

SUPREME COURT OF NIGERIA
11TH JANUARY, 2008, SC.216/2000
CORAM:- S. U. ONU, D. MUSDAPHER, S. A. AKINTAN,
A. M. MUKHTAR, I. F. OGBUAGU, JJSC

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|-------------------------------------|-------|-------------|
| 1. CHIEF S. O. AGBAREH | | APPELLANTS |
| 2. TOSIL HOLDINGS LTD. | | |
| AND | | |
| 1. DR. ANTHONY MIMRA | | |
| 2. AUSTRIAN SCIENTIFIC TECH. | | RESPONDENTS |
| CONSRUCTION CO. LTD. | | |
| 3. FIDELITY UNION MERCHANT BANK LTD | | |

APPEALS - Issues - Ground of appeal - In respect of which no issue was raised - And no argument proffered - Is deemed abandoned (H1)

EVIDENCE - Documents - Contracts - Oral evidence is not admissible - To prove, vary, alter or add to the term - Of a written contract (H2)

COURTS - Records - Binding nature of - Records of proceedings or appeals - Are binding on the court and parties - They are presumed to be genuine (H3)

CONTRACTS - Agreements - Terms of - Are binding on the parties - Written agreements of the parties - Is the only authoritative admissible evidence of the contract - With some exceptions (H4)

CONTRACTS - Terms - Denial - That payment of third instalment - Does not fall within the parties' contract - Is dishonest (H5)

JUDGMENTS - Consent judgments - Terms - Interpretation of - Must be anchored on the parties' prior written agreements - In line with the principle - That requires interpretation - To be wholistic and not isolated (H6)

CONTRACTS - Breach - Consent judgment - That incorporated parties' written agreements as binding - Was wrongfully interpreted in isolation by Court of Appeal - Appellants are entitled to percentage amount as contracted (H7)

APPEALS - Preliminary objection - To validity of appeal - Where not moved with court's leave before oral hearing of appeal - It is deemed waived and abandoned (H8)

APPEALS - Cross appeal - Merit - Where cross appeal is not properly initiated - And no miscarriage of justice is occasioned by the decision - Supreme Court will ignore it as mere academic exercise (H9)

FACTS

Before the Lagos High Court the plaintiffs/appellants filed an action against the defendants/respondents. Appellants claimed inter alia, specific performance by respondents of the terms/conditions of two written agreements between 2nd appellant and 2nd respondent. They also claimed an order for a clean account of contracts in respect of all the Traffic Lights contracts at phase1/phase 2 Abuja, and payment of outstanding sums found due to appellants in accordance with the said agreements. The 2nd respondent - a German Company - appointed 2nd appellant its sole agent for purpose of procuring contracts for the installation of traffic lights in the Federal Capital Territory, Abuja (traffic light project). 2nd respondent agreed to pay 2nd appellant a remuneration of 35% of the contract price procured by the 2nd appellant. The agreements provided for arbitration in case of any dispute that may arise between the parties.

Second appellant procured contracts, especially the one for the sum of over N176.8 million which was later reviewed upwards to over N505.7 million. Payment was to be effected in four instalments. For the 1st instalment, 2nd respondent paid the agreed percentage remuneration. Dispute arose between the parties as a result of concealment of records by 2nd respondent, and as to whether the 2nd appellant is entitled to further payments from the outstanding contract balance. Upon commencement of a suit before the High Court, a consent judgment was delivered in the appellants' favour in accor-

dance with the parties' terms of settlement. Upon recovery of a 2nd instalment of the contract balance the agreed 35% was paid. As a 3rd instalment was recovered, 2nd respondent refused to pay. Appellants instituted 2 separate actions to claim 35% of the said 3rd instalment of the contract sum. They also commenced attachment proceedings vide the motion on notice seeking 4 orders by virtue of the Consent Judgment. Trial court delivered judgment in the appellants' favour. Respondents' appeal to the Court of Appeal was allowed. Dissatisfied, appellants have now appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether having regards to the Agreement dated 30/11/92 and 1/12/92 between the 2nd Appellant and the 2nd Respondent under which various payments have been made relating to the Traffic Light project and realizing that the two said agreements were the pivot in the Consent Judgment of 1/11/96, between the parties, the Court of Appeal was right in isolating clause 4 of the consent judgment for decision on the ground that the word "Current" therein referred only to the 2nd payment embodied in the said Consent Judgment and that the 2nd Appellant was not entitled to the payment of 35% of N71,169,943.32 being the 3rd C. V. payment for the installation of Traffic Lights at Abuja even though Parry Osayande and Parry Blue Chips had been paid by the 2nd Respondent out of the 3rd C. V. payment.

HELD (Allowing the appeal per **OGBUAGU JSC**, Akintan JSC dissenting)

APPEALS - Issues - Ground of appeal

1. Since no issue was raised by any of the parties in their respective Briefs in respect of Ground Two of the Grounds of Appeal, I will ignore/discountenance it and accordingly, strike out the ground, on the settled law and practice of the Appellate Courts firstly, that the courts consider only the issues and not the Grounds of Appeal. Secondly, a Ground of Appeal, not having any argument proffered to cover it, is deemed abandoned and will be struck out. (p. 85 F)

Contracts - Oral evidence is not admissible

2. In this appeal, with utmost respect to the parties and their learned

counsel, the issue, is the interpretation of the Consent Judgment as a whole and not just that of paragraph/Clause 4 in isolation. Documentary evidence in this matter, is crucial. There is therefore, in fact, speaking for myself, no need for any oral evidence which may amount to giving evidence in respect of the contents of a document or documents. This is because of the settled law firstly, that prima facie, oral evidence will not be admitted to prove, vary or alter or add to the term of any contract which has been reduced into writing when the document, is in existence except the document itself. Secondly, documentary evidence it is settled, is the best evidence. (p. 86 H)

COURTS - Records - Binding nature of

3. The law is settled that Records of Proceedings/Appeal, bind the parties and the court until the contrary is proved. This is because, there is the presumption of its genuineness, although this is rebuttable. Again, a court is entitled to look at the contents of its file or Records and refer to it in consideration of any matter before it. (p. 87 H)

E Agreements - Terms of

4. It is also settled that if parties enter into an Agreement, they are bound by its terms and that one or the court, cannot legally or properly, read into the Agreement, the terms on which the parties have not agreed and did not agree to.

Also settled, is that an Agreement is binding only on the parties thereto and not on third parties. Thus, if and where there is any disagreement as to what is or are the term or terms of an Agreement on any particular point, the authoritative and legal source of information for the purpose of resolving the disagreement, is of course, the written Agreement executed by the parties. As a matter of fact, Section 132 of the Evidence Act states that only admissible evidence of a contract, is the contract itself although the Section, recognizes exceptions. (p. 88 H)

CONTRACTS - Terms - Denial

5. It is therefore, beyond doubt, that the said payment, was the said 3rd instalment of the said contract the subject-matter of the said Agree-

ments. It was, with respect, dishonest, false and fraudulent on the part of the 2nd Respondent, to say or claim that the said payment, was in respect of another/separate contract. Let me debunk the said assertion or claim by the 2nd Respondent. (p. 92 G)

Consent judgments - Terms - Interpretation of

6. The court below as I stated herein-above, dealt with and interpreted paragraph/Clause 4 in isolation of the other paragraphs/Clauses in the said Consent Judgment. In the case of Martin Schroeder & Co. v. Major & Co. (Nig.) Ltd. (1989) 2 NWLR (Pt.101) 1 at 12; (1989) SCNJ 210, this Court - per Wali, JSC., stated inter-alia, as follows:

"The object of interpreting any statute or instrument is to ascertain the intention of the legislature that had made it or that of the parties that had drawn it. This is done by reading the words used in the particular section of the statute or the document; Where the meaning is not clear by doing so, the other sections of the statute or the whole of it, shall be read together to ascertain the meaning.

Having regard to paragraph/Clause 1 of the Consent Judgment and the relevant paragraphs/Clauses I have already referred to and reproduced, there is no where in my respectful view, paragraph/Clause 4 of the Consent Judgment, can be read, without reference to and anchoring it on the said two Agreements stated to be binding on the parties, particularly having regard to Clauses 2, 3, respectively, 7, 8, 11 and 12 thereof (at pages 111 to 118 of the Records). I so hold. To do otherwise, with profound humility, is bound to and will do violence to the wordings of the said two Agreements and distort, its/the said terms or Clauses and of course, the said Consent Judgment. (pp. 95 D/96 A)

CONTRACTS - Breach - Consent judgment

7. At page 295 of the Records, the court below concluded inter alia, as follows:

"On the whole, I get the impression that parties in framing their terms of settlement in the manner they did had in mind a particular amount of money which was to be paid vide the next cheque to be issued to the 2nd judgment debtor by the Federal Capital Devel-

opment Authority. I therefore uphold appellant's appeal on the point.
[The underlining mine]

With profound humility and respect to His Lordships, this cannot be right. In fact, it is far from the truth having regard to paragraph/Clause 1 of the said Consent Judgment which pointedly and unequivocally, referred to the Agreements of the parties that it stated, are binding on them. I therefore, agree with the submission of the learned counsel for the Appellants in their Briefs that the court below ought to have taken into consideration, other paragraphs/clauses in the Consent Judgment particularly, Clause 1 which is the Pivot so to say of the Consent Judgment before arriving at its said conclusion.

In conclusion, this appeal as regards Issue one of the Appellants is meritorious and it succeeds. I hereby allow the appeal and set aside the decision of the court below. I hold that the Appellants are entitled to 35% (thirty-five per cent) share of the said sum of N71,169,943.32 (seventy-one million one Hundred and sixty-nine thousand, nine hundred and forty-three naira, thirty-two kobo) which must be paid to them by the 1st and 2nd Respondents forthwith. (pp. 97 E/102 A)

APPEALS - Preliminary objection

8. The 1st and 2nd Respondents, have rightly raised or given Notice of Preliminary Objection in their said Brief. I say rightly, because, a Notice of Preliminary Objection, may validly be raised to question either the competence of an appeal or an issue raised for determination by an Appellant. However, a party filing or raising it in the Brief, must ask the Court for leave to move it before the oral hearing of the appeal commences, otherwise and this is settled, it will be deemed to have been waived and therefore, abandoned. (p. 101 E)

Cross appeal - Merit

9. Now, on the merits of the Cross-Appeal, I have noted that the 3rd Respondent/Cross-Appellant, did not appeal to the court below, the said Ruling of the trial court. Therefore, I agree with the 1st and 2nd Respondents/Cross-Respondents in their Brief, that the instant Cross-Appeal, was initiated without proper base at the court below. It is built on an incompetent foundation. What is more, going into it, will

amount to this Court, embarking on an academic exercise which it is not permitted to do as it will result to an exercise in futility.

It need to be emphasized that this Court, will not be drawn into indulging itself into an academic exercise in futility, more especially, where the Cross-Appellant and its learned counsel, have not shown and indeed, will be unable to show, what miscarriage of justice that has been occasioned to the 3rd Respondent/Cross-Appellant by the said decision of the court below. (pp. 104 C/105 A)

NOTABLE POINTS OF INTEREST

OGBUAGU JSC

1. Appellate court can prefer any party's issues or formulate issues by itself

Finally, an Appellate Court can, prefer an issue or issues formulated by any of the parties and can, itself and on its own, formulate an issue or issues which in its considered view, is/are germane to and is or are pertinent in the determination of the matter in controversy. In my respectful view therefore, the excerpt reproduced under this Ground Two, amounts to no more, than the learned Justice, stating that he preferred the issues formulated by the said Appellants. His Lordship, was entitled to do so, provided, that those issues so formulated, clearly took care of the main controversy between the parties. I have already stated that since none of the parties formulated any issue in respect of the said ground two, the said ground stands and remains struck out. (p. 86 B)

2. Need for counsel to vet documents filed in courts

Let me therefore, once again, passionately appeal to some or few learned counsel who prepare and file processes in all our Superior Courts of Record and more especially in the Appellate Courts and in this Court in particular, to be more painstaking, and exercise patience in preparing their documents and vetting them before they are filed in the courts. Even if their services are free of charge, but as professionals, once a case or a brief is accepted, then, there is a duty on the part of such counsel, to do a thorough job in respect of processes to be filed in the court. Learned Counsel must bear in mind and in fact or indeed, assume, that those documents, will be read by

the Judge or Justices hearing and determining the case or matter.
(p. 86 F)

3. Greed of man - Lesson to learn unto repentance

B Admissible evidence in this appeal, is the said Agreements of the parties which are binding on them. In my respectful view, this is a classic case where greed and perfidy of man, are manifested in a very repulsive and often, mean manner. The 2nd Respondent although a Company and a juristic entity, was/is run by a human being. The lesson C however, to humanity-men and women alike and the so-called businessmen, are firstly, that the courts, cannot permit or allow, any person, to benefit from his own wrong. Secondly, every intrigue or dishonesty by any human being, has an "invisible track," a loop-hole, weak or vulnerable spot. (p. 101 A)

D

AKINTAN JSC (DISSENTING)

4. Documents - Clear words - Expression of one thing implies exclusion of others

E Thus, the law is settled that where the words of a statute are plain, precise and unambiguous, then it should be given the ordinary and natural meaning.

F Similarly, it is a well established rule of interpretation of deeds and statutes that the expression of one thing is the exclusion of another. The principle is ably expressed in the Latin Maxim: *expressio unius est exclusio alterius* or *expressum facit cessare tacitum*. The term means that the expression of one person or thing implies the exclusion of other persons or things of the same class but which are not mentioned. (p. 113 C)

G

5. Consent judgment terms should be upheld - Not terms of prior agreement

H Applying the law as declared above to the facts of the instant case, it is clearly stated in the clause 4 of the consent judgment that "*the 2nd defendant in accordance with the terms of the agreement shall be paid 35% share of the current cheque being expected by the 2nd defendant as per the A.I.E. No BS/398/1996 dated 2nd August, 1996.*" The parties have, in the said clause, clearly and unequivocally

specified the payment, for which the respondent was to pay the 35% to be the one covered by A.I.E No BD/398/1996 dated 2nd August, 1996. I believe that the specific mention of the cheque from which the 35% was to be paid to the 2nd appellant excludes all other payments which might be due or made to the 2nd respondent. It is therefore totally wrong and erroneous to hold that the 2nd respondent was bound, under the said clause 4 or other clauses of the consent judgment, to pay 35% of the amounts on all other cheques received apart from the one specifically mentioned in the clause 4. The above view is further strengthened by the provision of clause 5 of the consent judgment which provides:

"That the above payment be made within 7 days after crediting of the amount to the account of the 2nd defendant."

The words "above payment" used in the clause 5, no doubt, refers to the specific payment expected on the voucher specifically mentioned in the clause 4. It did not say that the payment should be in respect of "every cheque received" or "all payments made in respect of the contract." It is therefore wrong to infer that the terms of the consent judgment could be read to cover all other payments made under the two agreements. That should not be the position. But what the consent judgment covered is what was specifically stated in the clause 4 of the agreement. Any claim outside that, in my view, could be the subject of a new cause of action.

Similarly, it is wrong to hold that the terms of the consent judgment must be read strictly in line with the original agreement. Doing that would ignore the possibility of a compromise by the parties of the various stands taken before the terms of the consent judgment were drawn up. (p. 113)

6. Machinery of justice should not be used in questionable national contracts

I believe that the entire transaction is one which the machinery of justice should not have been be used to obtain redress without scrutiny. A situation where a contract of the nature disclosed above could be revised upward to such a scandalous amount and under which a group of people, as the appellants, could comfortably secure 35% of the contract sum merely for helping to procure the award of the

contract and no more, calls for scrutiny and the courts, in my view, should not accept or interpret and enforce the terms of their so called contract blindly and no more. One is bound to ask if their mandate as "agent for procuring contract" included the assistance in securing the scandalous upward review of the contract sum as disclosed above.

B It is generally presumed that a contract of the nature, as in the instant case, was awarded only after a bill of quantity must have been prepared. It is therefore necessary to know what type of bill of quantity was prepared and who prepared such a bill of quantity that could accommodate an upward review of a contract sum from the original
C sum of N176,839,780 to N505,779,424.50 and what role, if any, was played by the appellants in securing the scandalous upward review. I believe that the above questions are some of the areas which the appropriate authorities charged with investigation of such mat-
D ters should look into and see if there was a conspiracy by anybody or group of people to defraud the nation through the award of the said contract and if so, take appropriate steps to retrieve the ill that might have been committed against the nation. (p. 115 E)

E **REPRESENTATION**

Frank O. Ezekwueche, for the Cross- Appellant/3rd Respondent.
Kayode Sofola, SAN., (with him, E.E.Ikolodo), for the 1st and 2nd Respondents.

F Appellants/Cross-Respondents and their counsel - Absent

CASES REFERRED TO

Alhaji Are & anor. v. Ipaye & anor. (1986) 3 NWLR (Pt.29) 416
Ndime v. Okocha (1992) 7 NWLR (Pt.252) 129: (1992) 7 SCNJ
G Nsilari v. Mothercat Ltd. (1995) 8 NWLR (pt.311) 377
Lawal v. G. B. Ollivant (1972) 3 SC 124 at 137
Queen v. Onuegbu (1957) 3 SC NLR 130
Toriola v. Willaims (1982) 7 SC 27 at 46
Ibrahim v. Mohammed (1996) 3 NWLR (Pt.437) 453
H Ogun v. Asemah (2002) 4 NWLR (Pt.256) 208
Da Rocha v. Hussain (1958) 3 FSC 89 at 92 (1958) SCNL 280
Nigerian Tobacco Co. Ltd. (1987) 2 NWLR (Pt.56) 299 at 306
Nasr V. Bovari (sic) (1969) All N.L.R. 35

Okumagba v. Egbe (1965) 1 All N.L.R. 62

Aouad & Another v. Kessrawani (1956) 1 FSC 35

Nwangwu v. Nzekwu & Another (1957) 3 FSC 36

STATUTES & RULES REFERRED TO

Arbitration and Conciliation Act, Cap. 19, LFN 1990

Evidence Act ss. 74, 75, 132

Supreme Court Rules 1999 O. 6 r. 8 (6)

BOOKS REFERRED TO

Black's Law Dictionary, 6th Ed. p. 581

G. Dworkin - Odgers' Construction of Deed and Statutes, 5th Edition 1967, p. 94 & 268

Halsbury's Laws of England Vol. 12, (4th Edition) para. 1469

Maxwell on the Interpretation of Statutes, 12th Edition by Langan, D p. 293

Steven H. Gofis, Law Dictionary, 1975, p. 76

LEAD JUDGMENT BY OGBUAGU JSC

The 2nd Respondent - a German Company, appointed the 2nd Appellant, as its only Agent for the purpose of procuring contracts for the installation of Traffic Lights in the Federal Capital Territory, Abuja (Traffic Light Project). Both parties, entered into a written Agreement dated 30th November 1992 and 1st December, 1992 respectively. (See pages 111 to 115 and 116-119 of the Records). The two Agreements, provided for arbitration in respect of any dispute that may arise between the parties relating to the interpretation of the said Agency Agreements (See Clause 18). By the two Agreements, the 2nd Respondent, agreed to pay the 2nd Appellant, a remuneration of 35% (thirty-five percent) of the contract price procured by the 2nd Appellant.

The 2nd Appellant, procured contracts from the Federal Capital Development Authority (hereinafter called "the FCDA") and especially, the contract for the installation of Traffic Lights at 64 Junction, Abuja which was for the sum of N176,839,780.00 (one hundred and seventy six million, eight hundred and thirty-nine thousand, seven hundred and eighty naira) which was later, reviewed

upwards to N505,779,424.50 (Five hundred and Five million, seven hundred and seventy-nine thousand, four hundred and twenty-four naira, fifty kobo) less withholding tax and VAT. The FCDA, was to effect payment in four instalments. The 1st instalment of the sum of N70,735,912.00 (Seventy million, seven hundred and thirty-five thousand, nine hundred and twelve naira), was paid by the FCDA. In terms of or in compliance with the said Agreements, the 2nd Respondent, paid the 2nd Appellant, the sum of N24,757,569.20 (Twenty-four million, seven hundred and fifty-seven thousand, five hundred and sixty-nine naira twenty kobo).

A dispute later arose between the parties as a result of the 2nd Respondent, concealing from the 2nd Appellant, of relevant documents and the payment by the FCDA of the pending sum of 14439,090,342.80 (Four hundred and thirty-nine million, ninety thousand, three hundred and forty-two naira eighty kobo) viz AIE NO. BD/398/96. Clauses 3 and 4 respectively of the Agreements, had provided thus:

"The Company (i.e. the 2nd Respondent) shall give to the Agent (i.e. the 2nd Appellant) copy of every letter and or Agreement in relation to any contract procured by the Agent".

In other words, the dispute, was whether the 2nd Appellant, was entitled to any further payments of the said agreed remuneration. The 2nd Appellant, took out a suit at the High Court of Lagos in Suit No. LD/2992/96 against the 1st and 2nd defendants and the Central Bank of Nigeria, claiming the following reliefs:

"(1) Specific performance of the terms and conditions by the Defendants of the Agreement dated the 30th day of November, 1992 and the supplemental Agreement dated the 1st day of December, 1992 between the Plaintiffs and the Defendants.

(2) An Order for a clean account of contracts in respect of all the Traffic Lights contracts at Phase 1 and Phase II, Abuja.

(3) Payment over to the Plaintiffs of all outstanding sums found due to the Plaintiffs in accordance -with the said agreement and interest thereon at the current Central Bank of Nigeria rate per annum until the Commission and remuneration due is fully paid up to the Plaintiffs.

(4) An Order directing the Defendants to give to the Plaintiffs a

copy of every letter, agreement and document in relation to the contracts procured by the Plaintiffs.

(5) Injunction restraining the Defendants by themselves servants, agents, privies or any person by whatever name so called from disturbing, depleting and/or withdrawing any sum of money already collected or to be collected by the Defendants from the Federal Capital Development Authority, Abuja in respect of Abuja Traffic Lights installations subject matter of this Action and/or lodged in any of the Bank Accounts maintained or operated by the Defendants without paying the commission due to the Plaintiffs in accordance with the terms and conditions of the Agreements between the parties dated 30/11/92 and 1/12/92 respectively".

It need be stated that the 2nd Respondent did not file any process, but agreed to settle the matter amicably out of court. In consequence, terms of settlement, were agreed upon, prepared and signed by the parties and their respective counsel and subsequently, filed in court. Consent Judgment, was entered by Famakinwa, J. For ease of reference, the said Judgment which appears at page 20 of the Records, read inter alia, as follows:

"..... By consent, Judgment is hereby entered in favour of the Plaintiffs against the Defendants (sic) in the following terms:-

(1) That the Agreement dated the 30th day of November, 1992 and supplemental Agreement dated 1st day of December, 1992 is between Plaintiffs and the 2nd Defendant and are only binding on them.

(2) That the 1st Plaintiff and 1st and 3rd Defendants are not parties to this Agreement referred to in (1) above and should not be parties to this Agreement.

(3) That the 2nd Defendant has always performed its obligations under the Agreement and see no reason for this process.

(4) That the 2nd Plaintiff in accordance with the terms of the Agreement shall be paid 35% share of the current cheque being expected by the 2nd Defendant as per the AIE [Authority to Incur Expenditure] No. BD/398/1996 dated the 2nd August, 1996.

(5) That the above payment be made within 7 days after the crediting of the amount to the account of the 2nd Defendant.

(6) That the above is hereby made the consent Judgment of

this Honourable Court.

Dated at Lagos this 1st day of November, 1996".

(the underlining mine)

After the above Consent Judgment, the FCDA, paid the 2nd instalment of N314,572,275,66 (Three hundred and fourteen million, five hundred and seventy-two thousand, two hundred and seventy-five naira, sixty-six kobo) out of the said balance of N439,090,342.80 as stated on the said AIE No. BD/398/96 leaving a balance of N124,518.067.14 (one hundred twenty-four million, five hundred and eighteen thousand, sixty-seven naira, fourteen kobo) outstanding yet to be paid by the FCDA. The 2nd Respondent paid the 35% (thirty-five per cent) i.e. the sum of N110,100,296.50 (One hundred and ten million, one hundred thousand, two hundred and ninety-six naira fifty kobo) to the 2nd Appellant.

D Comment by me - there was no problem.

The cause of the proceedings leading to the instant appeal, was/is the concealment by the 2nd Respondent from the 2nd Appellant, the payment by the FCDA to the 2nd Respondent, the 3rd instalment of the sum of N71,169,942,32 (Seventy-one million, one hundred and sixty-nine thousand, nine hundred and forty-two naira thirty-two kobo).

The Appellants, apart from instituting two separate actions to claim the 35% (thirty-five percent) share of the said contract sum - i.e. the 3rd Instalmental payment, applied by Motion on Notice, for Attachment and/or Garnishee proceedings seeking for four (4) orders of the trial High Court by virtue of the Consent Judgment. The application came up before Rhodes-Vivour, J. (as he then was). The issue before His Lordship, was whether the said sum of N71,169,943.32 paid as the said 3rd instalment, through an AIE voucher in 1997, was once and for all payment after the said Consent Judgment. While the Appellants asserted that the said payment, was the 3rd instalmental payment for the said project, the 2nd Respondent, claimed and maintained that the said payment, was for a separate contract for the said project. After both counsel for the parties had addressed that court, in a considered Ruling delivered on 22nd April, 1999, the learned Judge, found specifically and as a fact at page 105 of the Records, that the basis of the Consent Judgment,

is/was the said two Agreements of the parties. That the said sum of N71,169,943.32, was actually paid to the 2nd Respondent who lodged it in the 3rd Respondent's Bank. That the sum of N773,990.80 (Seven hundred and seventy-three thousand, nine hundred and ninety naira, eighty kobo), should be paid to the 2nd Appellant forthwith by the 3rd Respondent/Cross-Appellant. The said Ruling, appears at pages 96 to 106 of the Records. B

The 1st and 2nd Respondents, dissatisfied with the said Ruling, appealed to the Court of Appeal, Lagos Divisional (hereinafter called "the court below"). They also, filed an application for stay of execution pending the hearing and determination of the appeal. On 12th October, 1999, the court below, in a considered Ruling, granted unconditionally, the application for a stay of execution. See pages 213 to 226 of the Records. Dissatisfied with the said Ruling, the Appellants appealed to this Court. C D

In respect to the instant appeal to this Court, after the parties had filed and exchanged Briefs in the court below that heard arguments from the parties, on 10th May, 2000, the court below, (Coram: Oguntade, Aderemi, Sanusi, JJCA) in a considered Judgment, - per Oguntade, JCA (as he then was), allowed the appeal and held in the main, that paragraph/Clause 4 of the said Consent Judgment, did not apply to the payment of the said N71,169,943.32 such that one could hold that by force of the said Consent Judgment, the 2nd Respondent, was bound to pay the 2nd Appellant, the said sum of N24,480.11 representing 35% of the payment under the said Clause 4. E F

Dissatisfied with the said Judgment, the Appellants, have appealed to this Court on four (4) grounds of appeal. Without their particulars, they read as follows: G

"Ground One:

The learned Justices of the Court of Appeal misdirected themselves in fact when they found that the 2nd Respondent was not bound to pay the 2nd Appellant the sum of £424,909,480.11 representing 35% of the sum of N71,162(sic) 943.32 being the second payment received after the consent judgment despite the subsisting agreement entered as consent judgment between the parties. H

Ground Two:

The learned Justices of the Appeal (sic) misdirected themselves on the facts and occasioned a miscarriage of justice when they failed to consider the issues for determination raised and -argued by the Appellants (as Respondents before the Court of Appeal) arising from the Grounds of Appeal filed before the Court of Appeal when the
 B *presiding Judge (sic) stated thus:*

"The Judgment Creditor also formulated four issues for determination but I shall be guided in this judgment by Appellants issues for determination".

C *Ground Three:*

The learned Justices of Appeal (sic) misdirected themselves on the facts when they only pronounced on Clause 4 of the Consent Judgment rather than reading interpreting (sic) the Consent Judgment as a whole document and particularly clause ONE thereof which
 D *stated that parties are bound by the two agreements of 30/11/96 and 1/12/96 respectively.*

Ground Four:

The Judgment is against the weight of evidence".

Observation

E It is noted by me that in the said Notice of Appeal dated and filed on 18th May, 2000 under the "part of the decision of the lower court complained of, the sum of the 3rd C.V. payment, is stated to be N71,162,243.32 while under Ground one and its No. 1 "particulars of misdirection", the sum is stated to be N71,162,943.32. But under
 F "Relief Sought", from this Court, the sum stated, is N71,169,942.32k. This is really, with respect, not only confusing, incorrect and indeed, very disgusting to me.

The Appellants have formulated two (2) issues for determination, namely:

"Issue One

Whether having regards to the Agreement dated 30/11/92 and 1/12/92 between the 2nd Appellant and the 2nd Respondent under which various payments have been made relating to the Traffic Light
 H *project and realizing that the two said agreements were the pivot in the Consent Judgment of 1/11/96, between the parties, the Court of Appeal was right in isolating clause 4 of the consent judgment for decision on the ground that the word "Current" therein referred only*

to the 2nd payment embodied in the said Consent Judgment and that the 2nd Appellant was not entitled to the payment of 35% of W77,169,943.32 being the 3rd C. V. payment for the installation of Traffic Lights at Abuja even though Parry Osayande and Parry Blue Chips had been paid by the 2nd Respondent out of the 3rd C. V. payment. B

Issue Two

Whether there is breach of the provision of Rules 10 and 26 of the Rules of Professional conduct in the Legal Professional (sic) published in the Federal Republic of Nigeria Official Gazette No. 5 of 18th January, 1990 Volume 67 by Messrs. Kehinde Sofola & Co. who acted for the 2nd Appellant and others in settlement at a stage of the dispute among the Parties for which he was paid N500,000.00 as legal fees by the 2nd Appellant in connection with the execution of the Installation of Traffic Light Project at Abuja the subject matter of this Appeal". D

On its part, the 1st and 2nd Respondents, have formulated what they describe as "the only competent issue that can rightly arise from the appeal of the Appellants....." It reads thus:

"Whether the Court of Appeal was right when it held that the sum of N71,169,943,(sic) later paid to the 1st and 2nd Respondents by the Federal Capital Development Authority (after the Appellants had been paid 35% share of the current cheque being expected as per paragraph 4 of the consent judgment) does not form part of paragraph 4 of the consent judgment of 1st November, 1996". E F

When this main appeal and the Cross-Appeal of the 3rd Respondent/Cross-Appellant, came up for hearing on 16th October, 2007, the Appellants and their learned Counsel, were absent without any reason brought to the attention of the Court. However, the Clerk of Court, informed the Court that the learned counsel for the Appellants - one Oji, Esq., was in Court on 17th October, 2006, when this instant appeal was adjourned to 16th October, 2007 for hearing. That in spite of this fact, Hearing Notices, were also sent out to the parties on 6th November, 2006. H

Kayode Sofola, Esq., (SAN) - learned Counsel for the 1st and 2nd Respondents, with him Ikolodo (Miss), told the Court that the Appellants' Brief dated 11th June, 2001, was filed on 12th June,

2001 and that they also filed a Reply Brief on 27th May, 2004. That the Appellants'/Cross-Respondents' Reply Brief to the Cross-Appellant's Brief, was filed on 6th October, 2004. He also referred the Court to the Appellants'/Cross-Respondents' Brief to the Cross-Appellant's Brief filed on 11th May, 2005. The learned SAN also told the Court that
 B the 1st and 2nd Respondents, filed their Brief on 18th February, 2004 and their Brief in response to the 3rd Cross-Appellant's/Respondent's Brief on 27th September, 2004. He adopted their two (2) Briefs and urged the Court, to dismiss the appeal.

C Learned Counsel for the 3rd Cross-Appellant - Ezekwueche, Esqr., told the Court that they did not file any Brief in respect of the main appeal, but that they filed a Brief in respect of their own Cross-Appeal, on 5th September, 2002 and the Cross-Appellant's Reply Brief on 14th January, 2005. He adopted the said Briefs and urged
 D the Court, to allow the 3rd Respondent's/Cross-Appellant's appeal. He stated that he represents the Garnishee and that they want the Court to make an Order that whosoever wins, should collect the money from his client. He however, stated that the Garnishee order, has been set aside.

E Query - As a result of the Court of Appeal Judgment?

Pursuant to Order 6 Rule 8(6) of the Rules of this Court (as Amended in 1999), the appeal of the Appellants, was treated as having been argued and will be considered as such. Judgment was there-
 F after, reserved till today.

Before going into the merits of this appeal, I wish to further observe that it appears to me, with the greatest respect, that no seriousness and diligence, were also employed/exhibited in the preparation or vetting of the Appellants' Brief of Argument. This is worrisome
 G and regrettable. At page 1 thereof, under introduction/statement of facts - first paragraph, it is therein stated inter alia:

*"By an Agreement.....between the 2nd Appellant and the 2nd Respondent, the 2nd Appellant (instead of the 2nd Respondent) appointed the 2nd Respondent (instead of the 2nd Appellant) as the
 H only agent Abuja"*

See and compare with the immediate paragraph after Clause 12. Reading down the said Page 1 in what I regard as paragraph 6, the following appears:

"From the 1st instalment of N70,735,912.00 the 2nd Appellant was paid N24,757,569.20 by the 2nd Appellant (instead of 2nd Respondent) being 35% of the said sum"

At page 3 thereof, the calculation of the amounts paid, are erroneous and misleading. For instance, where the figure/amount of N314,572,275.66 should have been stated, what appears at the first paragraph is N314,572.66 which is stated to be

"out of the sum of N439,090,342.80 stated on the AIE No. BD/398/96 leaving a clear balance of N124,518,067.14 outstanding yet to be paid 2nd Respondent".

At page 11 thereof- first paragraph, it is stated inter alia, thus:

"Immediately after the Consent Judgment, the FCDA however was only able to pay N314,572,276.66 as 2nd CV payment and the 2nd Respondent paid N110,100,296.50 to the 2nd Respondent (instead of the 2nd Appellant) leaving a balance to the 2nd Appellant".

At the said page 11 of the Brief, in paragraphs 3, 4 and 5, what appears throughout, is stated to be N71,743.32 (instead of N71,169,942.32).

Lastly, the said Issues of the parties, were not related to any of the Grounds of Appeal. In my respectful view, only one issue is relevant in the determination of this appeal - namely Issue one of the Appellants and the lone issue of the 1st and 2nd Respondents which arise from Grounds 1, 3 and 4 of the Grounds of Appeal.

Since no issue was raised by any of the parties in their respective Briefs in respect of Ground Two of the Grounds of Appeal, I will ignore/discountenance it and accordingly, strike out the ground, on the settled law and practice of the Appellate Courts firstly, that the courts consider only the issues and not the Grounds of Appeal. See the cases of Sabiba v. Yassin (2002) 2 SCNJ. 14 at 24 and Ezemba v. Ibeneme & anor. (2004) 7 SCNJ 136 at 155-156. ***Secondly, a Ground of Appeal, not having any argument proffered to cover it, is deemed abandoned and will be struck out.*** See the cases of Alhaji Are & anor. v. Ipaye & anor. (1986) 3 NWLR (Pt.29) 416 at 418 C.A.; Chukwuosor v. Obuora ((1987) 3NWLR (Pt.61) 454 at 479; (1987) 7 SCNJ. 191 also cited in the case of Lamboye & 3 ors. v. Ogunsiji & 2 ors. (1990) 6 NWLR

(Pt.155) 201 at 231-232 C.A; Ndime v. Okocha (1992) 7 NWLR (Pt.252) 129; (1992) 7 SCNJ. 355 and Nsilari v. Mothercat Ltd. (1995) 8 NWLR (pt.311) 377 just to mention but a few. This is because, a Ground of Appeal, must have an issue to cover it. See Ibrahim v. Mohammed (1996) 3 NWLR (Pt.437) 453; Dieli & ors. v. Iwuno & ors. (1996) 4. NWLR (Pt.445) 622; (1996) 4 SCNJ. 57; Ogun v. Asemah (2002) 4 NWLR (Pt.256) 208 and many others.

Finally, an Appellate Court can, prefer an issue or issues formulated by any of the parties and can, itself and on its own, formulate an issue or issues which in its considered view, is/are germane to and is or are pertinent in the determination of the matter in controversy. See the cases of Mma Sha (Jnr.) & anor. v. Da Rap. Kwan & 4 ors. (2000) 5 SCNJ. 101; Lebile v. The Registered Trustees of Cherubim & Seraphim Church of Zion of Nig. Ugbebla & 3 ors. (2003) 1 D SCNJ. 463 at 479 and Emeka Nwana v. Federal Capital Development Authority & 5 ors. (2004) 13 NWLR (Pt. 889) 128 at 142-143; (2004) 7 SCNJ. 90 at 99. citing several other cases therein. In my respectful view therefore, the excerpt reproduced under this Ground Two, amounts to no more, than the learned Justice, stating that he E preferred the issues formulated by the said Appellants. His Lordship, was entitled to do so, provided, that those issues so formulated, clearly took care of the main controversy between the parties. I have already stated that since none of the parties formulated any issue in F respect of the said ground two, the said ground stands and remains struck out.

Let me therefore, once again, passionately appeal to some or few learned counsel who prepare and file processes in all our Superior Courts of Record and more especially in the Appellate Courts G and in this Court in particular, to be more painstaking, and exercise patience in preparing their documents and vetting them before they are filed in the courts. Even if their services are free of charge, but as professionals, once a case or a brief is accepted, then, there is a duty on the part of such counsel, to do a thorough job in respect of processes to be filed in the court. Learned Counsel must bear in mind H and in fact or indeed, assume, that those documents, will be read by the Judge or Justices hearing and determining the case or matter.

In this appeal, with utmost respect to the parties and

their learned counsel, the issue, is the interpretation of the Consent Judgment as a whole and not just that of paragraph/ Clause 4 in isolation. Documentary evidence in this matter, is crucial. There is therefore, in fact, speaking for myself, no need for any oral evidence which may amount to giving evidence in respect of the contents of a document or documents. This is because of the settled law firstly, that prima facie, oral evidence will not be admitted to prove, vary or alter or add to the term of any contract which has been reduced into writing when the document, is in existence except the document itself. See the cases of Da Rocha v. Hussain (1958) 3 FSC 89 at 92 (1958) SCNL 280 and S.C.O.A. (Nis.) Ltd, v. Bourdex Ltd. (1990) 3 NWLR (Pt.138) 380 at 389 and many others. ***Secondly, documentary evidence it is settled, is the best evidence.*** See the case of The Attorney-General, Bendel State & 2 ors. v. United Bank for Africa Ltd. (1986) 4 NWLR (Pt.37) 547 at 565. B C D

In the case of FSB International Bank Ltd, v. Imano (Nig.) Ltd. (2000) 11 NWLR (Pt.679) 620 at 637; (2000) 7 SCNJ. 65, this Court - per Achike, J.S.C., (of blessed memory) stated inter alia, as follows: E

"I must emphasise that having regard to the nature of this application and there being nothing but documentary evidence placed before us that this Court is in as good a position as the High Court, as well as the Court of Appeal, to examine the entire documentary evidence and the other documents placed before the lower courts". F

In my respectful view therefore, the mere fact that the parties did not testify and tender the said Agreements between them, is of no moment or consequence and it is immaterial in the circumstances of the case leading to this instant appeal. Firstly, there is no dispute between the parties to the said Agreements, that the Agreements do not exist or that they did not sign/execute the same. Secondly, the said Agreements are part of the contents of the Records sent to this Court from the court below. In other words, these said Agreements, were before the two courts below. ***The law is settled that Records of Proceedings/Appeal, bind the parties and the court until the contrary is proved.*** See the cases of Horst Sommer & ors. v. Federal Housing Authority (1992) 1 NWLR (Pt.219) 548: (1992) 1 G H

SCNJ.73. Texaco Panama Incorporation (Owners of Vessel "M.V. Star Tulsa") v. Shell Petroleum Development Corporation of Nig. Ltd. (2002) 2 SCNJ.102 at 118. (2002) 2 SCNJ. 102: and Chief Fubara & ors. Chief Minimah & ors. (2003) 5 SCNJ. 142 at 168, just to mention but a few. **This is because, there is the presumption of its genuineness, although this is rebuttable.** See the case of Alhaji Nuhu v. Alhaji Ogele (2003) 18 NWLR (Pt.852) 251 at 272: (2003) 12 SCNJ. 158 at 172. **Again, a court is entitled to look at the contents of its file or Records and refer to it in consideration of any matter before it.** See the cases of West African Provincial Insurance Co. Ltd, v. Nigerian Tobacco Co. Ltd. (1987) 2 NWLR (Pt.56) 299 at 306: Osafire v. Odili Ltd. (1990) 3 NWLR (Pt.37) 130: (1990) 5 SCNJ. 118; Chief Asbaisi & ors. v. Ebikorofe & ors. (1997) 4 NWLR (Pt.502) 630 at 648: (1997) 4 SCNJ. 147 at 160: Asbohomovo & 2 ors. v. Eduyegbe & 6 ors. (1999) 3 NWLR (Pt.594) 170; (1999) 2 SCNJ. 94 citing two other cases therein and Jikantoro & 6 ors. v. Dantoro & 6 ors. (2004) 5 SCNJ. 152 at 177 - per Edozie, JSC, just to mention but a few. See also Section 74/75 of the Evidence Act.

In the circumstances of the above established law, I will therefore, treat or deal with the said Issue ONE of the Appellants together with the lone issue of the 1st and 2nd Respondents. I have earlier in this Judgment, reproduced the said Consent Judgment. No. 1 thereof states,

"That the Agreement dated 30th day of November, 1992 and supplemental Agreement dated 1st day of December, 1992 "is (sic) between Plaintiffs and the 2nd Defendant (i.e. the 2nd Respondent) and are binding".(The underlining mine)

Of course, the Consent Judgment talks about the said two Agreements between the Appellants and the 1st and 2nd Respondents. These two said Agreements, have already been referred to by me in this Judgment and they can be found at pages 110 to 119 of the Records. They are part of the Records before the court below and this Court and also referred to in the said Consent Judgment at page 20 of the Records. Of course, **it is also settled that if parties enter into an Agreement, they are bound by its items and that one or the court, cannot legally or properly, read into the**

Agreement, the terms on which the parties have not agreed and did not agree to. See the case of Evbuomwan & 3 ors. v. Eleme & 2 ors. (1994) 7-8 SCNJ. (Pt.II) 243.

Also settled, is that an Agreement is binding only on the parties thereto and not on third parties. See the case of W.D.N. Ltd, v. Oyibio (1992) 5 NWLR (Pt.239) 77 at 100 - 101 C.A. **Thus, if and where there is any disagreement as to what is or are the term or terms of an Agreement on any particular point, the authoritative and legal source of information for the purpose of resolving the disagreement, is of course, the written Agreement executed by the parties.** So said this Court in the cases of Union Bank of Nigeria Ltd, v. Sax (Nig.) Ltd. & ors. (1994) 9 SCNJ. 1 at 12 and Mrs. Layode v. Panalpina World Transport Nig. Ltd. (1996) 7 SCNJ. 1 at 14-15 citing the cases of Olaloye (Mrs.) v. Balosun (Madam) (1990) 5 NWLR (Pt.148) 24; (1990) 7 SCNJ. 205 and D Union Bank of Nig. Ltd. & Prof. Ozigi (1994) 3 NWLR (Pt.333) 385; (1994) 3 SCNJ. 42. See also the case of Alhaji A. Baba v. Nigerian Civil Aviation Training Centre & anor. (1991) 5 NWLR (Pt.192) 388; (1991) 7 SCNJ. 1. **As a matter of fact, Section 132 of the Evidence Act states that only admissible evidence of a contract, is the contract itself although the Section, recognizes exceptions.** See the case of Arjay Ltd. & 2 ors. v. Airline Management Support Ltd. (2003) 7 NWLR (Pt.820) 577; (2003) 2 SCNJ. 149 at 169.

At page 105 of the Records, the learned Judge in his said Ruling, stated inter alia, as follows:

"The basis of the Consent Judgment is the Agreement freely entered into by the judgment creditor and the judgment debtor (2nd Plaintiff and 2nd Defendant). In the Consent Judgment the 2nd Plaintiff is to be paid 35% share of the cheque that was still being expected by the 2nd defendant as at 1/11/96, the date the Consent Judgment was entered for the parties. The sums were not paid to the judgment creditor. They ought to be paid. Accordingly the 5th Garnishee, the Fidelity Union Merchant Bank Ltd. is hereby ordered to pay the sum of N775,990.20 to the judgment creditor Ganishor forthwith".

At page 291 of the Records, the court below, rightly in my respectful view, identified the "central issues in the appeal" - i.e.

"The different interpretations which the judgment/debtors and the judgment creditors gave to the Consent Judgment given by Famakinwa, J. on 1-11-96".

It is pertinent for me to observe, that the court below, identified this fact at page 293 of the Records where the following appear,
B inter alia:

"As I said earlier, the 2nd defendant debtor paid to the 2nd judgment creditor the sum of N110,296.50 out of the sum of N314,572,275.66 paid to it on 28-2-97. On 7-10-97, the sum of N71,162, (sic) (169) 943.32 was paid to the 2nd judgment/creditor....."
C

It then posed the question thus:

"The question that arises for consideration is - Did paragraph 4 of the Consent Judgment above apply to the payment of N71,162 (sic) 943.32 such that one could hold that by the force of the judgment, 2nd judgment debtor was bound to pay the 2nd judgment creditor the sum of N24,909,480.11 representing 35% of the payment? and it answered thus: "I think not".
D

It then stated inter alia, as follows:

"The words of the Consent Judgment clearly speak for themselves. It was not for the court below to alter or vary them even if in the light of disputations before it, it thought that the parties might have intended something other than was recorded in the consent Judgment."
E

This last sentence, in my respectful view, was not so or true and it was unfair to the learned trial Judge. It then at page 294 thereof, completely agreed with the submission of the late learned Senior Advocate of Nigeria - Kehinde Sofola, SAN, for the 2nd Respondent in his
F Brief which reads as follows:

"It is respectfully submitted that the rules of interpretation or construction do not allow words used to be altered - see Okumagba v. Egbe (1965) 1 All N.L.R. 62. Words used are not to be treated as surphrsage (sic). See Nasr V. Bovari (sic) (1969) All N.L.R. 35. Words are not to be added. See Mabinnor (sic) v. Ogunleye (1970) 1 All N.L.R. 17. Therefore altering, ignoring or adding words is virtually amending the provision and that is beyond the powers of the courts. The function of the courts is to expound the meaning of the text".
H

Surprisingly and in spite of its agreement to the said submission, the court below, proceeded, with respect, to do the opposite of the above firmly laid/established principles of law or rules of interpretation by ignoring or amending so to speak, the said agreement of the parties that are binding on them by confining itself to, paragraph/ Clause 4 and interpreting it in isolation to the other paragraph/Clauses of the said Consent Judgment. This was also done, in spite of the overwhelming facts in the Records and the settled law. I say so because, even in the case of Union Bank of Nig. Ltd, (not UBA Ltd.) & Anor. v. Nwaokolo (1995) 6 NWLR (Pt.400) said to be at 132 (it is at (P.127) and it is at page 154 cited and relied on by the 1st and 2nd Respondents in their Brief, (it is also reported in (1995) 4 SCNJ.93), (and which was/is not very correctly and completely reproduced and with some typographical spelling by the learned counsel for the Appellants at page 1 of their Reply Brief to the 1st and 2nd Respondents' Brief and under issue one of the Appellants); this Court - per Onu, JSC stated at page 154 of the NWLR inter alia, as follows:

"It is trite that in the construction of documents, the cardinal principle is that the parties are presumed to intend what they have in fact said or written down. Accordingly the words employed by them will be construed and should be given their ordinary and plain meaning unless, of course, circumstance, such as trade usage or the like, dictate that particular construction ought to be applied in order to give effect to the particular intention envisaged by the parties. See Aouad & Another v. Kessrawani (1956) 1 FSC 35, Nwangwu v. Nzekwu & Another (1957) 3 FSC 36 and A.G. Kaduna State and others v. Atta & 2 others (1986) 4 NWLR (Pt.38) 785. As a general rule therefore, words should be given their ordinary and plain meaning and additional words or clauses ought not to be imported into a written agreement or document unless it is impossible to understand the agreement or document in the absence of such additional words or clauses. See Solicitor General, Western Nigeria v. Adebajo (1971) 1 All NLR 178 and Union Bank of Nigeria Ltd. v. Ozigi (1974) (sic) it is (1994) 3 NWLR (Pt.333) 385. The point must also be made that it is not the function of a Court to make or rewrite a contract for the parties. See Fakorede & ors. v. A.G. of Western State (1972) 1 All NLR (Pt. 1) 178 & 189 and British Movietonews Ltd. v. London &

District Cinema Ltd. (1952) A.C. 166. And so, where parties have embodied the terms of their contract in a written document, extrinsic evidence, whether oral or contained in other writings, is not admissible save in a few accepted exceptions, to add to, vary, contradict or subtract from the terms of such document. See Olaloye v. Balogun B (1990) 5 NWLR (Pt.148) 24".

Clause 2 of the 1st Agreement at page 111 which is the same as the Records Clause 12 at pages 117-118 of the Records, provides as follows:

C *"This Agreement shall be deemed to have commenced at the signing of this Agreement and shall continue in force until final payment on and/or execution of any contract covered by this agreement. If by 31st December 1993 no contract is awarded to the Company both parties are free to terminate or renew this agreement".*

D (The underling mine)

E It is not in dispute that the FCDA were to liquidate the total payment of the said contract sum in (4) four instalments. There is evidence already noted in this Judgment, that there was no problem in the payment of the first instalment. When the (2nd) second instalment was made and there rose a problem created by the 2n Respondent, this led to the Consent Judgment after an arbitration. The 2nd Respondent, thereafter, paid the 2nd Appellant.

F For purposes of emphasis, there are pages 56 and 57 of the Records. Page 57, shows, the Payment Voucher of the 3rd instalment for the said sum of N71,169.943.32. Therein, it is stated inter alia, as follows:

G *"Being 3rd C.V. payment made to the above-named Coy (i.e. the 2nd Respondent) for supply and installation of Traffic Light at 64 junction in Abuja".*

(The underlining mine)

Evidence of this payment is Exhibit C.

H ***It is therefore, beyond doubt, that the said payment, was the said 3rd instalment of the said contract the subject-matter of the said Agreements. It was, with respect, dishonest, false and fraudulent on the part of the 2nd Respondent, to say or claim that the said payment, was in respect of another/separate contract. Let me debunk the said assertion or claim by***

the 2nd Respondent.

I have already referred to Clause 2 of the said Agreement of the 1st Agreement and Clause 3 of the 2nd Agreement the wordings of which, are clear, unambiguous and need no interpretation. Clause 2 or 3 of both Agreements also reproduced at page 3 of the Appellants' Reply Brief) provide as follows: B

"This Agreement shall cover all contracts or projects for the installation of Traffic Lights in the Federal Capital Territory Abuja". Clause 3 of the 1st Agreement III or Clause 4 of the 2nd Agreement at page 116 of the Records which provides that "the Company shall give to the Agent copy of every letter and or Agreement in relation to any contract procured by the Agent", can be seen to flow from the said Clause 2 or 3 above. C

Clause 7 of the 1st Agreement or Clause 8 of the 2nd Agreement, reads as follows: - D

"Payment to the Agent shall be only pro-rata to the sum paid at any time for any project under this Agreement".

Clause 8 of the 1st Agreement of Clause 9 of the 2nd Agreement, provides thus:

"All payments or commission paid to the Agent shall be in the same currency as received by the Company and shall be determined and payable pro-rata to the amount paid to the Company". E

These clauses, are also clear and unambiguous and are still in respect of the one and only one contract covered by the said two Agreements. F

Now, at pages 101 and 102 of the Records, the learned Judge in his said Ruling of 22nd April, 1999, made some findings of fact. He stated inter alia, as follows:

"Paragraphs 5, 6, 7 and 8 show the justification for the Gar-nishee proceedings. It reads-

5. That the FCDA paid the said payment of N71,169,943.32k to judgment Debtor with Central Bank cheque No. 001163585 of 7/10/97

6. That the sum of N24,909,480. 11k is due to the judgment Creditors out of the payment of N71,169,943.32k.

7. That the Judgment Debtors have refused failed or neglected to pay the sum of N24,909,480.11k due to the Judgment Creditors

despite repeated demand.

8. *That the Garnishees jointly and severally have the funds of N71,169,743.32k under their control in the accounts of the Judgment Debtors kept with them.*

B *The above is not denied. The 5th Garnishee, the Fidelity Union Merchant Bank Ltd. swore to a further and better affidavit to show cause on 6/10/98.*

In the affidavit supra paragraph 4 is clear. It reads -

C *4. That the Statement of Account showed the Account of the 2nd judgment Debtor from April, 1998 instead of October, 1997 when the sum of N71,169,943.32 was lodged into its account with the Bank.*

D *Exhibit B. attached to the said affidavit is the Statement of Account of the 2nd Judgment Debtor. Its contents are in support of paragraph 4 above.*

It is thus settled that the sum of N71,169,943.32 was in the Account of the 2nd Judgment Debtor the 5th Garnishee in October 1997".

E *At page 104 thereof, His Lordship stated inter alia, as follows: "The 5th Garnishee, the Fidelity Union Merchant Bank Ltd. relied on two Affidavits to show cause dated 1/5/98 and 6/10/98. It explains on the affidavit supra the movement of the sum paid in thus:-*

F *5. That on 8/10/97 it deposited a cheque for N71,169,943.32 in it's Account aforesaid for clearing.*

6. That the said cheque was cleared and its Account credited accordingly.

G *7. That it draw cheques on the said Account and the Bank honoured same in the ordinary cause of Banker/Customer relationship.*

H *8. That as at 16/7/98 when the Garnishee Order was served on us, the credit balance in its Account was N772,954.62 (Seven Hundred and Seventy-two.thousand, nine hundred and fifty-four naira, sixty-two kobo) credit.*

9. That the statement of its Account with our Bank as at today, show the credit balance in the Account to be N773,990.80 credit.

The said statement of account is attached hereto and marked 'A' The above is not disputed".

Finally, for purposes of emphasis, I again reproduce, His Lordship's finding of fact and holding at page 105, inter alia, as follows:

"The basis of the consent judgment is the Agreement freely entered into by the judgment creditor and the judgment debtor (2nd plaintiff and 2nd defendant).

In the consent judgment the 2nd plaintiff is to be paid 35% share of the cheque that was still being expected by the 2nd Defendant as at 1/11/96, the date consent judgment was entered for the parties. The sums were not paid to the judgment creditor. They ought to have been paid to him. Accordingly the 5th Garnishee, the Fidelity Union Merchant Bank Ltd. is hereby ordered to pay the sum of N775,990,80 to the judgment creditor garnishor forthwith".

The court below as I stated herein-above, dealt with and interpreted paragraph/Clause 4 in isolation of the other paragraphs/Clauses in the said Consent Judgment. In the case of Martin Schroeder & Co. v. Major & Co. (Nig.) Ltd. (1989) 2 NWLR (Pt.101) 1 at 12; (1989) SCN.J. 210, this Court - per Wali, JSC, stated inter-alia, as follows:

"The object of interpreting any statute or instrument is to ascertain the intention of the legislature that had made it or that of the parties that had drawn it. This is done by reading the words used in the particular section of the statute or the document: Where the meaning is not clear by doing so, the other sections of the statute, or the whole of it, shall be read together to ascertain the meaning. This same rule applies to other instruments. The provisions of the two rules are crystal clear, one is general while the other is special....."

The underlining mine)

In the case of Artra Industries Nig. Ltd, v. The Nigerian Bank For Commerce and Industry or (N.B.C.I.) (1998) 4 NWLR (Pt.546) 357 at 375 paragraph C also cited and relied on by the Appellants in their said Reply Brief (it is also reported in (1998) 3 SCN.J. 97), Onu, J.S.C., stated inter alia, as follows:

"..... In interpreting a document, due regard must be given to

the entire document so as to find out the correct meaning of the word in relation to the agreement.....".

[The underlining mine]

Having regard to paragraph/Clause 1 of the Consent Judgment and the relevant paragraphs/Clauses I have already referred to and reproduced, there is no where in my respectful view, paragraph/Clause 4 of the Consent Judgment, can be read, without reference to and anchoring it on the said two Agreements stated to be binding on the parties, particularly having regard to Clauses 2, 3, respectively, 7, 8, 11 and 12 thereof (at pages 111 to 118 of the Records). I so hold. To do otherwise, with profound humility, is bound to and will do violence to the wordings of the said two Agreements and distort, its/the said terms or Clauses and of course, the said Consent Judgment.

Indeed, in the case of Unilife (not UNIIFE as appears in the Appellants' Reply Brief) Development Co. Ltd, v. Adeshisbin & 4 ors. (also not properly cited) (2001) 4 NWLR Pt. 704) 609 (a). 626 paragraph C - per Achike, J.S.C. (of blessed memory) (not at 614 ratio 3 which is the Editor's ratio). It is also reported in (2001) 2 SCNJ. 116, it was held, inter alia, as follows:

"It is a fundamental rule of Construction of instruments (I also add documents and Agreements) that its several Clauses, must be interpreted harmoniously so that the various parts of the instrument are not brought in conflict to their natural meaning, emphasising the same point, the learned authors of Halsbury's Laws of England Vol. 12, (4th Edition) paragraph 1469) stated tersely but pointedly:

"The best construction of Deeds is to make one part of the deed expound the other; and so make all the parts agree. Effect must, so far as possible be given to every word and every Clause".

[The underlining mine]

See also the same principle approved by this Court in the case of Lamikoro Ojokolobo & ors. v. Lapade Alamu & anor. (1987) 3 NWLR (Pt.61) 339: (1987) 7SCNJ. 98.

It is ironical that Kehinde Sofola, Esqr. (SAN) (of blessed memory) and who the court below "completely" agreed with his said submission reproduced by me in this Judgment, appeared for the

Appellants in Unilife's case (supra). Karibi-Whyte, J.S.C., in his contribution/Concurring Judgment, at page 636 paragraphs A -B, stated as follows:

"I agree with Mr. Sofola, SAN in his submission that the court below was in error to have relied on Clauses 3 and 6 of the lease agreement only and limited itself in the construction of the lease agreement to the construction of these clauses alone. The approach adopted by the court below is in violation of one of the fundamental and hallowed principles in the construction of document and written instruments, that the several parts, where there are more than one, must be interpreted together to avoid conflicts in the natural meaning in the various parts of the written document or instrument. This rule of construction was approved by this Court in Ojokolobo & Ors. v. Alamu & anor. (1987) 3 NWLR (Pt.61) 377, (1987) 7 SCNJ. 98". [The underlining mine]

It is noted by me that in the above case, Achike, J.S.C., at page 625, had noted that in the Court of Appeal, Niki Tobi, J.C.A. (as he then was), in his Concurring Judgment, expressly stated "I shall take only two Clauses in the lease". In the instant appeal, I have referred to and reproduced the question or poser by the court below as to the "central issue" for determination as to the interpretation of only paragraph/Clause 4 of the Consent Judgment. **At page 295 of the Records, the court below concluded inter alia, as follows:**

"On the whole, I get the impression that parties in framing their terms of settlement in the manner they did had in mind a particular amount of money which was to be paid vide the next cheque to be issued to the 2nd judgment debtor by the Federal Capital Development Authority. I therefore uphold appellant's appeal on the point. [The underlining mine]

With profound humility and respect to His Lordships, this cannot be right. In fact, it is far from the truth having regard to paragraph/Clause 1 of the said Consent Judgment which pointedly and unequivocally, referred to the Agreements of the parties that it stated, are binding on them. I therefore, agree with the submission of the learned counsel for the Appellants in their Briefs that the court below ought to have taken

into consideration, other paragraphs/clauses in the Consent Judgment particularly, Clause 1 which is the Pivot so to say of the Consent Judgment before arriving at its said conclusion.

The said paragraph/Clause 1, clearly referred to the Agreements of the parties some of the relevant paragraphs/Clauses, I have also referred to in this Judgment. At no where from the affidavits in the Records, did the Appellants admit that the said sum of N71,169,943.32, does not form part of the current cheque being expected by the 2nd Respondent as per AIE No. BD/398/96. See the affidavit in support and counter-affidavit at pages 13, 53 and 91 of the Records. I note that the 1st and 2nd Respondents, never objected before Rhodes-Vivour, J., (as he then was) nor at the court below, that the said agreements, were not exhibited or given in evidence. Any such suggestion or submission in this regard, is taken by me with respect, as an after-thought made in very bad faith by the 1st and 2nd Respondents. The Agreements were not only exhibited in the said processes filed in that court, and were relied on by the learned Judge, before his said Ruling. More importantly, they are contained in the Records before the court below and in this Court.

When it is submitted at page 14 of the 1st and 2nd Respondents' Brief that,

"Clearly the Court of Appeal was right when it held that paragraph 4 of the Consent Judgment did not apply to the subsequent payment of N71,162, (sic) 943.32 such that the force of the judgment the 1st and 2nd Respondents were bound to pay the Appellants the sum of N24,909,480.11 representing 35% of further payment after the terms of the Consent Judgment had been complied with".

[The underlining mine]

I am thoroughly amazed because, I or one may ask, was the subsequent or further payment by the FCDA, made or effected, for any other contract to the 2nd Respondent in respect of any other project except that relating to the said installation of the said Traffic Lights in Abuja? Was the payment of the contract sum, not being made by instalmental payments by the FCDA to the 2nd Respondent? Yes of course and this is not denied by the 1st and 2nd Respondents. Is there any evidence by the 1st and 2nd Respondents, to

contradict the letter from the Federal Ministry of Finance Budget Office which is at page 56 of the Records and the contents of the said Payment Voucher at page 57 of the Records? In my respectful and firm view, the 1st and 2nd Respondents, did not and have not adverted their "minds" and arguments, to these pertinent questions or posers. My respectful answers to the first and third questions are in the negative. B

I am also amused by the further submission in the said Brief that the Appellants cannot rely on the contents of the two Agreements to give effect to subsequent payments which they felt they were entitled to because, according to them, at the time the Consent Judgment was entered by the learned "trial" Judge, the contents of the said Agreements were never before the court as exhibits to enable the court examine the contents and determine the periodicity of payments. With profound respect to the learned counsel and his clients, this submission is very funny to me. This is because, if the said two Agreements, were not exhibited or were not before Famakinwa, J, for examination of the contents, why and how did paragraph/ Clause 1 of the Consent Judgment, refer to the said two Agreements and state that they are only binding on the parties to the said Agreements? I or one may ask. In fact, the said Consent Judgment was entered "in favour of the Appellants (Plaintiffs) against the Defendant". In my humble view, it was because the 2nd Respondent "had always performed its obligation under the Agreement and was ready and willing to continue performing the same", (as stated in paragraph/Clause 3 of the Consent Judgment), that it did not see the reason for the Appellants, going to Court to seek for the enforcement of their entitlements under the said Agreements. It is most regrettable when it is further submitted that, D E F G
"The Clause (sic) (which Clause? It is not stated) in the two agreements cannot be of any relevance in this Court as they were not tendered in evidence in the trial Court and any reference to them or quotation therefrom is with respect an exercise in futility".

Well, if because the two Agreements were not tendered and any reference to them or quotation therefrom, amounts to an exercise in futility, again, paragraph/ Clause 1 of the Consent Judgment, unequivocally, states that they are binding on the parties to the said H

Agreements and so be it! Any wonder at page 68 of the Records, after the Ruling of Rhodes-Vivour, J., (as he then was) of 1st July, 1999, when the learned counsel for the Appellants complained to the learned Judge about the stoppage by the 3rd Respondent of the Cheque issued in favour of the Appellants, the following inter alia, appear:

"V.O. Ijomah (learned counsel for the 3rd Respondent) -we received Notice of Appeal and we were joined. We had no alternative to stop the cheque until the matter is disposed off. I will tell my principal to give the judgment creditor (i.e. the 2nd Appellant) his money. Court - You better do so quickly".

I must confess that the stance of the 1st and 2nd Respondents, is very disgusting to me to say the least. The sanctity of a contract or Agreement freely entered into, is no longer respected by them because of selfish monetary interest and love and quest for money. Afterwards, the case at the trial court, was fought on affidavit evidence where relevant documentary evidence including the said Agreements, were exhibited.

Before I am done, I am not going to bother myself in going into what a Consent Judgment is all about or its meaning. That has long been settled in a line of decided authorities. See the cases of *Ojara v. Agip Nig. Plc & Anor.* (2005) 4 NWLR (Pt.916) 515 (a), 537, 538 C.A. citing *Woluchem v. Wokoma* C1974) 3 S.C. 153 @ 166, 168; *Oshoboja v. Alhaji Amuda & 2 ors.* (1992) 6 NWLR (Pt.350) 690 @ 703; (1992) 7 SCNJ 317 and recently, in *Race Auto Supply Co. Ltd. & 3 ors. v. Alhaja Faosat Akibu* (2006) 13 NWLR (Pt.997) 333 @ 354-355. 359-360; (2006) 6 SCNJ. 98; (2006) 6 S.C. 1; (2006) 26 NSCQR 809; (2006) MJSC 190; (2006) JNSC (Pt.20) 585; (2006) 8-9 SCM 307 and (2006) All FWLR (Pt.327) 486.

In, the case of *General Accident Fire and Life Assurance Corporation, Ltd, v. Inland Revenue Commissioners* (1963) 1 All E.R. 618 at 627; (1963) 1 WLR 1207, Plowman, J. stated inter alia, as follows:

"Dealing first with the question of constructionA consent order must in my judgment, be construed in the light of any admissible evidence of surrounding circumstances, but without direct evidence of the parties' intention.....Evidence of surrounding circum-

stances, in my opinion, includes evidence as to the nature of the dispute which was compromised by the order."

[The underlining mine]

Admissible evidence in this appeal, is the said Agreements of the parties which are binding on them. In my respectful view, this is a classic case where greed and perfidy of man, are manifested in a very repulsive and often, mean manner. The 2nd Respondent although a Company and a juristic entity, was/is run by a human being. The lesson however, to humanity-men and women alike and the so-called businessmen, are firstly, that the courts, cannot permit or allow, any person, to benefit from his own wrong. Secondly, every intrigue or dishonesty by any human being, has an "invisible track, a loop-hole, weak or vulnerable spot. This is just by the way.

I am satisfied that in the hearts of hearts of whosoever signed the said Agreements as the Director of the 2nd Respondent, knows that the interpretation given by the court below, is with respect, wrong and not justified in all the circumstances of this case leading to the instant appeal. My answer therefore, to issue one of the Appellants and the lone issue of the 1st and 2nd Respondents, is rendered in the Negative.

ISSUE TWO

The 1st and 2nd Respondents, have rightly raised or given Notice of Preliminary Objection in their said Brief. I say rightly, because, a Notice of Preliminary Objection, may validly be raised to question either the competence of an appeal or an issue raised for determination by an Appellant See the cases of Ajide v. Kelani (1985) 3 NWLR (Pt.12) 248 at 257 & 258 and Salami v. Mohammed (2000) 9 NWLR 469; (2000) 6 SCNJ 281 just to mention but a few. ***However, a party filing or raising it in the Brief, must ask the Court for leave to move it before the oral hearing of the appeal commences, otherwise and this is settled, it will be deemed to have been waived and therefore, abandoned.*** See the cases of Ajibade v. Pedro (1992) 5 NWLR (Pt.241) 257 at 270 and Oforkire & anor.v. Maduiké & 5 ors. (2003) 5 NWLR (Pt.812) 160; (2003) 1 SCNJ. 440 at 448.

I note that at page 9 of the Appellants' Brief, it is stated that on 7th May, 2001, their motion for leave to appeal on law, mixed law

and facts against Mr. Kehinde Sofola SAN, was struck out by this Court for being incompetent. So be it. But more importantly, at page 6 of their Reply Brief, the said Issue two, has been abandoned by the Appellants. In the circumstance, the same is accordingly struck out.

In conclusion, this appeal as regards Issue one of the Appellants is meritorious and it succeeds. I hereby allow the appeal and set aside the decision of the court below. I hold that the Appellants are entitled to 35% (thirty-five per cent) share of the said sum of N71,169,943.32 (seventy-one million one Hundred and sixty-nine thousand, nine hundred and forty-three naira, thirty-two kobo) which must be paid to them by the 1st and 2nd Respondents forthwith.

Costs follow events. The Appellants are entitled to costs which is fixed at N10,000.00 (ten thousand naira) payable to them by the 1st and 3rd Respondents. I have no doubt in my mind that the 2nd Respondent/Judgment debtor, was in absolute contempt of the High Court by stopping the execution of that court's said order.

CROSS-APPEAL

This is an appeal by the 3rd Respondent/Cross-Appellant who was a Garnishee in the High Court and a Respondent in the court below. I note that it did not file an appeal in the court below against the said Ruling of Rhodes-Vivour J. (as he then was). I note that at page 4 No. 2 paragraph 2.01, of its Brief, it describes itself as "a nominal party", (i.e. a party in name only and not in reality as defined in the Oxford Advanced Learner's Dictionary or existing in name only as defined in Black's Law Dictionary).

However, I have already in this Judgment, reproduced the depositions of the Respondent/Cross-Appellant in paragraphs 5 to 9 in its two affidavits sworn to and relied upon by it, as reproduced in the said Ruling of the learned Judge. So, I need not go into the facts in relation to the matter before Rhodes-Vivour, J, (as he then was) leading to the said Ruling. Be that as it may, for what it is worth, I will still deal with it even briefly, even though, it is an appeal that has no proper base at the court below. I have also reproduced what transpired at the trial court after the said Ruling of the learned Judge who stated - "you better do so quickly". (i.e. to pay the Judgment creditor quickly). I have noted also that the 3rd Respondent/Cross-Appellant,

paid over to the Judgment Creditor, the said sum of N773,990.80 which sum Ezekwueche, Esqr. told the Court on the hearing date of this appeal that the said order was set aside by the court below. Since it is settled that courts must deal with relevant issue or issues validly raised by the parties, I now proceed to deal with them except that in this Court, if the determination of an issue takes care of the entire appeal, there will be no need going into other issues. See the case of Anyaduba & anor. v. Nigeria Renowed Trading Co. Ltd. (No.2) (1992) 5 NWLR (Pt.243) 535; (1992) 6 SCNJ. 204. B

The 3rd Respondent/Cross-Appellant has formulated three (3) issues for determination namely, C

"(i) Whether or not the Learned Justices of the Court of Appeal were right in completely ignoring in their judgment the Cross-Appellant's Brief of Argument (Ground 1).

(ii) If the answer to issue (1) (sic) above is in the affirmative, whether the Court of Appeal's failure to consider the said Brief of Argument did not occasion a miscarriage of justice. (Ground 2)

(iii) Whether or not the Learned Justices of the Court of Appeal were correct in failing to pronounce on the fate of the Garnisheed N773,990.80 paid over to the Appellants pursuant to the Garnishee order absolute. (Ground 3) E

On its part, the Appellants/Cross-Respondents, have formulated one (1) issue for determination, It reads -

"Whether the trial court was right in asking the Cross-Appellant to pay over to the 2nd Appellant, the sum of N773,990.80 being part of N24,909,480.11k as 35% of the Third payment of the sum of N71,169,943.32k paid by F.C.D.A. to the 2nd Respondent in respect of the Traffic Light project in Abuja as duly covered in the two agreements of 30th November, 1992 and 1st December, 1992". G

For the 1st and 2nd Respondents/Cross-Respondents, they formulated two issues for determination, namely,

"Whether the lower court was right when it ignored the arguments in the Cross Appellant's Brief when the arguments therein were based on an issue, which was not distilled or formulated from any of the Grounds in the Notice of Appeal?"

(b) Whether the failure of the lower court to consider arguments in the Cross-Appellant's Brief on an incompetent issue did oc-

casion a miscarriage of justice".

I wish to ignore with respect, the one issue of the Appellants/Cross-Respondents because and this is settled, that this Court, does not deal with and will not consider a matter from the High Court. See the cases of Hamman v. Chief Harriman (1987) 3 NWLR (Pt.60) 244 at 257; (1987) 6 SCNJ. 218; Chief Olatunde & anor .v. Abidosun & anor. (2001) 12 SCNJ. 225 at 234 and Engr. Asbi v. Chief Ogbé & 5 ors. (2004) 6NWLR (Pt.868) 78 at 143-144; (2004) 2 SCNJ. 1 at 52 just to mention but a few. The said issue is accordingly, struck out by me.

Now, on the merits of the Cross-Appeal, I have noted that the 3rd Respondent/Cross-Appellant, did not appeal to the court below, the said Ruling of the trial court. Therefore, I agree with the 1st and 2nd Respondents/Cross-Respondents in their Brief, that the instant Cross-Appeal, was initiated without proper base at the court below. It is built on an incompetent foundation. What is more, going into it, will amount to this Court, embarking on an academic exercise which it is not permitted to do as it will result to an exercise in futility. See the cases of Eperokun v. University of Lagos (1986) 4 NWLR (Pt.34) 162 at 179 C.A.; Titiloye v. Olupo (1991) 7 NWLR (Pt.205) 519 at 534; (1991) 9-10 SCNJ. 122 and Bamsboye v. University of Ilorin (1999) 10 NWLR (Pt.622) 290 at 330; (1999) 6 SCNJ. 295 and many others.

I am obliged to commend the stance and submissions of the learned counsel for the 1st and 2nd Respondents/Cross Respondents - Sofola, Esqr. (SAN) in their Brief. This is what is expected of all learned counsel who are themselves, Ministers in the temple of justice. Afterwards, it is said that justice is the most honourable gift from God/Allah to man and that they are honourable who do justice.

In conclusion, my answers to issues (i) and (iii) of the 3rd Respondent/Cross-Appellant is that the court below, was right both in completely ignoring its Brief of Argument and in rightly in my view, making no pronouncement on the said Brief. My answer therefore, to the 1st and 2nd Respondents'/Cross-Respondents' issues (a) is in the Positive or Affirmative while my answer to issue (ii) of the Cross-Appellant and issue (b) of the 1st and 2nd Respondents/Cross-Re-

spondents is in the Negative.

It need to be emphasized that this Court, will not be drawn into indulging itself into an academic exercise in futility, more especially, where the Cross-Appellant and its learned counsel, have not shown and indeed, will be unable to show, what miscarriage of justice that has been occasioned to the 3rd Respondent/Cross-Appellant by the said decision of the court below except of course, that it wants to continue trading with the Judgment creditor's said money due to him by the said Agreements of the parties thereto and which money in any case, is not its money strictly and legally speaking. This is perhaps, why the said learned counsel, urged this Court at the hearing of this appeal, to make an order for his clients to keep the money and to pay it to whoever wins in this appeal. But, if I or one may ask, will it be just and equitable to make the said order, having regard to all the circumstances of this case adumbrated by me in the main appeal? I think not. The Cross-Appeal which with respect, is time wasting and an exercise in futility, fails. It is accordingly dismissed as it is grossly misconceived. I was minded to award costs against the 3rd Respondent/Cross-Appellant, but I hereby make no Order as to costs.

ONU JSC

I had the privilege to read before now the judgment of my learned brother Ogbuagu, J.S.C just delivered. I am in entire agreement with him that the appeal as regards issue one is meritorious and it succeeds with costs of N 10,000.00 payable to them by the 1st and 3rd Respondents.

The cross appeal being misconceived is accordingly dismissed with no order as to costs.

MUSDAPHER JSC

I have had the honour to read in advance the judgment of my Lord Ogbuagu, J.S.C just delivered with which I entirely agree. His Lordship had adequately set out the facts and has discussed very comprehensively and admirably all the issues submitted for the de-

termination of the appeal and the cross-appeal.

I adopt the reasonings as mine and accordingly allow the appeal and set aside the decision of the court below and adjudge that the appellants are entitled 35% share of the sum of N 71,169,943.32 which the 1st and 2nd respondents are bound to pay.

B I also dismiss the cross-appeal as it is unmeritorious and it is grossly misconceived. I abide by the order for costs proposed in the aforesaid lead judgment.

C

MUKHTAR JSC

I have in advance the lead judgment delivered by my learned brother, Ogbuagu, JSC. I have considered the reasoning that led to the conclusion of the judgment on the appeals, and I am satisfied
D that the main appeal is meritorious and indeed deserves to succeed. I also allow the appeal and set aside the judgment of the conclusion on the cross-appeal, and abide by the consequential orders made in the lead judgment in respect of both appeals.

E

AKINTAN JSC

The dispute that led to this case arose over payment of commissions due to the appellants from the 2nd respondent company. The appellants and the 2nd respondent company had entered into
F two written agreements dated 30th November, 1992 and 1st December, 1992 respectively. The agreements were between the 2nd appellant company and the 2nd respondent company. The 1st appellant is the chairmen of the 2nd appellant's company while the 1st
G respondent, is the chairman of the 2nd respondent company.

The 2nd respondent had, by the said agreements, appointed the 2nd appellant as its "only agent in the Federal Capital Territory, Abuja for procuring contracts for the installation of traffic control lights in Abuja Nigeria." Clause 6 of the 1st agreement provides that "the
H company shall pay to the agent by way of remuneration 25% less withholding tax pro-rata of the contract price."

Clauses 1, 7 and 8 of the second agreement provide as follows:

"1 This agreement is supplemental to the agreement dated 30th November, 1992..."

7. The Company shall pay to the agent by way of remuneration 10% less withholding tax pro-rata of the contract price.

8. Payment to the agent shall be only pro-rata to the sum paid at any time for any project under this agreement." B

In each of the two agreements, provision is made therein that all disputes arising from the agreement "shall at the joint request of the parties be submitted to arbitration in accordance with the Arbitration and Conciliation Act, Cap. 19, Laws of the Federation of Nigeria 1990 or any statutory re-enactment or modification thereof." C

The 2nd respondent was awarded the Abuja traffic light project. It was for the supply and installation of traffic lights in 64 junctions in the Federal Capital Territory, Abuja. The contract sum was originally put at N176, 839,780. But this was later reviewed upward to D N505,779,424.50. The 2nd respondent made numerous payments to the 2nd appellant as commissions amounting to 35% of the sums received as provided under the agreements. Then a dispute arose between the parties as to whether the 2nd respondent was entitled to further payments by way of commissions. In their bid to compel the 2nd respondent to make further payments as provided for in the agreements, the appellants did not avail themselves of the provision relating to arbitration. Instead, they, as 1st and 2nd plaintiffs, issued a writ of summons in Lagos High Court (Suit No LD/2992/96) against the respondents as 1st and 2nd defendants on 23rd September, 1996. E
The following reliefs were sought from the court in their said action: F

"1. Specific performance of the terms and conditions by the defendants of the agreement dated 30th day of November, 1992 and the supplemental agreement dated the 1st day of December, 1992 between the plaintiffs and the defendants. G

2. An order for a clean account of contracts in respect of all the Traffic Lights contracts at phase 1 and phase 11, Abuja.

1. Payment over to the plaintiffs of all outstanding sums found due to the plaintiffs in accordance with the said agreements and interest thereon at the current Central Bank of Nigeria rate per annum until commission and remuneration due to the contract is fully paid to the plaintiffs. H

2. *An order directing the defendants to give to the plaintiffs a copy of every letter, agreement and document in relation to the contracts procured by the plaintiffs.*

3. *An injunction restraining the defendants by themselves, servants, agents, privies or any person by whatever name called from disbursing, depleting or withdrawing any sum of money already collected or to be collected by the defendants from the Federal Capital Development Authority, Abuja in respect of Abuja Traffic light Installation Project, subject matter of this action lodged in any of the bank accounts maintained or operated by the defendants without paying the commission due to the plaintiffs in accordance with the terms and conditions of the agreements between the parties dated 30th November, 1992 and 1st December, 1992 respectively."*

On 24th September, 1996, the appellants took a further step against the respondents when they sought and obtained an ex parte order of injunction against the 1st and 2nd respondents. They were restrained therein from appointing any other agent or procure contract for the installation of traffic lights in FCT contrary to the agreements between them. They were also restrained from receiving, clearing any bank cheque issued in respect of the contract executed in respect of the traffic lights; and interim injunction restraining them from disbursing, depleting or withdrawing any sum of money already collected or to be collected by the defendants pending the determination of the Motion on Notice.

When the Motion on Notice came up for hearing, the court was informed that there was a move to settle the matter out of court. The terms of settlement prepared by the parties were filed and the trial court was urged to make the terms as the judgment of the court. The court granted the request and the judgment based on the terms filed is as follows:

"1. *That the agreement dated 30th day of November, 1992 and supplemental agreement dated 1st day of December, 1992 is between plaintiffs and the 2nd defendant and are only binding on them.*

2. *That the 1st plaintiff and the 1st and 3rd defendants are not parties to this agreement referred to in (1) above and should not be parties to this agreement,*

3. *That the 2nd defendant has always performed its obligations under the agreement and sees no reason for this process.*

4. *That the 2nd defendant in accordance with the terms of the agreement shall be paid 35% share of the current cheque being expected by the 2nd Defendant as per the A.I.E (Authority to Incur Expenditure) No BD/398/1996 dated the 2nd August, 1996.* B

5. *That the above payment be made within 7 days after the crediting of the amount to the account of the 2nd defendant.*

6. *That the above is hereby made the consent judgment of this honourable court."* C

The dispute that followed after the above consent judgment is in respect of the interpretation to be given to the consent judgment, particularly its clauses 4 and 5. It was the contention of the respondents that the payment covered by the terms of the agreement was limited to the one mentioned in clause 4 of the consent judgment D which was paid to the appellants within the time specified in clause 5 of the consent judgment.

The appellants, on the other hand, held the view that the consent judgment covered all other payments received in respect of the contract. E

It may be mentioned that apart from the action instituted by the appellants, which I have discussed above, the 2nd respondent, as plaintiff, also filed an action against the 2nd appellant, as defendant, on 20th October, 1997 (Suit No ID/2613/1997). The 2nd respondent had pleaded in its statement of claim filed along with the said action in paragraphs 3 to 8 as follows: F

"6. *The plaintiff avers that based on the deceit and misrepresentation made to it by the defendant and in the belief that defendant had acted in accordance with the clause 1 of the said agreement G referred to in paragraph 3 above, began to fulfill its obligation under the said agreements by making payments which percentage was 35% of the total contract sum inclusive of commission to the defendant vide various cheque dated (2) 19th January, 1992, (2) 16th June, 1994, (2) 28th February, 1997 totaling the sum of N134,857,865.69 H which was more than what the defendant was entitled to the plaintiff shall rely on copies of cheques and bank drafts evidencing payments aforesaid at the trial of the action.*

7. *The plaintiff avers that it was consequent upon the institution of an action dated 30th March, 1997 by the defendant herein in the Ikeja High Court in Suit No ID/723/97 Tosil Holding Limited & Anor. v Austrian Scientific Technological and Contracting Company Limited and 2 ors. claiming for an order of mareva injunction on the grounds that the plaintiff has not paid the defendant its entitlements which was granted by Honourable trial judge which is still pending and has disrupted the prompt conclusion of the contract in Abuja by the plaintiff herein, the balance due to it under the agreements referred to in paragraph 3 above and based on the enquires, that it subsequently made that it became obvious vide a letter dated 22nd day of May, 1997 Ref No FCDA/DES/JPBK/47/191 from the Federal Development Authority, Abuja that the defendant never acted as its agent in the procuring of the contract to wit payments had been made to it. (The plaintiff hereby pleads the said letter). The plaintiff will rely on the court order and the motion for Mareva injunction filed by the defendant. The allegation of non-payment of commission was false.*

8. *In the premises the plaintiff has been misled into making the payments recited in paragraph 5 hereof when the defendant rendered no services in aid of securing the aforementioned contract."* The 2nd respondent then claimed as follows in paragraph 9 of the said statement of claim:

"9 Whereof the plaintiff claims from the defendant vide an order of court directing the defendant -

(a) To refund the sum of N 134,857,865.96 based on a consideration that failed, to wit, no contract was procured by the defendant as contained in clause 1 of the agreements between the parties dated 30th November and 1st December, 1992 respectively and received by deceit and misrepresentation made to it, interest on the said amount at the rate of 21% per annum from the date of the initial payment on the 19th of January, 1994 till date and thereafter at the rate of 6% per annum after judgment until liquidation."

The letter from the Federal Capital Development Authority (FCDA) with reference No FCDA/DES/JPBK/47/191, dated 22nd May, 1997 and pleaded in paragraph 7 of the statement of claim was attached to the statement of claim. The letter reads, inter alia, as

follows:

*"Federal Capital Development Authority
Abuja, Nigeria
Ref: FCDA/DES/JPBK/47/191 22nd May 1997
The Managing Director
ASTAC(Nig.)Ltd.,
41, Oduduwa Way,
Ikeja-Lagos.*

B

*Sir,
Re: Tosil Holding Limited -Trying to prevent Astac (Nig) Ltd
from traffic light completion in Abuja.*

C

*We refer to your letter Ref: M/go dated 18th March, 1997 in
which you complained that one Tosil Holding Limited is preventing
and disrupting the completion of the traffic light contract in Abuja
and that Tosil Holding Limited has proceeded to the High Court to
obtain a Mareva against Astac (Nig) Ltd. We are very disappointed
about this disruption by Tosil Holding Ltd who are not known to us at
all. However, we expect that if this company Tosil Holding Ltd. is
your agent, he should assist you to expeditiously complete the con-
tract in Abuja.*

E

*We are very much disappointed and we would like you to take all
necessary actions to prevent further disruption in the implementa-
tion of this contract. This office will not enter into any dialogue with
any person or company not directly connected to this contract.*

F

*We are rather disturbed at this unnecessary delay in completion of
this contract. We have, however, noted your determination to pro-
ceed to implement this contract despite the difficulties the said Tosil
Holding Ltd. is placing in your way.*

Yours faithfully,

G

*Engr. S. K. Danladi
Director of Engineering Services
For: Hon. Minster, FCT."*

It may also be mentioned that the position as at the time the consent judgment was filed, the parties had joined issues on whether the award of the contract by the Federal Capital Territory to the respondent was with an input from the appellant in view of the claim in the respondent's suit and the letter from the Federal Capital Territory.

H

None of the cases reached the trial stage and as such the parties did not lead any evidence at the trial court. That court, therefore, made no findings of fact on the very important question on whether the contract was awarded to the respondent as a result of the appellant's imputes made under the contracts entered into by the two parties.

B The 2nd respondent, in line with the provisions of clause 4 of the consent judgment which mentioned a specific payment voucher, maintained that since it paid the amount due to the 2nd appellant in respect of the voucher, it was no longer under any obligation to make
C any payment in respect of other receipts apart from the one specifically named in the clause 4 of the judgment.

The appellant's contention was however to the contrary. In a bid to enforce payment from the other amounts received, apart from the one mentioned in clause 4, an application for a garnishee order
D was made to the High Court. The court granted the order. An appeal to the Court of Appeal against the order of the High Court was allowed. The present appeal is from the judgment of the court below setting aside the garnishee order.

E The parties filed their briefs of argument in this court. The appellants formulated one issue in respect of this aspect of the appeal. It is as follows:

*"Whether having regards to the agreements dated 30/11/92 and 1/12/92 between the 2nd appellant and the 2nd respondent under which various payments have been made relating to the Traffic Light project and realizing that the two said agreements were the pivot in the consent judgment of 1/11/96 between the parties, the Court of Appeal was right in isolating clause 4 of the consent judgment for decision on the ground that the word "current" therein referred only to the 2nd payment embodied in the said consent judgment and that the 2nd appellant was not entitled to the payment of 35% of N71,169,943.32 being the 3rd C.V. payment for the installation of Traffic Lights at Abuja even though Parry Osayande and parry blue chips had been paid by the 2nd respondent out of the 3rd C.V.
H payment."*

The respondents also formulated a similar issue in their brief and as such I do not consider it necessary to reproduce it.

As I have stated earlier above, the dispute is in respect of the

interpretation to be given to the provisions of the consent judgment. The disagreement arose as to the interpretation of clause 4 of the consent judgment which provides:

"That the 2nd defendant in accordance with the terms of the agreement shall be paid 35% share of the current cheque being expected by the 2nd defendant as per the A.I.E. (Authority to Incur Expenditure) No BD/398/1998 dated the 2nd August 1996."
(Underlining supplied by me for emphasis)

The question is whether that clause should be interpreted to cover all outstanding cheques apart from the one specified in the clause or restricted to the particular payment specified in the clause. I have no doubt in holding that the words of the clause are clear and unambiguous. Thus, the law is settled that where the words of a statute are plain, precise and unambiguous, then it should be given the ordinary and natural meaning: See *Lawal v. G. B. Ollivant* (1972) 3 SC 124 at 137; *Aya v. Henshaw* (1972) 3 SC 87 at 95; *Queen v. Onuegbu* (1957) 3 SC NLR 130; *Toriola v. Willaims* (1982) 7 SC 27 at 46; and *Shell Petroleum Development Co. Ltd. v. Federal Board of Inland Revenue* (1996) 8 NWLT (Pt. 466) 256 at 285.

Similarly, it is a well established rule of interpretation of deeds and statutes that the expression of one thing is the exclusion of another. The principle is ably expressed in the Latin Maxim: *expressio unius est exclusio alterius* or *expressum facit cessare tacitum*. The term means that the expression of one person or thing implies the exclusion of other persons or things of the same class but which are not mentioned: See *Odgers' Construction of Deeds and Statutes*, 5th edition by G. Dworkin, 1967, pages 94 and 268; *Mills v. United Counties Bank Ltd.* (1911) 1 Ch. 699; *Maxwell on the Interpretation of Statutes*, 12th edition by Langan, page 293; *Black's Law Dictionary*, 6th edition page 581; and *Steven H. Gofis, Law Dictionary*, 1975, page 76.

Applying the law as declared above to the facts of the instant case, it is clearly stated in the clause 4 of the consent judgment that *"the 2nd defendant in accordance with the terms of the agreement shall be paid 35% share of the current cheque being expected by the 2nd defendant as per the A.I.E. No BS/398/1996 dated 2nd August 1996."* The parties have, in the said clause, clearly and unequivocally

cally specified the payment, for which the respondent was to pay the 35% to be the one covered by A.I.E No BD/398/1996 dated 2nd August, 1996. I believe that the specific mention of the cheque from which the 35% was to be paid to the 2nd appellant excludes all other payments which might be due or made to the 2nd respondent. It is therefore totally wrong and erroneous to hold that the 2nd respondent was bound, under the said clause 4 or other clauses of the consent judgment, to pay 35% of the amounts on all other cheques received apart from the one specifically mentioned in the clause 4. The above view is further strengthened by the provision of clause 5 of the consent judgment which provides:

"That the above payment be made within 7 days after crediting of the amount to the account of the 2nd defendant."

The words "above payment" used in the clause 5, no doubt, refers to the specific payment expected on the voucher specifically mentioned in the clause 4. It did not say that the payment should be in respect of "every cheque received" or "all payments made in respect of the contract." It is therefore wrong to infer that the terms of the consent judgment could be read to cover all other payments made under the two agreements. That should not be the position. But what the consent judgment covered is what was specifically stated in the clause 4 of the agreement. Any claim outside that, in my view, could be the subject of a new cause of action.

Similarly, it is wrong to hold that the terms of the consent judgment must be read strictly in line with the original agreement. Doing that would ignore the possibility of a compromise by the parties of the various stands taken before the terms of the consent judgment were drawn up. This includes on the part of the 2nd respondent, that the appellants did not have any input in the award of the contract to it and as such a claim for a refund of the sum mistakenly paid to the appellants amounting to N134,857,865.96.

Having come to the above conclusion, I hold that the proper order is to dismiss the appeal and affirm the judgment of the court below. I will also add that the entire case has brought to the open, the great scandal that has always bedevilled this nation. The contract awarded to the 2nd respondent company of which the 1st respondent, a foreigner, was the chief executive, was for the installation of

traffic light at 64 junctions in Abuja. The original cost of the job was N 176,839,780. And by the two agreements entered into by the present appellants and 1st and 2nd respondents, the appellants were to be paid 35% of the contract sum. In other words, the 2nd respondent company was expected to successfully and satisfactorily execute the contract with the balance of 65% of the original contract sum. But that was not to be so. This is because it was revised upward to a new sum of N505,779,424.50. No reason was given for the astronomical upward review. But the appellants' take home was also automatically tied to the revised contract sum of N505,779,242.50.

The 2nd respondent has disclosed in paragraph 9 of the action it filed at the High Court that it had so far paid the appellants N134,857,865.69 representing 35% of the amount then received by it out of the contract sum and in compliance with the terms of the agreement reached with the appellants. It was also not disputed that payment of the 35% of the amount on the voucher specified in clause 4 of the consent judgment was also made. The present dispute arose over what was due to the 2nd respondent out of the contract sum apart from the payment specified in the clause 4 of the consent judgment.

I believe that the entire transaction is one which the machinery of justice should not have been used to obtain redress without scrutiny. A situation where a contract of the nature disclosed above could be revised upward to such a scandalous amount and under which a group of people, as the appellants, could comfortably secure 35% of the contract sum merely for helping to procure the award of the contract and no more, calls for scrutiny and the courts, in my view, should not accept or interpret and enforce the terms of their so called contract blindly and no more. One is bound to ask if their mandate as "agent for procuring contract" included the assistance in securing the scandalous upward review of the contract sum as disclosed above.

It is generally presumed that a contract of the nature, as in the instant case, was awarded only after a bill of quantity must have been prepared. It is therefore necessary to know what type of bill of quantity was prepared and who prepared such a bill of quantity that could accommodate an upward review of a contract sum from the original

sum of N176,839,780 to N505,779,424.50 and what role, if any, was played by the appellants in securing the scandalous upward review. I believe that the above questions are some of the areas which the appropriate authorities charged with investigation of such matters should look into and see if there was a conspiracy by anybody or group of people to defraud the nation through the award of the said contract and if so, take appropriate steps to retrieve the ill that might have been committed against the nation.

I had the privilege of reading the draft of the lead judgment written by my learned brother, Ogbuagu JSC. For the reasons I have given above, I do not agree with his conclusion. I come to the conclusion that the appeal lacks merit and I accordingly dismiss it. I however, abide with the orders made in the lead judgment in respect of the cross appeal. I however make no order on costs.

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