

SUPREME COURT OF NIGERIA
23rd FEBRUARY, 2007. SC. 216/2001
CORAM:- S. U. ONU, D. MUSDAPHER. S. A. AKINTAN,
W. S. N. ONNOGHEN, I. F. OGBUAGU, JJSC

CIVIL DESIGN & CONSTR- UCTION COMPANY NIG LTD AND S. C. O. A. NIGERIA PLC APPELLANT CROSS-RESPONDENT RESPONDENT/ CROSS-APPELLANT
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PLEADINGS - Hire purchase - Rig - Evidence of defendant - Supported plaintiff's case - That the particular rig in issue - Is a motor vehicle - Within contemplation of s. 20(1) Hire Purchase Act (H1)

ESTOPPEL - Evidence - Where defendant made a factual representation - That the rig in question is a motor vehicle - He is estopped from denying that fact (H2)

HIRE PURCHASE - Seizure - Applicable law - Is the Hire Purchase Act not the common law - And no law authorizes repossession by seizure - But as provided by law (H3)

ACTIONS - Conversion - Damages - Money had and received - Plaintiff is entitled to value of the chattel at date of conversion - Plus any consequential damages (H4)

TORTS - Damages - Detinue & Conversion - Wrongful seizure of chattel - Appellant is entitled to damages - As per *Stitch* case (H5)

HIRE PURCHASE - Contracts - Breach - Outstanding instalment - Cannot be recovered by respondent - That has violated the Hire Purchase Act (H6)

APPEALS - Reversal - Damages - Findings of trial Court - Where supported by properly evaluated evidence - Court of Appeal was wrong in reversing it (H7)

APPEALS - Appellate court - Duty - Perverse finding of lower court - In awarding what was never claimed - Should be set aside (H8)

PLEADINGS - Issues - Variation - Facts that were not pleaded - Evidence on them - Grounds to no issue and are inadmissible (H9)

FACTS

Before the High Court, Ikeja Lagos, the plaintiff/appellant filed an action against the defendant/respondent. Plaintiff claimed inter alia, a declaration that the seizure of two of its rigs by the defendant was wrongful, an inquiry into the current market value of the 1st rig and an award of the said current value. It claimed the sum of N414,480.00 being money had and received by the defendant and damages at the rate of N2,000.00 per day from the date of the wrongful seizure. Plaintiff also made several other claims in the alternative. The cause of action arose from a hire purchase contractual relationship between the parties in respect of the rigs and two road scrapers. Plaintiff made full payment in respect of the 1st rig and was owing some amount for the 2nd. The parties were not agreed as to their contractual situation concerning the supplied road scrapers. Upon delivery of some of the chattels to the defendant for service purposes, it seized them without following due legal process.

Aspect of the issues that arose in this case is whether a rig is a motor vehicle or not towards determining whether it is the common law or statutory law that is applicable. The trial court found in favour of the plaintiff but awarded N100,000.00 outstanding instalments to defendant. Defendant's appeal to the Court of Appeal was upheld in part. Being dissatisfied, the plaintiff has now appealed to the Supreme Court while the defendant also cross appealed.

ISSUES FOR DETERMINATION

"3.01 In the circumstances of this case, and in particular having

regard to the issue of estoppel and the presumptions of law that arose in this case, was the Court of Appeal right in holding that the Common Law as opposed to the Hire Purchase Act, (Cap 169 L.F.N) governs the transaction relating to the motor rig registered as LA 8509 WD?

3.02 With regard to the plaintiff's 2 scrappers and the reliefs sought for their conversion/detinue what reliefs should the Court of Appeal have awarded in the circumstances of this case?

3.03 In the circumstances of this case, what is the correct measure of damages for the seizure of the plaintiff's rigs?

3.04 Was the award of the sum of N108,324.16 to the defendant made on the correct principles of law?"

HELD (Unanimously allowing the appeal and dismissing the cross appeal per **ONNOGHEN JSC**)

Hire purchase - Rig - Evidence of defendant

1. It is settled law that a plaintiff must succeed on the strength of his case and not on the weakness of the defence and that where the evidence of the defence supports the case of the plaintiff, the plaintiff is entitled to rely on same in proof of his case. It is not disputed that the plaintiff/appellant pleaded that the rig is a mechanically propelled motor vehicle intended or adopted for use on roads duly registered as a motor vehicle by the respondent. The position of the law being what it is the appellant is entitled to take advantage of the evidence of DW1 extracted under cross examination and which supports the pleading of the appellant to the effect that the particular rig in issue is a motor vehicle.

I hold the view that if the rig is generally treated as if it is a motor vehicle and having regard to the facts and circumstances of this case - its being registered by the motor licensing authority, being insured, given certificate of road worthiness and driven by a driver – it is in fact a motor vehicle within the contemplation of section 20(1) of the Hire Purchase Act. (p. 906 A/G)

Where defendant made a factual representation

2. That apart, it is in evidence that it is the respondent who represented to

the appellant that the rig in question is a motor vehicle by the act of registration of same as a motor vehicle with the motor licensing authority and obtained a certificate of road worthiness for the vehicle and are, in law, estopped from denying that the said rig is a motor vehicle.

B (p. 907 C)

HIRE PURCHASE - Seizure - Applicable law

3. Even under the common law, if it were to apply to the facts of this case, which I do not concede, the respondent cannot seize or repossess the rig without recourse to the court. It is therefore not the case that if the common law applies the respondent can repossess the rig by seizure or otherwise than as provided by law, particularly as it is in evidence before the court that appellant had paid up to 60% of the purchase price of the rig in question which fact has not been denied by the respondent.

I therefore hold that the Hire Purchase Act applies to the transaction between the parties and that as it is admitted that appellant has paid 3/5th of the purchase price of the rig in issue the respondent cannot in law repossess the rig otherwise than in accordance with the law. In the circumstance I resolve issue No. 1 in favour of the appellant. (p. 907 D)

Conversion - Damages - Money had and received

4. The claim is therefore a declaration that the delivery of the two scrapers to SADP is wrongful and an order of inquiry into the current value of the scrapers as at the time of judgment and award of the resultant current value as damages less the N319,806.00 which is to be refunded as money had and received.

In the case of *Stitch vs. A-G of the Federation* (1986) 12 S.C 373 at 422 - 423 this Court stated, per UWAIS, JSC (as he then was) that the measure of damages for conversion is “the value of the chattel at the date of conversion together with any consequential damages flowing from the conversion.”

Since the lower courts have, rightly in my view, found concurrently that the delivery and sale of the appellant’s scrapers by the respondent to SADP was without the authority of the appellant and there-

fore wrongful and the respondent has not contested issue No. 2 as argued before this Court and therefore deemed to have conceded same, it follows that appellant is entitled to the reliefs claimed in respect of the said two scrappers, particularly as pleaded in paragraph 34(8), 34(9), 34(10) and 34(11) of the Third Amended Statement of Claim which is hereby ordered accordingly. For the avoidance of doubt it is further ordered that the necessary inquiries into the market value of the said scrap-
pers shall be as at the date of the judgment of the High Court.
(p. 909 F)

Detinue & Conversion - Wrongful seizure of chattel

5. From the facts as found by the lower courts it is clear and I hold that the appellant's two rigs were wrongfully seized by the respondent and that appellant is entitled to damages for the wrongful act of the respondent and as pleaded in the reliefs in the statement of claim, (as amended) earlier reproduced in this judgment.

In the case of STITCH VS A-G FEDERATION (1986) 17 NSCC 1389: at 1404 - 1405 this Court, per ANIAGOLU JSC stated the position as regards damages in respect of detinue/conversion in similar circumstance as follows:-

"With regard to CLAIM 3 which reads:

"An order for the release of the said car to the plaintiff on the payment of the said sum",

The appellant is entitled to the possession of the car but the car the release of which the appellant seeks under that head of claim, is now virtually a wreck - a derelict. Many of its parts have been sold by the 4th respondent (O. O. Onifade). Many are missing and the car had been, for sometime now, grounded, in the open, without a shelter and subject to the deleterious effects of the elements. For this court to order for the appellant to have delivered to her the car which she brought into the country on 3rd April 1982 would be virtually to order the impossible. But the car was physically there at the Tin Can Island port as a second-hand car in good working condition. It was the Federal Government's fault - Federal Government personified by 1st and 2nd respondents that the appellant

did not get hold of her car. Since the car cannot now realistically be physically delivered to the appellant, she must be entitled to receive from the tortfeasor an amount which will buy her a second-hand Mercedes Benz 280 saloon car in good working condition, with accessories as contained in the car she imported on 3rd April 1982. Accordingly, in respect of Claim 3, it is hereby ordered that that head of claim be remitted to the trial Federal High Court, Lagos, with these Directions:

(i) to take evidence as to what a second-hand Mercedes Benz 280 saloon car of the type brought into the country by the appellant on 3rd April 1982, the subject-matter of these proceedings, will cost to purchase now and award the appellant the amount found; and

(ii) the parties will be at liberty to call whatever evidence they consider necessary for the purpose of determining the present cost or value of the car as ordered in (i) above” (p. 912 D)

HIRE PURCHASE - Contracts - Breach

6. Even under the common law, it is settled that a hirer cannot repossess the hired goods without an order of court. In the instant case it is not disputed that the respondent never obtained the leave of the court before seizing the rig in issue. In short, in either way, the respondent’s seizure of the rig in question was in breach of contract and therefore condemnable. It is therefore clear, and I hereby hold that the respondent having seized rig No. LA 8509 WD in violation of the provisions of the Hire Purchase Act cannot recover the outstanding installment of N100,000.00 and that the Court of Appeal erred in holding otherwise. (p. 919 C)

APPEALS - Reversal - Damages

7. On the sub-issue as to the award of N8,324.16 I find as a fact that the Court of Appeal did not give any reason for reversing the judgment of the trial court on the issue. It is settled law that evaluation of evidence and ascription of probative value is the primary function of the trial court which heard and watched the witnesses testify and that an appellate court will not ordinarily interfere with the findings of a trial court unless in special or exceptional circumstances such as where the finding of the

trial court is not supported by the evidence or is otherwise perverse or where the trial court has not made full use of the opportunity of watching the demeanor of the witnesses etc. In the instant case there is evidence in support of the rejection of the claim by the trial court particularly as exhibits DD8 on which the lower court based its decision predated 1984 B when both parties agree that rig No. LA 2632 WD was sent in for repairs; the said exhibits cannot therefore be relevant to the claim. That apart, exhibits D - D8 are internal documents of the respondent which documents were authorized not by the appellant but an employee of the respondent by name De La Rue as admitted by DW2. I therefore resolve C the issue in favour of the appellant and set aside the award of N108,324.16 made by the Court of Appeal in favour of the respondent. (p. 919 E)

Appellate court - Duty

8. It is settled law that an appellate court has the duty to set aside a perverse finding, judgment or decision particularly one that awarded a defendant what it never claimed on a case it never made before the court, as is in the instant case - see Ekpenyong vs. Nyong (1975) 2 S.C 71. E (p. 921 E)

PLEADINGS - Issues - Variation

9. On the third issue it is very clear that exhibit D3 is at variance with the pleadings of the cross appellant. It was never the case of the cross appellant that rig No. LA 2632 WD was sold by the appellant to the cross F appellant as can be verified from the pleading. Exhibit D3 was even shown not to have been made by an officer of the appellant. It is trite law that G evidence on a fact not pleaded grounds to no issue, where admitted such evidence is strictly inadmissible in law primarily as it is not relevant - if it were, it ought to have been pleaded. I therefore hold the view that the Court of Appeal was right in coming to the conclusion it reached on H exhibit D3 and consequently find no merit in the cross appeal (p. 921 F)

NOTABLE POINTS OF INTEREST

OGBUAGU JSC

1. Self help can never be lawful

B It is surprising to me that the trial court, in the face of this fact, with respect, made a U-turn so to say, by holding that the ownership of the first Rig No. LA 2632 WD, had reverted to the Respondent and relied on Exhibit D3. It even stated at page 439 of the Records, that “the method of recovering this rig from the Plaintiff might be crude and barbaric”,
C that the Respondent has a right to possession of the rig which it eventually recovered. This decision in my respectful but humble view, is perverse in the extreme. Of course, self-help in any guise and by any person - high or low, Government or its functionaries/agents, have been depre-
D cated by this Court in many decided authorities. In the case of *Ellochim (Nig.) Ltd. & ors. v. Mbadiwe (1986) 1 NWLR (Pt.14) 47 @ 65 - Aniagolu, JSC*, stated inter alia, as follows:

“*The laws of civilized nations have always frowned at self-help. If*
E *for no other reason than that they engender breaches of peace*”
(p. 944 F)

2. Conversion - How constituted - Measure of damages

F It need be borne in mind, that to constitute Conversion, there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner’s rights, and an intention in so doing, to deny the owner’s rights or to’ assert a right inconsistent with them. The inconsistency, is the gist of the action. There need not be any positive intention to chal-
G lenge the true owner’s rights. I hold that in the case of scrappers, a case of conversion, was clearly established by the Appellant against the Respondent. The normal measure of damages, is the market value of the goods and there may be an addition for consequential loss if not remote.
H See *Ezeani v. Ejidike (1964) 1 ANLR 402*.

Again, it is not the case of the Respondent, that it sold the scrap-
pers on behalf of the Appellant, but that it delivered the same, to SADP on the instructions of the Appellant which have been found by the court

below and myself, to be a lie. (p. 946 F)

REPRESENTATION

J. C. EZIKE Esq., for the appellant with him is CHUMA CHUKWUDI Esq.

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T. OLAYINKA Esq., for the respondent/cross appellant.

CASES REFERRED TO

Ezeani v. Ejidike (1964) 1 ANLR 402

Ellochim (Nig.) Ltd. & ors. v. Mbadiwe (1986) 1 NWLR (Pt.14) 47 @ 65 C

Stitch vs A - G Federation (1986) 17 NS.CC 1389: at 1404 - 1405

Ayoke vs. Bello (1992) 1NWLR (pt. 218) 380 at 309-402

Yeoman Credit Co. vs. Waragowski (1961) 3 All ER 145

Stabilini vs. Obasi (1997) 9 NWLR (pt. 520) 293 at 301 and 304 D

Allied Bank vs. Akubueze (1997) 6 NWLR (pt. 509) 374

Incar (Nig) Ltd vs. Elias Bus Transport Ltd (1970) NCLR 583

Estarn Distributors Ltd vs. Goldring (1957) 2 All ER 525 at 533

Ekpenyong vs. Nyong (1) (1975) 2S.C 71 at 80 - 81 E

Temile vs. Awani (2001) 12 NWLR (pt. 524) 726 at 752

George vs. dominion Flour Mills (1963) 1 All NLR 71 at 77

Burns v. Currel (1963) 2 All E.R 295

Daley v. Hargreaves (1961) 1 All ER 552

F

Macdonald v. Carmicheal (1911) SC (1) 27

STATUTE REFERRED TO

Hire Purchase Act (Cap. 169 LFN) ss. 1(a), 9(1) & (5), 20(1), 2(2) (a), 9(2) (a) G

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Lagos in appeal No. CA/L/243/93 delivered on the 9th day of February, H 2001 in which the court held as follows:

‘1.The plaintiff claim in respect of Rig. No. LA 2632 WD succeeds and the plaintiff is awarded:

(a) *The sum of N3,300,000.00 as the market value of the rig at the date of judgment of the lower court.*

(b) *N560,000.00 as damages for loss of income on the rig for 260 days at the rate of N2,000.00 per day.*

B 2. *The claims of the plaintiff on rig No. LA 8509 WD are refused as the plaintiff did not show that a Rig is a motor vehicle within the meaning of section 1 of the Hire Purchase Act, cap. 169.*

C 3. *The award of the sum of N319,806.00 on the scrappers are affirmed; and this court sees no reason to award more than that amount.*

4. *On the counter claim by the defendant, judgment is given in favour of the defendant for the sum of N108,324.16 the breakdown of which is as follows:-*

D (a) *N100,000.00 being the unpaid balance of the purchase price due on the rig No. LA 8509 WD.*

(b) *N8,324.16 being cost of repairs and spare parts on the plaintiff's rig."*

E The facts of the case, as can be gathered from the very lengthy and unnecessarily tedious pleadings of the parties include the following:

F The plaintiff who is also the appellant before this Court, at first bought one Ingersoll Cyclone Water Well rig with registration No. LA 2632 WD from the respondent under a Hire Purchase Agreement for the sum of N431,842.00 which the appellant eventually fully paid for thus becoming the owner thereof.

G The second transaction between the parties involves a second rig with registration No. LA 8509 WD which the appellant also bought under a Hire Purchase Agreement for the sum of N514,482.00 in respect of which the appellant paid the sum of N100,000.00 being two installments of N50,000.00 each remaining unpaid or outstanding at the time of the dispute between the parties. The facts of the above two transactions are not disputed by the parties.

H There is finally a third transaction involving scrappers, the facts in relation to which are violently disputed by the parties. It is the appellant's case that on 26/1/84 and 10/2/84 respectively, it bought a road scrapper each on those dates for the sum of N159,903.00 and fully paid cash for

both. The appellant further contends that the parties later agreed that the sums paid on the two scrappers be merged and credited to the appellant on account of the purchase by the appellant on hire purchase terms of one new rig and 'two service rigs', that the respondent later expressed its inability to implement the said agreement which made the appellant to instruct the respondent to sell the scrappers and make a refund to it of the purchase price for both scrappers. B

On the other hand the respondent contends that each scrapper was sold for N177,162.00 and that the sum of N159,903.00 paid by the appellant on each scrapper was a deposit against the said purchase price and that the appellant owed the balance of N34,518.00 on both scrapers. It is the further contention of the respondent that appellant bought two other scrappers for which no deposit was made but rather that the appellant allegedly deposited its rig No. LA 2632 WD as security against the payment due on the said scrappers. The respondent claimed to have delivered the four scrappers to Sokoto Agricultural Development Project (SADP) on behalf of the appellant on an alleged instruction of the appellant which the appellant denied. D E

It is in these circumstances that the appellant instituted suit No. LD/481/85 in the High Court of Lagos State, holden at Ikeja claiming the following reliefs as per the 3rd Amended Statement of Claim:-

"1. A *DECLARATION* that the seizure of the plaintiff's rigs Nos. LA 2632 WD and LA 8509 WD was wrongful. F

2. An inquiry into the current market value of rig No. LA 2632 WD and an award of the said current value of the said rig.

3. The sum of N414,480.00 being money had and RECEIVED by the defendant on rig No. LA 8509 WD before the wrongful seizure plus damages at the rate of N2,000.00 per day from the date of the wrongful seizure, i.e. 29th May, 1984 until payment of the said damages. G

4. *ALTERNATIVELY*, an inquiry into the current market value of the said rig No. LA 8509 WD and an award of the ascertained value as damages. H

5. An order directing all necessary inquiries and accounts.

6. The sum of N2,000.00 per day being loss of use of rig No. LA

2632 WD from 1st March, 1984 until the rig is released.

7. An order directing an inquiry into the market value of the above rigs and payment thereof to the plaintiff in lieu of or in addition to return of the rigs.

B 8. A declaration that the delivery of the plaintiff's 2 (Nos) Fiat/AII-is Motor Scrappers Model 360B to the Sokoto Agricultural Development Project (SADP) by the defendant was wrongful and without the authority of the plaintiff.

C 9. An order directing the defendant to make a refund of a sum of N319,806.00 (Three Hundred and Nineteen Thousand, Eight Hundred and Six Naira), being money had and received for the two scrappers sometime in 1984 which the defendants have failed and/or neglected to deliver to the plaintiff and or converted to their use.

D 10. An order directing all necessary inquiries into the market value of the said scrappers at the date of hearing and/or judgment.

E 11. An order awarding the market value as damages to the plaintiff less the sum of N319,806.00 aforesaid being damages for conversion and/or detainue"

F The respondent counter claimed against the appellant in a Statement of Defence in which it admitted that rig No. LA 2632 WD belonged to the appellant but contended that appellant sent the said rig to it for repairs in mid February 1984 and used the same as security for outstanding liability for an alleged credit purchase of two additional scrappers which the appellant allegedly instructed the respondent to deliver, in addition to the earlier two scrappers, to the Sokoto Agricultural Development Project. The respondent also claimed N100,000.00 outstanding install-
G ments etc, etc.

H The trial court found in favour of the appellant except for the claim of N100,000.00 outstanding two installments which it awarded to the respondent. The respondent appealed to the Court of Appeal while the appellant cross appealed against the said decision of the trial court resulting in the judgment now on appeal before this Court and being considered in this judgment.

The issues for determination as identified by learned counsel for

the appellant, C. EZIKE Esq., in the appellant's brief of argument filed on 9/8/2001 are as follows:-

"3.01 In the circumstances of this case, and in particular having regard to the issue of estoppel and the presumptions of law that arose in this case, was the Court of Appeal right in holding that the Common Law as opposed to the Hire Purchase Act, (Cap 169 L.F.N) governs the transaction relating to the motor rig registered as LA 8509 WD?" B

3.02 With regard to the plaintiff's 2 scrappers and the reliefs sought for their conversion/detinue what reliefs should the Court of Appeal have awarded in the circumstances of this case?" C

3.03 In the circumstances of this case, what is the correct measure of damages for the seizure of the plaintiff's rigs?"

3.04 Was the award of the sum of N108,324.16 to the defendant made on the correct principles of law?" D

The respondent, on the other hand has cross appealed to this Court and in the Cross Appellant's brief of argument filed on 8/3/04 by PRINCE ADESEGUN AJIBOLA, the following issues have been identified for determination:- E

"1. Whether there was evidence to support the award of damages made by the Court of Appeal.

2. Whether the Court of Appeal was justified in making a fresh appraisal of evidence already appraised by the trial court. F

3. Whether the Court of Appeal was right when it held that Exhibit D3 was in-admissible and evidence of fact not pleaded."

In arguing appellant's issue 1, learned counsel stated that it is common ground that out of the sum of N514,482.00 hire purchase price for rig No. LA 8509 WD the appellant had at the time of its repossession by the respondent paid the sum of N414,482,00 leaving a balance of two installments of N50,000.00 each; that though the respondent claimed that the hire purchase agreement was governed by the Common Law, the appellant stated that it was governed by the provisions of the Hire Purchase Act, cap 169 particularly as the rig No. LA 8509 WD is a mechanically propelled vehicle intended or adopted for use on roads and duly registered as a motor vehicle; that the trial court rightly held that the G H

transaction in rig No. LA 8509 WD is governed by the Hire Purchase Act, 1965 and submitted further that the Court of Appeal was in error when it reversed that holding by holding that the said transaction was governed by the common law. Learned counsel further submitted that the holding
 B by the Court of Appeal to the effect that exhibit D2 did not incorporate the provisions of the Hire Purchase Act as it did not stipulate that on payment of 3/5th of the purchase price the respondent would not be able to repossess the rig and that the appellant did not call evidence to prove
 C that a rig is the same thing as a motor vehicle are erroneous particularly as they were made without reference to or consideration of the submissions of learned counsel for the appellant before that court.

Learned counsel then referred to exhibit D2 and stated that the Statutory Notice requirement of section 2(c) of the Hire Purchase Act and the
 D schedule thereto were complied with by their verbatim reproduction in exhibit D2 and that clause 6 thereof contains “*Restrictions of Owners Right To Recover Goods*” particularly as it is only in the Act that the right to recover the goods in issue is restricted whereas under the common
 E law, no such restriction exists as long as the hirer is in default of installments; that since appellant paid more than 3/5th of the price it was wrong for the respondent to have recovered the rig.

Submitting in the alternative, learned counsel, stated that granted,
 F without conceding that it is the common law that applies to the transaction the result would still be the same as the respondent cannot recover the rig after the appellant had paid 50% or 60% of the purchase price without recourse to the court, which was never done in this case.

On the sub-issue as to whether the appellant called evidence to prove that
 G a rig is the same thing as motor vehicle learned counsel referred the court to page 921 of the record where the Court of Appeal found “*that under cross examination, DWI gave evidence suggesting that the rig No. LA 8509 WD was generally treated as if it was a motor vehicle,*” and submit-
 H ted that the above finding amounts to finding that the said rig is a motor vehicle; that the respondent is estopped from denying that the said rig is a motor vehicle having by itself registered it as a motor vehicle with the motor’ Licensing Authority, insured same, obtaining a road worthiness

certificate for same and having previously treated exhibit P as an agreement under the Act and Rig No. LA 2632 WD as a motor vehicle; that the case of Burns vs. Currel (1963) 2 All E.R 295 supports the view that the said rig is a motor vehicle.

On his part, learned counsel for the respondent in the respondent's B brief deemed filed on 27/4/05 formulated two issues in respect of the appeal by the appellant. The issues are as follows:-

"1. Whether the Court of Appeal was right in holding that the provisions of the Hire Purchase Act do not apply to the transaction in C respect of water Rig No. LA 8509 WD.

2. Whether the award of the sum of A/708,324.16 to the defendant by the Court of Appeal was properly made in line with the principles of law?"

It is clear that appellant's issues 1 and 4 are the same or similar to D respondents issues 1 & 2. However in relation to issue No. 1, learned counsel for the respondent submitted that it is the case of the respondent that the rig was voluntarily surrendered to the respondent by the appellant; that even if the version of the appellant that the rig was seized by the E respondent is accepted the seizure is not unlawful considering the applicability of the provisions of the Hire Purchase Act, 1990. Learned counsel urged the court not to disturb' the finding by the Court of Appeal that the transaction in issue is outside the contemplation of the Hire Purchase F Act. Learned Counsel referred the court to sections 1(a), 9(1) and (5) of the Hire Purchase Act as well as section 20(1) thereof and submitted that appellant failed to prove that rig No. LA 8509 WD is a motor vehicle under the Hire Purchase Act. Counsel referred to Burns vs. Currel supra, G Daley vs. Hargreaves (1961)1 All ER 552 and Macdonald vs. Carmicheal (1911) S.C (1) 27 and submitted that rig No. LA 8509 WD is not a motor vehicle within the Act; that the fact that exhibit D2 does not stipulate that the respondent would not reposses as provided under section 9(1) of the H Hire Purchase Act upon payment of 3/5th of the purchase price by the appellant confirms the intention of the parties to take the transaction outside the purview of the Hire Purchase Act; that since it is the intention of the parties that the transaction be governed by the common law and it is

not disputed that appellant had defaulted in the payment of installments, the agreement is therefore determined, relying on *Atere vs. Amao* (1957) WNLR 176. Learned counsel therefore urged the court to resolve the issue against the appellant.

B Section 1 of the Hire Purchase Act, provides as follows:-

“Subject to the provisions of section 19 of this Act, the provisions of this Act (other than the provisions relating to the control of advertisement) shall apply in Relation to:

C *(a) all hire purchase agreements and credit sale agreements (other than agreements in respect of motor vehicles) under which the hire purchase price, as the case may be does not exceed two thousand naira.....”*

D The question is whether the rig No. LA 8509 WD is a motor vehicle within the contemplation of the Hire Purchase Act or not. The trial court found that it is while the Court of Appeal said it is not. To answer the question one has to look at the provisions of the Hire Purchase Act so as to know what the Act recognises as a motor vehicle. In that respect section 20(1) of the Hire Purchase Act is very relevant. It defines the term as follows:-’

“Motor vehicle” means a mechanically propelled vehicle intended or adopted for use on roads or for use for agricultural purposes.”

F There is no dispute that the rig LA 8509 WD is mounted on a chassis, registered with the Motor Licensing Authority, given a certificate of road worthiness and insured. Also not disputed is the fact that it is driven by a driver from point to point. Equally not disputed is the fact that the registration, insurance etc were done by the respondent.

G PW1 stated at pages 226 - 227 that:-

“DH 60 Ingersol Ran Cylone Drilling machine is mounted on a chassis like a water Tanker- and it is called a Derick. The rigs were duly registered with a Motor Licensing Authority. The registration was done by the Defendant.”

H DW1 stated at page 277 thus:

“Ingersole Waterwell rig is not a Motor Vehicle. But each has to be registered with the licensing authority. There must be Motor Vehicle Insurance for them. There must be a road worthiness certificate. There is

a vehicle licence. It is driven by a Driver.....”

In paragraph 43 of the Plaintiffs Reply and Defence to the counter claim, the plaintiff pleaded inter alia:

“..... the rig therein is a mechanically propelled vehicle intended or adapted for use on roads duly registered as a motor vehicle with the licensing authority by the defendants and contrary to the defendants Is covered by Hire Purchase Act, (1915). The defendants are hereby given notice to produce the original hire purchase agreements between the parties herein and numbered 7/T4600297/83 and 14/T4600291/82.”

In resolving the issue “were, the purchase and sale governed by Hire Purchase Act 1965?”. The learned trial judge at page 437 stated thus:

“.....In resolving this issue the question I ask is - What is the intention of the parties? Is there any consensus ad idem? The answers are that it was the intention of the parties that this transaction should be governed by Hire Purchase Act 1965 and the minds of the parties meet on this. In my judgment the purchase and sale of the two RIGS were governed by the Hire Purchase Act, 1965. To hold otherwise would involve not only making a new agreement for the parties but also varying the existing agreement. I hold that it will be unjust and inequitable for either party to resile from these agreements exhibit P1 and D2.”

The reaction of the Court of Appeal to the above finding is at pages 919 920 of the record where it stated thus:-

“At the trial, the plaintiff did not call any evidence to show that a rig was the same thing as a motor vehicle. The nearest the plaintiff went to showing this was in the testimony of PW1 at page 226 of the record of proceedings where he said;

“DH 60 Ingersoll that (sic) Cydone Drilling Machine is mounted on a chassis like a water tanker and it is called Derick. The rigs are duly registered with a Motor Licensing Authority. The registration was done by the defendant.....” and therefore concluded that the rig in question is not a motor vehicle and therefore the transaction was governed by the common law instead of the Hire Purchase Act.

However at page 921 of the record the Court of Appeal found as follows:-

“/ am not unaware that under cross examination, DW1 gave evidence suggesting that the rig No. LA 8509 WD was generally treated as if it was a motor vehicle.....”

It is settled law that a plaintiff must succeed on the strength of his case and not on the weakness of the defence and that where the evidence of the defence supports the case of the plaintiff, the plaintiff is entitled to rely on same in proof of his case. It is not disputed that the plaintiff/appellant pleaded that the rig is a mechanically propelled motor vehicle intended or adopted for use on roads duly registered as a motor vehicle by the respondent. The position of the law being what it is the appellant is entitled to take advantage of the evidence of DW1 extracted under cross examination and which supports the pleading of the appellant to the effect that the particular rig in issue is a motor vehicle. The piece of evidence is at page 227 of the record and had earlier been reproduced in this judgment. At the risk of repetition I reproduce same hereunder:

“Ingersole Waterwell rig is not a Motor Vehicle. But each has to be registered with the licensing authority. There must be a motor vehicle insurance for them. There must be a road worthiness certificate. There is a vehicle licence. It is driven by a driver.”

To confirm the fact that the above evidence together with other pieces of evidence on record established the fact that the rig was a motor vehicle for the purpose of the Hire Purchase Act, the Court of Appeal found at page 921, also reproduced earlier:

“that under cross examination, DW1 gave evidence suggesting that the rig No. LA 8509 WD was generally treated as if it was a motor vehicle.”

I hold the view that if the rig is generally treated as if it is a motor vehicle and having regard to the facts and circumstances of this case - its being registered by the motor licensing authority, being insured, given certificate of road worthiness and driven by a driver – it is in fact a motor vehicle within the contemplation of section 20(1) of the Hire Purchase Act.

In the case of Dale vs. Hagreaves (1961) 1 All ER 552 at 556

SALMON J held that all that is required to categorise a machine as a motor vehicle is its capacity of “*being driven along public roads in transit or for purposes of carrying materials from one site to another.*”

In *British Oxygen Co. vs. Board of Trade* (1968) 2 All ER 177 at 183 BUCKLEY J held that:

“*I am unable to accept the company’s contention that vehicle here means only such ordinary means of transport as lorries and motor cars... in my judgment it extends to specialized vehicles.*”

and I hereby adopt that view as mine in this case. The rig in question is a specialized vehicle duly registered etc, etc.

That apart, it is in evidence that it is the respondent who represented to the appellant that the rig in question is a motor vehicle by the act of registration of same as a motor vehicle with the motor licensing authority and obtained a certificate of road worthiness for the vehicle and are, in law, estopped from denying that the said rig is a motor vehicle. .

Even under the common law, if it were to apply to the facts of this case, which I do not concede, the respondent cannot seize or repossess the rig without recourse to the court. It is therefore not the case that if the common law applies the respondent can repossess the rig by seizure or otherwise than as provided by law, particularly as it is in evidence before the court that appellant had paid up to 60% of the purchase price of the rig in question which fact has not been denied by the respondent.

I therefore hold that the Hire Purchase Act applies to the transaction between the parties and that as it is admitted that appellant has paid 3/5th of the purchase price of the rig in issue the respondent cannot in law repossess the rig otherwise than in accordance with the law. In the circumstance I resolve issue No. 1 in favour of the appellant.

On issue No. 2, learned counsel for the appellant stated that the lower courts are in agreement that the delivery and sale of appellant’s two scrappers to S.A.D.P was wrongful as the appellant never authorized same; that what constitutes the problem is the amount to award as

damages; that having found that the claim of the appellant succeeded in that respect, the trial court ought to have ordered inquiry as to damages as claimed instead of making the order as an alternative to the award of N319,806.00, which was not what the appellant claimed - that the appellant made a cumulative and consecutive claim grounded in conversion. Learned counsel then stated that the Court of Appeal erred in limiting the award, upon appeal, to the sum of N319,806 under the impression that appellant had specifically asked for that sum and that appellant had also asked that the scrappers be sold and as such cannot claim on the basis of loss of income.

Learned counsel submitted that as evidenced in paragraphs 34(8), 34(9), 34(10) and 34(11) of the statement of claim, the appellant asked for far much more than the N319,806.00; that the appellant asked for the refund of N319,806.00 purchase price plus an order of inquiry into the current value of the scrappers and the award of the resultant current value as damages less the N319,806.00 purchase price.

Learned counsel further submitted that it is not the defence of the respondent that it sold the scrappers for the appellant but that it delivered same to SADP on the instructions of the appellant.

Referring to the case of *Stitch vs. A-G of the Federation* (1986) 12 S.C 373 at 422 - 423 learned counsel submitted that the measure of damages for conversion is generally “*the value of the chattel at the date of conversion together with any consequential damages flowing from the conversion,*” and that on the authority of *MacGregor on Damages*, 14th Edition paragraphs 1056 and 1087 the appellant is entitled to recover in addition to the N319,806.00, the amount by which the market value of the goods have risen between conversion and judgment and that the appellant is entitled to the replacement values of the two scrappers subsequent to the date of the judgment of this court.

I have carefully gone through the respondent’s brief and the cross appellant’s brief filed in this appeal and have not seen where arguments have been preferred by the respondent to counter the submissions of learned counsel for the appellant in respect of issue 2 *supra*. In fact, the two issues formulated by learned counsel for respondent do not include

appellant's issue 2. However, does it mean that in law the appellant is entitled to the claims as couched?

It is not in doubt that both the High Court and the Court of Appeal found as a fact that the appellant's two scrapppers were delivered and sold by the respondent to S.A.D.P without the authority of the appellant and as such wrongful, and that the appellant's claim in respect of the scrapppers succeeded. The question that follows is the measure of damages recoverable by the appellant in the circumstance. B

In paragraph 34 (8), (9) (10) and (11) of the Third Amended Statement of Claim at page 343 of the record, the appellant claimed as follows:- C

“(8) A declaration that the delivery of the plaintiff's 2(No.) Fiat Allis Motor Scrapper Model 3608 to the Sokoto Agricultural Development Project (SADP) by the defendant was wrongful and without the authority of the plaintiff. D

(9) An order directing the defendants to make a refund of a sum of N319,806.00 (Three Hundred and Nineteen Thousand, Eight Hundred and Six Naira) being money had and received for two scrapppers sometime in 1984 which the defendants have failed and/or neglected to deliver to the ' plaintiff's and or converted to their use. E

(10) An order directing all necessary inquiries into the market value of the said scrapppers at the date of hearing and/or judgment. F

(11) An order awarding the market value as damages to plaintiff's (sic) less the sum of N319,806.00 aforesaid being damages for conversion and/or detinue.”

The claim is therefore a declaration that the delivery of the two scrapppers to SADP is wrongful and an order of inquiry into the current value of the scrapppers as at the time of judgment and award of the resultant current value as damages less the N319,806.00 which is to be refunded as money had and received. G

In the case of *Stitch vs. A-G of the Federation* (1986) 12 S.C H 373 at 422 - 423 this Court stated, per UWAIS, JSC (as he then was) that the measure of damages for conversion is “the value of the chattel at the date of conversion together with any consequential

damages flowing from the conversion.”

Since the lower courts have, rightly in my view, found concurrently that the delivery and sale of the appellant’s scrappers by the respondent to SADP was without the authority of the appellant and therefore wrongful and the respondent has not contested issue No. 2 as argued before this Court and therefore deemed to have conceded same, it follows that appellant is entitled to the reliefs claimed in respect of the said two scrappers, particularly as pleaded in paragraph 34(8), 34(9), 34(10) and 34(11) of the Third Amended Statement of claim which is hereby ordered accordingly. For the avoidance of doubt it is further ordered that the necessary inquiries into the market value of the said scrappers shall be as at the date of the judgment of the High Court.

D On issue No. 3 learned counsel referred the court to paragraph 34(7) of the Statement of Claim. As regards rig No. LA 2632 WD which both courts found had been fully paid for by the appellant, learned counsel for the appellant submitted that the court ought to have assessed and E awarded or ordered the assessment and award of the value of the rig as at or subsequent to the date of its judgment i.e. Court of Appeal judgment.

With regard to rig No. LA 8509 WD learned counsel submitted F that the lower court was in error when it ordered the refund of the installments already paid as an alternative to an order for inquiry prayed for in paragraph 34(7) of the Statement of Claim and that by the authority of Ayoke vs. Bello (1992) 1 NWLR (pt. 218) 380 at 397 -405 the appellant is entitled to the return of the said rig or the resultant assessed value in G addition to the damages of N2,000.00 per day until payment or return of the said rig as prayed; that since the respondent did not sign exhibit D2 in violation of section 2(2) (a) of the Hire Purchase Act, the consequence is that the counter claim for the N100,000.00 balance of installments in H respect of the rig in question is unenforceable and that by operation of section 9(2) (a) of the said Act coupled with the fact that appellant had paid more than the relevant proportion of the price before the seizure of the rig, all the appellant’s liabilities under the said exhibit D2 are extin-

guished, relying on Ayoke vs. Bello supra at 401; that the Court of Appeal ought to have awarded the claim of N2,000.00 per day by way of profit until delivery of the rig and not to have limited the award to 260 working days particularly as the appellant claimed the profit per day “from 1st March 1984 until the rig is released to the plaintiff” and PW1 testified to the fact that appellant’s claim is as per the statement of claim.

In short, learned counsel submitted that appellant is entitled to the replacement values of its rigs, the loss of profit as claimed and generally to be placed in the same position it would have been but for the respondent’s wrongful acts of seizure of the rigs, and urged the court to resolve the issue in favour of the appellant.

Though learned counsel for the respondent did not argue the issue in the respondent’s brief, it was argued as part of the issues in the cross appeal.

Learned counsel for the respondent argued that the Court of Appeal was in error in awarding damages to the appellant when there was no evidence in support of the award; that rig No. LA 2632 WD which both parties agree belongs to the appellant was delivered to the respondent by the appellant as security against the purchase price of two scrapers. Strangely it is also the submission of counsel for the respondent that the said rig was “*traded for 2 scrappers*” appellant needed from the respondent and that exhibit D3 is evidence of the sale of the said rig by the appellant to the respondent. That being the case, learned counsel for the respondent is of the view that appellant is not entitled to any award in respect of LA 2632 WD and that the Court of Appeal was in error when it made an award in respect of same.

It is to be noted that learned counsel for the respondent has not addressed the court in respect of the award in relation to rig No. LA 8509 WD. It should also be noted that the case of the respondent in the pleadings and at the trial is not that the rig in question was sold by the appellant to it.

However, contrary to the conflicting submissions of learned counsel for the respondent that the rig No. LA 2632 WD was delivered by the appellant to the respondent as security for the purchase of two additional

scrapppers, and at the same time that the said rig was sold by the appellant to the respondent vide exhibit D3, the respondent admitted in paragraph 5 of its 4th Amended Statement of Defence and counter claim at page 365 of the record that the said rig was sent in by the appellant for repairs as B pleaded and contended by the appellant throughout the proceeding. The respondent pleaded therein inter alia thus: “.... *The defendants admit that the plaintiff had sent the rig pleaded therein for repairs....*”

The lower courts found that the appellant neither bought two additional scrapppers nor instructed the respondent to deliver any to the SADP. The Court of Appeal specifically found at page 957 of the C record that “*it is not the case of the defendant that the plaintiff sold rig No. LA 2632 WD to it;*” and there is no appeal against that crucial finding of fact which is borne out of the pleadings of the respondent. D

From the facts as found by the lower courts it is clear and I hold that the appellant’s two rigs were wrongfully seized by the respondent and that appellant is entitled to damages for the wrongful act of the respondent and as pleaded in the reliefs in the statement of claim, (as amended) earlier reproduced in this judgment. E

In the case of STITCH VS A-G FEDERATION (1986) 17 NS. CC 1389: at 1404 - 1405 this Court, per ANIAGOLU JSC stated the position as regards damages in respect of detainue/conversion in similar circumstance as follows:- F

“With regard to CLAIM 3 which reads:

“An order for the release of the said car to the plaintiff on the payment of the said sum”, G

The appellant is entitled to the possession of the car but the car the release of which the appellant seeks under that head of claim, is now virtually a wreck - a derelict. Many of its parts have been sold by the 4th respondent (O.O. Onifade). Many are missing and the car had H been, for sometime now, grounded, in the open, without a shelter and subject to the deleterious effects of the elements. For this court to order for the appellant to have delivered to her the car which she brought into the country on 3rd April 1982 would be virtually to order the impos-

sible. But the car was physically there at the Tin Can Island port as a second-hand car in good working condition. It was the Federal Government's fault - Federal Government personified by 1st and 2nd respondents that the appellant did not get hold of her car. Since the car cannot now realistically be physically delivered to the appellant, she must be entitled to receive from the tortfeasor an amount which will buy her a second-hand Mercedes Benz 280 saloon car in good working condition, with accessories as contained in the car she imported on 3rd April 1982. Accordingly, in respect of Claim 3, it is hereby ordered that that head of claim be remitted to the trial Federal High Court, Lagos, with these Directions:

(i) to take evidence as to what a second-hand Mercedes Benz 280 saloon car of the type brought into the country by the appellant on 3rd April 1982, the subject-matter of these proceedings, will cost to purchase now and award the appellant the amount found; and

(ii) the parties will be at liberty to call whatever evidence they consider necessary for the purpose of determining the present cost or value of the car as ordered in (i) above"

On his part, UWAIS JSC (as he then was) at 1406 - 1408 stated the law as follows:-

"Now the misappropriation of goods may result from a number of facts and there are certain differences in relation to damages between actions for conversion and detinue see paragraph 986 of McGregor on Damages, 13th Edition. We have reached the conclusion in this case that it will not be in the interest of justice to make the order for the release of the car because it has been cannibalized and therefore is not the same as the car that the appellant sought to be released to her when she brought the action on 23rd September, 1982.

It is necessary therefore to examine the nature of the appellant's claim in asking for the release of the car. When the appellant's action was brought the car was in possession of the 2nd respondent and the appellant's claim could only be based on detinue. But at the time we heard the appeal, following the sales to the 3rd and 4th respondent, (sic) conversion of the care by the 2nd respondent had taken place. The ques-

tion then is: is the appellant's claim I'm detinue or conversion? This question has to be answered before this court can decide on the remedy to be awarded the appellant. In *General And Finance Facilities Limited V Cooks Cars (Romford) Limited (1963) 1 W.L.R. 644 at p.648, Diplock, L. J. (as he then was) differentiated action in conversion from action in detinue as follows:*

“There are important distinction between a cause of action in conversion and a cause of action in detinue. The former is a single wrongful act and the cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action for detinue.” (*italics mine*).

I accept this exposition of the law. It follows therefore that the appellant's cause of action in this case is based on detinue and not conversion, which took place long after the action was instituted and the decision of the trial court given.

As already pointed out there are differences in the nature of damages to be awarded in either cause of action in conversion or cause of action in detinue. Diplock, L. J: dealt with the differences in the *General And Finance Facilities Limited* case (*supra*) where he observed as follows on pp.649-650:

“The action for conversion is a purely personal action and results in a judgment for pecuniary damages only. The judgment is for a single sum of which the measure is generally the value of the chattel at the date of conversion together with any consequential damage flowing from the conversion and not too remote to be recoverable in law.... On the other hand the action in denitue partakes of the nature of an action in rem in which the plaintiff seeks specific restitution of his chattel....

In the result an action in detinue today may result in a judgment in one of three different forms:

(1) for the value of the chattel as assessed and damages for its detention; or

(2) for return of the chattel or recovery of its value as assessed and damages for its detentions; or

(3) for the return of the chattel and damages for its detention.”

In the present case we have come to the conclusion that the car cannot be returned to the appellant in the state in which it exists now. Instead therefore the appellant is to recover the value of the car. The difficulty which has arisen is: as at what date is the value of the car to be assessed? This is not difficult to determine in a normal case. For in Rosenthal V Alderton & Sons Limited (1946) 1 K.B. 374 at 377, the Court of Appeal in England said "In an action of detinue the value of the goods claimed but not returned ought, in our judgment, to be assessed as at the date of the judgment or verdict". And the dictum is said in paragraph 218 of McGregor on Damages, 13th Edition to have

"..... established that a plaintiff suing in detinue is entitled to claim, in the absence of a return of the property, the market price at the time of the judgment; thus any rise in the market price between detention and judgment is at the risk of the defendant."

Again, in the case of General and Finance Facilities Limited (*supra*) it is observed on page 651 thereof as follows:

"In the ordinary way where an action goes to trial the issues of liability, assessment of value of the chattel, and damages for its detention, are dealt with at the hearing, and final judgment in one or other of the above forms is entered."

Is this court therefore to order the assessment of the value of the appellant's car as at now or as at the date when the Federal High Court gave its judgment, namely, 18th May, 1983? It is pertinent to mention that although the appellant is in addition to the value of the car entitled to general damages, no such claim has been made in either her writ of summons or statement of claim. She would have been entitled to damages had the claim been made. Be that as it may, in my view, therefore, the assessment of the value of the car which is going to be made by the Federal High Court should be as at the date when that court gave its judgment in the case, which is 18th May, 1983 and not as at the date of this judgment or any date in the future as ordered in the judgment of my learned brother, Aniagolu, J.S.C."

The above position of the law clearly applies to issues 2 and 3 on damages recoverable in respect of the detinue particularly where the prop-

erty cannot be returned as in the instant case.

On issue No. 4, learned counsel for the appellant submitted that the award of N100,000.00 outstanding balance on LA 8509 WD was made by the Court of Appeal without considering any of the two statutory defences raised by the appellant which defences constitute complete answer to the claim in question; that the counter claim for the sum of N100,000.00 was unenforceable because by admittedly failing to sign exhibit D2, the respondent breached the mandatory requirement of section 2(2) of the Hire Purchase Act which prohibits the appellant from enforcing any provision of exhibit D2 including recovery of the outstanding balance. For the above submission, learned counsel cited and relied on *AYOKE vs. BELLO* (1992) 1NWLR (pt. 218) 380 at 309-402.

Learned Counsel further submitted that by operation of section 9(2) (a) of the Hire Purchase Act, the seizure of the rig after payment of the relevant proportion and without a court order disengages the appellant from all liabilities under exhibit D2; that even under the common Law the respondent is in breach in that it never obtained a court order before it repossessed the rig in issue. Submitting further in the alternative to applicability of both the Act and the Common Law, learned counsel submitted that common law does not allow over-compensation and as such the respondent should not be allowed to retain the rig, the N414,480.00 installments already paid thereon and also recover the outstanding N100,000.00; that the proper measure of damages recoverable in such circumstance is as stated in *Yeoman Credit Co. vs. Waragowski* (1961) 3 All ER 145 on the basis of the Hire Purchase price of goods, less

(a) the sums already paid or payable by the Hirer at the moment of termination;

(b) the value of the goods repossessed or if the goods have been sold, the proceeds of the sale;

(c) the amount (if any) payable on the exercise of option to purchase; and

(d) a discount in respect of each return to the owner of his capital outlay.

However learned counsel for the appellant maintained that the com-

mon law principles stated supra do not apply since the transaction is governed by the Hire Purchase Act, as earlier submitted.

On the award of N8,324.16 as cost of repairs and spare parts, learned counsel submitted that the Court of Appeal did not give any reason for the award particularly as the trial court had dismissed same. B
Learned counsel submitted that since it is common ground that the rig was sent in for servicing in mid February 1984, the contents of exhibit D5 - D8 clearly show that they were made before 1984, that though the pleading of the respondent supports the contention that the transaction predates 1984, the argument of learned counsel for the respondent which C
was also accepted by the Court of Appeal is that the claim was for 1984 repairs. Referring to exhibits D5 - D8 learned counsel submitted that internal documents of the respondent cannot bind the appellant particularly as there is no indication that any officer of the appellant signed the D
documents, relying on *Stabilini vs. Obasi* (1997) 9 NWLR (pt. 520) 293 at 301 and 304; that the evidence of PW3 that the appellant did not receive the services or order the spare parts remains unimpeachable; that since the Court of Appeal had not stated that the findings of the trial court E
in this respect was perverse it was wrong in law for the Court of Appeal to have reversed the said finding, relying on *Allied Bank vs. Akubueze* (1997) 6 NWLR (pt. 509) 374; *Metal Construction vs. Aboderin* (1998) 6 NWLR (pt. 563) 538. Learned counsel urged the court to resolve the F
issue in favour of the appellant and allow the appeal.

On his part, learned counsel for the respondent submitted that an owner in a Hire Purchase transaction is not barred from suing for arrears of the purchase price from the hirer by reason of his intention to repossess the hired property; that the appellant repudiated the agreement by G
failing to pay the installments when due and payable as a result of which the respondent repossessed the rig; that the owner is entitled to claim the arrears, relying on *Incar (Nig) Ltd vs. Elias Bus Transport Ltd* (1970) NCLR 583; that under the common law by resuming possession of the H
goods the owner does not abandon or lose his right to sue for arrears of rent, relying on *Brooks vs. Beinrstein* (1909) 1KB 98.

On the award of N8,324.16 learned counsel for the respondent

submitted that it is not disputed that the rig was sent to the respondent for repairs and that exhibits D - D8 are invoices of cost of repairs on the said rig No. LA 2632 WD.

On the submission of learned counsel for the appellant that since
 B there was a wrongful seizure of the rig under the Act, the appellant was
 relieved of its obligation to pay arrears of hire, learned counsel for the
 respondent submitted that the hiring in respect of the two rigs was not in
 law governed by the Hire Purchase Act and urged the court not to disturb
 C the award of N108,324.16. Learned counsel urged the court to dismiss
 the appeal.

I had earlier in this judgment held that the transaction relating to
 the two rigs involved in this action is governed not by the common law
 as contended by learned counsel for the respondent and agreed by the
 D Court of Appeal in its judgment on appeal but by the provisions of the
 Hire Purchase Act. Under section 2(2) (a) of the Hire Purchase Act par-
 ties to a hire purchase agreement are, among other requirements required
 to sign the agreement of hire. In the instant case, it is not disputed that
 E only the appellant signed exhibit D2 and that the respondent never signed
 same. From the facts on record the appellant had paid 3/5th of the hire
 purchase price and under section 9(2) (a) of the Hire Purchase Act, the
 respondent cannot enforce repossession of the rig in issue.

F The effects of non-compliance with the requirements of section
 9(2) are four:-

(i) The owner cannot enforce the hire-purchase agreement. He is
 thereby disabled from instituting action to recover any monies due under
 the hire-purchase agreement, whether in respect of hire-rent or by way
 G of damages for breach of contract.

(ii) The owner cannot enforce any guarantee relating to the hire-
 purchase agreement.

(iii) The owner is rendered incapable of enforcing any right to
 H recover the goods from the hirer. This clearly means that the hirer gets a
 statutory bonus: he keeps and uses the goods without paying for them -
 see *Estarn Distributors Ltd vs. Goldring (1957) 2 All ER 525 at 533.*

(iv) Securities given by either the hirer or the guarantor in respect

of money payable under the hire purchase agreement are unenforceable by the owner and any deposit paid as such security by the hirer or guarantor is recoverable.

It is settled law that where a contract is declared unenforceable by the express provision of a statute, equity will not assist the party disentitled to enforce it by granting him a redress. B

It should be noted that learned counsel for the respondent made no submissions on this issue in the alternative to the court finding that the common law does not apply to the facts of this case. That being the case C I take it that learned counsel for the respondent has nothing to offer in that respect.

Even under the common law, it is settled that a hirer cannot repossess the hired goods without an order of court. In the instant case it is not disputed that the respondent never obtained the leave of the court before seizing the rig in issue. In short, in either way, the respondent's seizure of the rig in question was in breach of contract and therefore condemnable. It is therefore clear, and I hereby hold that the respondent having seized rig No. LA 8509 WD in violation of the provisions of the Hire Purchase Act cannot recover the outstanding installment of N100,000.00 and that the Court of Appeal erred in holding otherwise. D E

On the sub-issue as to the award of N8,324.16 I find as a fact that the Court of Appeal did not give any reason for reversing the judgment of the trial court on the issue. It is settled law that evaluation of evidence and ascription of probative value is the primary function of the trial court which heard and watched the witnesses testify and that an appellate court will not ordinarily interfere with the findings of a trial court unless in special or exceptional circumstances such as where the finding of the trial court is not supported by the evidence or is otherwise perverse or where the trial court has not made full use of the opportunity of watching the demeanor of the witnesses etc. In the instant case there is evidence in support of the rejection of the claim by the trial court particularly as exhibits DD8 on which the lower court based its decision predated F G H

1984 when both parties agree that rig No. LA 2632 WD was sent in for repairs; the said exhibits cannot therefore be relevant to the claim. That apart, exhibits D - D8 are internal documents of the respondent which documents were authorized not by the appellant but an employee of the respondent by name De La Rue as admitted by DW2. I therefore resolve the issue in favour of the appellant and set aside the award of N108,324.16 made by the Court of Appeal in favour of the respondent.

C On the cross appeal whose issues are:

"1. Whether there was evidence to support the award of damages made by the Court of Appeal.

2. Whether the Court of Appeal was justified in making a fresh appraisal of evidence already appraised by the trial court.

D *3. Whether the Court of Appeal was right when it held that Exhibit D3 was inadmissible and evidence of a fact not pleaded."*

E Learned counsel for the cross appellant submitted that the decision awarding damages to the appellant/cross respondent was *without* evidential basis; that the revaluation or reappraisal of evidence and arriving at different conclusion was perverse, and that declaring exhibit D3 to be evidence of unpleaded fact was totally wrong and unsupportable by the record, and urged the court to allow the cross appeal.

F On his part, learned counsel for the cross respondent submitted that issue 1 cannot be distilled from the omnibus ground of appeal which counsel submitted is incompetent, because the argument does not address the totality of the evidence as it should; that the onus of proof was on the cross appellant both on the pleadings and evidence. On the second
G issue learned counsel submitted that an appellate court has a duty to set aside a perverse judgment which awarded the cross appellant what it never claimed and based on a case it never made, relying on *Ekpenyong vs. Nyong* (1) (1975) 2S.C 71 at 80 - 81; *Temile vs. Awani* (2001) 12
H NWLR (pt. 524) 726 at 752.

Learned counsel further submitted that exhibit D3 is at variance with the pleadings of the cross appellant and that evidence at variance with pleadings is inadmissible, relying on *George vs. dominion Flour Mills*

(1963) 1 All NLR 71 at 77; and urged the court to dismiss the cross appeal.

I have to observe that I have dealt with many aspects of the issues in the cross appeal during my consideration of the main appeal. Particularly cross appellant's issue No. 1 had been dealt with completely when the issue of damages recoverable for the two rigs and two scrappers were considered and determined.

On issue No. 2, it is very clear, as found in the main appeal, that cross appellant presented conflicting claims in relation to how it came into possession of rig No. LA 2632 WD and for what purpose. In one breath it is claimed that the rig was delivered by the appellant to the cross appellant as security against the purchase price of two additional scrapers whereas in another breath it is contended that it was sold vide exhibit D3 by the appellant to the cross appellant. To compound the matter the cross appellant admitted that the rig was sent to it for repairs as pleaded and testified to by the appellant. At the end the trial court award ownership of rig No. LA 2632 WD to the cross appellant even though cross appellant never claimed such a relief in its counter claim neither did it plead such a fact of ownership.

It is settled law that an appellate court has the duty to set aside a perverse finding, judgment or decision particularly one that awarded a defendant what it never claimed on a case it never made before the court, as is in the instant case - see Ekpenyong vs. Nyong (1975) 2 S.C 71.

On the third issue it is very clear that exhibit D3 is at variance with the pleadings of the cross appellant. It was never the case of the cross appellant that rig No. LA 2632 WD was sold by the appellant to the cross appellant as can be verified from the pleading. Exhibit D3 was even shown not to have been made by an officer of the appellant. It is trite law that evidence on a fact not pleaded grounds to no issue, where admitted such evidence is strictly inadmissible in law primarily as it is not relevant - if it were, it ought to have been pleaded. I therefore hold the view that the Court of Appeal was right in coming to the conclusion it reached on exhibit D3

and consequently find no merit in the cross appeal which is hereby dismissed with N10,000.00 costs in favour of the cross respondent.

In conclusion I find merit in the main appeal which is accordingly allowed. The judgment of the Court of Appeal is hereby set aside
B and judgment is hereby entered for the appellant in the following terms:

“1. It is hereby declared that the seizure of the plaintiff’s rigs
Nos. LAW 2632 WD and LA 8509 WD by the defendant was wrongful.

2. It is hereby ordered that the trial court directs an inquiry into
C the market value of rig No. LA 2632 WD as at the date of judgment of that court and it is further ordered that an award of the said value as compensatory damages for *wrongful* seizure of the said rig is hereby made to the plaintiff.

3. It is hereby ordered that the defendant pays to the plaintiff the
D sum of N414,480.00 being money had and received by the defendant on rig No. LA.8509 WD before the wrongful seizure plus damages at the rate of N2,000.00 per day from the date of the wrongful seizure i.e. 29th May 1984 until judgment of the trial court.

E 4. The plaintiff is hereby awarded the sum of N2,000.00 per day for loss of use of rig No. LA 2632 WD from 1st March, 1984 until the rig is released.

5. It is hereby ordered that the trial court directs an inquiry into
F the market value of the two rigs as at the time of judgment of that court with an order that the value be paid over to the plaintiff in lieu of return of the said rigs.

6. It is hereby declared that the delivery of the plaintiff’s 2 (No.)
G Fiat Allis Motor Scrapper Model 360B to the Sokoto Agricultural Development Project (SADP) by the defendant was wrongful and without the authority of the plaintiff.

7. The defendant is hereby ordered to make a refund of the sum
H of N319,806.00 (Three hundred and Nineteen Thousand Eight Hundred and Six Naira) being money had and received for two scrapers sometime in 1984 which the defendant has converted to its use.

8. It is hereby ordered that the trial court directs all necessary inquiries into the market value of the said scrapers at the date of judg-

ment of the said court.

9. It is hereby further ordered that the market value so found be and is hereby awarded as damages to the plaintiff less the sum of N319,806.00 aforesaid for conversion and/or detainue.

Appeal is allowed with N10,000.00 costs in favour of the appellant.

B

ONU JSC

In Appeal No.CA/L/243/93 delivered on 9th February, 2001 the Court of Appeal sitting in Lagos held as follows:

C

“1. The Plaintiffs claim in respect of Rig No.LA 2632 WD succeeds and the Plaintiff is awarded:

(a) The sum of N3, 300.00 as the market value of the rig at the date of judgment of the lower court.

D

(b) N560, 000.00 as damages for loss of income on the rig for 260 days at the rate of N2, 000.00 per day.

2. The claims of the plaintiff on rig No.LA 8509 WD are refused as the plaintiff did not show that a Rig is a motor vehicle within the meaning of section 1 of the Hire Purchase Act, cap 169.

E

3. The award of the sum of N319, 806.00 on the scrappers are affirmed; and this Court sees no reason to award more than that amount.

4. On the counterclaim by the defendant, judgment is given in favour of the defendant for the sum of N108, 324.16 the breakdown of which is as follows: -

F

(a) N100, 000.00 being the unpaid balance of the purchase price due on the rig No. LA 8509 WD.

(B) N8, 324.16 being cost of repairs and spare parts on the plaintiffs rig.”

G

The plaintiff, who is hereinafter called “the Appellant,” at first bought one Ingersoll Cyclone Water Well rig with registration No.LA 2632 WD, from the Respondent under a Hire Purchase Agreement for the sum of H N1,000.00 being two instalments of N50, 000.00 each remaining unpaid or outstanding at the time of the dispute between the parties. The facts of the above two transactions, as will be observed, are un-disputed by the

parties.

There is finally a third transaction involving scrappers, the facts in relation to which, however, are violently disputed by the parties. In those instances, the allegations were that on 26/1/84 and 10/2/84 respectively, B it bought a road scrapper each on those dates for the sum of N159, 903.00 and fully paid cash for both. The Appellant's further contention is that the parties later agreed that the sums paid on the two scrappers be merged and credited to the Appellant on account of the purchase by the C Appellant on hire purchase terms of one new rig and 'two service rigs' that the respondent later expressed its inability to implement the said agreement which made the Appellant to instruct the respondent to sell the scrappers and make a refund to it of the purchase price for both scrappers.

D On the other hand the respondent contends that each scrapper was sold for N177, 162.00 and that the sum of N159, 903.00 paid by the Appellant on each scrapper was a deposit against the said purchase price and that the Appellant owed the balance of N34, 518.00 on both scrap- E pers. It is the further contention of the respondent that the Appellant bought two other scrappers for which no deposit was made but rather the Appellant allegedly due on the said scrappers. The Respondent claimed to have delivered the four scrappers to Sokoto Agricultural Development F Project (SADP) on behalf of the Appellant on an alleged instruction of the Appellant which the Appellant denied.

It is in these circumstances that the Appellant instituted suit No.LD/481/85 in the High Court of Lagos State, holden at Ikeja claiming the II heads of claims terminating in HEAD II couched thus:

G *"II. An order awarding the marketing value as damages to the plaintiff less the sum of N319, 806.00 aforesaid being damages for conversion, and/or detainue."*

H The respondent counterclaimed against the Appellant in a State- ment of Defence wherein it admitted that rig No. LA 2632 WD belonged to the Appellant but added that Appellant sent the said rig to it for repairs in mid-February 1984 and used same as security for outstanding liability for an alleged credit purchase of two additional scrappers which the

Appellant allegedly instructed the respondent to deliver, in addition, to the earlier two scrapers to the Sokoto Agricultural Development Project (SADP). The respondent, in addition claimed N100, 000.00 outstanding installments.

The trial court found in favour of the Appellant except the claim of B the N100, 000.00 outstanding two instalments which it awarded to the respondent. The respondent was aggrieved by the said decision while the Appellant cross-appealed to this Court.

The learned counsel for the Appellant, J.C. Ezike Esq., in the C Appellant's brief filed on 9/8/2001, identified the following issues for determination, to wit:

"3. 01 In the circumstances of this case, and in particular having regard to the issue of estoppel and the presumptions of law that arose in this case, was the Court of Appeal right in holding that the Common Law D as opposed to the Hire Purchase Act (Cap 169 LFN) governs the transaction relating to the motor rig registered as LA 8509 WD?"

3.02 With regard to the plaintiffs 2 scrapers and the reliefs sought for their conversion/detinue what reliefs should the Court of Appeal have E awarded in the circumstances of this case?"

3.03 In the circumstances of this case, what is the correct measure of damages for the seizure of the plaintiffs rigs

3.04 Was the award of the sum of N108, 324.16 to the defendant F made on the correct, principles of law?"

The respondent, on the other hand has cross appealed to this Court and in the Cross Appellant's brief of argument filed on 8/3/04 by PRINCE ADESEGUN AJIBOLA, the following issues have been identified for de- G termination: -

"1. Whether there was evidence to support the award of damages made by the Court of Appeal.

2. Whether the Court of Appeal was justified in making a fresh appraisal of evidence already appraised by the trial court. H

3. Whether the Court of Appeal was right when it held that exhibit D3 was inadmissible and evidence of fact not pleaded."

In arguing Appellant's Issue 1, learned counsel stated that it is

common ground that out of the sum of N514, 482.00 hire purchase price for rig No. LA 8509 WD the Appellant had at the time of its repossession by the respondent paid the sum of N414, 482.00 leaving a balance of two instalments of N50, 000.00 each; that though the respondent claimed
B that the hire purchase agreement was governed by the Common Law, the Appellant stated that it was governed by the provisions of the Hire Purchase Act Cap. 169 particularly as the rig No. LA 8509 WD is a mechanically propelled vehicle; that the trial court rightly held that the transaction in respect of rig No. LA 8509 WD is governed by the Hire Purchase Act,
C 1965 and submitted further that the Court of Appeal was in error when it reversed that holding; that the said transaction was governed by the common law. Learned counsel further submitted that the holding by the Court of Appeal to the effect that exhibit D2 did not incorporate the provisions
D of the Hire Purchase Act as it did not stipulate that on payment of 3/5th of the purchase price the respondent would not be able to repossess the rig and that the Appellant did not call evidence to prove that a rig is the same thing as a motor vehicle are erroneous particularly as they were made
E without reference to or consideration of the submissions of learned counsel for the Appellant before that court. Learned counsel then referred to Exhibit D2 and added that the Statutory Notice requirement of section 2(c) of the Hire Purchase Act and the schedule thereto were complied with by
F their verbatim reproduction in exhibit D2 and that the clause 6 thereof contain “Restrictions of Owners Rights to Recover Goods” particularly as it is only in the Act that the right to recover the goods in issue is restricted whereas under the common law, no such restriction exists as long as the hirer is in default of instalments. That since Appellant paid
G more than 3/5th of the price it was wrong for the Respondent to have recovered the rig.

Learned counsel then submitted in the alternative that granted without conceding that it is the common law that applies to the transaction,
H the result would still be the same in as much as the respondent cannot recover the rig after the Appellant had paid 50% or 60% of the purchase price without recourse, to the court which was never done in this case. With regard to the sub-issue as to whether the Appellant called evidence

to prove that a rig is the same thing as motor vehicle, learned counsel referred us to page 921 of the record where the Court of Appeal found

“that under cross-examination, DW1 gave evidence suggesting that the rig No. 8509 WD was generally treated as if it was a motor vehicle”, and submitted that the above finding amounts to a finding that the respondent is estopped from denying that the said rig is a motor vehicle by itself having registered it as a motor vehicle with the Motor Licensing Authority it was insured by obtaining a road worthiness certificate for it. That having previously treated exhibit P as an agreement under the Act and rig No.LA 2632 WD as a motor vehicle, the case of *Burns v. Currel* (1963) 2 All E.R 295 supports the view that the said rig is a motor vehicle.

On his part learned counsel for the respondent in the respondent’s brief deemed filed on 27/4/05 formulated two issues in respect of the appeal by the Appellant. The issues ask as follows: -

“1. *Whether the Court of Appeal was right in holding that the provisions of the Hire Purchase Act do not apply to the transaction in respect of water rig No LA 8509 WD.*

2. *Whether the award of the sum of N108, 324.16 to the defendant by the Court of Appeal was properly made in line with the principles of law?”*

It is clear that Appellant’s issues 1 and 4 are the same or similar to respondent’s issues 1 & 2. However, in relation to issue No. 1 learned counsel for the respondent submitted that it is the case of the respondent that the rig was voluntarily surrendered to the respondent by the Appellant, that even if the version of the Appellant that the rig was seized by the respondent be accepted, the seizure is not unlawful considering the applicability of the provisions of the Hire Purchase Act. 1990. Learned counsel therefore urged us not to disturb the finding by the court below that the transaction in issue is outside the contemplation of the Hire Purchase Act. Learned counsel referred us to sections 1(a), 9(1) and (5) of the Hire Purchase Act as well as section 20(1) thereof and submitted that Appellant failed to prove that rig No.LA 8509 WD is a motor vehicle under the Hire Purchase Act. Counsel after citing in support thereof the cases of

Burns v. Currel (supra), *Daley v. Hargreaves* (1961) 1 All ER 552 as well as *Macdonald v. Carmicheal* (1911) SC (1) 27, submitted that rig No.LA 8509 WD is not a motor vehicle within the Act; that the fact that exhibit D2 does not stipulate that the respondent would not reposses as provided under section 9(1) of the Hire Purchase Act upon payment of 3/5th of the purchase price by the Appellant confirms the intention of the parties to take the transaction outside the purview of the Hire Purchase Act that since it is the intention of the parties that the transaction be governed by the common law and it is not disputed that Appellant had defaulted in the payment of instalments the agreement is therefore determined relying on *Atere v. Amao* (1957) WNLR 176. Learned counsel therefore urged the court to resolve the issue against the Appellant.

Section 1 of the Hire Purchase Act provides as follows: -

D “Subject to the provisions of section 19 of this Act, the provisions of this Act (other than the provisions relating to the control of advertisement) shall apply in relation to:

E (a) all hire purchase agreements and credit sale agreements (other than agreements in respect of motor vehicles) under which the hire purchase price as the case may be does not exceed two thousand naira.....”

The question is, whether the rig No.LA 8509 WD is a motor vehicle within the contemplation of the Hire Purchase Act or not. The trial court found that it is while the court below said it is not. To answer the question one has to look at the provisions of the Hire Purchase Act to decipher what the Act recognises as a motor vehicle. In that respect, section 20(1) of the Hire Purchase Act is very relevant. It defines the term as follows: -

G “Motor vehicle” means a mechanically propelled vehicle intended or adapted for use on roads or for use for agricultural purposes.”

There is no dispute that the rig LA 8509 WD is mounted on a chassis, registered with the Motor Licensing Authority, given a certificate of road worthiness and insured. Also not disputed is the fact that it is driven by a driver from point to point. Equally not disputed is the fact that the registration, insurance etc were done by the respondent.

PW1 stated at pages 226-27 of the Records that:

“TH60 Ingersoll Cyclone Drilling machine is mounted on a chassis like water tanker - and it is called a Derrick. The rigs were duly registered with the Motor Licensing Authority. The registration was done by the defendant.”

DW1 stated at page 277 thus: -

B

“Ingersole Water rig must be registered with the licensing authority. There must be a motor vehicle insurance cover for them. There must be a road worthiness certificate. There is a vehicle license; it is driven by a driver.”

C

In paragraph 44 of the Plaintiffs Reply/defence to the counter-claim the plaintiff pleaded inter alia:

“the rig is mechanically propelled motor vehicle intended or adopted for use on roads duly registered as a motor vehicle by the defendants and contrary to the defendants.....is covered by the Hire Purchase Act, 1965. The defendants are hereby given notice to produce the original hire purchase agreements between the parties herein and numbered 7/T4600297/83 and 14/T4600291/82.”

D

In resolving the issue, were the purchase and sale governed by the Hire Purchase Act, 1965?” the learned trial judge at page 437 stated thus:

“In resolving this issue the question I ask is - what is the intention of the parties? Is there any consensus ad idem? The answers are that it was the intention of the parties that this transaction should be governed by Hire Purchase Act, 1965 and that did the minds of the parties meet on this. In my judgment the purchase and sale of the two RIGS were governed by the Hire Purchase Act, 1965. To hold otherwise would involve not only making’ a new agreement for the parties but also varying the existing agreement. I hold that it will be unjust and inequitable for either party to resile from these agreements exhibit PI and D2.”

F

G

The reaction of the Court of Appeal to the above finding at page 919 - 920 of the record is where it stated thus:

“At the trial, the plaintiff did not call any evidence to show that a rig was the same thing as a motor vehicle. The nearest the plaintiff went to showing this was in the testimony of PW1 at page 226 of the record of proceedings where lie said:

H

“DH60 Ingersoll that (sic) Cyclone Drilling machine is mounted on a chassis like a water tanker and it is called Derrick.

See *British Oxygen Co. v. Board of Trade* (1968) 2 All ER 177 at 183 wherein Buckley, J held that:

B “I am unable to accept the company’s contention that “vehicle” here means only such ordinary means of transport as Lorries and motor cars.....in my judgment it extends to specialized vehicles.”

C And I hereby adopt that view as mine in this case. The rig in question is a specialized vehicle duly registered etc. That apart, it is in evidence that it is the respondent who represented to the Appellant that the rig in question is a motor vehicle by the act of registration of same as a motor vehicle with the motor licensing authority and obtained a certificate of road worthiness for the vehicle and are, in law, estopped from D denying that the said rig is a motor vehicle.

Even under the common law, if it were to apply to the facts of this case, which I do not concede, the respondent cannot seize or repossess the rig without recourse to the court. It is therefore not the case that if E the common law applies the respondent can particularly as it is in evidence before the court that the appellant had paid up to 60% of the purchase price of the rig in question which fact has not been denied by the respondent.

F I accordingly hold that the Hire Purchase Act applies to the transaction between the parties and that as it is admitted that Appellant has paid 3/5th of the purchase price of the rig in issue the respondent cannot in law repossess the rig otherwise than in accordance with the law. In the circumstance, I resolve Issue No. 1 in favour of the Appellant.

G On Issue No.2 the query is whether the lower courts are in agreement that the delivery and sale of the Appellant’s two scrappers to S.A.D.P was wrongful as the appellant never authorized same, that what constitutes the problem is the amount to award as to damages, that having H found that the claim of the Appellant succeeded in that respect, the trial court ought to have ordered inquiry as to damages as claimed instead of making the order as an alternative to the award of N319, 806.00 which was not what the Appellant claimed - that the Appellant made a cumula-

tive and consecutive claim grounded in conversion. Learned counsel then stated that the court below erred in limiting the award upon appeal to the sum of N319, 806 under the impression that which he cannot claim on the basis of loss of income. See the case of *Stitch v. A.G of the Federation* (1986) 12 SC 373 at 422 – 423 where this Court (per Uwais, JSC) B as he then was, held (on what should be awarded).

“as the value of the chattel at the date of conversion together with an consequential damages flowing from the conversion.”

Since the lower courts having rightly, in my view, found concurrently that the delivery and sale of the Appellant’s scrappers by the respondent to SADP was without the authority of the Appellant and therefore wrongful and the respondent has not contested issue No. 2 as argued before the court, it was deemed to have conceded same. It follows that Appellant is entitled to the reliefs claimed in respect of the said two scrappers particularly as pleaded in paragraphs 34(8), 34(9), 34(10) and 34(11) of the Amended Statement of Claim which is hereby ordered accordingly. D

On issue No.3, the learned counsel referred us to paragraph 34(7) E of the Statement of Claim and that by the authority of *Ayoke v. Bello* (1992) 1 NWLR (Pt.218) 380 at 397 - 405 for the view that Appellant is entitled for the return of the said rig, or the per day or return of the said rig as prayed; that since respondent did not sign exhibit D2 in violation of F section 2(2)(a) of the Hire Purchase Act. The consequence is that the counterclaim for N100, 000.00 balance of instalments in respect of the rig in question is unenforceable and by operation of section 9(2)(a) of the said Act coupled with the fact that Appellant had paid more than the relevant proportion of the price before the seizure of the rig, all the G appellant’s liabilities under the said exhibit D2 are extinguished relying on *Ayoke v. Bello* (supra) at 401; that the court below ought to have awarded the claim of N200.00 per day by way of profit until delivery of the rig and not to have limited the award to 260 working days particularly as the H Appellant claimed the profit per day “from 1st March 1984 until the rig is released to the plaintiff and PW1 testified to the fact that Appellant’s claim is as per the statement of claim.

In short, learned counsel submitted that Appellant is entitled to the replacement values of its rigs, the loss of profit as claimed and generally to be placed in the same position it would have been but for the respondent's wrongful acts of seizure of the rigs, and urged the court to
B resolve the issue in favour of the Appellant.

Though learned counsel for the respondent did not argue the issue in its brief, it was argued as part of the issues in the cross-appeal.

It is to be noted that learned counsel for the respondent has not
C addressed the court in respect of the award in relation to rig No.LA 8509 WD. It should also be noted that the case of the respondent in the pleadings and at the trial is not that the rig in question was sold by the appellant to it.

However, contrary to the conflicting submissions of learned counsel
D for the respondent that the rig No.LA 2632 WD was delivered by the Appellant to the respondent as security for the purchase of two additional scrappers, and at the same time that the said rig was sold by the Appellant to the respondent vide exhibit D3 the respondent admitted in paragraph 5
E of its 4th Amended Statement of Defence and counterclaim at page 365 of the record that the said rig was sent in by the appellant for repairs as pleaded and contended by the appellant throughout the proceeding. The respondent pleaded therein inter alia thus “.....*The defendants admit*
F *that the plaintiff had sent the rig pleaded therein for repairs.....*”

The lower courts found that the Appellant neither bought two SADP. The Court of Appeal specifically found at page 957 of the record that “it is not the case of the defendant that the plaintiff sold rig No.LA 2632 WD to it,” and there is no appeal against that crucial finding of fact which is
G borne out of the pleadings of the respondent.

From the facts found by the lower courts it is clear and I hold that Appellant's two rigs were wrongfully seized by the respondent and that Appellant is entitled to damages for the wrongful act of the respondent.

H From the facts found by the lower courts it is clear and I hold that Appellant's two rigs were wrongfully seized by the respondent and that Appellant is entitled to damages for the wrongful act of the respondent. In consequence I resolve issue No.3 in favour of the Appellant.

On issue No.4, learned counsel for the Appellant submitted that the award of N100, 000.00 outstanding balance on rig No.LA 8509 WD was made by the Court of Appeal without considering any of the two statutory defences raised by the Appellant which defences constitute complete answer to the claim in question; that the counterclaim for the sum of N100, 000.00 was unenforceable because by admittedly failing to sign exhibit D2 the respondent Purchase Act which prohibits the Appellant from enforcing any provision of Exhibit D2 including recovery of the outstanding balance.

From the facts on record Appellant having paid 3/5th of the hire purchase price and under section 9(2)(a) of the Hire Purchase Act 1965, the respondent cannot enforce recaption of the rig in issue.

It is for these reasons and those more comprehensively contained in the judgment of my learned brother Onnoghen, JSC that I too allow the appeal and make similar consequential orders including costs contained therein.

Order: I allow the appeal and dismiss the Cross Appeal.

MUSDAPHER JSC

I have seen before now, the judgment of my Lord Onnoghen, JSC just delivered with which I entirely agree. I adopt the reasoning's as mine and I allow the main appeal and set aside the decision of the lower court. But I abide by the consequential orders made in the aforesaid judgment including the order as to costs.

AKINTAN JSC

The dispute that led to this action filed at Lagos State High Court arose over the seizure of the two rigs which the appellant acquired from the respondent/cross-appellant in the course of normal business transactions between the two parties. The appellant claimed that it acquired the rigs from the respondent under hire-purchase agreements and that they were wrongly seized when they were sent to the respondent for repairs.

The claim by the appellant, as plaintiff, included, *inter alia*, one for a declaration that the seizure of the plaintiffs rigs was wrongful; claims for various sums as damages; and in the alternative to the specific sums claimed as damages, there were claims for “*an order directing an inquiry into the current market value of the seized rigs and an award of the said current value of the said rig.*”

The trial court entered judgment in favour of the appellant except in respect of one of the monetary claims for N100,000 said to be outstanding two installments due on one of the rigs acquired under a hire-purchase agreement. On appeal to the court below, that court held, *inter alia*, as follows:

“*The plaintiffs claim in respect of rig No. LA2632WD succeeds and the plaintiff is awarded:*

(a) *The sum of N3,300,000 as the market value of the rig at the date of judgment of the lower court.*

(b) *N560,000 as damages for loss of income on the rig for 260 days at the rate of N2,000 per day,*

(2) *The claim of the plaintiff on the rig No. LA8509WD are refused as the plaintiff did not show that a rig is a motor vehicle within the meaning of section 1 of the Hire-Purchase Act, (Cap. 169)*

(3) *The award of the sum of N319,806 on the scrappers are affirmed and this court sees no reason to award more than that amount.*

(4) *On the counter-claim by the defendant, judgment is given in favour of the defendant for the sum of N108,324.16 breakdown of which is as follows:*

(a) *N100,000 being the unpaid balance of the purchase price due on the rig No. LA8509WD*

(b) *N8,324.16 being cost of repairs and spare parts on the plaintiff's rig.”*

On a further appeal to this court, two of the issues raised and canvassed are whether there was evidence to support the award of damages made by the court below; and whether the said court was justified in making a fresh appraisal of evidence already appraised by the trial court.

The main reason for rejecting one of the claims was that. a rig was not covered by description of transactions regulated by the Hire-Purchase Act as set out in Section 1(a) of the said Act. Section 1(a) of the said Hire-Purchase Act provides, *inter alia* that the Act shall apply in relation to -

“(a) all hire-purchase agreements and credit sale agreements (other than agreements in respect of motor vehicle) under which the hire-purchase price or total purchase price, as the case may be, does not exceed two thousand naira;”

The reason given by the court below for excluding rigs was that they are not motor vehicles. That reason is, however, not tenable since copious evidence was given that the rigs in question were registered by the Motor Licensing Authority and they are driven on the high ways like any vehicle.

Another point raised in the appeal is the propriety of the court ordering an enquiry into the current value of the seized rig with a view to determining the value as at the date of judgment of the trial court.

It is trite law that an action in detinue may result in a judgment in one of three different forms: (1) for the value of the chattel as assessed and damages for detention; or (2) for return of the chattel or recovery of its value as assessed and damages for its detention; or (3) for return of the chattel and damages for its detention. In the instant case, the plaintiff is entitled to claim in the absence of a return of the property or the market price at the time of judgment, thus any rise in the market price between detention and judgment is at the risk of the defendant: See *Stitch v. Attorney-General of Federation & Ors.* (1986) 2 NSCC 1389 at 1407; *General & Finance Facilities V. Cooks Cars (Romford)* (1963) 1 W.L.R 644; and *McGregor on Damages*, 16th edition, 1997, paragraph 1376, page 907. It follows therefore, that since the defendant failed to return the plaintiff’s property detained in the present case and the plaintiff rightly claimed for an order for inquiry by the court to determine the market value as at the time of judgment and for judgment for same and damages for loss of use, I hold that the judgment of the trial court to that end is quite in order.

I had the privilege of reading the draft of the lead judgment prepared by my learned brother Onnoghen, JSC. I entirely agree with his reasoning and for the fuller reasons given in the lead judgment and those I have given above, I allow the appeal and dismiss the cross-appeal. I
B abide by the order on costs made in the lead judgment.

OGBUAGU JSC

C This is an appeal against the Judgment of the Court of Appeal, Lagos Division (hereinafter called “the court below”), delivered on 7th February, 2001 and partially, allowing the appeal of both the Plaintiff/Appellant and the Defendant/Respondent. In conclusion, it held as follows:

D 1. *The Plaintiff’s claim in respect of Rig. No. LA 2632 WD succeeds and the plaintiff is awarded:*

(a) *The sum of N3,300.00 as the market value of the rig at the date of judgment of the lower court.*

E (b) *N560,000.00 as damages for loss of income on the rig for 260 days at the rate of N2,000 per day.*

2. *The claims of the plaintiff on rig No. LA 8509 WD are refused as the plaintiff did not show that a Rig is a motor vehicle within the meaning of Section 1 of the Hire Purchase Act, Cap. 169.*

F 3. *The award of the sum of N319,806.00 on the two scrappers **are** affirmed; and this Court sees no reason to award more than that amount.*

4. *On the counter-claim by the defendant, judgment is given, in favour of the defendant for the sum of N108,324.16 the break down of which is as follows —*

G (a) *N1, 00,000.00 being the unpaid balance of the purchase price due on the rig No. LA 8509 WD.*

(b) *N8,324.16. being cost of repairs and spare parts on the plaintiff’s*
H *rig.*

(c) *Each party is to bear its own costs.*

Dissatisfied with the decision of the court below, the Appellant has appealed to this Court on twelve (12) grounds of appeal. These grounds

and the particulars, cover ten (10) pages in single lines of the Records - i.e. from pages 970 to 979. The Appellant's Brief, of twenty-seven (27) pages in foolscap paper and in single spacing, presents in my respectful view, that the case is very complicated as it is indeed tedious for me to read. The trial court even observed, that the pleadings are prolix and verbose. B

As expected, the Respondent, Cross-appealed against the said decision of the court below as it had also counter-claimed in its second Amended Statement of Defence in the main appeal, C
The Appellant in the main appeal, has in its Brief of Argument, formulated four (4) issues for determination, namely,

"3.01 In the circumstances of this case, and in particular having regard to the issue of estoppel and the presumptions of law that arose in this case, was the Court of Appeal right in holding that the common law D as opposed to the Hire Purchase Act (Cap 169 L.F.N.) governs the transaction relating to the motor rig registered as No. LA 8509 WD?"

3.02 With regard to the Plaintiff's 2 scrapers and the reliefs sought for their conversion/detinue, what reliefs should the Court of Appeal E have awarded in the circumstances of this case?"

3.03 In the circumstances of this case, what is the correct measure of damages for the seizure of the Plaintiff's 2 rigs?"

3.04 Was the award of the sum of N108,324.16 to the defendant F made on the correct principles of law?"

On its part in the main appeal, the Respondent/Cross-Appellant in its Brief of Argument, formulated two (2) issues for determination, namely,

"1. Whether the Court of Appeal was right in holding that the provisions of the Hire Purchase Act do not apply to the transaction in respect of Water Rig No. LA 8509 WD? G

2. Whether the award of the sum of N108,324.16 to the Defendant by the Court of Appeal was properly made in line with the principles of law? H

I have had the privilege of reading before now, the lead Judgment of my learned brother, Onnoghen, JSC, who has, with respect, industriously and copiously, gone through the facts of this case leading to this

appeal. I adopt the same as mine and I agree with his reasoning. By way of emphasis, I will make my own contribution.

As regards Issue 1 of the Appellant, which is substantially the same with Issue 1 of the Respondent, the trial court found as a fact, that the intention of the parties, is/was that the transactions, should be governed by the Hire Purchase Act, 1965 and referred to Exhibits P1 and D2. As a matter of fact, at page 436 of the Records, the learned trial Judge stated that “this is a case of might limited liability companies trying to outsmart each other”. He found as a fact, that the Plaintiff/Appellant, bought two (2) Rigs - Registration Numbers LA 2632 WD and LA 8509 WD from the Defendant/Respondent. That the full purchase price of the LA 2632 WD had been paid in full. He referred to Exhibits P1 - P2. That ownership of the same had legally and lawfully, been transferred to the Appellant.

I note that the court below at page 922 of the Records, held that the fact about the full payment in respect of LA 2632, is undisputed by the parties. It stated inter alia, as follows:

“With respect to the rig No. LA 2632 WD, the undisputed evidence was that the plaintiff had fully paid the purchase price and that title thereto had been transferred to the plaintiff.

Then at page 923 thereof, it stated inter alia, as follows:

“It was common ground on the pleadings that the plaintiff had fully paid for the rig LA 2632 WD and that the said rig was sent to the defendant’s workshop for service in mid-February, 1984”.

At pages 949-950, the court below stated inter alia, as follows:

“It was common ground that the dispute between the parties arose from three distinct transactions. The plaintiff in the first transaction bought one Ingersol Cyclone - Water Well Rig Registration No. LA 2632 WD from the defendant under a Hire Purchase agreement for the sum of N431,842.00. The plaintiff fully paid the purchase price and became the owner of the rig.....”.

[the underlining mine]

There is concurrent finding of fact by the two lower courts, that the seizure of the above rig, was wrongful and unjustified. So, there is no

problem in respect of this transaction.

As regards the second transaction, the court below stated at page 950 of the Records inter alia, as follows:

“..... In the second transaction, the plaintiff again under a hire purchase agreement bought another rig from the defendant for the sum of N514,482.00. At the time the dispute arose, it was undisputed that the plaintiff had N100,000.00 balance to pay on the second rig No. LA 8509 WD”

[the underlining mine]

The problem in respect of this second transaction, is whether this rig, was seized by the Respondent as contended by the Appellant. While the Appellant pleaded and testified that in February, 1984, it sent rig No. LA 2632 WD to the Respondent’s workshop for service and that the Respondent seized the said rig and did not allow the Appellant to repossess it. That again in May, 1984, the Respondent went in the company of the Police to the Appellant’s warehouse, and seized the second rig No. LA 8509 WD and eight (8) drilling rods attached to it. That the Respondent has not returned the two rigs.

The Respondent on the other hand and as found as a fact by the court below, in its pleadings, substantially, agreed with the pleading of the Appellant as to the purchase of the two (2) rigs. It however, denied that it seized the rigs from the Appellant. The Respondent pleaded that following the inability of the Appellant to pay the balance of N100,000.00 (one hundred thousand naira), the Appellant, on 28th May, 1984, authorized that the said rig be recovered by the Respondent.

It is in this circumstance, that the question or issue of whether or not the provision of the Hire Purchase Act 1965, Cap 169 Laws of the Federation applied to the transaction concerning the sale of the rigs by the Appellant to the Respondent as alleged by the Respondent. Section 1 (a) and (b) of the Hire Purchase Act Cap. 168 sets down the transactions covered by the provision of the Act as follows:

“(a) All Hire Purchase agreements and credit-sale agreements (other than agreements in respect of motor vehicles) under which the hire-purchase price or total purchase price, as the case may be, does not exceed

two thousand naira; and

(b) All such agreements in respect of motor vehicles irrespective of the hire-purchase price or the total purchase price, being agreements made after the commencement of this Act and the expressions “hire purchase agreement” and “credit sale agreement” in the following provisions of this Act shall be construed accordingly”.

I have noted earlier in this Judgment, that the trial court, held that the intention of the parties, is/was that the transaction be governed by the Hire Purchase Act, 1965 and relied on Exhibits P1 and P2. I have also noted in this Judgment, that the court below, stated that the first and second transactions, were under Hire-Purchase Agreements.

Now, at page 952 of the Records, the court below - per Oguntade, JCA (as he then was), stated, inter alia, as follows:

“Since the purchase price of the rig No. LA 8509 was N514,463.00 and the purchase was made subsequent to the coming into force of the Hire Purchase Act, the provisions of the Act would only apply to the transaction on LA 8509 WD if the rig was a motor vehicle within the meaning ascribed to it under the Act”.

It reproduced the interpretation/definition of a motor vehicle in Section 20(1) of the Act, which reads as follows: -

“Motor vehicle” means a mechanically propelled vehicle intended or adapted for use on the roads or for use for agricultural purposes”.

Unfortunately and regrettably, the court below, held that the rig, is not a motor vehicle. It only referred to the pleading of the Respondent in paragraph 8 of its Fourth Amended Statement of Defence and Counter-Claim and stated that at the trial, the Appellant, “did not call any evidence to show that a rig was the same thing as a motor-vehicle”. It stated that the nearest the Appellant went to showing this, was in the testimony of P.W.1 at page 226 of the Records which it partly reproduced.

Now, at pages 69-70 of the Records, in paragraph 43 of the Appellant’s Reply/Defence to the counter-claim of the Respondent, it pleaded thus:

“With further regard to paragraphs 7 and 9 of the Statement of Defence and Counter Claim the Plaintiffs will contend that the rig therein

is a mechanically propelled vehicle intended or adapted for use on roads duly registered as a motor vehicle with the licensing authority by the Defendants and contrary to the Defendant's averment is covered by the Hire Purchase Act of 1965. The Defendants are hereby given notice to produce the original hire purchase agreements between the parties herein and numbered 7/T4600297/83 and 14/T4600291/82".

[the underlining mine]

Incidentally, the evidence of the P.W.1 at page 226 to 227 of the Records and which is/was reproduced by the court below at page 920 thereof, reads, inter alia, as follows:

"DH60 Ingersol that Cyclone (sic) Drilling Machine is mounted on a chassis like a water Tanker - and it is called Derick. The rigs were duly registered with a Motor Licensing Authority. The registration was done by the Defendant.....".

[the underlining mine]

I note that this evidence was not challenged in cross-examination by the Respondent or its learned counsel. At page 277 of the Records, DW1 under cross-examination by Adefuju, Esq. of counsel for the Appellant, testified inter alia, as follows:

"Ingersol Water Well Rig is not a motor vehicle. But each has to be registered with the licensing authority. There must be Motor Vehicle Insurance for them. There must be a road worthiness certificate. There is a vehicle license, it is driven by a driver.".

[the double underlining mine]

In Halsbury's Statutes of England 3rd Edition Vol. 28 dealing with "Road Traffic Act 1960". "Intended or adapted for use on roads", it is therein stated that a vehicle is intended for use on roads if a reasonable man looking at it, would say that one of its uses, would be a road use. As a matter of fact, the case of *Burns v. Currel* (1963) 2 Q.B. 433; (1963) 2 All E.R. 297 also cited at page 921 of the Records and was relied on by the court below, and in which a "Go-Kart", was held not be a motor vehicle was referred to in the above statement on the peculiar case or circumstances of the case, the court below held that a rig, is not a motor vehicle. This holding, in my respectful view, cannot be right.

Firstly, both in the Oxford Advanced Learner's Dictionary, 6th Edition and in Collins Cubuild Learner's Dictionary Concise Edition, rig is described as a large structure that is used for looking for oil and gas and for taking it out of the ground or the sea. There is the evidence of the PW 1 B that it is a drilling machine which is mounted on a chassis. The DW1 on oath, stated that there must be "Motor Vehicle Insurance for them". That it must be registered with the Motor Licensing Authority. That it must have a road worthiness Certificate (not air or sea certificate). That to be C on the road, it must be road worthy. DW1 further testified that there is "a vehicle licence" -i.e. a motor vehicle licence. To be on the road, it must be inferred by me, to be able to be "driven by a Driver" (meaning a Motor Driver - not a train Driver). All these solid evidence, are commonsensical. There is the unchallenged evidence of the PW1, that the registration and D of course, the obtaining of the motor licence from the "Motor Licensing Authority", were effected or done by the Respondent.

My learned brother, Oguntade, JCA (as he then was), stated at the said page 921 of the Records, inter alia, as follows:

E *"I am not unaware that under cross-examination, D.W.1 gave evidence suggesting that the rig No. LA 8509 WD was generally treated as if it was a motor vehicle."*

His Lordship then reproduced the said evidence which I have also F reproduced (supra). With respect, DW1 in my humble and respectful view, was not "suggesting". Even if he said it was "generally treated as if it was a motor vehicle", surely, it was generally, not in isolation or sometimes. In other words the users, the vendors/sellers, purchasers and the Motor Licensing Authority, all treated or called the rig in fact and in use, G as a motor vehicle. That was why the registration, and the licensing, must be in the Motor Licensing Authority. It has a Driver. Not that it is pushed by bare hands or towed by a towing van or vehicle to the site where it would be used for the prospecting or looking for oil or gas. It H must be driven to the site, by a Motor Driver (not a mechanic or Driller operator).

So, when His Lordship, stated at page 922 of the Record, that,
"That a rig may occasionally be driven on the road (which is a

concession or an admission that it is driven on the road and no where else) when it is being taken to a site to dig a borehole well does not in my view mean that it is intended or adapted for use on the roads. It would only qualify to be so if its very design, it is meant to ply the highway on a regular basis”, B

with respect, he was not justified to have so stated or held. This is because, the rig is not a taxi or a cab or a commercial vehicle, that are regularly driven or ply on the roads. Digging of Boreholes or prospecting or looking for oil or gas, surely and certainly, is not a daily affair. But to go to the site, the rig mounted on a chassis, must be driven to the site on the road by a Driver for that purpose. Thus, to be on the road, it must be registered, licensed, insured as a motor vehicle, and driven by a motor licensed Driver. From all that I have stated in this regard, I have no hesitation in holding and I so hold, that the rig LA 8509, qualifies as a motor vehicle within the Act in all the circumstances being a specialized vehicle. C D

Indeed and as a matter of fact, in the English case of *British Oxygen Co. Ltd. v. Board of Trade* (1968) 2 All E.R. 177 @ 183, Buckley, E J. stated, inter alia, as follows:

“..... I am unable to accept the plaintiff company’s contention that “vehicle” here means only such ordinary means of transport as lorries and motor cars.....”. F

See also the meaning of “motor vehicle” in 31 Halsbury’s Laws of England, 2nd Edition page 797 paragraph 1251 and for its definition in the Road Traffic Act, 1960 Section 253 (1) as reproduced by me (supra). The result is that having found as a fact and held that the rig is a motor vehicle just as rightly found and held by the trial court, the transaction come within the provisions of the Hire-Purchase Act, 1965. G

As to the scrappers, the trial court accepted the evidence of the witness for the Appellant that only Two (2) Scrappers and not four, were bought and that the price for each scrapper, is/was, N159,903.00 (one hundred and fifty-nine thousand, nine hundred and three naira). It referred to Exhibits P9 and P10. It held that if the amount paid by these exhibits, were deposits as alleged by the Respondents, that this should H

have been clearly stated in the said exhibits and the balance yet to be paid. It reproduced the content of Exhibit 10 thus, “Payment for 1 x 260 Scrapp-
per Machine”. It also found as a fact, and accepted the evidence of the Appellant Company, that it did not authorize the Respondent, to send the
B scrappers to SADP (Sokoto Agricultural Development Project).

The court below affirmed the findings of the trial court at page 927 of the Records, and stated that,

*“the defendant had been dishonest in its assertion that it delivered
the scrappers to SADP on the order of the Appellant.*

C *The result is that whereas the defendant ought to have sold the scrappers on plaintiffs behalf to any other buyer, it opted to use another Company as a cover to sell the same scrappers and two others to SADP”.*

It then reproduced the award made by the trial court hence its No.
D 2 award as had been reproduced by me earlier in this judgment.

It can be seen from what I have adumbrated in this Judgment, that the issues involved in this case leading to this appeal are simple and straight forward and not complicated as has been portrayed in the Appellant’s
E Brief.

What therefore, remains for me to do is having in effect, resolved the issues in favour of the Appellant, what order I am to make.

1. As regards the said rigs that have been found to have been
F wrongly seized by the Respondent, a case of Detinue has been made out by the Appellant. It is surprising to me that the trial court, in the face of this fact, with respect, made a U-turn so to say, by holding that the ownership of the first Rig No. LA 2632 WD, had reverted to the Respon-
G dent and relied on Exhibit D3. It even stated at page 439 of the Records, that “the method of recovering this rig from the Plaintiff might be crude and barbaric”, that the Respondent has a right to possession of the rig which it eventually recovered. This decision in my respectful but humble
H view, is perverse in the extreme. Of curse, self-help in any guise and by any person - high or low, Government or its functionaries/agents, have been deprecated by this Court in many decided authorities. In the case of *Ellochim (Nig.) Ltd. & ors. v, Mbadiwe (1986) 1 NWLR (Pt.14) 47 @ 65; (1986) 1 S.C. 99 @ 130; (1986) 1 All NLR (Pt.1) 1 @ 11, - Aniagolu,*

JSC, stated inter alia, as follows:

“The laws of civilized nations have always frowned at self-help. If for no other reason than that they engender breaches of peace”

At page 110 - Obaseki, JSC, also condemned its use and that the conduct of a party, should influence the award of damages.

An action in detinue, differs from an action in conversion in that it is said to be primarily not for damages, but for the return of the goods. In the English case of *General and Finance Facilities v. Cooks Cars (Ramford) Ltd. (1963) 1 WLR644, 650-651*; C.A, Diplock, L.J., pointed out that “an action in detinue, may result in a judgment in one of three different forms:

“(1) for the value of the chattel as assessed and damages for its detention; or

(2) for the return of the chattel or recovery of its value as assessed and damages for its detention; or

(3) for the return of the chattel and damages for its detention”.

See also the case of *J.E. Oshevire Ltd, v. Tripoli Motors (1997) 4 SCNJ. 246 @ 260, 263 -264* - per Onu, JSC. The judgment it is said, is generally, in the second form which gives the plaintiff, the opportunity to decide between enforcing specific restitution of the goods and claiming their value. As a matter of fact, the normal measure of damages, is said to be first, the market value of the goods where they are not ordered to be returned to the plaintiff. Secondly, whether the goods are or are not returned, it is such sum as represents the normal loss through the detention of the goods, sum, which should be the market rate at which the goods could have been hired during the period of detention. The value of the goods, is assessed in the same way as with conversion - i.e. the market value of the goods converted. Even if the goods fell in value after the time of conversion, the defendant, is still liable for the market value at the time of the conversion. See *Mc Gregor on Damages*, 13th Edition page 667 paragraphs 987, 991 and page 695 paragraphs 1032 & 1033, 1056-1057 *H and Clerk & Lindsell on Torts*, 14th Edition paragraphs 1071, 1151, 1173,1177.

Now, in our local case of *Chief Paul Ordia v. Piedmount (Nig.)*

Ltd. (1995) 2 NWLR (Pt. 379) 516; (1995) 2 SCNJ. 175 @ 181 -per Belgore, JSC, (as he then was), it is stated that Detinue, is based on the defendant's wrongful detention of plaintiff's chattel after the defendant's refusal to deliver up the chattel on demand by the plaintiff. That Detinue is an action only in tort for failure to deliver up the plaintiff's chattel and it entails claim for the return of the chattel or its value and damages for its detention. His Lordship, then stated the general analysis in *General & Finance Facilities Ltd, v. Cooks Cars* (Supra). See also *Oshevire Ltd, v. Tripoli Motors* (supra); *Chief J.K. Odumosu v. A.C.B. Ltd. (1976) 11 S.C. 55 @ 65; (1976) 6 ECSLR 435* and *Oseyomon & anor. v. Ojo (1997) 7SCNJ. 365 @ 385-386* - per Iguh, JSC. See also Halsbury's Laws of England 3rd Edition, Vol. 33 Pages 774 to 803 paragraphs 1283 to 1345.

D I note that the court below at page 923, stated inter alia, as follows:

“..... It was not the case of the defendant on the pleadings that the plaintiff sold the rig LA 2632 WD to it. Rather, it was that the plaintiff offered to give it as security against the amount due on the scrapers purchased from the defendant by the plaintiff.

It therefore, held that Exhibit D3, was evidence of a fact not pleaded and that it should have been discountenanced.

F It need be borne in mind, that to constitute Conversion, there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights, and an intention in so doing, to deny the owner's rights or to assert a right inconsistent with them. The inconsistency, is the gist of the action. There need not be any positive intention to challenge the true owner's rights. I hold that in the case of scrapers, a case of conversion, was clearly established by the Appellant against the Respondent. The normal measure of damages, is the market value of the goods and there may be an addition for consequential loss if not remote.

G See *Ezeani v. Ejidike (1964) 1 ANLR 402*.

Again, it is not the case of the Respondent, that it sold the scrapers on behalf of the Appellant, but that it delivered the same, to SADP on the instructions of the Appellant which have been found by the court

below and myself, to be a lie. In the case of *Margaret Chinyere Stitch v. Attorney-General of the Federation & 3 ors.* (1986) 12 S.C. 373 @, 422 - 427; (1986) 2 NSCC Vol. 17 page 1389 @ 1406-1408 - per Uwais, JSC. (as he then was), His Lordship referred also to the case of *Finance Facilities Ltd, v. Cooks Cars (Ramford) Ltd*, (supra) at page 648, and B came to the conclusion that the car of the plaintiff/Appellant, could not be returned to the appellant in the state in which it existed. That instead, the appellant was to recover the value of the car. It referred to the case of *Rosenthal v. Altderton & Sons Ltd.* (1946 1 K.B. 374 @, 377 C.A. where C it was stated that,

“In an action of detinue the value of the good claimed but not returned ought to be assessed as at the date of the judgment or verdict”.

His Lordship, noted that although the appellant is in addition entitled to the value of the car, but also entitled to general damages, and that D there was no such claim in her writ of summons or statement of claim. His Lordship held that the assessment of the value of the car which would be made by the trial court (Federal High Court), should be as at the date when that court gave its judgment in the case and not as at the date E of the judgment of this Court or any date in the future. His Lordship then agreed that the case should be remitted to the Federal High Court, for it to assess the value of the car and finally, ordered’ as underlined by me above.

Before concluding this Judgment, I had noted firstly, that in re- F spect of the first rig LA 2632 WD, that the purchase price, was fully paid for. Secondly, in respect of the second rig LA 8509 WD, the sale was not with the consent, authority or knowledge of the Appellant. The Respon- G dent admitted at page 365 of the Records in its paragraph 5 of the Fourth Amended Statement of Defence and Counter-Claim, that the Appellant sent the rig pleaded, for repairs. The two lower courts, found that the Appellant, never instructed the Respondent to deliver the rig to SADP and as reproduced by me herein in this Judgment. There is no appeal against H this finding. Since the said seizure, was wrongful, the Respondent, cannot justifiably, recover the said outstanding balance of N100,000.00 (One hundred thousand naira) from the Appellant. A person or body such as

the Respondent, cannot benefit from or take advantage of his/its own wrong. This is trite and settled law. In the case of *Buswell v. Goodwin* (1971) 1 All E.R. 418 @ 421, Widgery LJ. stated inter alia:

B “The proposition that a man will not be allowed to take advantage of his own wrong is no doubt a very salutary one and one which the Court would wish to endorse”.

C The respondent gave three (3) conflicting versions of how it came in possession of the first rig LA 2632. This fact, renders its evidence, to be very unreliable. I so hold. Also noted by me, is the fact that in the case of rig No. LA 8509 WD, the Appellant had paid 3/5th or 60% (sixty per-

D Finally, this case leading to the instant appeal, is a classic and eloquent evidence or demonstration, of the importance of documentary evidence, and being permanent in form, is more reliable than oral evidence and it is used as a hanger to test the credibility of oral evidence.
E See the cases of *Fashanu v. Adekoya* (1974) 6 S.C. 81 and recently, *Ezemba v. Ibeneme & anor.* (2004) 14 NWLR (Pt.894) 617- (2004) 7 SCNJ. 136 @ 151 (2004) 7S.C. (Pt.1) 45.

F In conclusion, I hold that this appeal, is meritorious and succeeds. I too, allow it and set aside the decision of the court below. On the authorities, I abide by the orders of my learned brother, Onnoghen, JSC, in the said lead Judgment including that in respect of costs.

G In respect of the court-Appeal, I too, dismiss it as lacking in substance and merit.

H