

**SUPREME COURT OF NIGERIA**  
18TH DECEMBER, 2009 SC. 26/2002  
**CORAM: - A. I. KATSINA-ALU, M. MOHAMMED,**  
**I. F. OGBUAGU, C. M. CHUKWUMA-ENEH,**  
**M. S. MUNTAKA-COOMASSIE, JJSC**

DIAMOND BANK LTD. .... APPELLANT  
AND  
1. PARTNERSHIP INVESTMENT CO. LTD.  
2. GAMJI BANK LTD. .... RESPONDENT

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APPEALS - Issues - Nature of - Whether of law or fact - Where facts are not in dispute - But the complaint is on application of the law to undisputed facts - The ground is one of law (H1)

TORTS - Negligence - Definition - It is failure to exercise the standard of care - That a reasonably prudent person would have exercised - In a similar situation (H2)

TORTS - Negligence - Banking - Liability of appellant - Propriety of finding - In view of the evidence on record - Particularly the instructions from 1st respondent as per Exhibit C - The finding is proper as borne out from the records (H3)

JUDICIAL PRECEDENTS - Distinguishing - Bank draft - Made subject to confirmation - Propriety - As bank manager gave an implied undertaking - To comply to PW1's instruction - The facts of UBA Ltd V. Ibhafidon is not applicable to this case (H4)

JUDGMENTS - Monetary judgments - Award of interest unclaimed - Propriety - The general rule is that monetary judgments attracts appropriate interest - Even where none is claimed (H5)

**FACTS**

The 1st respondent, a customer of appellant, as plaintiff, sued appellant and 2nd respondent as 1st and 2nd defendants respectively. The claim of 1st respondent was for two sums of money representing the values of two bank drafts he raised on appellant in

favour of two companies respectively. 1st respondent also claimed interest on the sum at 21% per annum till judgment date as well as general damages. The facts, which are largely undisputed is that after 1st respondent had raised the two drafts he orally instructed the manager of the branch of appellant where they were raised that they should not be paid without reverting back to him for confirmation. The manager told him to put the instruction in writing which he did. Yet both drafts were eventually paid by appellant without getting any confirmation from 1st respondent. 2nd respondent was the collecting bank through which payments were affected to the beneficiaries of the drafts.

The case of appellant was that the nature of bank drafts was that they must be honoured on presentation further that as drafts are drawn on a bank's account, the customer on whose instruction they are raised, such as 1st respondent, is not in a position to give further instructions regarding the payment once they are raised. After hearing, trial court gave judgment to 1st respondent as prayed against appellant but refused the claim for general damages. Aggrieved, appellant appealed to Court of Appeal which dismissed the appeal. This is a further and final appeal by appellant to Supreme Court.

### **ISSUES FOR DETERMINATION**

*“(i) Whether the Court, of Appeal was right, in finding that the 1<sup>st</sup> Respondent had validly pleaded negligence?”*

*“(ii) Whether the Appellant owed the 1st Respondent a duty of care in respect of the 2 bank drafts.*

*“(iii) Whether there was sufficient pleadings and proof of interest rate awarded in favour of the 1st Respondent”.*

### **HELD (Unanimously dismissing the appeal per **OGBUAGU JSC**)** **APPEALS - Issues - Nature of**

1. In my respectful view, this is a straight forward case in which the facts are clear and undisputed. I will prefer with respect, going straight to the merits of the case. I commend the industry of the learned counsel for the 1<sup>st</sup> Respondent in respect of the Preliminary Objection. But considering objectively the grounds of appeal and the particulars, I hold with respect, that all the grounds, are all grounds of law and no leave is required by the Appellant from this Court. It is settled that where facts are not in dispute and the only complaint, is

as to the way and manner the lower court has applied the law to those established undisputed facts, (as appears in the instant appeal), the ground of appeal, is one of law. (p. 2231 C)

***TORTS - Negligence - Definition***

2. What is Negligence? In Black's Law Dictionary, 8<sup>th</sup> Edition at pages 1062 to 1063, twenty eight (28) types or categories of negligence, are stated therein. At page 1061 thereof, negligence is generally defined as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or wilfully disregarding of others' rights. (p. 2231 H)

***TORTS - Negligence - Liability of appellant***

3. In the instant case leading to this appeal, the Appellant, does not dispute the fact that it received Exhibit "C" giving it instructions not to pay without a confirmation and clearance from the 1st Respondent.

As stated by the court below, the learned trial judge;

*"graphically referred to and utilized the testimonies of these vital witnesses in his judgment and after evaluation of the totality of the evidence adduced before him concluded that the Appellant was negligent".*

I cannot agree more. The above is borne out from the Records especially at pages 101 to 103 of the Records. See also pages 272 to 274 of the Records. I cannot, with the greatest respect, fault those findings of facts of the learned trial Judge. (pp. 2232 F/ 2233 B)

***JUDICIAL PRECEDENTS - Distinguishing - Bank draft***

4. It is clear to me that if there is a law, practice or Bank rule that a customer cannot and has no power to give such instruction, the said Manager, could have refused the oral request of the PW1, but rather, he asked him to put it in writing, which was an implied assurance or undertaking that he would comply with the said instruction. At no time did he inform the PW1 that the Bank or himself, has a duty to give value to the drafts when presented for payment by the beneficiaries. I therefore, hold that the facts and circumstances in the case

of *UBA Ltd v. Ibhafidon (supra)* is not applicable in the instant case. It is cited and relied on with respect, out of context. I so hold.  
(p. 2238 A)

***Monetary judgments - Award of interest unclaimed***

B 5. I am also aware that the general rule, is that monetary judgment, attracts-appropriate interest even where none is claimed.

In my respectful and firm view, the 1<sup>st</sup> Respondent claimed interest. The stance of the Appellant in this matter, is unfortunate especially where its defence to the action, is made in very bad faith. I am even of the view that the 1<sup>st</sup> Respondent, was entitled to exemplary damages in all the circumstances of this case as the two lower courts in their respective judgment, demonstrated. However, the learned trial judge refused the claim for damages. However, in view of the Provisions of the said Order 39 Rule. 7 of the High Court Rules (*supra*), I am, very reluctantly, reducing the interest payable to the 1<sup>st</sup> Respondent to 10% (ten percent] payable to it by the Appellant from the 12<sup>th</sup> of April, 2000 until the entire Judgment debt, is liquidated. (pp. 2239 H/ 2240 A)

***NOTABLE POINTS OF INTEREST***

**OGBUAGU JSC**

1. *Counsel should not cite judgment not read by him*

F It is important and it is also advisable that learned counsel appearing in this Court in particular or in any other court for that matter, should not rely heavily on the ratios of the Editor, without reading the entirety of a judgment. Failure to do so, invariably, results in learned counsel often, citing a decided authority out of context. (p. 2238 C)

**CHUKWUMA-ENEH JSC**

2. *It is wrong to treat bank draft like ordinary cheque*

H It is not right to treat “bank draft” and ordinary “cheque” as interchangeable terms as the two instruments connote different legal instruments with differing implications. Even the definitions of these two instruments clearly attest to their inherent differences. A bank draft according to Advanced Law Lexicon 3<sup>rd</sup> edition Book 1 page 462 has been defined as, “a cheque drawn on a bank by itself. A banker’s *draft must be honoured because it is drawn on the bank*

*itself rather than on the debtor's account. The debtor must pay the bank the sum drawn in advance."*

An ordinary Cheque on the other hand, is defined in Section 73 of Part III of the Bills of Exchange Act Cap.B8 Laws of the Federation of Nigeria 2004. Section 73 provides as follows:

*"A Cheque is a bill of exchange drawn on a banker payable on demand and except as otherwise Provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."* (p. 2242 F) B

### *3. A bank draft may be countermanded* C

It would appear from the above cited case of Idigbe J (as he then was) that with regard to the two instruments that paying out their proceeds is made pursuant to a debtor/customer relationship.

Guided, as it were, by the principles as expounded in the above authorities, I think it would be wrong to contend that bank drafts has peculiar implication as such, and as not being subject to or amenable to be countermanded as in the case of ordinary bank cheques. Clearly recent judicial thinking does not seem to support that proposition as the cases I have examined here show. (p. 2244 C) D E

### *4. Onus is on banker to prove absence of negligence*

It is settled law that for a banker in order to exonerate itself from liability arising out of being negligent in dealing with cases of conversion of the proceeds of "bank drafts" the banker must bring the instruments within the provisions of Section 2 (1 ) of the Bills of exchange Act. It must also bring itself within the provisions of Section 82 of the Bills of Exchange Act in order to be protected under the Act that is, by bringing itself within the statutory exception. Based on the above premises, the onus of proving that transacting payments of the drafts is "without negligence" is on the part of the appellant as clearly provided in Section 82 of the Bills of exchange Act. (p. 2244 E) F G

### *5. Entitlement to interest must be pleaded and proved* H

On the issue claim of interest at 21% I agree with the appellant that the 1st respondent not having pleaded fully by particularizing that head of its claim, is made worse by the relief not being supported by

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evidence at trial as contemplated in the well settled principle as set out in the case of *Ekwunife v. Wayne (W/A) Ltd (1989) 5 NWLR (pt.122) 422* that is on the entitlement to interests in cases of this nature.

This aspect of the claim not having been pleaded and proved  
B is hereby dismissed. (pp. 2246 C /2247 D)

**REPRESENTATION**

Olumide Aju for the Appellant/Applicant

C Funke Agbor (Mrs.) with Dayo Ayoola-Johnson for the 1st Respondent.

**CASES REFERRED TO**

- Nwadike & 2 ors. V. Ibekwe & 2 ors. (1987) 4 NWLR (pt. 67) 718  
D Osasona v. Oba A. Ajayi & 3 ors. (2004) 5 SCNJ. 82  
Koya v. United Bank for Africa Ltd. (1997) 4 NWLR (pt.481) 251  
Metal Construction (W. A.) Ltd, v. Migliore & ors. (1990) 1 NWLR (Pt. 126) 299  
Alhaji Kalla v. Jarmakani Transport Ltd (1961) ANLR 778 @ 785  
E Aku Nmecha Transport Service (Nig.) Ltd. & anor v. Atuloye (1993) 6 NWLR (Pt.298) 233 @ 248 C.A.  
Koya v. United Bank For Africa Ltd. (1997) 1 NWLR (Pt. 481) 251 @ 291 (1997) 1 SCNJ 41 @ 42  
U.B.N Ltd. v. Nwoye (1996) 3 NWLR ( Pt. 435) 137  
F United Bank of Africa Ltd. v. Julius A. Ibhafidon (1994) 1 NWLR (Pt. 318) 90 C.A  
Augustine F. I. Ibama v. Shell Petroleum Development Co. of Nigeria Ltd. (1998) 3 NWLR (Pt.542) 493 @ 500 C.A  
G Bavery Contract and trading Co. (Southern) Ltd (1959) 2 W.L.R. 568  
Beblor v. Ligouri (1950) 2 AER 733  
R v. Davenport (1954) 38 CAR 37 at 41.  
Hannan's Lake View Central Ltd Armstrong & co. (1900) 16 TLR  
H 236  
Agbonmagbe Bank Ltd v CFAO Ltd (1967) NMLR 173  
Ekwunife v. Wayne (W/A) Ltd (1989) 5 NWLR (pt.122) 422

**STATUTE & RULES REFERRED TO**

High Court Laws of Lagos State, s. 12

High Court of Lagos (Civil Procedure) Rules, 2004, 0.39 r. 7

**BOOK REFERRED TO**

Black's Law Dictionary 8th Edition, pages 1062 to 1063

B

**LEAD JUDGMENT BY OGBUAGU JSC**

This is an appeal against the decision of the Court of Appeal, Lagos Division (hereinafter called "the court below") delivered on the 19<sup>th</sup> December, 2002 dismissing the appeal of the Appellant to it and affirming the judgment of the trial High Court - per Rhodes-Vivour, J. (as he then was) delivered on 12th April, 2000. C

Dissatisfied with the said decision, the Appellant has further appealed to this Court. It filed two separate Notices and Grounds of Appeal, firstly, on 20th December, 2002 with two Grounds of Appeal and the second one on 8th January, 2003 with three Grounds of Appeal and which without their particulars, read as follows:

**"GROUND 1**

*The learned Appellate Judges (sic) erred in law and thereby came to a wrong decision when they held at page 12 of the judgment that:* E

*"It has been shown that Appellant owed the 1st Respondent a duty of care, it has been shown that Appellant has breached this duty. Damage as a result of the breach had equally been proved. Appellant should not have paid the 2 cheques without the prior confirmation in writing of the 1st Respondent."* F

**GROUND 2**

*The Court of Appeal erred in law in upholding the judgment of the trial court on the award of interest when it held at page 13 of the judgment that:* G

*"the writ contains principal sum find the rate of interest for which recovery the (sic) action was commenced. Thus the fact as contained in the writ had become statement in the claim "* H

**GROUND 3**

*The learned Court of Appeal erred in law in holding that the Appellant was negligent".*

The facts of the case briefly Stated are that the "1st Respon-

dent, was a Customer of the Appellant and maintained a Current Account with its Marina Branch, Lagos. On 28 December, 1994, the 1st Respondent requested the Appellant, to issue two (2) separate bank cheques otherwise called “Manager’s Cheques” one in the sum of N11, 000,000.00 (Eleven Million Naira) in favour of Eko Fisheries Ltd. and the other, in the sum of N6, 250,000.00 (six Million Two Hundred and Fifty Thousand Naira) in favour of first Yield Investment Ltd. The said cheques, were subsequently, delivered to the Beneficiaries. The Managing Director of the 1<sup>st</sup> Respondent (PW1), orally, requested the Manager of the Appellant -(DW3), not to pay the two cheques without a confirmation and clearance from the Respondent. The said Manager, demanded that the request, be reduced in writing and this was done vide its letter dated 29th December, 1994 - (Exhibit C). However, when the cheques were presented for payment by the said Beneficiaries, the-Appellant paid the two cheques through the 2nd Respondent in spite of or contrary to the said instructions in Exhibit C. The case of the Appellant or contention is that the cheques being Certified Bank Drafts were honoured on presentation. The Appellant pleaded that the value of the cheques, was on purchase, debited against the Buyers’ Account thus making the Appellant, the Drawer of the cheques. Therefore, the 1st Respondent was not in a position to give further instructions regarding the payment. In other words, the Appellant alleged that being Bank Drafts, the 1<sup>st</sup> Respondent cannot or could not and had no power, to countermand on them or to request the Appellant, to confirm the drafts before payment is/was made against them.

I note that the 2<sup>nd</sup> Respondent’s case was that if properly discharged its duly as “Collecting Bank”. By a Writ of Summons, the Respondent claimed against the Appellant and the 2nd Respondent jointly and severally as follows:

*“1. The sum of #6,250,000.00 (Six million, two hundred and fifty thousand naira) being money received by the Defendants in negligently cashing the bank Draft made out by the 1<sup>st</sup> Defendant for the Plaintiff.*

*2. The sum of #11,000,000.00 (Eleven Million Naira) against the Defendant only being money negligently paid by it despite the Plaintiff’s subsisting countermand and direct instructions not to pay until confirmation is given by the Plaintiff.*

3. *Interest from the 29th day of December 1994 at the rate of 21% per annum until date of judgment, and at the rate of 6% per annum till final liquidation.*

4. *Sum of #2,000,000.00 (Two Million Naira) being general damages following (sic) from the said negligently paid and cashed cheque by the Defendant”.* B

Pleadings were filed and exchanged by the parties. After the hearing, the learned trial Judge, found in favour of the 1st Respondent and entered judgment accordingly. His Lordship, however, refused the claim for general damages and dismissed the case against the 2nd Respondent. Aggrieved by the said judgment, the Appellant unsuccessfully, appealed to the court below which dismissed the appeal, hence this instant appeal. C

The Appellant has formulated three (3) issues for determination, namely; D

“(i) *Whether the Court, of Appeal was right, in finding that the 1<sup>st</sup> Respondent had validly pleaded negligence?*

(ii) *Whether the Appellant owed the 1st Respondent a duty of care in respect of the 2 bank drafts.*

(iii) *Whether there was sufficient pleadings and proof of interest rate awarded in favour of the 1st Respondent”.* E

I note that the 1st Respondent, gave Notice of Objection attacking the said Grounds of Appeal in its Brief of Argument which it argued in paragraphs 3.1 to 3.15 thereof. It however, stated in paragraph 3. 16 (ibid) that in the unlikely event the Court finds that one of the said grounds, is a ground of law which could sustain the appeal, that the Court, on the authority of Nwadike & 2 ors. V. Ibekwe & 2 ors. (1987) 4 NWLR (pt. 67) 718 @ 732 (it is also reported in (1987) 12 S.C. 14) - per Agbaje, JSC, should strike out other of-fending grounds together with any issues distilled therefrom. F G

It however, thereafter, formulated two (2) issues for determination, which read as follows:

“4.2.1 *Whether in the circumstances of this case, the Court, of Appeal was right in finding that the Appellant was liable in negligence.* H

4.2.2. *Whether the pleadings and evidence led thereon was sufficient to sustain the award of interest, in favour of the Respondent”.*

It had stated that grounds 1 and 3 of the Grounds of Appeal, could be subsumed under one (i) issue in order, according to it, to avoid proliferation of issues.

I note that the Appellant, filed a Reply Brief and when this appeal came up for hearing on 12th October, 2009, Ajax, Esqr. -  
 B learned counsel for the Appellant, adopted their two Briefs. He urged the Court to allow the appeal after stating that the two lower courts below, treated the two instruments, as normal cheques instead of treating them as Bank drafts.

C Agbor (Mrs.) - leading counsel for the 1st Respondent, adopted their Brief and told the Court that they raised a Preliminary Objection in paragraph 3 of their Brief. He/she urged the Court to dismiss the appeal either on the Objection or on the merits. He/she debunked the assertion of his/her learned friend for the Appellant and stated  
 D that it is not true that the two lower courts, treated the instruments as normal cheques instead of bank drafts as also argued in their Brief. Thereafter Judgment was reserved till to-day.

I note that the Appellant, in its Brief of Argument in paragraph 2.8 stated that the Appellant,  
 E *“filed two Notices of Appeal respectively dated 20th December, 2002 and 8th January, 2003 against the judgment, of the Court, of Appeal. This is a further Appeal to the Supreme Court against the judgment of the Lower Court”*

F From paragraph 2.02 of its Reply Brief, it appears to me that it relies on the later Notice of Appeal filed on 8<sup>th</sup> January, 2003. I note that the Brief of the 1<sup>st</sup> Respondent, is predicated on the said Notice of Appeal. So be it. The 1<sup>st</sup> Respondent contend or submit that all  
 G the three grounds in the said Notice, are grounds other than grounds of pure law requiring that leave of the Court should have been obtained before they could be validly filed and argued. It therefore, prays and urges the Court to strike out all the grounds of appeal.

I note that the Appellant in all the grounds of appeal stated the particulars of error in law. It is now settled that particulars of error  
 H alleged in a ground of appeal, are intended to highlight the complaint against the judgment on appeal. They are the specification of the error or misdirection in order to make it clear, how the complaint, is going to be canvassed in an attempt to demonstrate, the flow in a relevant aspect of the judgment. See the case of Osasona v.

Oba A. Ajayi & 3 ors. (2004) 5 SCNJ. 82 - per Uwaifo, JSC.

Generally, where error of law or misdirection is made in a ground of appeal, the particulars of error of law or misdirection, must be given. There is nothing wrong in including the particular of the error in the error itself. This will accord with justice, by allowing the appeal to be determined on its merit. See the case of *Koya v. United Bank for Africa Ltd. (1997) 4 NWLR (pt.481) 251 @ 274; (1997) 1 SCNJ 1*. Afterwards, it is said that the whole purpose of grounds of appeal, is to give to the other side, notice of the case it has to meet in the Appellate Court. The 1<sup>st</sup> Respondent, has not stated that it is unable to understand or appreciate what the complaint of the Appellant is all about. It never asked for further and better particulars. **In my respectful view, this is a straight forward case in which the facts are clear and undisputed. I will prefer with respect, going straight to the merits of the case. I commend the industry of the learned counsel for the 1<sup>st</sup> Respondent in respect of the Preliminary Objection. But considering objectively the grounds of appeal and the particulars, I hold with respect, that all the grounds, are all grounds of law and no leave is required by the Appellant from this Court. It is settled that where facts are not in dispute and the only complaint, is as to the way and manner the lower court has applied the law to those established undisputed facts, (as appears in the instant appeal), the ground of appeal, is one of law.** See the case of *Metal Construction (W. A.) Ltd, v. Migliore & ors. (1990) 1 NWLR (Pt. 126) 299* referred to in the Appellant's Reply Brief, (it is also reported in *(1990) 2 SCNJ. 20 as Megliore & ors. V. Mental Construction (West Africa) Ltd In Re Miss C Ogundare*).

Now to the issues of the parties. I will take Issues (i) and (ii) of the Appellant and Issue 4.2.1 of the Respondent more so, as the 1<sup>st</sup> Respondent, has conceded that Grounds 1 and 3 from which the issues are distilled, could be subsumed under issue 1 of the Appellant.

***What is Negligence? In Black's Law Dictionary, 8<sup>th</sup> Edition at pages 1062 to 1063, twenty eight (28) types or categories of negligence, are stated therein. At page 1061 thereof, negligence is generally defined as the failure to exercise the standard of care that a reasonably prudent person***

**would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or wilfully disregards of others' rights.**

B It is settled that negligence, is a question of fact and not of law. So, each case must be decided in the light of the facts pleaded and proved. No one case, is exactly like another. See the case of *Alhaji Kalla v. Jarmakani Transport Ltd (1961) ANLR 778 @ 785* referring to the English cases of *Baker v. Longhurst (E) & Sons Ltd. (1933) 2 K. B. 461; 102 L.J. 573; 149 L.T. 264; (1932) All E. R. Rep. 102 and Tart v. Chitty (G.W) & Co. Ltd. K. (1933) 2 K.B. 465; 102 L. J. K. B. 568; 149 L.T. 261; (1931) All E.R. Rep. 826.*

D I am aware and this is also settled in a number of decided cases by this Court that a Plaintiff, as a matter of law, is required, in an action on negligence, to state or give particulars of negligence alleged and to recover on the negligence pleaded in those particulars. It is not sufficient for a plaintiff to make a blanket allegation of negligence against a defendant on a claim of negligence without giving full particulars of the items of negligence relied on as well as the duty of care owed to him by the defendant. See the cases of *Aku Nmecha Transport Service (Nig.) Ltd. & anor v. Atuloye (1993) 6 NWLR (Pt.298) 233 @ 248 C.A. ; Koya v. United Bank For Africa Ltd. (1997) 1 NWLR (Pt. 481) 251 @ 291 (1997) 1 SCNJ 41 @ 42 - per Iguh, J.S.C., citing the case of Umudje v. Shell - BP Petroleum Development Co. of Nig. Ltd. (1975) 9 -11 S. C. 155 @ 166 – 167 and Seismograph Service Nig. Ltd. v. Mark (1993) 7 NWLR (Pt. 304) 204 C. A. Cited in the Parties' Briefs.*

G **In the instant case leading to this appeal, the Appellant, does not dispute the fact that it received Exhibit “C” giving it instructions not to pay without a confirmation and clearance from the 1st Respondent.** I note that the DW3 - the said Branch Manager, swore and testified from page 66 of the Records. Under H cross-examination, he testified inter alia, as follows:

*“We drew the cheque, on instruction of the Plaintiff. It was the plaintiff's money. Plaintiff was our customer we owe him obligation to protect his interest and funds. He can only deal with us by giving us instruction. Before this incident MD of Partnership -..... (mean-*

ing the 1<sup>st</sup> Respondent) had dealt with me for 2 - 3 years and has built a good customer Banker relationship. I would not like to see him loose (sic) his funds. I am to ensure he does not loose his funds (sic) (meaning I am to ensure he does not loose his funds) ..... are dated 28/12/94 (i.e. the Cheques). The letter asking me not to pay is dated 29/1/94. I had not paid out the funds by 29/12/94". B  
(the underlining mine]

**As stated by the court below, the learned trial judge;**  
***“graphically referred to and utilized the testimonies of these vital witnesses in his judgment and after evaluation of the totality of the evidence adduced before him concluded that the Appellant was negligent”.*** C

**I cannot agree more. The above is borne out from the Records especially at pages 101 to 103 of the Records. See also pages 272 to 274 of the Records. I cannot, with the greatest respect, fault those findings of facts of the learned trial Judge** who even referred to the decision of this Court in the case of U.B.N Ltd. v. Nwoye (1996) 3 NWLR ( Pt. 435) 137 it is also reported in (1996) 2.SCNJ. 222 where the following appear inter alia: D E

*“the amount in the draft cheque even if credited of a customers account is not equivalent to cash lodgement. The customer has to wait until after the cheque has been cleared before it could be regarded as cash “.*

It is noted by me early in this Judgment that the Appellant, regarded itself as the Purchaser of the draft cheque. His Lordship held that the customary period for clearing must also be observed for drafts. As a matter of fact, as noted by the learned trial Judge; F

*“DW4 - the Deputy Manager in Banking Operations of the 2<sup>nd</sup> Respondent, testified that if she got similar instructions as that in Exhibit “C”, she would confirm from the customer before she pays. She said:-*

*‘I am duty bound to confirm from the customer’”.*

The learned trial judge held inter alia, at pages 101 and 102, H as follows:

*“Since D.W.3 knew the legal consequences of a draft he ought not to have advised P.W.I to put such a request in writing. For what purpose may I ask. By the Bank Manager telling P.W.1 to put it in*

*wilting it is implied that he undertaking that he would not pay until P.W.I: authorises him to pay. He has put on an added duty of care which is against the norm”.*

He reproduced the said evidence of the DW3 also reproduced by the-court below and myself above found as a fact-and held as follows:

“Examining D.W.1’s evidence it becomes clear to me that there was an unusual rush pay the cheques Exhibit A and B and the customary 5 days or even 4 days for clearing was not observed ... in the case of Inhibit A (sic)”. (the underlining mine.) I agree.

His Lordship, referred to part of the evidence of the DW3 where he stated that he did not accede to the said request of the 1<sup>st</sup> Respondent and had the following to say, inter alia:-

“So what did he do. He chose to ignore it. In Negligence as it relates to banks, the circumstances must be such that it would be prudent for the bank having been put on Notice to take certain steps before paying the cheque and If such steps are not taken or in a satisfactory manner short of negligence will arise.”

A prudent banker would never ignore Exhibit C. Negligence implies want of care, as would be expected for reasonable man (sic) to exercise in the circumstances. The issue of countermand does not arise in this case. This is case (sic) where clear instructions are given to a Bank Manager on how the customer expects his draft to be handled. The Branch Manager says he received the instruction before action on the drafts. Prudence demands that he ought to have told the customer that a Draft once issued can no longer be recalled. Rather he kept silent, surely the customer is very much in order to belief (sic) that his instructions would be carried out...

The plaintiff pleaded that he gave similar instructions to credit Bank and the Bank obeyed his instructions. They did not pay the cheque. Surely it cannot be said that the 1st defendant (i.e. the Appellant) acted bona-fide and without negligence.

I entirely agree just as the court below agreed. See also the succinct observation Ayoola JSC in the case of *Mr. Agbanelo v. Union Bank of Nigeria Ltd. (2000) 7 NWLR (Pt. 666) 534 @ 550* (it is also reported in *(2000) 4 SCNJ 353*) also reproduced in the 1<sup>st</sup> Respondent’s Brief as to the principle of law that a Bank has a duty to exercise reasonable care and skill in carrying out its customer’s in-

structions. That this duty, extends over the whole range of banking business within the contract with the customer.

Before concluding the issues, I note that a lot of fuss or heavy weather has been made by the Appellant in its Brief and by its learned leading counsel even at the hearing of the appeal as to the decision in the case of United Bank of Africa Ltd. v. Julius A. Ibhafor (1994) 1 NWLR (Pt. 318) 90 C.A. to the effect that a Bank Draft, is payable at sight and therefore, cannot be countermanded. That no duty of care can exist when the drafts were not capable of being countermanded. B

Firstly, apart from the above case/decision of the Court of Appeal not being binding on this Court, the facts in the case, are not in all fours with the facts and circumstances of the case leading to the instant appeal. The facts in that case, are distinguishable from those in the instant appeal, For the avoidance of doubt and for the records, I will state the facts as appears in the Report. C

*“One Mr. Ehinola who was introduced to the respondent in this appeal claimed to have a large sum of money in dollars, in his domiciliary accounts with the appellant herein. He offered to sell to the respondent at the rate of N4 to one US dollar. The respondent was not willing to take advantage of the offer unless he was able to confirm the claim of Mr. Ehinola to ascertain the liquidity position of the account. Mr. Ehinola and the respondent together went to the appellant’s central branch office in Lagos where the said Mr. Ehinola applied to withdraw the sum of \$33,643.00 from his account The Bank official told them to come back the following day. On getting there the following day the respondent was informed by the Bank official that he could proceed with the foreign exchange, transaction as Mr. Ehinola has/had sufficient funds to accommodate the amount applied for by Mr. Ehinola.”* D E F

*The respondent claimed he handed over N134,572.00, the naira equivalent of US\$33,643.00 to Mr. Ehinola in the presence of the Bank official concerned and that thereafter the appellant, through one of its official drew up a Sank Draft No. 031069 for US\$33,643.00 in his (respondent’s) favour and handed it over to him (respondent). The respondent went with the draft to the appellant’s branch in Benin and was informed that he will be able to encash the sum on the draft. He was advised to open an account with the draft which advise the respondent complied with on 18/11/86 and he was allocated with an* G H

*Account No, FCA/0003 with a teller with which he paid the draft into his account with the Bank. The respondent was asked to call back at the Bank after 21 days to collect the proceeds of the draft. At the expiration of the 21 days, the respondent was not given any money but was informed that nothing had been heard from the*  
 B *appellant's head office in Lagos.*

*The appellant Bank later wrote a letter to the respondent repudiating any payment on the draft. The respondent as plaintiff therefore commenced this action and claimed in his Writ of Summon the*  
 C *sum of US\$33,613.00 interest at 15% on the said sum.*

*The case for the appellant was that the domiciliary account of Mr. Ehinola's was funded from a forged cheque. It is also contended that the respondent is not entitled to recover the proceeds the draft (sic) as the transaction or arrangement he made with Mr. Ehinola is*  
 D *illegal being in contravention of the Foreign Currency (Domiciliary Accounts) decrees No. 18 of 1986 which forbids transactions in foreign exchange other than with an authorised dealer which the appellant claimed Mr. Ehinola was.*

*The defendant, not satisfied with the judgment of the trial court*  
 E *appealed to the Court of Appeal.*

*The following statutory provisions were considered in the determination of the Appeal-Sections 1(1), (2), (3), 2(1), 3(1), (2) (3) (4) (5) (6) (7) (8) and 6 (1) of the Foreign Currency (domiciliary*  
 F *Accounts) Act Cap. 151 Laws of the Federation of Nigeria 1990".*

*As a matter of fact, the issues are also not the same. Again, for the avoidance of doubt, I will reproduce the said issues. They read as follows:*

*"1. Whether the transaction between Mr. Ehinola who is a*  
 G *customer of the appellant Bank which rise to the issuance of the Bank Draft by the appellant Bank to the respondent was illegal under the Foreign Currency (Domiciliary Accounts) Decree No. 8 of 1986*

*2. Whether the alleged subsequent discovery of forgery in the New York City Bank Account of B. J Ehinola was proved before*  
 H *the trial court and if proved whether such a forgery justified the appellant's subsequent dishonour of its own verified and certified flunk Draft.*

*3. Whether the learned trial Judge was right in awarding to the respondent by way of damages the face value of the Bank Draft in*

*US Dollars or foreign Currency and whether he was right to have awarded Post-Judgment interest too”.*

The Court of Appeal - per Ejjiunmi, JCA (as he than was) held that the said Bank had a duty to have honoured its draft-already issued to that plaintiff/respondent and then proceed against the drawer to recover its money which could be done by simply debiting the drawer's account if it had not already done so and then, call on him to come and credit his account with more funds. In the instant case, in my respectful view, if the Appellant had obeyed the instructions of the 1<sup>st</sup> Respondent, those who should have complained or have a cause of action against the Appellant, should have been both or one of the beneficiaries of the said drafts, in that case, the Appellant could have applied to join the 1<sup>st</sup> Respondent or the 1<sup>st</sup> Respondent could have applied to be joined in any such suit if and where the said beneficiaries or any one of them, did not sue the 1<sup>st</sup> Respondent for breach or seek specific performance.

In other words, it was held inter alia, that;

*“It is common knowledge, that while a Banker may refuse to honour an ordinary cheque on the ground that the drawer has no money in his account to cover the amount in the cheque, a Bank Draft on the other hand is payable at sight regardless of Whether the person on whose behalf the draft was issued had money in his account at the material time or not.”*  
*[the underlining mine]*

The above is clear and unambiguous. The scenario, facts and/or circumstances, are distinguishable from the instant case. Although I hold that the trial court, was in error when it stated at page 128 of the records that “This is a case where before drafts were issued instructions were given to the 1st defendant....”, I have noted in this Judgment that it is not in dispute that it was on the 28th December, 1994, that the drafts were issued, while the instruction was given on the 29th December, 1991. There is also evidence that the Appellant was still in possession of the drafts when he received the instructions and had not yet paid to the beneficiaries. It is well established that mistake or error in a Judgment is immaterial. In other words, that it is not every mistake or error of a trial judge, that will vitiate the entire Judgment more so, if there are other evidence to support his said Judgment. See the cases of *Ukejianya v. Uchendu (1950) 13 WACA*

2238 Diamond Bank v. Partnership Inv. Co. (2009) 12 KLR Ogbuagu JSC  
45 @ 46; Onajobi v. Olanipekun (1985) 4 S. C. (pt. 2) 156 @ 163  
and many others.

***It is clear to me that if there is a law, practice or Bank rule that a customer cannot and has no power to give such instruction, the said Manager, could have refused the oral request of the PW1, but rather, he asked him to put it in writing, which was an implied assurance or undertaking that he would comply with the said instruction. At no time did he inform the PW1 that the Bank or himself, has a duty to give value to the drafts when presented for payment by the beneficiaries. I therefore, hold that the facts and circumstances in the case of UBA Ltd v. Ibhafidon (supra) is not applicable in the instant case. It is cited and relied on with respect, out of context. I so hold.*** Afterwards, the Latin maxim is “UBI JUS IBI REMEDIUM”

This is why it is important and it is also advisable that learned counsel appearing in this Court in particular or in any other court for that matter, should not rely heavily on the ratios of the Editor, without reading the entirety of a judgment. Failure to do so, invariably, results in learned counsel often, citing a decided authority out of context. The duty of a Banker as admitted by the DW3, is to protect the interest of his customer and protect his money.

I have deliberately gone this far, because, as noted by me earlier in this Judgment, each case, has to be decided on its own peculiar or particular facts and circumstances. In my respectful view, where a person has acted in good faith and another is damnified by such an act, I believe that the words “I am sorry” are a “balm” that can heal all wounds. But where one persists in justifying such a wrongful act as has happened, in this case leading to this appeal by the Appellant, a court of justice including this Court, must see and allow justice to prevail even if the heavens fall although it will not fall. The court below, refused to disturb the findings of fact of the learned trial judge. In the circumstances, it was justified to do so. I affirm the said decision. What emerges, is that there are concurrent findings of facts or Judgments by the two lower courts”. This Court, will not interfere. My answers therefore, to Issues (i) and (ii) of the Appellant and Issue 4.2.1 of the 1<sup>st</sup> Respondent, are in the Affirmative/Positive.

In respect of Issue (iii) of the Appellant and Issue 4.2.2 of the

1<sup>st</sup> Respondent, the general rule at Common Law, is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. See London Chattam and Dover Railway v. South Eastern Railway (1893) A. C 249. Thus, interest will however, be payable where there is an express agreement to that effect and such an agreement, maybe inferred from a course of dealing between the parties. See Re-Duncan and Co. (1905) 1 Ch. 307 or where an obligation to pay interest arises from the common or usage of a particular-trade or business and I add like in banking. See the case of Alfotrin Ltd. (The Owners of M V Fotini) v. The Attorney-General of the Federation & anor. (1996) 9 NWLR (Pt. 475) 634 @ 638; (1996) 12 SCNJ.236 @ 264.

It is also settled that the High Court, has an inherent power to make Orders even if not sought where such orders, are “*incidental*” to the prayers sought. In other words, a Plaintiff may be given such equitable relief as he may be entitled to even though he has not specifically asked for one. See the case of Ndah v. Attorney-General Bendel State & ors. (1976) 6 U.I.L.R. (Pt II) 266 @ 278

The power of a court to award interests was provided in Section 12 High Court Laws of Lagos State. Some Rules of courts provide that the court, may order or award interest at a rate not exceeding (then) 10% per cent per annum to be paid upon any judgment commencing from the date thereof or afterwards as the case may be. See for instance, Order 40 Rule 7 of the High Court of Kano State (Civil Procedure Rules, 1988). See the case of Kano Textile Printers PLC v. Alhaji Ahmed Tukar (1999) NWLR (Pt. 589) 78 @ 85 C.A. See also Order 39 Rule 7 of High Court of Lagos (Civil Procedure) Rules, 2004.

Also settled, is that it is not in every case that evidence has to be adduced in respect of interest claimed before interest is awarded. That in certain cases, even failure to claim interest in the Writ of Summons or Statement of Claim, will not preclude a successful plaintiff, from praying for and being awarded interest after judgment had been entered for an amount. See the case of Nigeria General Superintendence Co Ltd. V. The Nigerian Ports Authority (1990) 1 NWLR (Pt. 129) 741 @ 748 C.A. **I am also aware that the general rule, is that monetary judgment, attracts-appropriate interest even where none is claimed.** See the case of Augustine F. I. Ibama v.

2240 Diamond Bank v. Partnership Inv. Co. (2009) 12 KLR Ogbuagu JSC  
Shell Petroleum Development Co. of Nigeria Ltd. (1998) 3 NWLR  
(Pt.542) 493 @ 500 C.A. - per Uwaifo, JCA (as he then was).

**In my respectful and firm view, the 1<sup>st</sup> Respondent claimed interest. The stance of the Appellant in this matter, is unfortunate especially where its defence to the action, is made in very bad faith. I am even of the view that the 1<sup>st</sup> Respondent, was entitled to exemplary damages in all the circumstances of this case as the two lower courts in their respective judgment, demonstrated. However, the learned trial judge refused the claim for damages. However, in view of the Provisions of the said Order 39 Rule. 7 of the High Court Rules (supra), I am, very reluctantly, reducing the interest payable to the 1<sup>st</sup> Respondent to 10% (ten percent) payable to it by the Appellant from the 12<sup>th</sup> of April, 2000 until the entire Judgment debt, is liquidated.**

In the final analysis/result, although my answers to the said Issue (iii) of the Appellant and Issue 4.2.2 of the 1<sup>st</sup> Respondent, are also in the Affirmative/Positive, but in all the circumstances having regard to the afore-said Rule of court, the interest is hereby reduced as aforestated. This appeal fails save as it affects the interest payable to the 1st Respondent by the Appellant. I hereby affirm the decision of the court below affirming the judgment of the trial court in respect of the Principal sum awarded.

Costs follow the amount. The 1st Respondent is entitled to costs of N50, 000.00 (fifty thousand naira) payable to it by the Appellant.

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**KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment delivered by my learned brother Ogbuagu I agree with it, and for the reasons he gives I too dismiss it. I abide by the consequential orders therein.

H

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**MOHAMMED JSC**

I have had the opportunity before today of reading the judgment of my learned brother Ogbuagu JSC which he has just delivered.

ered. I agree with him that there is no merit in this appeal. On the evidence on record, the trial Judge Court found the appellant negligent in paying the 1<sup>st</sup> Respondent's, drafts in spite of agreeing in writing not to pay those drafts to the beneficiaries. There is evidence that the Appellant disregarded clear directives of the 1<sup>st</sup> Respondent to stop the payment, of the drafts which were paid even before the four days allowed for their clearance expired. The Court of Appeal was therefore right in affirming the decision the trial High Court in favour of the 1st Respondent. B

Accordingly, the appeal is without merit and the same is hereby dismissed. C

There shall be N50, 000.00 costs in favour of the Respondents.

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D

**CHUKWUMA-ENEH JSC**

This action now on appeal in this court for negligent payment of Bank cheques after the customer, that is, the respondent in this court has in a written request to its banker, that is, the appellant in this court solicited its banker's cooperation to revert to the 1st respondent for confirmation of the two cheques issued in favour of the First Yield investment Ltd and Eko Fisheries Ltd., in the respective sums of N6, 250,000.00 and N11, 000. 000.00 before transacting their payments. E

There has been concurrent decisions of the two lower courts wherefore the 1<sup>st</sup> respondent has bad judgment in the suit entered in its favour in both lower courts. F

The appellant being dissatisfied with the decision of the lower court has appealed to this court by two Notices of Appeal filed on 20/12/2002 and 8/1/2003 respectively. Both Notices of Appeal have been filed within the statutory period allowed to appeal in this matter by law. It is my view that by the principle of law laid down in *Tukur v Government of Gongola State (1988) 1 NSCC (Vol.19) 30* an appellant could withdraw timeously any one of two processes of the same nature filed in good faith in an action without necessarily incurring the wrath of abuse of process against duplicity of process. As so the instant Notices of Appeal, the appellant rightly has withdrawn one of the Notices. In this case the remaining Notice of Appeal G H

subsists as a valid process to sustain the appeal provided the Grounds of Appeal therein contained are competent. Having opted to present the appeal upon the Notice of Appeal filed on 8/1/2003 *by* filing its brief of argument based on, the Notice of Appeal tiled on 20/12/2007 is taken as having been abandoned, and therefore should be  
B discounted and is hereby struck out.

I agree with the lead judgment that the Grounds of Appeal contained in the Notice of Appeal of 8/1/2003 are competent. Before turning to the substantive issues raised in this appeal, let me state  
C that I stand on the facts and circumstances as well as the cases of the parties as per their respective briefs of argument as have been fully detailed in the body of the lead judgment. Save that I have decided to set out the issues for determination as signposts to guide me in discussing the matter; the appellant in this matter has raised 3 issues  
D for determination in its brief of argument as follows:

(i) Whether the Court of Appeal was right in finding that the 1st respondent had validly pleaded negligence?

(ii) Whether the appellant owed the 1st respondent a duty of care in respect of the 2 bank drafts.

(iii) Whether there was sufficient pleadings and proof of interest rate awarded in favour of the 1st respondent.?  
E

The 1st respondent has formulated 2 issues for determination as follows:

*“(1’) Whether in circumstances of this case, the Court of Appeal was right in finding that the appellant was liable in negligence.*  
F

*(2) Whether the pleadings and evidence led thereon was sufficient to sustain the award of interest in favour of the respondent.”*

In view of the fact that this is a difficult case, I think I should  
G vouch an opinion on the controversy surrounding the two instruments i e the said bank cheques raised in this matter. Firstly, it is not right to treat “bank draft” and ordinary “cheque” as interchangeable terms as the two instruments connote different legal instruments with differing implications. Even the definitions of these two instruments  
H clearly attest to their inherent differences. A bank draft according to Advanced Law Lexicon 3<sup>rd</sup> edition Book 1 page 462 has been defined as, “a cheque drawn on a bank by itself. A banker’s draft must be honoured because it is drawn on the bank itself rather than on the debtor’s account. The debtor must pay the bank the sum drawn

*in advance.*”

An ordinary Cheque on the other hand, is defined in Section 73 of Part III of the Bills of Exchange Act Cap.B8 Laws of the Federation of Nigeria 2004. Section 73 provides as follows:

*“A Cheque is a bill of exchange drawn on a banker payable on demand and except as otherwise Provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.”*

Apart from the apparent proposition of law that “drafts” must to be honoured and ordinary “cheques” payable on demand, there is not much to be said immediately about the two instruments based on the premises of the above definitions. However, the peculiarities of the two instruments have been brought out in a succinct manner by Idigbe J (as he then was) in the case of *R v. Okon (1933-1966) NBLR at 241 at 253-254* and I quote with approval His Lordship on this aspect of the matter thus:

*“When money is paid by a customer into the bank, there is a contract between the banker and the customer in which the banker receives the money as a loan from a customer against the promise by the banker to honour the customer’s cheque or orders of the customer. In this connection there is hardly any difference between a cheque and a draft. As was said by Pallock C. B ‘the word draft no doubt includes bill of exchange as well as a cheque.’*

*‘It is a nomen generale which embraces every request by the drawer upon the drawee to pay money.’ See Hunter v. Boywer (1850) 15 LT05 281 at 282. A bankers draft however is not to be regarded as a cheque since it is not really addressed by one person to another as required by the Bill of Exchange Act Cap. 21 (Section 3). It is drawn on behalf of a bank upon itself, whether payable at the Head office or at some other branch of the bank and at law, the Head office and its branches constitute one legal person or entity (see Capital and Counties Bank Ltd. v. Gordon (1903) AC 204). All the same where as in the instant case a customer request his banker to provide him with a banker’s, draft the amount in respect of which is to be debited to his account, he ought ordinarily to enclose with his request a cheque covering the amount. The amount so paid in by the customer becomes under the principle above described the bank’s money and when paid out, still that of the bank, but paid out*

*pursuant to the contract above described (-i.e. that of debtor and customer)"/>Also see *Bavery Contract and trading Co. (Southern) Ltd (1959) 2 W.L.R. 568* and *Foley v. Hill ZHLC 28. Exparte Beblor v. Ligouri (1950) 2 AER 733* and *R v. Davenport (1954) 38 CAR 37* at 41.*

B In this graphic manner the erudite learned judge has brought out in clearest of terms the nitty gritty of the legal implications between the two instruments i.e. “bank draft and ordinary “cheque.” Although, I must emphasize, that while a bank draft must be honoured, an ordinary cheque is payable on demand this distinction  
C between the two instruments is significant as based on the fact that before a bank draft issues the customer’s account must have been debited and so all things being equal it must be honoured, this is not the case with ordinary cheque which is payable subject to availability  
D of funds in the Customer’s Account. Even moreso the word “draft” includes a bill of exchange as well as a cheque. It would appear from the above cited case of Idigbe J (as he then was) that with regard to the two instruments that paying out their proceeds is made pursuant to a debtor/customer relationship.

E Guided, as it were, by the principles as expounded in the above authorities, I think it would be wrong to contend that bank drafts has peculiar implication as such, and as not being subject to or amenable to be countermanded as in the case of ordinary bank cheques. Clearly  
F recent judicial thinking does not seem to support that proposition as the cases I have examined here show.

Having so concluded it is settled law that for a banker in order to exonerate itself from liability arising out of being negligent in dealing with cases of conversion of the proceeds of “bank drafts” the  
G banker must bring the instruments within the provisions of Section 2 (1 ) of the Bills of exchange Act. It must also bring itself within the provisions of Section 82 of the Bills of Exchange Act in order to be protected under the Act that is, by bringing itself within the statutory exception. Based on the above premises, the onus of proving that  
H transacting payments of the drafts is “without negligence” is on the part of the appellant as clearly provided in Section 82 of the Bills of exchange Act. See *Hannan’s Lake View Central Ltd. v. Armstrong A Co. (1900)16 TLR 236* where the words “without negligence” in the Act have been defined. Again, guided by the pronouncement of this

court in construing Section 82 of the Bills of Exchange Act particularly of the words ‘without negligence’ which means without want of reasonable care in reference to the interest of the true owner who happens in the instant case to be the 1st respondent. See *Hannan’s Lake View Central Ltd v. Armstrong & co. (1900) 16 TLR 236* and with approval the judgment of Onyeama J. (as he then was) in *Nigerian Breweries Ltd v. Muslim Bank (W.A) Ltd (1933-1966) 1 NBLR 282*. In this regard the appellant has not discharged the onus placed on the appellant by Section 82 of the Bills of Exchange Act.

On the other hand, if my conclusions above are wrong even though I don’t concede, that it is my view that there are a number of compelling ingredients of acts of negligence to sustain the decision of the lower court on the question of negligence albeit having been established against the appellant. They include firstly, the fact that the 1<sup>st</sup> respondent wrote a letter requesting the manager of the bank to seek for his confirmation i.e. from the 1st respondent before transacting payments of the drafts. The letter has been dated 29/12/2002; it is not being disputed that the 1<sup>st</sup> respondent has been prompted to put the request by the manager of the banker (appellant) who must be taken to have known the implications of such requests for confirmation of cheques in writing. There is also an accepted evidence that one of the drafts has on it endorsed “Account payee only” suggesting that the instrument is not negotiable but that notwithstanding, it has been negotiated to a third party’s Account. Even then, one of the drafts has been issued in the wrong name of Fast Investment Co. Ltd as against First Yield Investment .Ltd. All the same, it has been paid. This singular act should have put a reasonable prudent banker on inquiry. Again, the drafts have been paid against the norm, on banking practice of allowing 5 days clearing period. These acts of negligence have been founded upon by the trial court and upheld by the court below. They constitute particular of negligence in this case. Much as I agree with the appellant that a bland allegation of negligence in a suit as the instant one founded in negligence is not enough without particularizing the acts of negligence the above acts of negligence have been pleaded and supported by testimonial evidence.

It is settled law that negligence is basically one of facts, not of law and so each case must be decided based on its peculiar facts See *Akalla v. Jarmakan Transport Ltd. (1961) ANLR 747*. As a follow-up

to this principle of law, in an action in negligence, the plaintiff must show that the defendant owes him a duty of care and that he has suffered damage by the breach of that duty. See: *Agbonmagbe Bank Ltd v CFAO Ltd (1967) NMLR 173*. The 1st respondent as has been found by the trial court and upheld by the lower court, has established rightly to my mind that on the relationship between the parties, the appellant owes it duty of care and the breach of it as I have showed herein and the damage that has followed.

I must observe that due to the misconception by the defence of the onus on it no attempt has been made to show in this case that transacting payments of these cheques have not been due to its (i.e. appellant) negligence, an onus placed on it by Section 82 of the Bills of Exchange Act 2004. This is fatal to its case.

On the issue claim of interest at 21% I agree with the appellant that the 1st respondent not having pleaded fully by particularizing that head of its claim, is made worse by the relief not being supported by evidence at trial as contemplated in the well settled principle as set out in the case of *Ekwunife v. Wayne (W/A) Ltd (1989) 5 NWLR (pt.122) 422* that is on the entitlement to interests in cases of this nature.

The relief as granted is for 21% interest from 29/12/94 until judgment and at 3% until the judgment is fully paid. The question is whether granting this head of claim is legally well grounded. After all payment of interest comes within special damages to be strictly proved.

The principles governing the award of interest as a right in claims as here have been ably set out in the above cited case and if I may express it in the language of the case it runs as follows:

“Interest may be claimed as a right when it is contemplated by agreement between the parties, or under a mercantile custom or under, a principle of equity such as breach of a fiduciary relationship....”

Not only is there no proper pleading of this item of the claim there is no evidence adduced anywhere at the trial in that regard. For the 1<sup>st</sup> respondent to contend in paragraph 6.7 of its brief of argument that, by the very nature of the instant claim and the breach of the contractual duty owed to the 1st respondent, that the 1st respondent is entitled to the minimum interest at the rate a bank would charge its customers at that relevant time in 1994. By this submission

the, appellant has supported my view, on this relief. 'With respect, it is speculative for the 1<sup>st</sup> respondent to so contend, as the 1st respondent appears to be giving evidence. Firstly, there is no proper pleadings alleging the facts contained in paragraph 6.7 of the said brief as to the nature of their relationship nor as to denoting that 21% interest has been the minimum interest rate payable by Banks in 1994. B Surely, the 1<sup>st</sup> respondent is using its brief to adduce evidence in support of its case and this is unacceptable. Even more so, the relationship between the 1<sup>st</sup> respondent and the appellant is one of debtor and customer not one of fiduciary relationship. In the Wayne's case C cited above this court further said.

*"Where interest is being claimed as a matter of right, the proper practice is to claim entitlement to it on the writ and plead facts which show entitlement in the statement of claim and evidence given which show entitlement thereto, the court may if satisfied with evidence D award interest."*

This aspect of the claim not having been pleaded and proved is hereby dismissed.

For the above reasons and a much fuller reasons in the lead judgment, prepared by my learned brother Ogbuagu JSC, which I E have had the advantage of reading in draft I agree with him (save as in my dismissal of the claim for 21% from 29/12/94 until judgment) that the appeal is unmeritorious and should be dismissed. I too dismiss and abide by the consequential orders contained in the lead F judgment.

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### **MUNTAKA-COOMASSIE JSC**

I had the privilege of reading in draft the lead judgment rendered by my learned Lord Hon. Justice Ikechi Ogbuagu JSC just delivered. I entirely agree with his Lordships' reasoning and conclusion. In fact I adopt them as mine. The appeal lacks merit and same is hereby dismissed. I endorse the order as to costs.

H