidence of anticipated profits, it is not such evidence that should reasonably attract such huge award. E
(pp. 3811 D/ 3812 A/D)

REPRESENTATION

Prof. A. B. Kasunmu, SAN., (with him, Olisa Agbakoba, SAN, N. I. Quakers, Chike Okafor, Tunde Osadare, Sagay Opasanya, Busola Odusanya and Raphael Adeoye) for the Appellant.

Chief Afe Babalola, SAN, (with him, Chief S. A. Awomolo, SAN, Mr. Adenipekun, SAN, Dr. Akin Onigbande, Oyemole, Alhaji L. Sanusi, Olu Daramola, B. J. Akomolafe, Mrs. Remi Awe-Osho, Sesau Dada, A. M. Kolawole, Miss. O. A. Balogun, Mrs. M. B. Aladesawe, and Miss. Mary Ekepere) for the Respondent. F G H

CASES REFERRED TO

NDIC v. Okem Enterprises Ltd. (2004) 4 S.C. (Pt. II) 77; (2004) 10

3750 UBA Plc v. BTL Industries Ltd (2006) 12 KLR Musdapher JSC

NWLR (Pt. 880) 107 at 222

Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt. 81) 129

M. V Scheep v. Araz (2000) 15 NWLR (Pt. 691) 662 at 668

Arowolo v. Ifabiyi (2000) 4 NWLR (Pt. 757) 356

B Owoniboye Tech. Service Ltd. (1995) 4 NWLR (Pt. 391) 534 at 547

Akinsanya v. U.B.A Ltd. (1986) 4 NWLR (Pt. 35) 273

Multi-purpose Ventures Ltd & Ors. v. Attorney-General of Rivers State (1997) 9 NWLR (Pt. 522) 648 at 662

C The Military Administrator of Kwara State v. Lafiagi (1998) 7 NWLR (Pt. 557) 202 at 212

Okoye & Ors. v. Nigerian Construction & Furniture Company Ltd. (1991) 7 S.C (Pt. III) 33; (1991) 2 NSCC (Vol. 22) 422 at 436

CCS (Nig) Ltd. v. Mbakwe (2002) 7 NWLR (Pt. 758) at 163

D Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156 at 184

New Nigerian Bank Ltd. v. G. O. Oniovosa (1995) 9 NWLR (Pt. 419) 327, 334F

Tella v. Usman (1997) 12 NWLR (Pt. 531) 168, 173F

E Odusote v. Union Bank (1995) 9 NWLR (Pt. 421) 558

STATUTES REFERRED TO

Decree No. 107 1993 s. 230(1)

F Constitution of the Federal Republic of Nigeria 1999 s. 251(1)(d)

LEAD JUDGMENT BY MUSDAPHER JSC

This is an appeal by the defendant against the judgment of the Court of Appeal, Lagos Division delivered on the 22nd day of July, 2003 in which the aforesaid court confirmed the decision of the trial court. The claim of the plaintiff before the trial court as contained in paragraph 62 of the 2nd Further and Better Amended Statement of Claim is as follows:-

H “1. Declaration that the defendant was in breach of its duty to the plaintiff by its failure to remit to the overseas suppliers the purchase price (in foreign currency) of the goods supplied by its overseas suppliers for which payment was duly made by the plaintiff.

2. *An Order directing the defendant to buy the sum of:-*

- | | |
|---------------------|---------------|
| (a) Pounds Sterling | #3,632,872.93 |
| (b) US Dollars | 3,384,263.37 |
| (c) French Francs | 3,478,031.85 |
| (d) Duetshe Marks | 3,431,790.47 |
| (e) Belgian Francs | 3,758,533.10 |
| (f) Dutch Guilders | 672,810.34 |
| (g) Danish Krone | 79,515.00 |

B

to the plaintiff being the value of the goods ordered from overseas suppliers and received by the plaintiff and for which payment was made in Naira to the defendant at the material time at the prevailing rate of exchange and which the defendant has failed to remit to the overseas suppliers despite repeated demands.

C

ALTERNATIVELY TO RELIEF 2 ABOVE

D

An Order directing the defendant to pay to the plaintiff the naira equivalent of the said sums of money at the prevailing rates for exchange at the time the defendant chooses to pay the plaintiff.

(3) *The sum of N378,780,244.00 being anticipated profits from 1985 to 1994.*

(4) *Loss of profit at the rate of N6,302,510.00 per annum from 1994 to date of judgment.*

(5) *Interest on judgment debt at the rate of 7.5% until payment is reflected by the defendant.*

F

ALTERNATIVELY TO 1-5 ABOVE

6. *A declaration that the defendant was in breach of its duty to the plaintiff by its failure to duly inform the plaintiff in 1988 that the Central Bank of Nigeria had returned the sum of N8,541,557.66 which was to be remitted to the plaintiff's overseas suppliers.*

G

7. *An Order directing the defendant to pay to the plaintiff the sum of N8,544,577.66 returned by the Central Bank of Nigeria to the defendant with accrued interest to date.*

H

8. *An Order directing the defendant to pay to the plaintiff the difference in exchange rates in 1988 AND the prevailing rates of exchange by the Central Bank of Nigeria at the time of judgment or the*

prevailing rate of exchange as the defendant chooses to pay the sum of:

- | | | |
|---|---|--------------|
| | (a) Pounds Sterling | 3,632,872.93 |
| | (b) US Dollars | 3,384,263.37 |
| | (c) French Francs | 3,478,031.85 |
| B | (d) Duetshe Marks | 3,431,790.47 |
| | (e) Belgian Francs | 3,758,533.10 |
| | (f) Dutch Guilders | 672,810.34 |
| | (g) Danish Krone | 79,515.00 |
| C | (9) Interest on the said sum N8,544,557.66 at the prevailing rate of interest annually in 1988 when the Central Bank of Nigeria released the money to the defendant up to the time of judgment. | |
| | (10) The sum of N18,907,530.00 being anticipated profit from 1955 to 1987. | |
| D | (11) Interest at the rate of 7.5% from time of Judgment to the time of payment by the defendant.” | |

Pleadings were ordered, filed, exchanged and amended. At the trial, the plaintiff called five witnesses while the defendant called 7 witnesses. Five of them were called in Nigeria, while two of the defendant's witnesses testified in London. On the 19/6/2002, learned counsel adopted their written addresses and in addition orally addressed the court. After an exhaustive treatment of the evidence, the learned trial Judge entered judgment in favour of the plaintiff thus:-

“Accordingly, the plaintiff’s claims succeed. Prayers 1, 2, 3, 4 and 5 of the plaintiff’s 2nd Further and Better Amended Statement of Claim are granted with the following reductions.

As regards prayer 3 it shall be sum of N300m.
 As regards prayer 4 it shall be N5m per annum from 1994 to date of judgment.

In the light of the fact that the main claim succeeds, the alternative claim is hereby refused. The judgment sum shall attract an interest at the prevailing interest rate fixed by the Central Bank of Nigeria from 1987 until judgment and at 7% until the judgment paid.”

Dissatisfied with the judgment, the defendant lodged an appeal on 11 grounds of appeal in the Court of Appeal. Distilled from the grounds,

the defendant raised six issues for the determination of the appeal. In its judgment delivered on the 22nd day of July, 2003, the Court of Appeal dismissed the defendant's appeal. Still dissatisfied, the defendant has now appealed to this court and it was with the leave of this court that the defendant has filed the Second Amended Notice of Appeal on the 19/9/2006. The said Second Amended Notice of Appeal contains 11 grounds of appeal. Before the examination of the grounds of appeal and the issues submitted for the determination of the appeal, it shall be necessary to briefly state the facts as found by the learned trial Judge as follows:-

"The plaintiff's business is importation and distribution of building materials, industrial chemicals, and raw materials. These goods are imported from the plaintiff's overseas suppliers namely:

Meridian Trade Corporation;

Meridian International Credit Corporation and International Trade Meridian, Meridian Hamburg, Germany and Tata of India. The plaintiff has been banking with the defendant since 1980 and enjoys credit facility which it used to meet the costs of importation from its overseas suppliers.

The plaintiff imports items on credit from the overseas suppliers and the items are usually sent with bills of exchange, or bills for collection or by letter of credit. Between 1981 and 1983, several of such bills and letters of credit, Exhibits P1 to P330 were received by the defendant on behalf of the plaintiff. The price of each bill was denoted in foreign currency, and the total amount of Naira equivalent of the foreign currencies was N8,541,557.66 at the time the goods were ordered. The account of the plaintiff with the defendant was debited for the said amount. The defendant was expected to use the sum debited to secure Central Bank of Nigeria allocation of foreign exchange. The plaintiff seeks by this suit a return of the money it paid to the defendant for remittance to the overseas exporters who had supplied the goods to the plaintiff. The plaintiff claims that the defendant negligently failed to secure Central Bank of Nigeria allocation of foreign exchange despite persistent requests that the defendant should remit the money to the overseas supplier.

At this stage, it is very important that the situation in

Nigeria as at 1983 with regards to importation of goods is explained, and what is expected of an importer. P.W2, Mr. Tola Lapite, a banking and finance expert and consultant explained the situation in Nigeria at the time. I adopt his explanation. He said and I quote him:

B *“By the end of 1983, there was an accumulation or arrears of unpaid Bills in form of Bills for collection, Letters of credit and direct remittance by Central Bank of Nigeria.*

This was due to non availability of foreign exchange at the time.”

C In 1984, the Federal Government of Nigeria struck an agree-
ment with overseas creditors to refinance these unpaid Bills. They in-
volved Chase Manhattan Bank, New York as the Intermediary between
Federal Government of Nigeria and the overseas creditors Bank. Conse-
quently, Central Bank of Nigeria directed all Banks to submit claims on
D behalf of their customers to them for presentation to Chase Manhattan
Bank. Simultaneously, the overseas creditors bank submitted claims on
behalf of the creditors to Chase Manhattan Bank who was expected to
merge the claims submitted by both sides. This was in 1985. There was
E preliminary report in 1985 sent by Central Bank of Nigeria to the Bank to
confirm the outstanding unpaid Bills to Central Bank for verification by
Central Bank of Nigeria. This Report is called Debtors Summary Status
Report 1985 (DSSR 1985). The Banks were expected to inform the af-
F fected customers about the requirement from Central Bank of Nigeria
and guide them to complying.

After the Bank must have contacted the customer and collected
information from them, they resubmitted the report to Central Bank of
Nigeria. Central Bank will then verify the Report for onward submission
G to Chase Manhattan Bank, New York, U.S.A. The final Report started
coming out in 1987.

After matching the claims of creditors (overseas) and Nigeria
Importers, the successful claims and the unsuccessful claims were re-
H ported to Central Bank and upon receipt of this report, Central Bank
Nigeria debited the Accounts of the Banks and promissory notes were
issued to the overseas creditors. The unsuccessful and rejected Bills were
also advised to the Banks who in turn informed their respective custom-

ers of their bills.

If a Bill is unsuccessful, the money paid to the bank by the customer would be returned to Central Bank of Nigeria who returns it to the Bank and then to the customer.

From the pleadings and evidence before the court, the following facts are not in dispute.

1. The plaintiff/company was a customer of the defendant bank for a long time. See Paragraphs 4, 5, 6, 7 and 11 of Statement of Claim, admitted by Paragraph 1 of the Statement of Defence.

2. The plaintiff was a valued customer of the Bank and had a rosy time with the defendant Bank between 1980 to 1984. See defendants letter, Exhibit B and evidence of D.W.1 and D.W.2.

3. The defendant received the Bills for which payment was duly made. See evidence of P.W.4, D.W.1 and D.W.3.

4. The Unit of account was foreign currency as stated in Paragraph 18 of the Statement of Claim. It is not denied. See also evidence of P.W.4.

5. The total amount of Naira equivalent of the foreign currency was N8,541,557.60k. All relevant shipping and exchange control documents, all clearing documents including bills of exchange and tax clearance certificate were submitted to the Defendant in respect of each transaction to facilitate quick remittance of the value of the overseas suppliers. The bills usually have maturity days of about 180 days - See Exhibits P1 to P330 evidence of P.W.4, D.W.1, D.W.2 and D.W.5.

6. The plaintiff's bills fell within the refinancing scheme.

It is trite law that what is admitted need not be proved. The defendant on its part pleaded that the Central Bank of Nigeria did not return or refund the sum of N8,541.557.66 to the defendant in respect of the plaintiff's transactions. The plaintiff has no *locus standi* to bring the action. The plaintiff's action is caught by Section 8 of the Limitation Law Cap. 118 Laws of Lagos State 1994. That the defendant was not negligent in handling the plaintiff's transaction.

D.W.1 - Mr Ojukwu Chukwuemeka, A Senior Manager and Head

of Foreign Trade Department with the defendant testified under cross examination thus: “I know from records that in 1988, Central Bank of Nigeria returned all money in respect of unremitted bills back to Commercial Bank. The Commercial Bank is not expected to return it to the owner. The money should be kept in trust for the Beneficiaries pending satisfaction of certain conditions. The condition for keeping money for unremitted Bills is that the beneficiaries bank should send the Nigeria Bank an authenticated telex message saying that the beneficiary is in agreement with any case of need in Nigeria to be credited with the money. This is because the importer having claimed and sold the goods has received value for the supplier. That is why we are holding on to the money till today.” According to the above testimony, the Central Bank of Nigeria returned the plaintiff’s money to the defendant as far back as 1988. Till today, the defendant holds on to the plaintiff’s money. This suit is for the return of the money.”

Now distilled from the aforesaid 11 grounds of appeal, the defendant hereinafter referred to as appellant and the plaintiff, the respondent has formulated and submitted the following issues for the determination of the appeal:-

- “(i) *Whether in view of the pleadings of the respondent, the trial court has subject matter jurisdiction to adjudicate on the matter.*
- F “(ii) *In the event that it is held that the trial court had subject matter jurisdiction, was the Court of Appeal right in confirming the decision of the trial court that the plaintiff’s action is not statute barred.*
- “(iii) *If the respondent’s action is not statute barred, does the respondent have the locus standi to prosecute this case?*
- G “(iv) *Was the Court of Appeal right in refusing to set aside the judgment of the trial court on the ground that the said judgment is not perverse?*
- “(v) *Whether or not the respondent’s case should not have been dismissed by the lower courts having regard to the plea of the appellant and the evidence before court that the claim of the respondent runs contrary to public policy and Act of State doctrine.*
- H “(vi) *Should the award of damages and interest by the trial court*

and confirmed by the Court of Appeal be allowed to stand?”

In his brief for the respondent, the learned counsel has formulated and submitted similar issues. The appellant also filed the appellant’s reply brief. I shall in this judgment deal with the appeal by reference to the issues formulated by the appellant.

B

ISSUE 1

“Whether in view of the pleadings of the respondent, the trial court has subject matter jurisdiction to adjudicate on this matter.”

Under this issue, the appellant contends that the trial High Court has no jurisdiction to entertain the matter since the case is about the procurement of foreign exchange for payment of goods imported into Nigeria by sea through the appellant by Letters of Credit with banking facilities. The documentary evidence clearly shows the intricate link with the Central Bank of Nigeria. It involves and concerns the revenue as well as the monetary and fiscal policy of the Federal Government, thus the proper court is the Federal High Court which has the exclusive jurisdiction to entertain this kind of case. It is further argued that by Section 1 (i) (h) of the Admiralty Jurisdiction Act, the Federal High Court has exclusive jurisdiction over “any banking or letter of credit transaction involving the importation of goods to Nigeria in a ship. Whether the importation is earned out or not and notwithstanding that the transaction is between a bank and its customers.” It is again submitted that the action was instituted in 1994 and that by virtue of the decision in Adah v. NYSC (2004) 7 S.C. (Pt. II) 139, it is the law at the date that determines subject matter jurisdiction.

C

D

E

F

The respondent on the other hand argued that the claim is one simply found a breach of contract and for the return of the money paid to a bank by a customer due to total failure of consideration. It is submitted that the dispute herein is based on a breach of contract and negligence and the Federal High Court does not have any exclusive jurisdiction. The mere fact that the unit of account is foreign currency does not make it a foreign exchange matter. The learned counsel referred to Oyegoke v. Iriguna (2002) 5 NWLR (Pt. 760) 417 at 438; NDIC v. FMB (1997) 2 NWLR (Pt. 490) 735. See also CCB. Ltd. v. Mbakwe (2002) 7 NWLR

G

H

(Pt. 758) 163; DeLluch v. SBN Ltd. (2003) 5 NWLR (Pt. 842) 1 at 21.

I have carefully examined the claims of the respondent and I am unable to find on the pleadings or the evidence that the plaintiff as the respondent was making a claim predicted on the non-issuance or otherwise of letters of credit or of failure or otherwise of goods shipped to Nigeria. In my view, this is a straight forward matter of a claim for negligence and for breach of contract and for the return of money. The claim has nothing to do with shipping marine commerce or marine navigation. In the CCB v. Mbakwe case *supra* at page 179, it was held:-

“Where a bank is engaged to transmit or remit money from a purchaser to an issuing bank without more, that singular act does not confer status of issuing bank on the remitting bank so as to deprive the purchaser of the right to maintain an action against the remitting bank in the event of a default in remitting the agreed sum to the designated party.”

As mentioned above, the claim of the respondent before the trial court does not in any way relate to fiscal or monetary policy of the government neither does it relate to the revenue of the government. It is a claim essentially founded on negligence and breach of contract. I am of the view that the trial High Court has the necessary jurisdiction over the subject matter of the dispute. See NDIC v. Okem Enterprises Ltd. (2004) 4 S.C. (Pt. II) 77; (2004) 10 NWLR (Pt. 880) 107 at 222. I accordingly resolve Issue No. 1 against the appellant.

ISSUE NO. 2

This is concerned with the question whether the claim of the respondent is statute barred. It is submitted that the lower courts were in error to have held that Section 8 of the Limitation Law of Lagos State does not apply to bar the respondent’s claims. They acted erroneously when they held the period commenced from when the contents of Exhibit C were brought to the attention of the respondent, in 1994 even though Exhibit C was written in 1988. It is submitted that Reliefs 1 and 6, the two declaratory reliefs are caught up by the limitation Law. Relief No.

1 is a complaint of negligence/breach of contract on the part of the appellant for failing to remit the sums to the foreign suppliers. It is claimed that the right of action accrued six years after i.e. 1983 -1989. It is submitted that the respondent could not file the action in 1994 because the duty to remit Letter of Credit starts after 180 days after lodgment of funds. It is B further submitted that the claim by the respondent that the appellant continued to make assurances and promises that the money would be transmitted, or that the respondent was deceived into believing so, is not sufficient. Learned counsel referred to Section 58 of the Limitation Law of C Lagos State and submits that only fraud or concealment of fraud will prevent the limitation period from running. It is again added that allegation of fraud is to be proved beyond reasonable doubt.

It is again argued that the respondent could have known of the existence of Exhibit C with reasonable diligence. In any event, no fraud D was pleaded and none was proved.

For the respondent, it is submitted that the appellant has failed to state how the respondent could have discovered Exhibit C which was addressed by the CBN to the appellant. A customer of a bank should E believe what the bank has repeatedly told him. The respondent further added that he had specifically pleaded the assurances the appellant falsely continued to give him and that it was not until April 1994, that the appellant became aware that the Central Bank had returned the money to the F appellant since 1988. It is argued that apart from the general denial of Paragraphs 44 and 45 of the Further and Better Statement of Claim, the appellant did not controvert this in his Statement of Defence.

Now, this issue has been raised and considered by the lower G courts. The trial Judge held at page 432 of the records:-

“The fact that between 1983 to 1994, the chairman of the plaintiff, P.W.4 was repeatedly assured by top officials of the defendant bank to wit: Its Managing Director and Chief Executive, Alhaji S. S. Baffa, Branch Managers, Mr. Adedeji and Mr. Oyebola that the money would H be remitted to the overseas suppliers is established to my satisfaction. The defendant clearly does not dispute the above. If the plaintiff was constantly assured as late as 1994 that his money would be remitted to

the overseas supplier, then how, may I ask, can a cause of action arise in 1994." XX

The court also found the appellant did not cross examine the witness on this vital issue of concealment and deceit. I may add, that there was no appeal against such finding in Court of Appeal. The Court of Appeal also found that there was concealment of crucial fact and deceit. The cause of action only arose when the respondent accidentally stumbled on Exhibit C. The trial court found that the totality of the appellant's conduct in this case is fraudulent and concealment of fraud and the Court of Appeal affirmed this finding. See *Arowolo v. Ifabiyi* (2000) 4 NWLR (Pt. 757) 356. In the case of *Owoniboy's Tech. Service Ltd.* (1995) 4 NWLR (Pt. 391) 534 at 547, Mohammed, JSC., stated:-

D “In considering whether an action is statute barred, it is relevant to ask, “when does time begin to run? This court in the case of Fadare & Ors. v. The Attorney-General of Oyo State (1982) 4 S.C. (Reprint) 1; (1982) NSCC 52 at 60 referred to the case of Board of Trade v. Carter
E Irvine & Co. Ltd. (1927) AC 610 when it held:-

‘Time, therefore begins to run when there is in existence a person who can sue and another who can be sued, and all facts have happened which are material to be proved to entitle the plaintiff to succeed.’

F *It is crystal clear from the facts of this case that the respondent had not become aware of the wrong entries in his accounts until in 1980/81. That being the case, the right of action accrued when the respondent's demand to have his account credited was denied and refused and this happened in 1980/81. The claim of the respondent is not therefore statute*
G *barred."*

Similarly in my view, the right of action in this matter clearly accrued in 1994 when the respondent became aware of the existence of Exhibit C. The respondent could not reasonably be expected to file an action against the appellant when the appellant was always giving him assurances that his bills and letters of credit were being processed by Central Bank. Indeed there could be no cause of action. I accordingly resolve this issue No. 2 also against the appel-

lant.

ISSUE NO. 3

This is concerned with the question whether the respondent has the locus standi to prosecute the claim. It is submitted that the locus of the respondent to institute this action was challenged in Paragraph 33 of the Statement of Defence. It is argued that by Paragraph 19 of the Further and Better Statement of Claim, the respondent pleaded that the goods covered by bills in Exhibits P1 - P331 had infact been shipped to it and that the goods were collected by it. It is submitted that under the circumstances, the respondent would have no cause of action and cannot maintain an action for the recovery of the money meant for the goods. The money paid by the respondent becomes no longer his money but money held by the appellant for onward transfer to the overseas suppliers. Learned counsel refers to the case of *Akinsanya v. UBA* (1986) 2 NSCC 980. Though in that case, the Supreme Court was dealing with a confirmed letter of credit, in the instant case we are dealing with unconfirmed Letters of Credit. It is argued that in the case of *Union Bank v. Odusote* (1995) 9 NWLR (Pt. 421) 558 although such an action was allowed, the issue of locus standi was never raised and argued. Learned counsel also referred to unreported case of *Adegoke Motors v. Savannah Bank* suit No. CA/C/399/96 in which Ayoola, JCA., as he then was, relied and quoted with approval the dictum of Lord Denning in *W. J. Allan & Co. Ltd. v. El Nasr Export* (1972) 2 QB 198 at 212. Learned counsel has submitted that the Court of Appeal was in error to have confirmed the decision of the trial court on this issue.

Now, the trial court at pages 428-429 rejected the argument of the appellant on the issue of locus standi. He stated thus:

“The plaintiff contracted the defendant to procure foreign exchange required to discharge its liabilities to foreign suppliers. The foreign suppliers shipped the goods to the plaintiff a long time ago, but the plaintiff has not paid for the goods till today. The liability of the plaintiff to the foreign suppliers remains. Having failed to carry out the plaintiff’s instructions, the only sane thing to do is return the money to the plaintiff. The defendant says they are holding the money in trust

(see Evidence of DWI) The defendant has held on to the plaintiff's money now for about 18 years. See also Exhibit V wherein the defendant informed the overseas suppliers that the failure to remit the money was because the plaintiff had not paid the naira cover when in fact the plaintiff had paid the money to the defendant, a fact admitted by the defendant but which he found convenient to deny to the overseas suppliers. Holding unto the plaintiff's money for 18 years is criminal. The defendant has no justification whatsoever xxxx See Savannah Bank v. Adegoke Motors CA/C/399/96 xxxxxxxxxxxxxxxx Odusote v. Union Bank (1995) 9 NWLR (Pt. 421) 558. The plaintiff is entitled to a return or a refund of his money to enable him pay his overseas suppliers and restore his badly damaged name.

XX"

D **The Court of Appeal in my view, rightly confirmed the above finding of fact and held that the respondent has clearly the locus standi to institute the action.** In the case CCS (Nig) Ltd. v. Mbakwe (2002) 7 NWLR (Pt. 758), it was held at 163 thus:-

E “On who can sue bank for failure to remit money abroad - where
a bank is engaged to transmit or remit money from a purchaser to an
issuing bank without more, that singular act does not confer status of
issuing bank on the remitting bank in the event of a default in remitting
F the agreed sum to the designated party.”

I am of the firm view, that the decision of Ayoola, JSC., (as he then was) was correct in SBN v. Adegoke Motors Ltd. supra when he opined:-

^G “Also, as in this case where the application to the Central Bank is by the buyer and such an application can only be processed by the banker, a collateral contract arises whereby the banker undertakes to process the application and the buyer undertakes to pay.”

XX

H *A contract as has been described emerged, the aggrieved customer can sue and enforce that contract and claim damages where the banker has failed to exercise due care.”*

The complaint of the appellant under this issue is also not made

out. The respondent has the necessary locus standi. I resolve the issue against the appellant.

ISSUE NO. 4

This is essentially concerned with the finding of fact by the two lower courts. It is submitted that the Court of Appeal was in error to have refused to set aside the findings of facts made by the trial Judge. It is argued that had the learned trial Judge properly evaluated and appraised the evidence, he would find for the appellant. The learned counsel made a lengthy examination of the evidence and the numerous exhibits tendered and submitted that the claims of the respondent were false.

In my view, the matter before the trial court was very simple. The appellant as bankers agreed to process and transmit to the overseas importers the value of the goods already shipped and collected by the respondent. The respondent paid the naira equivalent of the foreign exchange involved. The appellant was negligent in processing for the foreign exchange. At page 779 of the Records of appeal, the Court of Appeal made the following finding:-

“The plaintiff contracted the defendant to procure foreign exchange required to discharge its liability to the foreign suppliers. The foreign suppliers shipped the goods to the plaintiff a long time ago, but the plaintiff has not paid for the goods till today. Having failed to carry out the defendant says they are holding in trust. See testimony of D. W.I. The defendant has held on to the plaintiffs money now for about 18 years. See also Exhibit V wherein the defendant informs the overseas supplier that failure to remit the money was because the plaintiff had not paid the naira cover when infact the plaintiff had paid the money to the defendant, a fact admitted by the defendant but which he found convenient to deny to the overseas suppliers.

xx

The plaintiff is entitled to a return or refund of his money to enable him pay his overseas suppliers and restore his badly damaged name.”

It is clear to me that the Court of Appeal was right to confirm the decision of the trial court because the appellant has woe-

fully failed to produce any evidence of promissory note used to pay the overseas supplier or that any of the 331 bills was refinanced. At the oral hearing of this appeal when counsel for the respondent submitted that none of the bills of respondent was refinanced in any of the documents referred to by the appellant, when asked, the appellant counsel was unable to show this court where any of the bills was refinanced.

These fundamental and crucial findings of facts were concurrently made by the two lower courts and the appellant has failed to convince me that exceptional circumstances exist for me to disturb the findings. I have carefully considered the judgments of the two lower courts and their reasoning. I have also considered the argument of the learned counsel for both parties. I am convinced that the evidence before the trial court was properly appraised and evaluated. I have no reason to disturb the concurrent findings of facts made by the two lower courts. I am not persuaded that the findings are perverse. I accordingly resolve Issue No. 4 against the appellant.

ISSUE NO. 5

This is concerned with the question whether or not the respondent's case should not have been dismissed by the lower courts having regard to the plea of the appellant that the evidence before the court that the claim of the respondent runs contradictory to public policy and Act of State Doctrine. The submission of the learned counsel for the appellant is that this case is linked to the Federal Government of obtaining debt relief and it is linked with the fundamental objective of the State. In reply, the learned counsel for the respondent argued that this is a new special defence raised for the first time in the Supreme Court and that there was no pleading to support it. I agree with the learned counsel for the respondent that this is a special defence which is raised for the first time in the Supreme Court without leave. Further more, there is no evidence whatsoever to support the argument. I find no merit whatever in the argument of the appellant's counsel. I resolve the issue against

the appellant.

ISSUE 6

This is concerned with the award, assessment and quantum of damages. As mentioned above, the courts below awarded the respondent sums in various foreign currencies being the value of the goods supplied by the exporters and which sums were not transmitted to the exporters or the overseas suppliers. In this judgment, I have dealt at length with the issue of the liability of a banker under such a situation to refund the customer. Accordingly, I do not need to go into this again, suffice it to say that prayer No. 2 stands as granted by both the trial court and the Court of Appeal.

The essence of the respondent's claim which pervades the record and indeed is the whole basis of the action is the failure of the appellant to transmit money to the overseas suppliers for goods already imported into Nigeria. If that money was duly remitted to the suppliers, there would be no need for the case at all. The essence of damages in breach of contract cases is based on restitutio in integrum. That is the award of damages in a case of breach of contract is to restore the plaintiff to a position as if the contract has been performed. In my view, since the respondent in this case has succeeded in his prayer No. 2, I do not think, it is proper to grant prayers 3 and 4. These are losses of anticipated profits (i) from 1985 - 1994 and (ii) from 1994 to date of judgment. The reason given was only because the foreign suppliers having not been paid refused to deliver goods to the respondent on credit. The respondent was duty bound to mitigate its losses and look for money elsewhere to resume trade with the usual suppliers or some other ones. I believe that the damages for loss of anticipated profits are too remote. The law imposes on a plaintiff in such a situation, the duty to take reasonable steps to mitigate the loss, consequent on the breach and debars from claiming for any remote damage which is due to his neglect or refusal to take other steps. The time factor is also very important, a plaintiff must as soon as he discovers that the defendant has breached his contractual obligation, he should

immediately begin to mitigate the losses. In the instant case, even if there is no remoteness of the damage, the respondent became aware of the breach when the suppliers were continuously demanding for payment. The respondent clearly could not just sit down after knowing the situation on the ground, it is duty bound to avoid the loss of expected profits by redeploying its resources elsewhere.

In any event, since the money to be remitted to the foreign suppliers was not meant to be employed in their business, the failure to remit the money cannot affect and has no bearing on the refusal of the suppliers to sell goods on credit to the respondents. Indeed the respondents could deal with other suppliers if they so wished. I am accordingly of the view, that items 3 and 4 cannot be recovered against the appellants.

I accordingly set aside the award of N300 million as damages for loss of anticipated profits from 1985 to 1994 and the sum of N5 million naira per annum also as loss of anticipated profits from 1994 till date of judgment. Subject to the above, the appeal fails and is dismissed by me. I award the respondent N10,000.00.

BELGORE CJN

I have read the judgment of Musdapher, JSC., and I agree with his reasonings and conclusion. It is the duty of the plaintiff/respondent to mitigate its loss. The sum of N378,780,244.00 being anticipated loss in alternative claim numbered 3 must not have been awarded; similarly item 4 for “Loss of Profit for N6,302,510.00. Otherwise, the appeal is dismissed as the concurrent findings of the two courts below cannot be assailed on the totality of the evidence on the record.

As the lead judgment is replete with all the facts and issues, I hereby adopt them as mine and I dismiss this appeal as unmeritorious.

ONU JSC

Having been privileged to read before now the judgment of my

learned brother, Dahiru Musdapher, JSC., just delivered, I agree with his conclusion that the appeal fails and it is dismissed by me.

As the facts of the case as well as its historical background are clear and indisputable as comprehensively set out in the judgment of my learned brother to need any further review, I intend here to go straight B into the consideration of the six issues identified by the appellants for our consideration - they incidentally overlap those proffered in their own 2nd Amended Brief of the respondent, thus:

(i) Whether in view of the pleadings of the respondent, the trial C court has subject matter jurisdiction to adjudicate on the matter. (Ground 1 of the 2nd Amended Notice of Appeal).

(ii) In the event that it is held that the trial court had subject matter jurisdiction, was the Court of Appeal right in confirming the decision of the trial court that the plaintiff's action is not statute barred? D (Ground 3 of the 2nd Amended Notice of Appeal).

(iii) If the respondent's action is not statute barred, does the respondent have the locus standi to prosecute this case? (Ground 2 of the 2nd Amended Notice of Appeal). E

(iv) Was the Court of Appeal right in refusing to set aside the judgment of the trial court on the ground that the said judgment is not perverse? (Grounds 4, 5, 6, 7 and 8 of the 2nd Amended Notice of Appeal) F

(v) Whether or not the respondent's case should not have been dismissed by the lower court having regard to the plea of the appellant and the evidence before the court that the claim of the respondent runs contradictory to public policy and Act of State Doctrine. (Ground 9 of the 2nd Amended Notice of Appeal). G

(vi) Should the award of damages and interest by the trial court and confirmed by the Court of Appeal be allowed to stand? (Grounds 10 and 11 of the 2nd Amended Notice of Appeal).

I would now wish to consider the issues serially and the rejoinder H in the Amended Appellant's Reply Brief as follows:-

ISSUE 1

Issue No. 1 asks whether or not the Lagos High Court has juris-

diction over the respondent's case which was a case of simple contract. The appellant treated this issue as Issue 1 in its brief of Argument at page 13. The appellant then proceeded to treat the issue in 37 lines only vide pages 13 to 15 without citing a single case in support thereof that the High Court lacks jurisdiction to entertain the suit. Contrary to the appellant's submission, the claim is one founded on breach of contract and for return of money paid to its bank by its customer due to failure of consideration. I have no hesitation in upholding the findings of the two lower courts that from the pleadings and evidence, the transaction is between a bank and a customer and not as cynically put by the appellant "a banking or Letter of Credit transaction involving importation of goods into Nigeria in a ship, whether the importation is carried out or not and notwithstanding that the transaction is between a bank and its customer."

Indeed, it is trite that jurisdiction is determined by the plaintiff's claim before the court See Akinsanya v. U.B.A Ltd. (1986) 4 NWLR (Pt. 35) 273; Multi-purpose Ventures Ltd & Ors. v. Attorney-General of Rivers State (1997) 9 NWLR (Pt. 522) 648 at 662; The Military Administrator of Kwara State v. Lafiagi (1998) 7 NWLR (Pt. 557) 202 at 212. Okoye & Ors. v. Nigerian Construction & Furniture Company Ltd. (1991) 7 S.C (Pt. III) 33; (1991) 2 NSCC (Vol. 22) 422 at 436 where Akpata, JSC, pointedly laid down the position of the law to be:

"The legal position as to competence or otherwise of the trial court to entertain a case is arrived solely on the facts disclosed in the Statement of Claim."

See also Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt. 81) 129. This rather ingenious though untenable submission cleverly ignores the law that any issue of jurisdiction is founded on the plaintiff's Statement of Claim alone, not the defendant's defence or any other process. See M. V Scheep v. Araz (2000) 15 NWLR (Pt. 691) 662 at 668 para H.

Be it noted that nowhere is it stated that the respondent is making a claim predicated on non-issuance or otherwise of letters of credit or of failure or otherwise of goods shipped into Nigeria. It is apparent that the appellant is labouring under a misconception of the purport and application of Section 1(i) (h) of the Admiralty Jurisdiction Act vis a vis the

issues in this case. In effect, the respondent is neither complaining here about shipping nor non-shipping of goods by sea.

Hence, I agree with the respondent's submission that the appellant's submission is thoroughly misconceived and of no moment. It is consequently not surprising that the appellant raised this issue in a few paragraphs of the pleadings, citing the statute without attempting to refer to the paragraphs of the pleadings or evidence of witnesses that support its contention because clearly there is none.

As the claim has nothing to do with monetary or fiscal policy of the Federal Government of Nigeria in the pleadings and evidence before the court, the mere fact that the unit of account is foreign currency for which the respondent paid the Naira equivalent does not make it a foreign exchange matter. See *Oyegoke v. Iriguna* (2002) 5 NWLR (Pt. 760) 417 at 438 paras F-G; H where the court held as follows:-

"..... the subject matter in dispute i.e. exchange of foreign currency can at best be a subject matter of concurrent jurisdiction between the Federal High Court and a State High Court. I hold that the trial court has jurisdiction to determine the issue of foreign exchange currencies."

Also in *NDIC v. FMB* (1997) 2 NWLR (Pt. 49) 735 at 755-756 para H-A, it was held that dispute between an individual customer and his bank in respect of transactions between them can hardly affect the vital interest of the Federal Government, the provision in Section 230(d) relates in that regard to the exclusive jurisdiction given to the Federal High Court:-

"Section 230(1) of Decree No. 107 of 1993 must first be viewed from its import as I earlier pointed out namely, to give exclusive jurisdiction to the Federal High Court over causes affecting the vital interest of the Federal Government as regards revenue, fiscal measures, financial institution, such as banks, the running of the Federal Government and its agencies and all matters within its exclusive list. A dispute between an individual customer and his bank in respect of transactions between them can hardly affect the vital interest of the Federal Government. So the proviso in Section 230(1) (d) relates in that regard to the exclusive juris-

diction given to the Federal High Court.”

See CCB (Nig.) Ltd. v. Mbakwe (2002) 7 NWLR (Pt. 758)? at 163 where the court held as follows:-

B “On who can sue bank for failure to remit money abroad where a bank is engaged to transmit or remit money from a purchaser to an issuing bank without more, that singular act does not confer status of issuing bank on the remitting bank so as to deprive the purchaser of the right to maintain an action against the remitting bank in the event of a default in remitting the agreed sum to the designated party.” (p. 179, paras, A-B)
C In the same vein, the Court of Appeal in the case of De Lluch v. SBN Ltd. (2003) 5 NWLR (Pt. 842) 1 at 21 para. C, held that it is only when a claim is in respect of fiscal measure or relate to the revenue of the Federal Government that Section 251 of 1999 Constitution applies-

D ‘It is clear from the above provision that the Federal High Court has only exclusive jurisdiction over matters enumerated in Section 251 (1)(d) of the 1999 Constitution where such relate to fiscal measures or the revenue of the Federal Government.

E The appellant’s claim before the High Court of Lagos State does not in any way relate to any fiscal measure of the Federal Government neither does it relate to the revenue of the Federal Government. It is a claim founded on the NEGLIGENCE of the Respondent Bank. Clearly,
F the High Court of Lagos State has jurisdiction to entertain the suit. I agree with the learned counsel for the appellant’s submission that even though Decree 107 and the 1999 Constitution enlarged the exclusive jurisdiction of the Federal High Court and reduced the hitherto unlimited jurisdiction of the High Court of Lagos State provided by Section 230(1)
G of 1979 Constitution, the High Court of Lagos State still has jurisdiction to entertain any claims connected with bank and banking except such claims were connected with fiscal measures or revenue of the Federal Government of Nigeria.” See SBN v. De Lluch (supra).

H As this is a claim of breach of contract by a customer against its bank, the Lagos State High Court has, in my firm view, jurisdiction to entertain the claim. Furthermore, as the appellant for its contention sought support by reliance on the Admiralty Jurisdiction Decree, I see no merit

therein. For as the Supreme Court held in NDIC v. Okem Enterprises Ltd. (2004) 4 S.C, (Pt. II) 77; (2004) 10 NWLR (Pt. 880) 107 at 222:-

“In effect, the proviso in Section 251(1)(d) is to limit the operationally of the foregoing prescription to show that applicability is not general but it does not destroy or divest the Federal High Court of this power. It should therefore be understood to mean that the Federal High Court enjoys equal power with the State High Court in banking cases involving bank and customer.”

ISSUE NO.2 asks: *“Whether a claim by a customer of a Bank for the return of the money due to failure of consideration runs contrary to public policy and act of state doctrine.”*

(Issue 5 in the Appellant’s Brief).

In the treatment of this issue which was considered in 40 lines, the three cases cited have no relevance to the case in hand. The appellant contended that this is linked to Federal Government’s efforts at obtaining debt relief for the country and that the matter is act of the State involving fundamental objectives of the State. It is also argued that if the appeal succeeds, many others will approach the court and that this will affect the financial programme of the State. As this is a special defence which the appellant was raising for the first time in this court, we were urged to strike out this issue on grounds of incompetence, it being settled law that special defences must be specifically pleaded. (2) Ibrahim Kano v. Gbadamosi Oyelakin (1993) 3 NWLR (Pt. 282) 399 at 409 paras. D-F which states as follows:-

“A defence which is a special defence and is available to the defendant at the time of the action must be pleaded specifically; where it is not pleaded, it could not be raised even on appeal.”

(3) Chief Niyi Akintola v. Balogun (2002) 1 NWLR (Pt. 642) at page 532 particularly at page 551, paras D-E which states thus -

“A special defence ought to be specifically pleaded. In the instant case, the grant of licence can be taken as a special defence which ought to be specifically pleaded.”

(4) Alhaji Mahmood I. Atta v. Miss Chinye A. M. Ezeanah (2000) 11 NWLR (Pt. 679) 363 at 383 paras B-D;

(5) F.C.D.A v. Naibi (1990) 5 S.C. (Pt. II) 79; (1990) 3 NWLR (Pt. 138) 270 at page 281 para F. Thus, it was held by the Supreme Court in Diab Nasr v. Berini (Beirut-Riyad) Nig Bank Ltd. (1968) 1 All NLR 274 at 295 per COKER, JSC:

B “..... but where illegality does not appear *ex facie*, the court is not entitled to speculate upon its incidence let alone expressly pronounce upon it unless it was made a part of the case of either side.”

(7) In the case of Ndiwe v. Shinggleton (1993) 2 NWLR (Pt. 274) 242 - which is not dissimilar to the instant appeal, the court at page C 250 said -

D “Looking closely at the plaintiff’s claim, there is nothing therein that even remotely raised any issue of illegality. It was a simple case of an overseas exporter selling goods to a Nigerian importer under a c & f contract which was to be paid for by a Bill of Exchange. Certainly, it is not illegal to pay for a transaction through a Bill of Exchange drawn by an Exporter in England accepted by an importer in Nigeria.”

(8) IMNL v. Pegofor Ind. Ltd. (2005) 15 NWLR (Pt. 947) 1 at 9.

E (9) A.I.C. Ltd. v. NNPC (2005) 5 S.C. (Pt. 11) 60 at pages 66-68 where this court held that where a party raising the defence of illegality has not raised it in its pleadings by stating the facts on which it relies, the appellate court will be disabled from considering the issue of illegality. F In the earlier decision in the case of Ekwunife v. Wayne (W.A) Limited (1989) 12 S.C. 92; (1989) 5 NWLR (Pt. 122) at page 456, this court held as follows:-

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

Apart from not pleading Act of State Doctrine or public policy neither is any evidence led on or even address made on them before the H two lower courts. Since there has not been any pronouncement on any of the issues, any appeal on them cannot be competent as appeal must be against the decision of the lower court. See Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156 at 184 BC; New Nigerian Bank Ltd. v. G. O. Oniovosa

(1995) 9 NWLR (Pt. 419) 327, 334F; Tella v. Usman (1997) 12 NWLR (Pt. 531) 168, 173F.

Moreover, there is no evidence or material to support any of the allegations which means that even if leave was sought, it must be granted. Since the issues are not part of the pleadings, the argument proffered on it at best, goes to no issue and should be struck out. See George v. Dominion Flour Mills Ltd. (1963) 1 All NLR 71. In that wise, I agree with the respondent that since there has been no pronouncement on them at the lower court for them to be the subject of an appeal, they are therefore incompetent. See Saraki v. Kotoye (supra). Thus, I agree with learned Senior Advocate for the respondent when he submitted that contrary to the argument of the appellant, no State will take delight in unnecessarily exposing its citizens to economic ruin or strangulation, arguing that the essence of re-financing is to assist the economy and the image of both the nation and her citizens. Further, that there is nothing in re-financing exercise which encourages evasion of international obligation. The aim, it is contended, is to enhance settlement of outstanding imports, adding that all the imports are claimed through the legitimate Central Bank of Nigeria (CBN) regulations since they all ought to be matched but for the negligence, dishonesty or deceit of the appellant. The misconception of the appellant in imputing public policy or act of State to defeat legitimate transaction being what this court has deprecated in the case of Onwuchekwa v. NDIC (2002) 2 S.C. (Pt. II) 28; (2002) 5 NWLR (Pt. 760) 391 at 392.

ISSUE 3

These issues (Grounds 2 and 3) which overlap appellant's issues 2 and 3 and argued as issues 2 and 3 in 2nd Amended Appellant's Brief, urges us to dismiss appellant's argument on these issues and confirm the concurrent judgments of the two lower courts and resolve against the appellant as concurrent findings which require special circumstances by the appellant to succeed. In my opinion, there is nothing new which the appellant has urged on us which will alter the judgment of the lower courts.

LIMITATION

The appellant's contention in this respect was that under this issue that the respondent ought to have discovered the existence of Exhibit C and that it was wrong for the trial court to hold that the cause of action would not arise until the respondent became aware of the exhibit. Appellant did not state how and where it would have discovered Exhibit C which was addressed to the appellant by CBN. The respondent was not a staff of CBN or UBA. As a customer ought and should believe what the Bank told him, the submission, to say the least, is erroneous. It is therefore too late in the day, it was further argued, for the appellant to raise this defence before us in this court having not controverted the averment of the respondent at the trial court to the effect that it did not become aware of Exhibit C until 1994.

The pleading in this regard is contained in paragraphs 44 and 45 of the 2nd Further and Better Amended Statement of Claim at page 135 which is as follows:-

"44. Due to persistent demands from overseas suppliers, for payment for the goods supplied to the plaintiff, the plaintiff continued to put pressure on the defendant through letters and personal visits of the plaintiff's Chairman to have the defendant remit the money to the overseas suppliers. The defendant falsely continued to assure the plaintiff that the money was still with the CBN and will be remitted.

45. The plaintiff avers that it was not until April, 1994 that it saw CBN circular ref. No.FOD/CFOF/08.N.B./Vol. 1/28 dated 24/11/88 which circular confirmed that the defendant had indeed received the money from the CBN as far back as 1988." (Underlining above is mine for emphasis).

Apart from the general denial, the appellant did not offer any single word on this material issue in the Statement of Defence. I am therefore of the view that appellant's argument with regard to its knowledge of Exhibit C goes to no issue, having raised the same issue in both High Court and the Court of Appeal.

The court, it was also held, found that the plaintiff did not cross-examine the witness or witnesses on this vital issue of concealment.

There was also no appeal against the findings and the Court of Appeal confirming the findings by the High Court, held that there was concealment of crucial facts as well as deceit; the issue, not being knowledge of any adverse possession but as to whether or not any cause of action accrued to the respondent before the discovery of Exhibit 'C'. As B Nnaemeka-Agu, JSC., put it in A-G Kwara State v. Olawale (1993) 1 NWLR (Pt. 272) 645, 663:

"I think I should begin my consideration of this important issue in this appeal by asking myself the question: What is a cause of action? I would be content in this respect to adopt the definition of the expression by Diplock, L. J. in Letang v. Cooper (1965) 1 QB 232, where he defined it as-

".....simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

..... the words "comprise every fact through (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the court."

See also Ogbinu v. Ololo (1993) 7 NWLR (Pt. 304) 128, 136 (per Karibi-Whyte, JSC.) and Odubeko v. Fowler (1993) 7 NWLR (Pt. 308) 637 at page 645 and Ajayi v. Military Administrator, Ondo State (1997) 5 NWLR (Pt.504) 237 at 243.

I agree with learned Senior Advocate for the respondents' submission that contrary to appellant's contention, knowledge of adverse possession is totally irrelevant and inapplicable, adding that lack of knowledge referred to by the respondent in its testimony in court, is not lack of knowledge of an adverse possession but rather that it is lack of knowledge of facts that gives it a right of action in a situation where the knowledge is essentially or wholly within the preserve of the appellant and who has hidden it from the respondent. It is different, it is further contended, from lack of knowledge of adverse possession of land in a land claim where adverse possession of land is a common knowledge, adding that what it means in the circumstances, is absence of any fact that can

support any cause of action by the respondent.

In the alternative, the respondent further submitted, that the appellant falsely assured it (respondent) that its bills have been processed and that its foreign suppliers would soon be paid, when the truth is that the appellant kept the respondent's money and was using the money to trade. On the other hand, appellant was said to have told the respondent's overseas suppliers that the respondent had failed to pay the Naira equivalent of the value of the Bills.

The trial court having been shown to have found that the totality of appellant's conduct in the case is fraudulent and criminal, the finding, the Court of Appeal affirmed – a submission, learned Senior Advocate for the respondent submitted, is clearly erroneous since in order to ascertain a plea of fraud, the plaintiff needed not use the word “fraud” specifically. It would suffice, it is contended, if allegations are made that the defendant made representation to the plaintiff upon which he intended the plaintiff to act, which representation was untrue and known to the defendant to be untrue. To buttress the submission, the case of *Okunola v. Oduola* (1987) 4 NWLR (Pt. 64) 141, was founded upon, adding that the respondent's pleadings in Paragraphs 22, 35, 38, 43, 44 and 45 in the 2nd Further and Better Amended Statement of Claim, satisfied this requirement.

Accordingly, the respondent's case falls squarely outside the contention of the appellant and thus falls within the exception created under the authority of *Akibu v. Azeez* (2003) 1 S.C. (Pt. II) 71; (2003) FWLR (Pt. 149) 1490, 1511 where this Honourable Court held as follows:

“*Apart from fraudulent concealment of right of action which itself furnishes a cause of action, knowledge cannot be said to be relevant. In order to constitute such fraudulent concealment as would, in equity take a case out of the law of limitation, it is not enough that these should be merely tortuous acts unknown to the injured party or the enjoyment of property without title while the rightful owner is ignorant of his agent, there has to be some abuse of a confidential position, some intention at imposition, or even some deliberate concealment of facts.*” (Underlining

supplied).

See also the case of Arowolo v. Ifabiyi (2002) 2 S.C. (Pt. I) 71 ;(2002) 4 NWLR (Pt. 757) 356, 378, a case decided by this court and whose facts are similar to the ones now being considered. There, the plaintiffs instituted an action in 1987 against the defendant for declaration B and return of its title deeds and tax receipts surrendered to the 1st defendant for a loan taken in 1978. The plaintiff, now respondent, as stated was said to have paid back the loan in 1979 as agreed and demanded for the return of his documents. The 1st defendant, it was maintained, end- C lessly made promises that he would return the documents. This continued from 1979 until 1987 when the 1st defendant confessed for the first time to the plaintiff that he had used the documents to raise a loan from the 2nd defendant bank. The 1st plaintiff then commenced the action in 1987 where up till now, the 1st defendant/appellant raised the defence of D statute of limitations while the High Court agreed with the plaintiff and held that the 1st defendant cannot take advantage of his dubious conduct and that the respondent cannot be expected to embark on a cause un- E known to him. The High Court agreed and held that the respondent cannot be expected to institute on a cause unknown to him. The Court of Appeal agreed and held that there was no reason to fault the judgments of the two courts below. See also the views of Iguh. JSC., in Jallco Ltd v. Owoniboys Technical Service Ltd. (1995) 4 NWLR (Pt. 391) 534 at 547 F where Mohammed, JSC., held thus:

“In considering whether an action is statute-barred, it is relevant to ask, ‘when does time begin to run’? This court, in the case of Fadare & Ors. v. Attorney-General Oyo State (1982) 4 S.C. (Reprint) 1; (1982) NSCC 52 at 60 referred to the case of Board of Trade Cayzer Irvine Ltd. G (1927) A.C 610 where it held that:

“Time, therefore, begins to run when there is in existence a person who can sue and another who can be sued, and all facts have happened which are material to be proved to entitle the plaintiff to succeed.” H

It is crystal clear from the facts of this case and that the respondent had not become aware of the wrong entries in his accounts until in 1980/81. That being the case, the right of action accrued when the

respondent's demand to have his account credited was denied and refused, and this happened in 1980/81. The claim of the respondent is not therefore statute barred."

Thus, it must be emphasized, that the plaintiff would not reasonably file any suit against the defendant Bank as long as it was assuring the plaintiff that its bills were being processed by the Central Bank. Indeed, there would be no cause of action as at that time.

LOCUS STANDI

Locus Standi denotes legal capacity to institute proceedings in a court of law. It is used interchangeably with terms like standi and title to sue. See Thomas v. Olufosoye (1986) 1 NWLR (Pt. 18) 669 at 685 (S.C); Fawehinmi v. Akilu (1987) 4 NWLR (Pt. 67) 797 and Bolaji v. Bamgbose (1986) 4 NWLR (Pt. 37) 623 at 646; Senator Abraham Adesanya v. President of Nigeria (1981) 5 S.C. (Reprint) 69; (1981) 2 NCLR 358; The State v. Ilori & 2 Ors. (1983) 1 SCNLR 94 at 111 and A-G of Kaduna v. Hassan (1985) 2 NWLR 483.

The appellant in arguing this issue urged this court to overrule the case of Adegoke Motors v. Savannah Bank - CA/4/399/96. It is necessary, firstly to point out that Adegoke Motors' case followed the decision in Akinsanya v. UBA Ltd. (1986) 2 NSCC P. 980 where, as admitted by the appellant, the Supreme Court decided a similar case. Adegoke Motors' case also followed the decision of this court in the case of Union Bank v. Odusote (1995) 9 NWLR (Pt. 421) 558, where Ayoola, JCA (as he then was) who read the leading judgment relied on a number of cases including Lord Denning's decision in D.J. Allan & Co. v. E.L Nasr Export (1972) 2 QB 198 at 212.

Obviously, the invitation of the appellant that this court should overrule Adegoke's case is also an invitation that this court should overrule all the Supreme Court cases which Adegoke's case relied on. That will be most inappropriate. The appellant raised the issue of locus standi in the two courts below. The two courts resolved the issue against the appellant.

Earlier on, D.W.5 had said under cross-examination:

"Central Bank of Nigeria returned money to the commercial bank

for onward transmission to the importers for bills that did not match.”

How then can D.W.1 who testified for appellant say that the plaintiff’s money was returned to it by Central Bank of Nigeria that held it in trust, adding (see the evidence of D.W.1):-

“I can’t remember how many accounts we had during the financ- B
ing exercise. When money is transferred from deposit account to current
account, we are at liberty to use it. When Central Bank of Nigeria de-
cided to return it in 1988 we used it. Exhibits HH1-HH10, Exhibit C are
instructive. The plaintiff’s money was never held in trust, rather as learned, C
senior counsel put it, it was held in fraud. The plaintiff is very much
entitled to have his money returned to him immediately by the defen-
dant.”

The Court of Appeal at pages 780-781 of the Record confirmed D
the judgment of the High Court and concluded as follows:-

“Applying the above, the learned trial Judge from the facts es-
tablished whether appellant had justification to hold on tightly to
respondent’s money for 18 years whether rightly raised a justiciable issue E
and also a dispute between the parties. Respondent in my view passed the
two acid tests and the learned trial Judge was right to have granted the
LOCUS STANDI to the respondent from pleaded facts in the Statement of
Claim therefore I endorse and confirm that respondent having passed the
two acid tests of LOCUS STANDI, the learned trial Judge rightly granted F
the LOCUS STANDI to the respondent. Issue 2 in appellants’ issues (sic)
argument is resolved in favour of respondent. On the issue of the LOCUS
STANDI of respondent’s attack on the judgment of the learned trial Judge G
that granted the LOCUS STANDI to the respondent lacks substance and
unmeritorious with the consequential submission of dismissal of appellant’s
issue 2 that respondent lacked the LOCUS STANDI.”

For this submission by the learned Senior Advocate for the re-
spondent for there being no appeal against the findings of fact made by
the High Court and confirmed by the Court of Appeal, there is, in my H
view, no basis for disturbing the judgment of the lower court. Thus, I
uphold his submission that he cannot improve on the judgment of Ayoola,
JCA., (as he then was) in the case of Savannah Bank of Nig. Ltd. v.

Adegoke Motors Ltd. (unreported) CA/1/339/96, wherein his Lordship stated the position with respect to liability in international commercial transactions which this case is, as follows:-

B “Also as in this case, where the application to the Central Bank of Nigeria is by the buyer and such application can only be processed by the banker, a collateral contract arises whereby the banker is in fund for the purpose of allocation where such collateral contracts as have described have emerged, the aggrieved customer can sue to enforce that contract and to claim damages where the banker had failed to exercise
C due care.”

Learned Senior Advocate then submitted that contrary to the claim of the appellant, the facts have been established in this case namely:

D (i) That the respondent’s overseas suppliers have not been paid till now.

(ii) That the overseas suppliers have not ceded their right to be paid to ECGD or anybody at all.

E (iii) That the liquidators of the overseas suppliers do not know the appellant at all and are not looking unto it for anything.

(iv) That the overseas suppliers have black listed the respondent for its failure to pay for the goods it imported from these exporters.

F (v) That the money paid by the respondent is still being kept by the appellant. The appellant’s witness said they are keeping it in trust for the overseas suppliers who are however not looking unto the appellant and who in fact do not know the appellant and do not have the appellant in view.

G (vi) That the respondent is in dire need of mending its battered image before the overseas suppliers.

H (vii) That ECGD is merely a quasi insurance institution who reserves the right to proceed against the respondent if and whenever it pays any money to the respondent’s suppliers arising from the failure of the respondent to meet its obligations to the assured.”

The contention of the appellant that since the respondent had collected the goods, it had no right to complain is a clear manifestation of lack of understanding of the case of the respondent as well as the rights

and obligations of parties to the business of foreign transactions. It is undisputable that payment made to the appellant by the respondent was for remittance to foreign suppliers. Such that if no remittance was made for benefit of the suppliers, no one else can complain but the respondent that paid the money. What the position comes to is the fact that the suppliers remain strangers to the contract for remittance with no power to enforce it or claim refund vide Ikpeazu v. ACB (1965) NMLR 374, 379. See also Alfortin v. L. AGRD (1966) 9 NWLR (Pt. 475) 634 at 655 and Brollo Ltd v. Nkwioha (1995) 9 NWLR (Pt. 419) 361 at 368. Be it noted that essentially, importation is mostly through bill of exchange by which payments will be made many days after collection of goods.

The appellant's contention that respondent lacks locus depicts total misconception of the nature of importation business or conduct.

This is because it is trite that international commercial transactions invariably involve four autonomous though interconnected contracts as spelt out in the case of Nasaralia Enterprise Ltd. v. Arab Bank Nig. Ltd (1986) 4 NWLR (Pt. 36) 409. In the case in hand, those four contracts were as follows:-

1. The first contract is the underlying contract of sale between the Nigerian Buyer, Nasaralia Enterprises Ltd. and a foreign seller, the World Grain Company Ltd of Thailand. Under this contract, the Thai Company the Vendor was to sell to the Nigerian Company Vendee 100,000 bags of Thailand Long Grain Parboiled rice. The Nigerian Company cannot pay with Nigerian currency hence the need for the second contract.

2. The second contract was between the Nigerian buyer, the plaintiff/company and his bank - the defendant. Under this contract, the Nigerian buyer instructs his bank to open a letter of credit in favour of the World Grain Company Limited of Thailand. Under this second contract, the Nigerian bank - the defendant was under a contractual obligation to issue the credit in strict conformity and compliance with all the instructions of the plaintiff and the prevailing law in that regard. Here, it is part of the plaintiff's case that the defendant was in breach of the obligations imposed on it by mandate and stipulations of the plaintiff and the exist-

ing law when the defendant failed to endorse on the credit the requirements of the Merchant Shipping (Amendment) Decree No. 9 of 1978 sections thereof.

3. The third contract was between the Defendant Bank now the Issuing Bank and a foreign Bank where the seller or vendor resides - in the case of Bank of Tokyo Thailand. This said Bank is the confirming Bank. Under this third contract, the Nigerian Bank, the defendant in this case, undertakes to reimburse the Bank of Tokyo, Thailand for all payments it made to the Vendor. Grain Company on presentation by the World Grain Company documents which *ex-facie* confirm with the terms and condition of the credit. The plaintiff's case here is that the bank of Thailand was grossly negligent in failing to deduct obvious inconsistencies and contradictions apparent on the face of the documents presented to it. It is also the plaintiff's case that the defendant was negligent in not detecting the irregularities on the documents and in not stopping payment.

4. The fourth contract was between the Bank of Tokyo, Thailand and the world Grain Company Limited of Thailand. Under this contract, the Bank of Tokyo, Thailand undertook to pay World Grain Company Limited of Thailand the amount on the credit against presentation of stipulated documents."

See also the case of Savannah Bank of Nig. Ltd v. Adegoke Motors (supra), the locus classicus on the point.

In the instant case, the contract for remittance of money to foreign suppliers of the respondent dovetails into the second category of contracts in international commercial transactions set out hereinbefore. Hence, the appellant's contention that the respondent lacks locus standi to sue for non-remittance of the money to her suppliers and its refund cannot be anything than a serious misconception. Besides, the submission also provides the answers to the question of what constitutes cause of action raised and argued by the appellant. This is more so since it is trite that the currency of the home country of the respective supplier is the unit of account for settlement of the respective imports of the suppliers. And since the Naira fluctuates to almost all international currencies,

it becomes the duty of the appellant who caused the default in effecting the remittance to provide to take care of the value of all affected imports. See this court's findings in Odusote v. UBN Ltd. (supra) see also Wood House v. Nigeria Produce (supra).

The allegation of want of locus standi or cause of action, in my view, is therefore erroneous. This is because the appellant took a narrow view of the contractual relationship between it as a Banker and the respondent as her customer.

For the reasons set out above, I also resolve this issue against the appellant.

ISSUES 4 and 5 considered together complain (i) "Whether the lower court was wrong in affirming the judgment of the trial court having regard to the evidence before the trial court." and (ii) "Whether or not the lower court considered issue 3 of the Appellant's Brief and issue 4 set out by the lower court itself." (Grounds 5 and 6 overlapping Issue 3 of Appellant's Brief) which have been given full and adequate consideration in the preceding issues to need any further treatment except to add that I adopt them and resolve them against the appellant but in favour of the respondent.

ISSUE 6. The question issue six poses is: "Whether the damages awarded by the trial court and confirmed by the court below were not done properly and whether the amount awarded is liable to be set aside by this honourable court" (Grounds 10 and 11).

This issue as can be deciphered from the records, is also argued as issue 6 in the 2nd Amended Appellant's brief at pages 66-75.

In arguing it, the appellant submitted that as the overseas suppliers are not making any demand for the money any longer, the respondent ought not to recover the money and proceeded to criticise the assessment of damages and the award of interest. The appellant in his opening argument of this issue argued in its brief that the damages would amount to unjust enrichment or the equivalent of a windfall. From the totality of the evidence adduced, it appears clear that the respondent proved every head of damages and the lower courts did so find. I agree with the respondent's submission therefore that contrary to the contention of the

appellant that the respondent has been guilty of unjust enrichment, it is rather the appellant itself which by its argument that the respondent is not entitled to the return of the money it had earlier paid to the appellant, that wants to unjustly enrich itself, which in effect, is an unjust and immoral proposition. See Chandler v. Webster which is authority for the proposition that where money was paid under a frustrated contract, the payer is entitled to recover the money.

An example of this is to be found in the testimony of P.W.4 who admitted inter alia -

"The money I paid to U.B.A is still with CBN because CBN circular Exhibit C of November 1988 stated clearly that the money had been returned to the defendant. I kept on writing to the defendant and they kept on assuring me that the money had been approved and awaiting remittance. It was found to be untrue."

Continuing his evidence, P.W.4 said:

"The defendants are negligent in many ways. They concealed money facts. They suppressed money. 1. They kept on telling me that the money we lodged with them had been approved and awaiting remittance. 2. They kept on saying that CBN was holding the money when in fact they had collected the money since 1988 as evidenced in Exhibit C. 3. They lied to our overseas suppliers that the reason why they have not paid overseas suppliers was because we had not paid local currency when in fact we have paid over N8m. Fraudulently they were charging the plaintiff foreign exchange rate differential suggesting that foreign exchange had been allocated whereas no remittance was made."

Continuing, P.W.4 further pinned the appellant down with its duplicity when he said:

"The bank has not returned the money paid to them for remittance to our overseas supplier."

It is not correct that the money should not be returned to me. It is not correct that the money is still with CBN. Defendant has no right to keep the money. Plaintiff has absolute interest in the money because the money was lodged for a specific purpose with the defendant to pay our overseas supplier.....

Defendant paid no interest on my deposit since 1984 as directed by CBN in Exhibit E. They are holding on to my money without interest. If the money had been put in deposit account, it would have yielded compound interest i.e. from 1988. That would be about N150m.”

The respondent further demonstrated that because of the B appellant’s wilful and reckless false statements that its foreign exchange was being processed when known to it, the CBN had returned the money back to the appellant, the respondent was black-listed by the overseas suppliers and its business collapsed as a result of the non-remittance of C its money by the appellant.

It is settled law that in a case like the one in hand where there is a breach of contract, the amount of damages to be paid in respect of the breach is the amount necessary to put the respondent wronged and ag- D grievied in the position he would have been had there been no breach. See Idahosa v. Oronsaye (1959) 4 S.C 166; Ijebu Ode Local Government v. Adedeji Balogun (1991) 1 S.C. (Pt. I) 1; (1991) 1 NWLR (Pt. 166) 136 at 139. Since the appeal herein is from the decision of the Court of Appeal and most of the points now raised on this issue are not properly cognis- E able on appeal herein, they are accordingly ignored as not arising. See Raimi v. Akintoye (1986) 3 NWLR (Pt. 26) 97 at 105 (per Nnamani, JSC) see also Plateau Publishing Co. v. Adophy 4 NWLR (Pt. 34) 205 at page 215. F

For the above reasons proffered by me and those contained in the lead judgment of my learned brother, Dahiru Musdapher, JSC., I too dismiss this appeal. I abide by the consequential orders inclusive of those as to costs made therein. G

KATSINA-ALU JSC

I have read before now, in draft, the judgment delivered by my H learned brother, Dahiru Musdapher JSC., in this appeal. He has dealt admirably with all the issues raised in the appeal. I agree entirely with his reasoning and conclusion.

There is nothing I can usefully add.

TABAI JSC

This judgment is sequel to an appeal against the judgment of the Court of Appeal dated the 22/7/2003 which confirmed the earlier judgment of the High Court dated the 22/7/2002. The action was initiated at the Lagos Division of the High Court of Lagos State on or about the 30/5/94 when the writ of summons was issued along with a 28 paragraph Statement of Claim. Both the Statement of Claim and Statement of Defence were amended severally. In paragraph 62 of the 2nd Further and Better Amended Statement of Claim, the plaintiff which is respondent herein claimed against the defendant which is appellant herein the following reliefs:-

(1) Declaration that the defendant was in breach of its duty to the plaintiff by its failure to remit to the overseas suppliers the purchase price (in foreign currency) of the goods supplied by its overseas suppliers for which payment was duly made by the plaintiff.

(2) An order directing the defendant to pay the sums of

POUNDS STERLING	3,632,872.93
US DOLLARS	3,384,263.37
FRENCH FRANCS	3,478,031.85
DEUTSCHE MARKS	3,431,790.47
BELGIAN FRANCS	3,758,533.10
DUTCH GUILDERS	672,810.34
DANISH KRONE	79,515.00

to the plaintiff being the value of the goods ordered from overseas suppliers and received by the plaintiff and for which payment was made in Naira to the defendant at the material time at the prevailing rate of exchange and which the defendant has failed to remit to the overseas suppliers despite repeated demands.

AN ALTERNATIVE TO RELIEF 2 ABOVE

An order directing the defendant to pay to the plaintiff the Naira equivalent of the said sums of money at the prevailing rates of exchange

at the time the defendant chooses to pay the plaintiff.

(3) The sum of N378,780,244.00 being anticipate profit from 1985 to 1994.

(4) Loss of profit at the rate of N6,302,510.00 per annum from 1994 to date of judgment.

(5) Interest on judgment debt at the rate of 7.5% until payment is effected by the Defendant.

ALTERNATIVE TO 5 ABOVE

(6) A Declaration that the defendant was in breach of its duty to the plaintiff by its failure to duly inform the plaintiff in 1988 that the Central Bank of Nigeria had returned the sum of N8,541,557.66 which was to be remitted to the plaintiff's overseas suppliers.

(7) An order directing the defendant to pay to the plaintiff the sum of N8,544,557.66 returned by the Central Bank of Nigeria to the defendant with the accrued interest to date.

(8) An order directing the defendant to pay to the plaintiff the difference in the exchange rate in 1988 AND the prevailing rate of exchange by Central Bank of Nigeria at the time of judgment or the prevailing rate of exchange as the defendant chooses to pay the sums of:-

POUNDS STERLING	£3,632,872.93
US DOLLARS	#3,384,263.37
FRENCH FRANCS	Ffr. 3,478,031.85
DEUTSCHE MARKS	DM. 3,431,790.47
BELGIAN FRANCS	3,758,522.10
DUTCH GUILDERS	672,810.34
DANISH KRONE	79,515.00

(9) Interest on the sum of N8,544,557.66 at the prevailing rate of interest annually in 1988 when the Central Bank of Nigeria released the money to the defendant up to the time of judgment.

(10) The sum of N18,907,530.00 being anticipated profit from 1985 to 1987.

(11) Interest at the rate of 7.5% from time of judgment to the time

of payment by the defendant.

The trial involved the testimony of five witnesses for the plaintiff/respondent and seven for the defendant/appellant. One thousand three hundred and thirty one documents were admitted as Exhibits at the trial.

B In granting the claim, the learned trial Judge, B. Rhodes-Vivour, J., (as he then was) stated at page 442 lines 22-24:

“Judgment is hereby entered for the plaintiff against the defendant in the unit of currency in prayer 2 or at the prevailing exchange rate in Naira at the time the defendant chooses to pay the plaintiff.”

C At page 444 lines 3-4 of the record, he further said:

“I hereby grant the sum of N3,000,000,000.00 being anticipated profit from 1985 to 1994 and similarly loss of profit at the rate N5m per annum 1994 to date of judgment.”

D And in the concluding paragraph of the judgment he stated:

“Accordingly the plaintiff’s claims succeed. Prayers 1, 2, 3, 4, 5 of the plaintiff’s 2nd further and Better Statement of Claim are granted with the following reductions. As regards prayer 3 it shall be the sum of N300m. As regards prayer 4 it shall be N5m per annum from 1994 to date of judgment. In the light of the fact that the main claim succeeds, the alternative claim is hereby refused. The judgment sum shall attract an interest at the prevailing interest rate fixed by Central Bank of Nigeria from 1987 until judgment and at 7% until the judgment debt is fully paid.”

G In its judgment, on the 22/7/2003, the Court of Appeal dismissed the appeal and affirmed the judgment of the trial court in its entirety. In this appeal before us, the parties, through their counsel, filed and exchanged their briefs of argument.

In the second Amended Appellant’s Brief of Argument prepared by Prof. A. B. Kasunmu, SAN., seven issues for determination were formulated. While in the second Amended Respondent’s Brief settled by H Chief Afe Babalola, SAN., six issues were proposed for determination. The issues as formulated are, in substance, the same and they are:-

(1) Whether the action is incompetent and liable to be struck out for:-

(a) the trial court's lack of subject matter jurisdiction; to adjudicate in the matter; or

(b) the action being statute barred by virtue of the provisions of Section 8 of the Limitation Law of Lagos State; or

(c) the respondent's lack of locus standi to prosecute the claim. B

(2) Whether the respondent's case ought to be dismissed on the ground that it runs contradictory to Public Policy and Act of State Doctrine.

(3) Whether the Court of Appeal was wrong in affirming the judgment of the trial court having regard to the totality of the evidence before the court? C

(4) Whether the award of damages by the trial court and affirmed by the Court of Appeal be allowed to stand?

First is the question of subject matter jurisdiction under issue D one above. It is the submission of learned senior counsel for the appellant that in view of the fact that the matter pertains to the procurement of foreign exchange for the importation of goods by sea, banking facilities and letters of credit by the defendant bank, the intricate link of the Central Bank of Nigeria and the trial court's finding in respect thereto and issues involving the revenue as well as the monetary and fiscal policy of the Federal Government of Nigeria, the case is not just one for negligence, contract, deceit, trust or fraud within the jurisdiction of a State E High Court but one which falls within the exclusive jurisdiction of the Federal High Court by virtue of the provisions of the Constitution (Suspension and Modification) Decree No. 107 of 1993, the Federal High Court (Amendment) Decree No. 60 of 1991 and Section 1(i)(h) of the Admiralty Jurisdiction Act. It is further submitted in the appellant's Reply F Brief that the matter is not just one for simple debt recovery, breach of contract or negligence in an ordinary banker customer relationship caught by the proviso to Section 230(l)(d) of the 1979 Constitution. Rather, it is argued, it is a case of banker customer transaction relating to fiscal measures and involving letters of credit which came within the exclusive H jurisdiction of the Federal High Court. He relied on Cotecna International Limited v. Ivory Merchant Bank Ltd. & Ors. (2006) 6 MJSC 89. He

3790 UBA Plc v. BTL Industries Ltd (2006) 12 KLR Tabai JSC
distinguished Integrated Timber and Plywood Products Ltd. v. Union
Bank Nigeria Plc (2006) 5 S.C. (Pt. 11) 52 or (2006) 12 NWLR (Pt. 995)
483 from the present case.

Learned Senior Counsel for the respondent argued, on the other
B hand, that the case is simply one of banker/customer relationship based
on breach of contract and negligence over which, therefore, the Federal
High Court does not enjoy exclusive jurisdiction and relied on the proviso
to Section 230(1)(d) of the Constitution (Suspension and Modification)
C Decree 1993. It is further submitted that the mere fact of the unit of
account being in foreign currency does not make it a foreign exchange
matter. He relied on Oyegoke v. Iriguna (2002) 5 NWLR (Pt. 9760) 417
at 438; NDIC v. F.M.B. (1997) 2 NWLR (Pt. 490) 735 at 755-756; C.C.B.
(Nig.) Ltd. v. Mbakwe (2002) 7 NWLR (Pt. 758) 163; De Lluch v. S.B.N.
D Ltd. (2003) 5 NWLR (Pt. 842) 1 at 21 and NDIC v. Okem Enterprises
Ltd. (2004) 4 S.C. (Pt. II) 77; (2004) 10 NWLR (Pt. 880).

The purport of the proviso to Section 230(1)(d) of the Constitu-
tion (Suspension and Modification/Decree 1993 which is in pari materia
E with Section 251(1)(d) of the 1999 Constitution has been settled in a
number of cases two of the most recent being Federal Mortgage Bank of
Nigeria v. Nigeria Deposit Insurance Corporation (1999) 2 S.C. 44; (1999)
2 NWLR (Pt. 591) 333 and NDIC v. Okem Enterprises Ltd. (supra). The
F provision itself states:-

*“230(1) Notwithstanding anything to the contrary contained in
this Constitution and in addition to such other jurisdiction as may be
conferred upon it by an Act of the National Assembly or a Decree, the
Federal High Court shall have and exercise jurisdiction to the exclusion
G of any other court in civil cases and matters arising therefrom:*

*(d) banking, banks, other financial institutions including any
action between one Bank and other, any action by or against the Central
Bank of Nigeria arising from banking foreign exchange, coinage, legal
H tender, bills of exchange, letter of credit, promisory note and other fiscal
measures; Provided that this paragraph shall not apply to any dispute
between an individual customer and his bank in respect of transactions
between the individual customer and the bank. (underlining mine)”*

In Federal Mortgage Bank of Nigeria v. Nigeria Deposit Insurance Corporation (supra), this court held that dispute over matters listed in Section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993 like banking, banks, other financial institutions etc. arising from simple customer/banker relationships are, by virtue of the proviso to the subsection, exempted from the exclusive jurisdiction of the Federal High Court. And in N.D.I.C. v. Okem Enterprises Ltd., this court construed the proviso to Section 251(1)(d) of the 1979 Constitution to have exempted the exclusive jurisdiction of the Federal High Court over the matters listed in the subsection if the dispute is between an individual customer and his bank and that in such cases both the Federal High Court and a State High Court enjoy concurrent jurisdiction. I do not think we have any cause whatsoever to depart from that construction. It appears to be the most rational construction to be accorded the provision and I have no other choice than to adopt the interpretation as to the purport and/or effect of Section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993. There is, in fact, no controversy between the parties as to the effect of the provision.

The only controversy here is whether the present dispute is one between an individual customer and his bank in respect of transactions between them which falls within the concurrent jurisdiction of both the Federal High Court and a State High Court under the proviso to Section 230(1)(d) of Decree No. 107 at 1993. In my view, the present dispute is simply one arising from individual customer/banker relationship and falls squarely within the proviso to Section 230(1)(d) of Decree No. 107 of 1993 over which the Lagos State High Court shares concurrent jurisdiction with the Federal High Court. I hold, in consequence, that the trial court has subject matter jurisdiction.

On the issue of whether the action is statute barred, the appellant referred to Section 58 of the Limitation Law of Lagos State and submitted that the period of limitation can only be prevented from running upon proof of fraud or concealment of fraud against the appellant and which proof, it was argued, the respondent failed to establish. It was further argued that had the respondent exercised reasonable diligence, it could

have discovered the existence of Exhibit 'C'. With respect to Exhibit C therefore, it was submitted that both courts below erred in postponing the commencement of the period of limitation to 1994 when the respondent allegedly became aware of the existence of Exhibit C. The appellant
B finally submitted that from the facts in Exhibits DDD1 - DDD2 (i.e. DSSR) which were sent to the respondent in 1987, the action is clearly statute barred.

The respondent on the other hand argued that there was no way it could have become aware of Exhibit C prepared by the Central Bank of
C Nigeria and sent to the appellant. The respondent further argued that in view of the pleadings in Paragraph 44 of the Statement of Claim to which there was no specific traverse and the evidence in support thereof which was not contested in cross-examination, the rejection of the plea by the
D courts below cannot be faulted.

With respect to Exhibit C, I am persuaded by the argument of the respondent. From the facts and circumstances available, I do not see how the respondent could have become aware of the existence of Exhibit
E C by sheer diligence. On this issue, paragraphs 42, 43, 44 and 45 of the second Further and Better Amended Statement of Claim are relevant. The said paragraphs state:-

42. The plaintiff avers that vide C.B.N. Circular No. FOD/CFOF/
F 08.NB/Vol. 1/28 dated 24th November, 1988, the sum of N8,541,557.66 was returned to the defendant by the C.B.N. in 1988.

43. The plaintiff further avers that the defendant kept the fact stated in paragraph 42 (supra) from the plaintiff.

44. Due to persistent demands from overseas suppliers for pay-
G ment for the goods supplied to the plaintiff, the plaintiff continued to put pressure on the defendant through letters and personal visits of the plaintiff's Chairman to have the defendant remit the money to the overseas suppliers. The defendant falsely continued to assure the plaintiff that
H the money was still with the C.B.N. and will be remitted.

45. The plaintiff avers that it was not until April 1994 that it saw C.B.N, circular ref. No. FOD/CFOF/08. NB Vol. 1/28 dated 24/11/88 which circular confirmed that the defendant had indeed received the money

from C.B.N. as far back as 1988.

At the trial, evidence was led substantially as pleaded above. The appellant was at pains to contend that no sum of N8,541,557.66 was, by Exhibit C, returned or refunded by the Central Bank of Nigeria to the appellant. There is no evidence that the respondent became aware of the facts in Exhibit C before April 1994. And it is my view that the cause of action only accrued to the respondent upon its becoming aware of Exhibit C.

With respect to Exhibits DDD1 to DDD2, the case of appellant founded therein is that it had taken steps in furtherance of settling the respondent's overseas suppliers/creditors. I do not think the appellants tendered Exhibits DDD1-DDD2 as proof of their default in using the N8,541,557.66 to settle respondent's indebtedness to their overseas creditors. I do not therefore see how Exhibits DDD1 - DDD2 could sustain the plea of statute bar. On the question of whether or not the action is statute barred, I have no reason to interfere with the findings and conclusion of the trial court and affirmed by the court below.

Next is the respondent's alleged lack of locus standi to prosecute the case. The submission of the appellant is that having regard to the uncontested facts that the respondent has received the goods for which purchase the money was deposited with the appellant for onward transfer to the respondent's overseas suppliers, the money no longer belongs to the respondent for it to claim and that the appellant's duty of care is only to the overseas suppliers. It was submitted therefore that while the respondent may sue for damages, it definitely cannot sue for recovery of the money.

The settled principle of law is that it is the averments in the Statement of Claim that determine a plaintiff's locus standi. If the averments disclose that the rights or interests of the plaintiff have been or in danger of being violated or adversely affected by the act of the defendant, he would be deemed to have sufficient, interest to have locus standi to sue. See Owodunni v. Registered Trustee of Celestial Church of Christ & Ors. (2000) 6 S.C. (Pt. III) 60; (2000) 10 NWLR (Pt. 675) 315 at 355; Momoh v. Olotu (1970) 1 All NLR 117, Adesanya v. President of the

Federal Republic of Nigeria (1981) 5 S.C. (Reprint) 69; (1981) 5 S.C. 112; Oloriode v. Oyebe (1984) 1 SCNLR 390.

The substance of the pleadings in paragraphs 7, 8, 9 and 12 of the 2nd Further Amended Statement of Claim is that its business entailed the importation and distribution of finished goods from its overseas suppliers like Meridian Trade Corporation Limited; International Trade Meridien (I.T.M.); Meridien International Credit Corporation (M.I.C.C.) etc. That these finished goods were usually imported on credit from the overseas suppliers who usually sent same to it with bills of exchange or bills for collection or letters of credits. These documents were, on the instruction of the respondent, usually sent to and received by the appellant whose duty it was to secure foreign exchange allocation to the value of the received imported goods and pay the overseas suppliers/creditors. That between 1981 and 1983, several such bills and letters of credit (about 343) were received by the appellant on behalf of the respondent. That through the negligence of the appellant, it failed to secure foreign exchange allocation from the Central Bank of Nigeria and thus the overseas suppliers/credits remained unpaid for the goods they supplied to it. And for the damages it allegedly suffered, it was pleaded in paragraphs 36 and 54 thus:

36. *“As a result of the non-payment of the values of the various transactions, the suppliers had stopped credit sales to the plaintiff and that has adversely affected the business, earnings, reputation and goodwill of the plaintiff.”*

54. *“As a result of non-payment of the outstanding items, the plaintiff has been blacklisted among foreign suppliers who have stopped supplying the plaintiff and withdrew the bank guarantee in favour of the plaintiff which guarantee were earlier granted to the plaintiff as a result of good performance.”*

Are the averments in the foregoing and other paragraphs of the 2nd Further Amended Statement of Claim not sufficient to vest the respondent with locus standi? In my view, the pleadings in paragraph 19 of the 2nd Further Amended Statement of Claim notwithstanding, the totality of the averments sufficiently disclose allegations that the rights and

interest of the respondent have been violated or at least adversely affected to entitle it to sue. I agree that the two courts below appear to have based their determination of this issue of the respondent's locus standi on the trial court's findings at the trial, instead of the averments in the Statement of Claim. However, their conclusion about the respondent's locus standi cannot, in view of the pleadings be faulted.

Furthermore, in paragraphs 29 and 30 of the 3rd Amended Statement of Defence, the appellant pleaded as follows:

29. *"The defendant will maintain at the trial that the plaintiff's overseas suppliers were at all material times members and affiliates of the ITM Corporation Limited formerly Saltraco Holdings Limited and hold 40% equity shares in the plaintiff. The defendant shall rely on the plaintiff's Memorandum and Articles of Association at the trial."*

30. *"The defendant further avers that the plaintiff's foreign suppliers did not blacklist the plaintiff as both the said foreign suppliers and the plaintiff are both shareholders and/or joint owners of the plaintiff."*

These averments clearly show the appellant's acknowledgment of the respondent's interest in the alleged failure of the foreign exchange transactions. It therefore looks preposterous, in my respectful view, for the self same appellant to challenge the respondent's locus standi. The result from the foregoing considerations is that I also resolve this issue of the respondent's locus standi in favour of the respondent.

The next issue is whether the respondent's case is liable to dismissal on the ground that it is contradictory to Public Policy and Act of State doctrine. It was argued by the appellant that in appropriate circumstances, public policy is applied in the administration of justice. It was submitted that the refinancing exercise was an Act of State and that liability, if any, arising therefrom ought to be excused. Appellant relied on the case of Alfotrin Ltd. v. A-G of the Federation (1996).

The submission of the respondent in reaction is that the issue of Public Policy and Act of State is a special defence which was however not raised in the pleadings and is raised here for the first time and is therefore liable to be struck out. The respondent cited quite a number of cases on the appellant's duty to specifically plead special defences like

this, amongst them Ibrahim Kano v. Gbadamosi Oyelakin (1993) 3 NWLR (Pt. 282) 397 at 409; Chief Niyi Akintola v. Balogun (2000) 1 NWLR (Pt. 642) 532; Alhaji Mahmood I. Atta v. Miss Chinyere A.M. Ezeanah (2000) 11 NWLR (Pt. 679) 363.

B Here again, I am inclined to uphold the objection of the respon-
dent. The issue of whether or not the claim is against or contradictory of
Public Policy and Act of State was not raised either expressly or by
necessary implication in the pleadings. Nor was it raised as a point of law
before the two courts below. It is being raised here for the first time and
C I do not think this court can entertain it particularly having regard to the
fact that the two courts below had not the opportunity to express their
opinion on it. Even Alfotrin v. A-G of the Federation (supra) cited by the
appellant seems to support the stance of the respondent where at page
D 664, this court per Ogundare, JSC., said:-

*“In this appeal on hand, the defendants did not plead act of
state as a defence, nor was it ever the basis of their case. They based
their defence on there being no privity of contract between them and the
E plaintiff.....”*

That the protection sought under An Act of State or Executive
action was refused. It is my view that the defence of Public Policy or Act
of State does not avail the appellant and I so hold.

F I now come to the issue of whether the Court of Appeal was
wrong in affirming the judgment of the trial court having regard to the
totality of the evidence before the court. The appellant alleges failure of
or improper evaluation, contending that had the trial court embarked upon
a proper evaluation, particularly the documentary evidence available, it
G would not have come to the same conclusion. Specifically, the appellant
complains of the trial court’s failure to evaluate documentary evidence
tendered through the D.W.5, namely, Exhibits XX1 - XX75, YY1 - YY265,
E.E. spread sheets, ZZ1 - ZZ267, spread sheets HH1 - HH10 and GG,
H AAA1-AAA2, BBB1-BBB19, CCC1-CCC3 and DDD1-DDD2. It was the
appellant’s submission that the explicit and detailed evidence of the D.W.5
supported by these documents shows that 321 out of the 331 bills sub-
mitted by the respondent to the appellant were duly processed, approved

and paid for by the Central Bank of Nigeria. It was further argued that neither the trial court nor the Court of Appeal made any reference to the evidence of the D.W.5 or a review of the documents and that the failure so to do led to the perverse findings. With specific reference to DSSR eventually admitted in evidence as Exhibits DDD1 - DDD2 to which B neither court allegedly made any specific reference, it was the submission of the appellant that the document is conclusive proof that the bills were processed and settled through the Central Bank of Nigeria by the appellant. The appellant highlighted areas of the oral evidence of the defence witnesses especially D.W.1 and D.W.3 and contended that the findings of the trial court were not borne out by the evidence and therefore C that there was no basis for these witnesses to have been discredited.

On its part, the respondent, at pages 46 - 48 of its Brief itemized a number of reasons which, it claims, justify the concurrent findings of D the Courts below that its Bill were not refinanced and that the Central Bank of Nigeria returned the whole of the respondent's N8,541,557.66 to the appellant since 1988. I shall, in the course of this judgment, make recourse to these. With respect to the documentary evidence allegedly E not considered by the two courts below, it was the submission that none of them contained a single Debit Note or a Schedule of Payment of any of the 333 Bills of the respondent and that the non-specific reference to them by the trial court would therefore not alter the findings and judgment. F None of the exhibits, it was argued, qualified for the mandatory Debit Advice or Central Bank of Nigeria Schedule of Payment. And in an attempt to show that the documents did not improve the appellant's case, the respondent embarked on a detailed analysis of the exhibits.

G The most crucial question is: were the respondent's Bills refinanced and the respondent's overseas creditors, for whom the sum of N8,541,557.66 was meant, paid? The uncontroverted facts are that the plaintiff/respondent, which main business is the importation and sale of H some type of goods from various overseas suppliers, has had a customer/ banker relationship with the defendant/appellant with and through which it carried out its business. Between 1981 and 1983, the respondent imported, on credit, goods from various overseas suppliers. On the in-

struction of the respondent and pursuant to their banker/customer contractual relationship, the goods were sent to the respondent through the appellant along with bills of exchange or bills for collection or letters of credit totalling 333 Bills which are Exhibits P1-P333. The total amount of
B Naira equivalent for the settlement of these bills in foreign currencies was N8,541,557.66. On agreement and for the settlement of these debts, the appellant appropriated the said sum by debiting the current account of the respondent and was expected thereafter to apply to the Central
C Bank of Nigeria for approval and foreign exchange allocation for onward remittance to the respondent's overseas suppliers/creditors.

The case of the respondent is that due to the negligence of the appellant, no Central Bank of Nigeria Foreign Exchange allocation was obtained and so its overseas creditors remain unpaid and it remains in-
D debted to them. And that its debt payment exercise having failed, the Central Bank of Nigeria has, since November 1988, returned the said sum of N8,541,557.66 to the appellant which, however, concealed that fact from it until 1994 when by sheer accident Exhibit C by which the
E Central Bank of Nigeria returned the money to the appellant was obtained.

On the other hand, the case of the appellant as pleaded in paragraphs 7, 8 and 11 of the 3rd Amended Statement of Defence is simply
F that it discharged all its obligations under its banker/customer contractual relationship with the respondent and that all the respondent's 331 bills were at its instance, duly processed, approved and paid by the Central Bank of Nigeria under the debt refinancing scheme.

I shall now consider the complaints of the appellant using the
G three points complaint as stated in paragraph 2.02 at page 6 of the Amended Appellant's Reply Brief namely:-

- (a) Non-consideration of the documentary evidence submitted by the defence.
- H (b) Distortion of the oral testimony of the D.W.1, D.W.2 and D.W.5.
- (c) Misconstruing the contents of Exhibit C and the evidence led on it.

I would begin with the alleged distortion of the oral testimony of the D.W.1 and D.W.3 and D.W.5. In the first place I agree with learned counsel for the appellant that none of the D.W.1 and D.W.3 expressly admitted that by Exhibit C, the Central Bank of Nigeria returned the sum of N8,541,557.66 to the appellant. The learned trial Judge repeatedly found that one or other of the defence witness admitted that fact of the return of the sum of N8,541,557.66 via Exhibit C. At page 442 lines 14-16, the learned trial Judge credited the said evidence to have been adduced by the D.W.1. He said:-

“Indeed, D.W.1 said on oath that the sums paid by the plaintiff, that is the Naira equivalent of N8,541,557.66 was returned to it and the said sum are held in trust for the overseas suppliers.”

There was no testimony of the D.W.1 to that effect. Again, the learned trial Judge repeatedly found and stated that the appellant had been using the respondent’s money i.e. N8,541,557.66 for 18 years. At page 44 lines 23-24 he said:

“The defendant has had the use of the money for the past 18 years and as at today is still trading with the plaintiff’s money.”

Exhibit ‘C’ by which the money was allegedly returned clearly belies that finding of the learned trial Judge and affirmed by the Court of Appeal. Besides, the finding is incompatible with the respondent’s assertion made in paragraphs 42 and 45 of the 2nd Further and Better Amended Statement of Claim. In paragraph 42, the respondent pleaded:-

“The plaintiff avers that vide Central Bank of Nigeria Circular No. FOD/CFOF/08.NB (Vol. 1/28) dated 24th November, 1988, the sum of N8,541,557.66 was returned to the defendant by the Central Bank of Nigeria in 1988.”

The pleading in paragraph 45 is to the same effect. If this money was returned to the defendant via Exhibit C in November 1988 as pleaded in paragraphs 42 and 45 of the Statement of Claim, the defendant could not have used it for 18 years. I am quite conscious of the burden on an appellant who complains against a concurrent finding of fact. The policy of this court is not to disturb the concurrent finding of both the High Court and Court of Appeal, unless there is some miscarriage of justice or

a violation of some principles of law. See Ezeokafor Umeojiako & Anor. v. Ahanonu Ezenamuo & Ors. (1990) 1 NWLR (Pt. 126) 253; Afolayan v. Ogunrinde (1990) 2 S.C. 70; (1990) 1 NMR (Pt. 127) 369. In this case, the concurrent finding about the appellant's use of the money for
B 18 years is clearly not supported by the evidence on record and so that findings should be set aside. The impact of these findings on the case depends, by and large, on the totality of the evidence before the court and that shall be addressed in due course in this judgment.

C The next complaint is the alleged non-consideration of some documentary evidence tendered by the defence which details I have earlier stated above. One thousand three hundred and thirty one documents were tendered and I agree with learned counsel for the respondent that the mere failure of the learned trial Judge to comment and pronounce upon
D each and every one of them is not enough to vitiate the judgment. The submission of learned counsel for the appellant is that had the documents been considered, the judgment would have been different since, according to him, they are conclusive proof that respondent's bills were settled
E and paid for by the Central Bank of Nigeria.

I had earlier made reference to the submission of learned counsel for the respondent to the effect that the documents have no probative value and that their consideration would not have altered the concurrent
F findings and judgment of the lower courts. Although the documents have been admitted, the weight to be attached to their contents is another matter. The controversy here calls for this court's evaluation of the documents to determine their probative value. The exercise has nothing to do with the assessment of the credibility of witnesses and so this court is in
G as vantage a position as the two lower courts to embark upon the evaluation exercise. See A-G Oyo State & Anor v. Fairlakes Hotels Limited & Anor. (1989) 12 S.C. 1; (1989) 5 NWLR (Pt. 121) 255 at 282-283 292; Ayeni v. Dada (1978) 3 S.C. (Reprint) 24; (1978) 3 S.C. 35; Akinola v. H Oluwo (1962) 1 SCNLR 352.

Let me now examine these exhibits in the light of the comments on them by learned senior counsel for the parties. The first is Exhibit GG. Both counsel for the parties drew attention to the evidence of witnesses

on this set of exhibits. Under cross-examination, the D.W.1 at page 164 of the record testified thus on Exhibit GG:-

“..... I cannot remember whether Exhibit GG was in existence before I left. There is no date on Exhibit GG as to when it came into existence. I cannot remember the officer who received Exhibit GG. Central Bank of Nigeria is a public institution. When they send documents to Commercial Banks they would accompany it with their letter. Exhibits GG does not contain any covering letter”

Still continuing on Exhibit GG, the D.W.1 stated further:-

“I see Exhibit GG. There is no stamp of C.B.N. there. There is no letter accompanying it. No where is it signed by anyone as the maker. It is a computer printout. It was not certified by C.B.N. or anyone. I do not know who received it (Exhibit GG). I only went to the archives and collected it for this case. Plaintiff is claiming 333 Bills. There are 80 Bills in Exhibit GG. No column in Exhibit GG showing where, when and how payment was made.”

At page 175 of the record of appeal, the D.W.2 spoke of Exhibit GG as follows:

“I see Exhibit GG. It is a working document. My working document when I was in U.B.A. It contains ECGD refinanced claims for various importers and exporters and BTL’s claim in this binder are 197.”

The D.W.3 also gave some evidence on Exhibit GG. In the light of the evidence of these defence witnesses on Exhibit GG, it cannot in any conceivable sense be any proof that the respondent’s 331 or 321 bills were duly processed approved and paid by the Central Bank of Nigeria. The D.W.1 and D.W.2 would not even agree as to the number of the respondent’s Bills that are contained in Exhibit GG. While one said 80 the other said 197. It is certainly not a document on which the court can rely to find in favour of the appellant.

Next is Exhibits HH1 - HH10. These are 10 letters from the Central Bank of Nigeria, Tinubu Square, Lagos, to The Manager U.B.A. Lagos. Each one is dated 19/10/88. And each is headed RE: TRADE DEBT REFINANCING PROGRAMME. Each is stated to have debited the U.B.A. account with the sum stated therein. There is nothing in each

indicating its connection with the respondent's 331 or 321 Bills or even with the respondent at all. For the determination of whether the respondent's bills were processed, approved and paid for by the Central Bank of Nigeria, the exhibits have no probative value and not helpful to
B the case of the appellant.

Exhibits AAA-AAA2. At page 218 of the record of appeal, the D.W.5 said of these exhibits:-

C *"Exporters ceded their right to ECA. In certificate C, there is always a summary attached to certificate C. It comes with it."*

The summary sheets attached to certificate C were admitted as Exhibits AAA1-AAA2. All I can say about these exhibits is that on their face, there is nothing clearly indicating that overseas creditors have ceded their rights to somebody else.

D Exhibits XX1 - XX75 and YY1 - YY205. These are only proof that the Central Bank of Nigeria took steps in the refinancing programme. Exhibits BBB1 - BBB19. These are another set of documents on which the appellants heavily relied in proof of their case. In his evidence, the
E D.W.5 spoke of these documents as follows:-

F *"I see Exhibits BBB1 - BBB19.317 bills are contained therein. Export Credit Agencies assume the liabilities of the suppliers because they are the insurers of the goods. In turn they assume direct payment to the suppliers."*

These documents are each headed BUYERS DETAILS. I checked them and the bills bearing the name of the respondent or its former name BISIOLU TECHNICAL LTD. are about 729. The difference between this figure of about 729, the D.W.5's figure of 317 and the figure of 331 or
G 321 was not explained. On the number of the respondent's bills processed, approved and paid by the Central Bank of Nigeria, Exhibits BBB1 -BBB19 do not help the case of the appellant.

H The next set of documents is Exhibits CCC1, CCC2 and CCC3 stated to be ECGD claims paid lists for the appellant. It is another set of documents on which the appellant relied heavily. Under cross-examination, the D.W.5 commented on these documents as follows:-

"I see Exhibits CCC1, CCC2, CCC3. There are some hand writing

on page 1. I do not know when it was written. I in company of staff brought Exhibits CCC1 from Abuja. The writing were on its when I brought it from Abuja. It is signed by Olorundare. Exhibit CCC1 has always been in my possession. Ojukwu who signed it and Olorundare who also signed are not staff of Central Bank of Nigeria. I do not know both of them in Central Bank of Nigeria.” (Underlining mine) B

If the two persons who signed the documents are not staff of the Central Bank of Nigeria and there is no explanation as to how these strangers became signatories of the documents, I do not see how such documents would attract some probative value in the assessment of a court. C

Another set of documents on which the appellant relied heavily in proof of their case is Exhibits DDD1 and DDD2. They are said to be the Certified True Copies of DSSR and the appellant’s assertion is that these were sent by the Central Bank of Nigeria direct to the respondent and they are so addressed. The respondent denied receiving these documents. Learned senior counsel for the respondent was, again at some pains to impugn the probative value of these documents. It was his contention that the documents do not contain the BCAP numbers, the overseas suppliers invoice numbers and dates contained in Exhibits P1 - P333, I examined and tried to compare the contents of these two sets of documents. D E

The dissimilarities between the two sets highlighted by learned senior counsel for the respondent may be there. I however just could not identify them. But one thing became clear. The letter embodying the documents was dated 21st May, 1987. It is headed DEBTOR SUMMARY STATUS REPORT issued AS OF 31st JULY, 1985. The bills contained therein are 356. It is a common ground that the respondent’s bills submitted were 331 or 333; not more than 333. There was no explanation as to the source of the remaining 23 or 25 bills credited in these documents to be those of the respondent. Again, the appellant maintained throughout the trial that out of the respondent’s 331 bills, 321 were matched and 10 were unmatched and rejected as being frivolous. I counted the matched bills in Exhibits DDD1 and DDD2 to be 271 and unmatched bills to be F G H

about 42. In the face of these features in Exhibits DDD1 and DDD2, I cannot say that the document provided any conclusive proof that 321 of the respondent's were processed, approved and paid by the Central Bank of Nigeria.

B The last exhibit which non-evaluation the appellant complained about is Exhibit EE. This is the only document that records 331 bills for the respondent. Again the numbers of bills refinanced and those not refinanced does not tally with the number contained in the oral testimonies of Defence Witnesses.

C The above is a fairly detailed analysis of the specific documentary exhibits about which non-evaluation the appellant complained. The documents together constitute an integral part of the defence of the appellant and the trial court had no reason whatsoever not to consider them. The trial court and indeed the Court of Appeal had a duty to carefully consider them. See Akeredolu v. Akinremi (1989) 5 S.C. 102; (1989) 3 NWLR (Pt. 108) 164; Olowosago v. Adebajo (1988) 9 S.C. 87; (1988) 4 NWLR (Pt. 88) 275; Karibu v. Grend (1992) 3 NWLR (Pt. 230) 426. There is nothing on the record to show that these documents on which the appellant relied so heavily were given the due consideration they deserved. The appellant thus had good cause to complain. The Court of Appeal appears to have also fallen into the same error of not considering the exhibits. This court has a duty to examine these documents and that is what I have done. See Imah v. Okogbe (1993) 9 NWLR (Pt. 316) 519; Anaere v. Anyaso (1993) 5 NWLR (Pt. 291) 1.

G What is clearly established from the review of the documents is that steps were taken by the appellant and the Central Bank of Nigeria to settle the respondent's overseas suppliers with the funds - N8,541,557.66 made available for that purpose. And for the reasons which I have stated with respect to each set of the documents, I do not think they provide any conclusive proof that 321 of the respondent's 331 or 333 bills were H processed, approved and paid by the Central Bank of Nigeria. Thus, although the two courts below did not, in their assessment of the case, refer specifically to these documents, the failure so to do, without more, does not make the judgment perverse. Whether or not the judgment is

perverse still depends on the totality of the evidence before the court.

Another controversy between the parties pertains to whether or not the appellant was entitled to hold and keep the money returned via Exhibit C in trust for the respondent's overseas suppliers. Although the appellant pleaded in paragraphs 16 and 17 of its 3rd Amended Statement of Defence to the effect that if any of the respondent's money is with it, it holds same as trustee for the respondent's overseas suppliers, its evidence was contradictory and does not support that assertion. It is true the D.W.1 gave evidence in support of that assertion when at page 161 of the record he said:-

"I know from records that in 1988 December, Central Bank of Nigeria returned all moneys in respect of unremitted bills back to commercial banks. The commercial bank is not expected to return it to the owner. The money should be kept in trust for the beneficiaries pending satisfaction of certain conditions..."

But the D.W.5, a Deputy Director of Central Bank of Nigeria at page 222 of the record contradicted the D.W.1 when he said:-

"C.B.N. returned money to the commercial banks for onward transmission to importers for bills that did not match."

I think the D.W.5 is a stronger authority on the matter.

Besides, Exhibit C does not seem to convey any authority on the commercial banks to hold such customers' money refunded in trust for the foreign suppliers. Part of Exhibit C reads:-

"Consequently, all future requests for the refund of Naira and those pending in Central Bank of Nigeria should be treated by you without further reference to the Central Bank of Nigeria."

The above clearly shows that customers were making requests for refund of moneys collected from them and the commercial banks were, by Exhibit C, advised to treat all such further requests without reference to the Central Bank. I hold therefore that the respondent was entitled to be refunded any money in respect of any of its 333 bills that was not remitted or settled.

This leads to the next and very crucial question. It is the question on which the whole controversy is founded and it is this. How much of

the sum of N8,541,557.66 appropriated from the current account of the respondent by the appellant for remittance to the respondent's overseas suppliers was returned by the Central Bank of Nigeria to the appellant via Exhibit C? It is a common ground that by Exhibit C, the Central Bank of Nigeria returned the Naira cover for the respondent's unmatched and unrefinanced bills. The case of the respondent is that there is no proof of the settlement of any of its 333 bills and therefore that it was the entire N8,541,557.66 that was returned through Exhibit C. The appellant, on the other hand, maintained in evidence that 321 of the respondent's 331 bills were matched and their Naira cover utilized and that it was the Naira cover for the 10 unmatched and rejected bills that was returned through Exhibit C.

As a general rule, the burden of proof is on the plaintiff to show that he is entitled to the relief sought. It is however not the law that the burden of first proving every particular fact invariably lies on the plaintiff. Section 137(1) of the Evidence Act, Laws of Nigeria, 1990 provides:

"In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings."

And Section 137(2) says:-

"If such party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with."

Going by these provisions therefore, there may arise situations where a defendant may be required, on the state of pleadings, to lead evidence to discharge the burden of proving the existence of a particular fact. See Okubule v. Oyagbola (1990) 7 S.C. (Pt. II) 60; (1990) 4 NWLR (Pt. 147) 723; Union Bank (Nig.) Ltd. v. Penny-Mart Ltd. (1992) 5 NWLR (Pt. 240) 228; First African Trust Bank Ltd. v. Partnership Investment Company Ltd. (2003) 12 S.C. (Pt. I) 90; (2003) 18 NWLR (Pt. 851) 35.

The respondent led evidence that it is entitled to be informed by

the appellant about the settlement of any of its bills and that because none of its 333 bills was settled, no such information was given to him by the appellant. That it received no Debit Advice accompanied by schedule of payment (which alone constitutes evidence of payment) from the appellant.

On this state of the pleadings and evidence and having regard to the fact that the questions about the number of bills paid and those not paid and the Naira cover for every unmatched and unpaid bill for which Exhibit C was made are facts which existence is peculiarly within the knowledge of the appellant and the Central Bank of Nigeria, the burden of proof of the total number of bills not matched and not paid, and their Naira cover therefore lies squarely on the appellant.

Was this burden discharged to entitle the appellant to the judgment of this case and thus a dismissal of the respondent's case? This is where the appellant ran into troubles. It is where the appellant, by its conduct of the defence, earned the trial court's tirade of damnifying language. The trial court had the impression that the evidence of the defence was sometimes at variance with its pleadings and is generally unreliable.

The first evidence which establish respondent's unreliability is contained in Exhibit B. It cannot be contested that the respondent was entitled to be informed about Exhibit C and the status of its interest conveyed therein. Exhibit C is dated 24th November, 1988. Even if the said Exhibit returned only the sum of N12,030.49 as the appellant claimed in Exhibit B and appellant had a duty to inform the respondent about it and even remit the said amount to the respondent. Appellant hid the facts about Exhibit C from the respondent for nearly six years. And when the appellant had reason to write Exhibit B on the 13th of May, 1994, it told, what turned out to be, a lie that it received only the Naira cover for one bill which is N12,030.49. The appellant went on to state, rather arrogantly, that the respondent was not even entitled to the refund of the N12,030.49. As I said, Exhibit B clearly demonstrates the appellant's insincerity in its dealings with the respondent- its self confessed "valued customer."

Exhibit B was made before the writ of summons in this suit was

issued. On this question of the number of bills settled and those unmatched and thus rejected, the appellant took a position different from that in Exhibit B. In part of Paragraph 11 of the 3rd Amended Statement of Defence, it averred:-

B *‘The defendant avers that all the transactions concerning the bills for collection and unconfirmed letters of credit relating to the plaintiff have been approved and refinanced by the Central Bank of Nigeria.’*

C See also paragraphs 7 and 8 where the appellant pleaded to the same effect. It was not the case of the appellant, as pleaded, that specific number of the respondent’s bills were refinanced and some unrefinanced. The case was that all the respondent’s bills were refinanced and settled and that there were no unrefinanced bills which Naira cover was sent through Exhibit C. At the trial therefore, all the oral and documentary D evidence about returned and unrefinanced bills were at variance with the case pleaded.

As respect the evidence itself, the oral testimony of the various defence witnesses was consistent as to the number of the respondent’s E bills submitted, the number matched and refinanced and that unmatched and unrefinanced. The evidence was that the respondent’s bills submitted were 331 out of which 321 were refinanced and 10 unmatched and rejected. Defence however did not identify the 10 unmatched and F rejected bills which Naira cover was sent through Exhibit C.

The refinancing exercise was entirely documentary and in proof of its assertion, the appellant tendered quite a number of documentary exhibits. They include Exhibits XX1-XX75, YY1-YY265, ZZ1-ZZ267, HH1-HH10, GG, AAA1-AAA2, BBB1-BBB19, CCC1-CCC3 and DDD1- G DDD2. I have earlier above pointed out features in these exhibits that tended to render them unreliable. Besides, on this all important issue as to the number of respondent’s bills, the number matched and that unmatched and rejected no two document submitted by the appellant tell the same H story. Exhibit EE contains 331 bills and so is consistent with the oral testimony of defence witnesses. But it records the unmatched bill which Naira cover was presumably sent through Exhibit C to be 9. With respect to Exhibit GG, the D.W.1 and D.W.2 each told a different story about the

respondent's bills contained therein. The D.W.1. claimed at page 164 of the record that the respondent's bills in Exhibit GG are 80. At page 175, the D.W.2 said they were 197. Exhibits BBB1-BBB19 presents a completely different account on the number of the respondent's bills presented. The D.W.5 testifying on this set of documents said there were B 317 bills. I checked and saw the bills bearing the name of the respondent or its former name BISIOLU TECHNICAL LTD to be about 729. Exhibit DDD1-DDD2 records about 271 matched bills and about 42 unmatched bills. As I said no two documents presented by the appellant tell the same C story about the number of unmatched bills which naira cover was sent by the Central Bank of Nigeria to the appellant through Exhibit C. The pre-trial Exhibit B tells a completely different story. Perhaps the appellant forgot its position on this issue of unrefinanced bills and corresponding D Naira cover when it was formulating its pleadings. On the whole, the entire evidence of the appellant was not only at variance with its case as pleaded. It was also full of contradictions.

In view of the above, it cannot be seriously contended that there was conclusive documentary proof of the respondent's unmatched bills E and their naira cover. On this issue, the appellant failed completely to discharge its burden of proof. The trial court was, in the circumstances, right to accept the case of the respondent and reject that of the appellant. Before concluding this issue, there is need to comment upon another F aspect of the case where the appellant demonstrated complete disregard for its banker/customer relationship with the respondent. In Paragraph 51 of the 2nd Further and Better Amended Statement of Claim, the respondent pleaded:-

"While trading with plaintiff's funds, the defendant continues to G charge exorbitant interests on the facilities granted to her to finance the remittance without effecting the remittance."

This assertion was amply supported by evidence from both parties. The D.W.2, for instance, stated under cross-examination at page H 168 of the record thus:-

"In 1994, the plaintiff was owing about N10m. In 1998 about N19m. Interest alone accounted for N19 from 1994 to 1998. The plaintiff

had a rosy patronage with us before this incident. I see Exhibit B. It is from the defendant to the plaintiff. Before then he was valued customer of the Bank.”

Thus, the respondent’s indebtedness to the appellant increased by almost 100% in 4 years. The appellant, upon receipt of Exhibit C decided to withhold the respondent’s money conveyed thereby for 14 years at the time of the judgment at the trial court on the 22/7/2002. The money has been withheld now for 18 years. If the respondent had been indebted to the appellant to the tune of N8,541,557.66 in 1988, what would have been the indebtedness today? Yet the appellant has argued severally that the respondent’s entitlement should not be more than N8,541,557.66. One can take judicial notice of the fact that the appellant is one of the most reputable banks in the country. And in defence of its reputation and standing in the banking industry, it ought to display absolute good faith in its dealing with its customers.

As stated earlier in this judgment, this issue of whether the Court of Appeal was wrong in affirming the judgment of the trial court having regard to the totality of the evidence is the key issue. In view of all I have discussed above, it ought to be and is hereby resolved in favour of the respondent.

The last issue is whether the award of damages by the trial court and affirmed by the Court of Appeal be allowed to stand. On this issue, learned senior counsel for the appellant argued that the award of N300,000,000.00 as anticipated profit and N5,000,000.00 as loss of profit from 1994 to date of judgment is not supported by the evidence of the P.W.4. In support of this contention, learned senior counsel referred to Exhibits S1-S10 wherein it is disclosed that the respondent’s profit for the period 1982-1985 was less than N600,000.00 and that its 1984 before tax profit was only N28,734.00. It was further submitted that a person claiming special damages has a duty to furnish the other party with details of the basis of such a claim in his pleading so that the latter party can verify the claims so made. He relied on Attorney-General Oyo State v. Fairlakes Hotels (No. 2) (1989) 12 S.C. 1; (1989) 5 NWLR (Pt. 121) 253 at 279.

Learned senior counsel for the respondent on his part argued that there was evidence in support of every item of award that was made. He quoted extensively from the evidence of the P.W.4 and submitted that the awards were justified. Learned senior counsel cited Idahosa v. Oronsaye (1959) 4 FSC 166; (1959) SCNLR 407; Ijebu-Ode Local Govt. B v. Adedeji Balogun (1991) 1 S.C. (Pt. I) 1; (1991) 1 NWLR (Pt. 166) 136 at 159; Swiss-Nigeria Wood v. Bogo (1972) 1 ANLR (Pt. 7) 433. With respect to the award of interest of N5,000,000.00 per annum, counsel again argued that the award was justified by the evidence and relied on Ekwunife v. Wayne (W/A) Ltd. (1989) 12 S.C. 92; (1989) 5 NWLR (Pt. 122) 422 at 445 and NGS Co. Ltd. v. NPA (1990) 1 NWLR (Pt. 129) 741 at 748. He prayed that the issue of damages awarded be resolved against the appellant. C

It is clear from the award that the N300,000,000.00 comes within D general damages since it is not specifically tied to any item of special damage specifically pleaded and proved. It is settled law that general damages, usually awarded to assuage loss suffered by a plaintiff from the acts of a defendant, is a matter of inference based on the trial court's E discretion. And an appellate court ought not to interfere with such award of general damages unless:-

- (a) Where the trial court has acted under a mistake of law; or
- (b) Where he has acted in disregard of principles; or F
- (c) Where he has taken into account irrelevant matters or failed to take into account relevant matters; or
- (d) Where he has acted under a misapprehension of facts; or
- (e) Where injustice would result if the appellate court does not G intervene; or
- (f) Where the amount awarded is either ridiculously low or ridiculously high that it must have been a whole erroneous estimate of the damage.

See U.B.N. Ltd. v. Odusote Bookstores Ltd. (1995) 9 NWLR (Pt. H 421) 558 at 556; Ademoyi v. Abibade 4 WACA 169; Obere v. The Board of Management Eku Baptist Hospital (1978) 6-7 S.C. (Reprint) 12; (1978) 6-7 S.C 15.

While considering the award of damages, the learned trial Judge laboured under the misapprehension of fact that the appellant had used the money for 18 years. At page 443 he said:-

“The defendant has had the use of the money for the past eighteen years and as at today is trading with the plaintiff’s money.”

He repeated this several times in the judgment. As I pointed earlier in this judgment, the finding is not supported by the evidence in court. Exhibit C by which the money was returned to the appellant was in 1988. The appellant’s use of the money from 1988 to 2002 cannot therefore be 18 years. The finding is also contrary to the case pleaded by the respondent at paragraphs 42 and 45 of the 2nd Better and Further Amended Statement of Claim. And it is clear that his perseverance in this error greatly influenced his award.

Besides, the award is unreasonably excessive. Although the respondent adduced some evidence of anticipated profits, it is not such evidence that should reasonably attract such huge award. In granting the main relief in foreign currencies, the learned trial Judge said:-

“It is a known fact that currencies are no longer stable. They swing around with every gust that blows. Judgment should be delivered in whatever currency seems fair and just in the circumstances of the case.”

Entering judgment in favour of the respondent has its peculiar significance in this case and that sufficiently meets the fairness and justice of the case. In the circumstances, this court should intervene in the award of N300,000,000.00 which is accordingly set aside. Similarly the award for loss of profit at the rate of N5m per annum from 1994 to date of judgment is set aside. It is in the nature of special damage and certainly there was no proof to justify its award.

In conclusion, and subject to the orders with respect to reliefs 3 and 4 for damages, the appeal fails and is accordingly dismissed. The appeal against the damages awarded under reliefs 3 and 4 succeeds and accordingly allowed. Having regard to the fact that the main appeal fails, the respondent is entitled to costs which I assess at N10,000.00.