

SUPREME COURT OF NIGERIA
19TH FEBRUARY, 2010. SC. 264/2002
CORAM:- W. S. N. ONNOGHEN, F. F. TABAI,
I. T. MUHAMMAD, J. O. OGEBE, O. O. ADEKEYE, JJSC

KAYODE VENTURES LTD APPELLANT
AND

1. THE HON. MINISTER OF FED.
CAPITAL TERRITORY
2. FED. CAPITAL DEVELOPMENT RESPONDENTS
AUTHORITY (FCDA)
3. SKY TECHNICAL (NIGERIA) LIMITED

CONTRACTS - Breach - Termination - When amounts to breach - Where the process of termination does not fully comply - With the provisions of the agreement - It amounts to a breach of contract (H1)

PLEADINGS - Averment - Not supported by evidence - Fate of - Such averment is deemed abandoned - And must be struck out by the court (H2)

CONTRACTS - Breach - Remedies - Propriety - Where breach has been established against a party - The appropriate remedy to which the innocent party is entitled - Is payment of compensation in form of damages (H3)

EVIDENCE - Evaluation - Reevaluation on appeal - Basis - It is only when the trial court fails to comply with the requirements of evaluation - That the appeal court could interfere - Which was not the case herein (H4)

EVIDENCE - Weight - Evidence of PW1 - Whether conclusive - Trial judge reduced the efficacy of the weight of the evidence - When he stated that it should only be persuasive - Though unchallenged (H5)

DAMAGES - Quantum - Reduction from 30% claimed to 15% - Propriety - Trial judge acted properly - For where plaintiff claims

more than he can prove - He is awarded a lesser sum (H6)

FACTS

The plaintiff/appellant sued defendants/respondents at the High Court of FCT, Abuja claiming sundry reliefs by which it challenged the alleged unlawful termination of its contract with the 1st and 2nd respondents for the construction of a link road along Keffi Road to Airport Express Way, Abuja. Appellant sought for either an injunction restraining respondents from unlawfully terminating the said contract or, in the alternative, for damages for breach of the contract. It was appellant's case that on 3rd. June 1997, the 2nd respondent awarded him the contract at the cost of N94,623,797.84, after a competitive tendering process. The letter of the award of contract was received in evidence as Exhibit F, while a subsequent formal contract executed by the parties in respect of the contract was received in evidence as Exhibit B. It was a term of Exhibit F that appellant was to be mobilized to site within two weeks after the execution of Exhibit B. Moreover, Exhibit B provided that 2nd respondent was to give the Bill of Quantities to appellant after its execution, which Bill was to guide the execution of work at the site.

It was in evidence that 2nd respondent not only failed to make the Bill of Quantities available to appellant, but also wrote a termination letter - Exhibit D - to appellant purportedly terminating the contract before the expiration of two weeks from the execution of Exhibit B. It was in consequence thereto that appellant commenced this action. In the interim, the contract was re-awarded to 3rd respondent. After trial, the learned trial judge gave judgment to appellant as he held that the termination was in breach of the terms of the contract. However, though appellant had claimed 30% of the contract sum as anticipated loss of profit and had called an expert witness to testify in respect thereof, the trial judge awarded him 15% of the contract sum under that head of damages. Aggrieved, respondents appealed to Court of Appeal. Appellant also cross-appealed on the quantum of damages. That court allowed the appeal and dismissed the cross-appeal. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal.

ISSUES FOR DETERMINATION

"1. Whether the learned justices of the court below were right

in concluding that the defendant lawfully terminated the contract award to the plaintiff.

2. Whether the learned Justices of the court below were right in holding that the trial judge wrongly evaluated the evidence before him and whether they were right in their own evaluation to warrant an interference with the findings and reasoning of the trial judge.

3. Whether plaintiff is entitled to damages.”

HELD (Unanimously allowing the appeal per **MUHAMMAD JSC**)
CONTRACTS - Termination - When amounts to breach

1. I agree with both the learned counsel for the appellant and the trial court that the breach of contract between the parties had indeed taken place as the provision made in written agreement, Exhibit ‘F’ was not fully complied with by the respondents. For whatever reason the termination of the contract was made, it is pertinent to remind the respondents that both themselves as a party to the contract and the court that heard them initially and the appellate court, are bound by the terms of the contract. Neither of the parties to the contract nor the court can be allowed to bring into the contract any extraneous term not agreed upon by the parties. Further, it is not the duty of the court to make contract for the parties, as its primary role is to interpret and enforce the terms of the contract as agreed to by the parties. (p. 630 C/E)

PLEADINGS - Averments - Not supported by evidence

2. I found that the respondents had averred in paragraph 6 of their statement of defence that it was normal practice in the 2nd defendant’s contract to commit a contractor to commence work before formal execution of contract agreement. This averment was never backed up by any evidence. Although the court below found that DW1 testified to that effect. I however, could not find any shred of evidence from the testimony of DW1 in that respect. That, perhaps, was why the trial court itself did not make any finding on that “*normal practice*”. Now, the trite position of the law of pleading is that where an averment has not been supported by evidence, that averment is deemed abandoned and must be struck out by the court. (p. 631 C)

CONTRACTS - Breach - Remedies - Propriety

3. Finally on this first issue, I agree with the trial court that since breach of contract has been established against the defendants/respondents, the appropriate remedy to which the plaintiff/appellant is entitled to is payment of compensation in form of damages. I resolve issue No.1 in favour of the appellant. (p. 631 H)

EVIDENCE - Evaluation - Reevaluation on appeal - Basis

4. ONU, JSC, for instance, in the case of EBOADE V. ATOMESIN [1997] 5 NWLR [part 506] 490 at page 507-508, stated as follows:

“The duty of appraising evidence given at a trial court is pre-eminently that of the court that saw and heard the witnesses, and it is also the right of the court to ascribe values to such evidence. The Court of Appeal may not disturb the judgment of the trial court if it is supported by evidence even in the slightest degree just because it would have come to a different conclusion on the same facts.”

Thus, it is only when the trial court fails to comply with such requirements in the evaluation of evidence that could cause a miscarriage of justice to one of the parties that the appeal court could interfere to save the situation, as it were. I, for one, honestly, find nothing wrong in the procedure adopted by the learned trial judge although the court below faulted it. (p. 633 D/G/634 B)

EVIDENCE - Weight - Evidence of PW1 - Whether conclusive

5. It was the finding of the trial court that the evidence of PW1 was neither discredited nor challenged by the respondents. The trite position of the law here, too, is that any evidence that is unchallenged or uncontroverted, the trial court has a duty to act on it where credible. I think I should state that the learned trial judge himself reduced the efficacy of the weight of PW1’s evidence, when he stated that although the evidence of PW1 stood uncontradicted and unchallenged being an expert evidence it should only be persuasive and not conclusive. (p. 642 H/643 B)

DAMAGES - Quantum - Reduction to 15% - Propriety

6. On the reduction of compensation from 30% averred by PW1 to 15% by the learned trial judge; the trite law is that where a plaintiff

claims more than he can prove, he is awarded the lesser amount. In this respect, I think the learned trial judge had exercised his discretion, judicially and judiciously, falling back on the evidence of PW1 to grant 15% of the contract sum to the appellant (p. 643 E)

REPRESENTATION

Professor Charles U. Iloegbune (SAN), with him: M.J. Tula Esq., I.H. Yamah Esq., Yakubu Philemon Esq., Akasoba Zainab Duke (Mrs.) for the appellant.

S.T. Ogunorisa for the respondents.

CASES REFERRED TO

NDUKWE V. LPDC [2007] 75 NWLR [pt. 1026] at pg 56
MBA V. AGU [1999] 12 NWLR [pt 629] 1 at pg 18 F - G
ATANDA V. AJANI [1989] 3 NWLR [part 111] 511 at page 539 D
OGUNBADE V. ADELEYE [1992] 8 NWLR [part 260] 409 at 419
KAMALU V. UMUNNA [1997] 5 NWLR [part 505] 321 at page 337
NZEKWE V. NZEKWE [1989] 2 NWLR [part 104] 373 at page 393
ONIFADE V. OLAYIWOLA [1990] 7 NWLR [part 161] 130 at pg.157
OJEGBE V. OMOTASONE [1999] 6 NWLR [part 608] 591 at 597 - E
598 H - A
EBOADE V. ATOMESIN [1997] 5 NWLR [part 506] 490 at page
507-508
OJEGBE V. OMOTASONE [1999] 6 NWLR [part 608] 591 at 597 - F
598 H - A
THE CASE OF UNION BANK V. OZIGI [1994] 3 NWLR [333] 385
at pg 389
DIBIAMAKA V. OSAKWE [1989] 3 NWLR [part 107] 101 at page
111-112 G
EBOADE V. ATOMESIN [1997] 5 NWLR [part 506] 490 at page
507-508
FIRST BANK OF NIGERIA PLC. V. MAY MEDICAL CLINIC [1996]
9 NWLR [pt. 471] 195 at page 204.
KANO TEXTILES PLC V. GLOEDE & HOFF [Nig.] Ltd. [2002] 2 H
NWLR [pt.751] 420 at pg. 450

STATUTE REFERRED TO

Evidence Act, Cap 14, L.FN; 1990, s. 149

LEAD JUDGMENT BY MUHAMMAD JSC

The plaintiff at the High Court of Justice of the Federal Capital Territory, Abuja [the trial court] and who is the appellant herein, is a limited liability Company carrying on Construction business throughout the Federal Republic of Nigeria. The 1st and 2nd defendants and now respondents in this appeal are the Honourable Minister of the Federal Capital Territory (F.C.T), Abuja and the Federal Capital Development Authority (F.C.D.A), a statutory body charged with the responsibility of physical development of the Federal Capital Territory, Abuja. The 3rd defendant/respondent is another limited liability Company carrying on business in the Federal Capital Territory.

The plaintiff averred in it's statement of claim that she was invited along with other contractors on the 10th of September, 1996, by the 2nd defendant to submit tenders for the rehabilitation of Keffi road at Karmo junction and Airport Express way. The plaintiff further averred that of all the six companies that tendered for the contract, that of the plaintiff was found to be the lowest and most attractive.

On the 3rd of June, 1997, the plaintiff was awarded the contract at the cost of N94,623,797.84.

A formal agreement was executed between the plaintiff and the 2nd defendant on the 30th day of July, 1997. The plaintiff averred that by virtue of clause 6.00 of the formal agreement, she was expected to mobilize it's resources and commence work within two weeks of signing the agreement. The 2nd defendant was required by the contract to furnish the plaintiff with full priced copy of the Bills of Quantity, the drawings and specifications. The drawings as afore stated were not given to the plaintiff and without the drawings the plaintiff could not mobilize and commence work on the site. The plaintiff claimed further that even after signing the contract the demand for the afore said drawings was in vain. The duration of the work was for 6 months from the date of signing the contract. Before the expiration of the two weeks period allowed for mobilization, there were moves to terminate the contract. And by a letter dated 29th of August, 1997, the contract of the plaintiff was terminated by the defendants. The plaintiff averred that despite the non-provision of

the necessary drawings, it mobilized on site after signing the agreement. A site inspection was carried out by an independent Engineer mandated to inspect the said contract. He produced a report on 3rd of September, 1997. The plaintiff averred further that as at the date of termination of the contract, it had expended about 11 Million Naira for hiring machinery on site, vehicles, procurement of materials including bitumen, payment of workers salaries, allowances, procurement of letter of bond from N.I.M.B Ltd. According to the plaintiff, immediately the contract was purportedly terminated, the 3rd defendant moved all machinery and men into the area plaintiff had already worked upon thereby committing trespass on the site. The plaintiff finally made the following claims:

"1. A declaration that the letter reference No. FCDA/DES/44/S/295/80 dated 29/8/97 titled "Termination of Contract for the construction of Link Road Kefft to Airport Express way" is illegal null and void

2. Perpetual injunction restraining the defendants, their servants, agents assigns and privies from interfering, interrupting, or preventing the plaintiff from executing contract agreement dated 30th of July 1997.

3. A perpetual injunction restraining the defendants, their assigns, agents and privies from carrying out any work on the construction of Link road III Alignment along Keffi Road to the Airport Express way, Abuja

4. A perpetual injunction restraining the 1st and 2nd defendants from giving effects, or any backing or support to the 3rd defendant in carrying out the construction of the Link Road III Alignment, Keffi to Airport Express way".

IN THE ALTERNATIVE

37. The sum of N28,387,137,139.35 being anticipated loss of profit from the aforesaid contract.

38. N30,000,000.00 as general damages for loss of goodwill reputation, and cost of demolition on site."

In their joint statement of defence the defendants denied each and every allegation of fact contained in the statement of claim except where the defendants expressly made an admission. They put the plaintiff on the strictest proof of every allegation not admitted.

After full hearing, the learned trial judge entered judgment in

favour of the plaintiff by holding that the termination of contract by the defendants was wrongfully done. He awarded to the plaintiff the sum of N14,193,569.68. Dissatisfied, the defendants appealed to the court below. After hearing the appeal, the court below allowed the appeal and set aside the judgment of the trial court. It also dismissed the cross-appeal.

The plaintiff/respondent appealed to this court by filing a Notice of Appeal dated 15th of December, 2000 containing five grounds of appeal. Another Notice of Appeal containing eight grounds of appeal was, with the leave of this court, filed on 24/12/2002. The latter Notice and grounds of appeal were deemed dully filed by this court on the 29th day of October, 2003. This means that the former Notice and grounds of Appeal contained in the Record of Appeal and dated 15th of December, 2000 were abandoned by the appellant.

In compliance with the Rules of Practice of this court, parties settled their briefs of argument which they adopted on the hearing day of the appeal.

Learned counsel for the appellant formulated the following issues:

ISSUES FOR DETERMINATION

1. *Whether the learned justices of the court below were right in concluding that the defendants lawfully terminated the contract award to the plaintiff.*
2. *Whether the learned Justices of the court below were right in holding that the trial judge wrongly evaluated the evidence before him and whether they were right in their own evaluation to warrant an interference with the findings and reasoning of the trial judge.*
3. *Whether plaintiff is entitled to damages."*

The respondents on their part, through their counsel, settled the following issues:

1. *Whether having regards to the state of pleadings and evidence in this case the learned justices of the Court of Appeal rightly held that the termination of the contract award to the Appellant was lawful. [Ground 3 of the Notice of Appeal].*
2. *Whether the court below was right in holding that findings of the trial court were perverse and in interfering with the said findings. [Ground 4 of the Notice of Appeal].*

3. *Whether the court below was right in setting aside the award of damages made by the trial court in favour of the Appellant. [Ground 5 of the Notice of Appeal].*

In this submissions on issue No1, learned counsel for the appellant stated that it was common ground between the parties that the terms of the contract awarded to the plaintiff by the defendants were as contained in Exhibits F and B. It was also common ground that the contract was terminated by the defendants. It is trite law, he submitted further, that in matters of contract in which the terms and conditions of the contract were embodied in a written document, the parties and the court will not be allowed to read into the contract extraneous terms on which they reached no agreement. In other words, both the parties and the court are bound by the terms of the contract and the court is to interpret and enforce the terms of the contract as agreed by the parties. Learned counsel cited and relied on the cases of INTERNATIONAL TEXTILE INDUSTRY (NIG.) LTD. V. ADEREMI [1999] 8 NWLR [pt. 614] 268; KOIKI V. MAGNUSSON [1999] 8 NWLR [pt. 615] 492.

Learned counsel for the appellant argued that the settled law is he who asserts must prove and hence the defendants having given reasons for the termination of the contract in paragraphs 13 and 18 of their statement of defence, have a duty to prove and justify the reasons for the termination. He argued further that the time limit within which the plaintiff was to mobilize to site had not expired at the material time when the defendants set the machinery in motion to terminate the contract and when the necessary drawing to be used had not been released by the defendants, notwithstanding the various demands made by the plaintiff. He made reference to Exhibit 'F' which, he said, by it, the plaintiff was not expected to carry on any construction until all relevant construction documents had been signed. He also referred to Exhibit 'B' the contract document which was executed on the 3rd of August, 1997, and it gave the plaintiff a period of two weeks to mobilize to site and that period would have expired on the 18 of August, 1997. The decision taken by the defendants to terminate the contract was premature. He quoted the evidence given under cross-examination by Defence Witness 1 which amounted to admission against interest. He cited the case of ADEYEYE V. AJIBOYE [1987] 3 NWLR [pt.61] 4321. He referred

also to the finding of the learned trial judge that the termination of the contract was wrong.

On the particular practice of the defendants to commit a contractor to commence work before formal execution of a contract agreement, which the court below upheld to be correct, learned counsel B submitted that there was no evidence to support it. He urged this court to set aside the conclusion of the court below on the practice which was never proved, though pleaded in paragraph 6 of the statement of defence. Learned counsel posited also that the provision C made by Exhibit 'B' for 7 days notice to be given before termination was not complied with. He urged this court to resolve issue No. 1 in appellant's favour.

The learned counsel for the respondents first raised an observation which had the character of a preliminary objection although D he did not specifically call it as such. That has to do with the issues formulated by the appellant and some of the Grounds of Appeal especially grounds 1 and 2 as set out in the Notice of Appeal. The first of these observations is that the appellant failed to marry the issues to the grounds of appeal. It had also failed to create any nexus between E the grounds of appeal and the issues in its argument. He urged this court to deprecate that kind of practice. Secondly, learned counsel observed that the appellant did not distill any issue from grounds 1 and 2 of Notice of Appeal as none of the three issues distilled raised F the complaints in those grounds of appeal and that these grounds are deemed abandoned and would be struck out. Several cases were cited in support among which are OJEGBE V. OMOTASONE [1999] 6 NWLR [part 608] 591 at 597 - 598 H - A; OGUNBADE V. ADELEYE [1992] 8 NWLR [part 260] 409 at 419 D - E. He urged G this court to strike out the grounds.

Learned counsel for the appellant filed a reply brief in answer to the issues raised by the respondent. He replied that the 3 issues for determination as formulated by the appellant are borne out of the Grounds of Appeal dated 23rd of December, 2002 and H filed on the 24th of December, 2002, and were not distilled from the 5 grounds of appeal contained in the earlier Notice of Appeal dated and filed on the 15th of December, 2000. The 3 issues by the appellant are borne out of the 8 grounds of appeal as contained in the Notice of Appeal aforesaid. He urged this court to discountenance

the objection in the respondent's brief relating to the issues for determination.

I cannot say that the learned counsel for the respondent was raising a preliminary objection on the brief of argument and the Grounds of Appeal contained in the Notice of Appeal filed in the court below on the 15th December, 2000. I say so because he has not complied with Order 2 Rule 9 of the Supreme Court Rules, 1999 [as amended] which provides that a respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before hearing, setting out the grounds of objection, and shall file such notice together with ten copies thereof with the Registrar within the same time. Where he fails to comply, the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such order as it thinks fit. I thought the learned counsel was making a peripheral observation that was why he was urging this court to deprecate the practice adopted by the learned counsel for the appellant. But for whatever that observation was made by the learned counsel for the respondent, he, at the end, succeeded in making the learned counsel for the appellant to file a reply brief in answer to that observation which to my mind, solved the respondents' problem. The learned counsel for the respondent made the following observation:

1. That the appellant has failed to marry the issues to the grounds of appeal in its Notice of Appeal

2. The appellant also failed to create any nexus between the grounds of Appeal and the issues in its argument on issues distilled for determination and

3. That the appellant did not distil any issue from grounds 1 and 2 of the Notice of Appeal as none of the three issues distilled raised the complaints in those grounds of appeal. These grounds he, submitted, are deemed abandoned and would be struck out.

Learned counsel for the respondent went on to distill his three issues from the remaining grounds 3, 4 and 5 of the Notice of Appeal. Thus, the respondents' issues set out earlier in this judgment stemmed from these three grounds.

In his reply brief which was filed on the 25th of May, 2009, the learned counsel for the appellant submitted that contrary to the

submission by the respondents at paragraph 3 : 1 of the respondents' brief of argument, the appellants 3 issues for determination were not founded on any of the 5 grounds of appeal earlier filed. They were borne out of the grounds of appeal dated the 23rd of December, 2002 and filed on the 24th of December, 2002. The issues
 B for determination, he further submitted, were not distilled from the 5 grounds of appeal as contained in the earlier Notice of Appeal dated and filed on the 15th of December, 2000. The appellant's 3 issues, he said, were borne out of the 8 grounds of appeal as contained in the
 C Notice of Appeal dated 23rd of December, 2002. He urged this court to discountenance the objection raised by the respondents.

I must say that this issue as argued above by the parties gave me a little anxiety in the sense that it was initially not clear to me as to how there came about two Notices of Appeal on the same appeal
 D with nothing practically to guide one on the quandary, neither from any of the parties nor from the file made available to me for the appeal. I had to travel extra miles to our Registry to find out exactly what had happened. It was then that I was shown an enrolled order made by this court which granted to the applicant/appellant extension
 E of time to seek leave to appeal, leave to appeal and extension of time to appeal. It also deemed as dully filed [on that date that is 29th of December, 2003] the appellant's Notice of Appeal. The respondent, according to that order, would have his time running from the date of service of that order on him. The order was made by this
 F court on the 29th day of October, 2003. The appellant did not tell us anywhere in his brief or his oral adumbration that there was an order of this court that validated his otherwise, incompetent Notice of Appeal. He never told us that he filed a motion for leave to appeal.
 G Although the respondent's counsel could not be blamed, there is nothing as well from him to inform us of whether he was ever served with the enrolled order or not, which was granted in chambers. This is one of the disturbing and nagging problems we usually grapple with in chamber proceedings.

H Now, as I said earlier, the leave sought and obtained to file the appeal saved the appeal itself. The appellant's brief of argument was shown to have been filed within a day after leave to appeal and a deeming order that the Notice of Appeal was dully filed, were granted. Whatever miracle might have been used by the appellant in getting

his record of appeal and the brief of argument filed in this court within a day after having the Notice and Grounds of Appeal been deemed filed, may appear surprising, though not impossible or illegal. There is therefore, a valid appeal before this court. There is also a competent brief filed by the appellant. I shall now consider the submissions made by learned counsel for the respondents on issue B No.1.

Learned counsel for the respondent submitted that the reason for terminating the appellant's contract was simply as a result of the respondents' contention that the appellant did not mobilize to site upon being granted the letter of award of the contract on 3rd of June, 1997. He referred to paragraphs 13 and 18 of the statement of defence which he set out as well. He argued further that the respondent's witnesses testified to this and tendered Exhibits 'K and L' to show that the appellant was directed to mobilize to site and D warned of the consequences of failure to do so. Learned counsel stated that there were conflicting averments on the statement of claim of the appellant. He cited paragraphs 8, 10, 12, 13, 24 and 27 thereof. He went further to say that with such contradictions reflected in the paragraphs referred to above, the appellant puts nobody in E doubt that it did not mobilize to the site because of the respondents' failure to provide it with drawings and because the agreement permitted them to mobilize to site within two weeks from the date of signing. Learned counsel for the respondent submitted that the appellant testified to these series of conflicting averments through its F witnesses and given the state of pleadings and evidence, the appellant prevaricated on the issue of mobilization to site. To further show that the appellant did not mobilize to site, the report of the independent inspection found that the appellant was not on the site. G

On the invoices, receipts, hire of machinery and procurement of materials and letter of advance payment bond, learned counsel for the respondents submitted that the appellant, who pleaded same in paragraph 27 of its statement of claim failed to tender any of them. He argued that if these documents were tendered, they could have H shown to some extent that the appellant attempted to mobilize to the site. Learned counsel urged this court to invoke section 149 [d] of the Evidence Act Cap. 14 LFN 1990 and to hold that the appellant failed to produce them because if it had done so, those documents

would have been against it. He cited in support: AREMUV. ADETORO [2007] 16 NWLR [1060] 244. Learned counsel for the respondents stated that they averred in paragraph G of their statement of Defence that it was normal practice in the 2nd defendant's contracts to commence work before formal execution of a contract. Learned counsel submitted that the 2nd respondent wrote Exhibit 'K' to the appellant directing it to commence construction immediately. No reply brief was filed by the appellant thereof. He submitted that failure to traverse that new fact constituted a formal admission by the appellant that it knew of the custom and openly flouted it. There was no need for the respondents to prove an admitted fact. He cited the provision of section 75 of the Evidence Act and the case of NDUKWE V. LPDC [2007] 75 NWLR [pt. 1026] at pg 56 paragraph G; AKPAN V. UMOH [1999] 11 NWLR [pt. 627] 349; MBA V. AGU [1999] 12 NWLR [pt 629] 1 at pg 18 F - G. It was submitted further that since Exhibit 'F' did not render the admitted custom inapplicable, that custom or practice commenced operation immediately upon the award of the contract on the 3rd of June, 1997. It was argued that the subsequent provision in Exhibit 'B' to the effect that the appellant had a period of two weeks to commence work after the execution of Exhibit 'B' was ineffectual as the terms in Exhibit 'B' manifestly or expressly operate prospectively and not retrospectively. The appellant, it was argued further, was obligated to mobilize to site immediately it received Exhibit 'F' but failed to do so which entitled the respondents to terminate the contract. The evidence of Defence Witnesses 1 and 2 that even several weeks after Exhibit 'B' was executed, the appellant failed to do anything at the site was another factor which defeats appellant's right in sticking to the two week period provided by Exhibit 'B'.

On the procedure of determining the contract and in compliance with what clause 21.01 of Exhibit 'B' provided the respondents submitted that in paragraphs 17 and 19 of the statement of claim, the appellant admitted that there was a decision to terminate the contract and that notice was given to appellant through Defence Witness 1 of respondents' intention to commence irreversible termination of the contract from 1st of September, 1997 on 13th of August, 1997, In evidence, the actual date of termination of the contract was 29th of August, 1997. It was argued further that the period between the date of the notice and the date of the letter of termination that is,

Exhibit '1 was more than seven days. Learned counsel for the respondents cited paragraphs 15, 16 and 18 of the Statement of Defence that it issued series of warning letters to the appellant. Having regard to the pleadings of the parties and the evidence led, the 1st and 2nd respondents complied with Clause 21.01 of Exhibit 'B' in terminating the contract. The trial court was wrong in holding that the contract was wrongfully terminated and the court below was right when it held otherwise. Learned counsel urged us to resolve this issue in favour of the respondents and against the appellant. B

Appellant's issue No. 2 is the trial court's evaluation of evidence and it's review by the court below. It is the submission of learned counsel for the appellant that the uncontroverted evidence of Defence Witness 1 to the effect that the respondent was instructed to commence work on site since 16th of June, 1997 vide Exhibit 'K', cannot stand because Exhibit 'B' which was later in time and which D was executed on the 3rd of August, 1997, gave plaintiff 14 days from the date of the execution of the contract to mobilize to site. He argued further that the oral evidence of Defence Witness 1 cannot be used to vary the contents of a written document that is Exhibit 'B' THE CASE OF UNION BANK V. OZIGI [1994] 3 NWLR [333] 385 E at pg 389 was cited in support. The learned counsel made reference to the practice where a contractor could be called upon to commence work on site before formal execution of the contract. He also made reference to the court below's holding on the Bill of Quantity F and the drawing; Exhibit 'A1' was the Bill of Quantity which was admitted in evidence with no objection from the defendants/respondents. As to Exhibit A1's authenticity, it was the court below that raised that issue Suo Motu. There was no conflict in the evidence on the source of the Bill of Quantity and it was wrong to reject the evidence of 1st plaintiffs witness on the basis of a conflict which did not exist. Learned counsel for the appellant urged this court to hold that there was no misconception whatsoever on the part of the learned trial judge concerning the evaluation he gave to the evidence before him, rather, it was the court below that fell into a grave error in substituting its own views for that of the trial court. He urged us to resolve this issue in favour of the appellant. G H

Learned counsel for the respondents submitted on issue two that the interference by an appeal court with the evaluation of evi-

dence made by a trial court as well as with the findings of a trial court are governed by settled principles of law. Several cases were cited in support including; EBOADE V. ATOMESUN [1997] 5 NWLR [pt. 506] 490 at page 507 - 508; MAGAJI V. ODOFIN [1978] 4 SC 94 at page 96; NZEKWU V. NZEKWU [1989] 2 NWLR [pt.104] 373 at page 393. The principle stated in these cases, is that an appellate court will not interfere with such findings unless they are perverse or unsupportable by the evidence led at the trial. It is further argued by the learned counsel for the respondents that the findings of the trial court which led it to the conclusion that the termination of the contract was wrongful were not supported by the pleadings and evidence led at the trial. The court below was in a good position to interfere with the findings and reassess the evidence. Learned counsel urged this court to resolve the issue in favour of the respondents.

Appellant's issue No. 3 is on the award of damages made by the trial court which the court below set aside. Learned counsel for the appellant urged this court to hold that the defendants conduct in terminating the contract was wrongful, hence, the plaintiff was entitled to damages. He further urged that since the evidence of 1st plaintiff's witness on the profit margin of 30% of the contract sum was not challenged and should be relied upon. He relied on the case of OSONDU CO. LTD. V. AKHIGBE [1999] 11 NWLR [pt. 625] 1. Learned counsel urged us to set aside the contrary views of the court below and restore the award made by the trial court as there was no evidence to the contrary before the court below that the plaintiff/appellant could not have realized 15% as profit on the contract price.

Learned counsel for the respondents submitted that the position taken by the court below in setting aside the award of N14,193,569.68 in favour of the appellant, is unassailable having regard to the state of pleadings and evidence in this case. He submitted further that given the act of termination of the contract was not wrongful, the appellant cannot be entitled to any damages as he was found by the court below to have done nothing at the site and he cannot benefit from his own wrong. He cited in support the cases of KANO TEXTILES PLC V. GLOEDE & HOFF [Nig.] Ltd. [2002] 2 NWLR [pt.751] 420 at page 450; FIRST BANK OF NIGERIA PLC. V. MAY MEDICAL CLINIC [1996] 9 NWLR [pt. 471] 195 at page 204. He urged us to resolve this issue in favour of the respondents and

against the appellant.

Now, it is clear from the pleadings of the parties, the evidence led before the trial court, its findings and judgment and the decision of the court below that this appeal arose as a result of dispute between the parties on whether there was a breach of the terms embedded in a Road Construction contract entered by the parties. Issue No. 1 by the appellant which is agreed by the respondents is on the lawfulness of termination of the contract between the parties. Now, where a legally permitted contract has been concluded by parties to it, the parties become bound by the terms and conditions provided therein. None of the parties will be permitted by law to resile from such terms and conditions except for good and genuine reasons. As a general rule, a contract may be determined either in accordance with the contractual terms such as through performance by the promisor of the exact terms he undertook to do for example, in contract of sale of goods or contract of supplies of service. Equally, a contract can be brought to termination where the promisor failed to perform through breach or where he made misrepresentation or where subsequent agreement took place. A Contract can also be terminated by frustration and or as a result of certain miscellaneous events such as merger and in some cases death or bankruptcy. In its paragraph 23 of the statement of claim, the plaintiff/appellant averred as follow:

“23. In violation of the contract agreement and the content of preliminary letter aforesaid, the defendants vide a letter dated 29th of August, 1997 reference No. FOCA/DES/44/S.295/80 signed by one Asmau T. Garba [Mrs.] terminated the plaintiff’s contract. The plaintiff plead [sic] and will rely on the aforesaid letter at the trial.”

In their statement of Defence, the defendants/respondents averred as follow:

“13. The defendant deny paragraph [sic] 16 and 17 of the plaintiff’s statement of claim and aver that the contract was terminated on account of the plaintiff’s persistent failure to mobilize on site in spite of repeated demands’ and instructions so to do.

18. The defendants denied paragraph 23 of the plaintiff’s statement of claim and further aver that the plaintiffs contract was terminated for failure to commence work of site in spite of repeated warnings.”

After the evaluation of evidence led before him, the learned trial judge made a finding on the termination of the contract between the parties. He stated, inter alia:

“The formal contract agreement was executed on 30/7/97 though signed sealed and delivered on 3/8/97 between the parties as evidenced by exhibit B

However as per their letter of 29/8/97, Exhibit 1 the said contract was terminated. The exhibit and paragraph 12 and 18 of statement of defence gives reasons for the termination as the plaintiffs persistent failure to mobilise on site in spite of repealed demands and instruction so to do by the defendants. This according to the learned counsel for the defendants, made it imperative that in so far as the plaintiff was in breach of contract should be and was terminated. The award of contract was however dated 3/6/97 [exhibit D F] and it says that the contract was to commence after Exhibit B was prepared and signed. This was done on 29/7/97 and finalised on 3/8/97. Therefore issuance of exhibit L which was dated 3/7/97 was putting the cart before the horse. The defendants cannot be hard [sic] to be complaining that the plaintiffs had refused to mobilise on site as the time for so doing was not yet at hand as per the contents and timing of exhibits F and exhibit B.”

The learned trial judge also found that the only relevant documents in the contract are Exhibits ‘F’ and ‘B’ and it is the terms contained therein that the plaintiff should follow to the letter and that much had been admitted by Defence Witness 1. The learned trial judge stated further as follows:

“The learned counsel for the defendants has rightly submitted that exhibits B [sic] speaks for itself. The agreement executed on 30/7/97 and signed on 3/8/97 allow [sic] the plaintiffs 2 weeks within which to commence work on site after DW1 wrote exhibit D on 24/8/97, four days before the grace period of 2 weeks had expired and it was to serve as last warning. This in my opinion is premature as the weeks allowed by exhibit B had not yet expired. However, assuming that exhibit B was a notice for the plaintiff to commence work on site and with a period of grace of up to 1/9/97 the termination letter dated 29/8/97 is premature the contract work had not commenced as per exhibit D. Therefore, it cannot be construed [sic] to be abandoned in the letter of clause 21.01 read together with exhibit D.

More so, that as per exhibit H, the drawings and specifications were not handed over to the plaintiffs by DW1 in line with clause 18.01 of the agreement. And as rightly submitted by the leading counsel of the plaintiff clause 21.01 of the agreement provides that 7 days notice should be given to the plaintiff to commence work and not outright termination as done by the defendants in this case [sic] exhibit 1.” B

The learned trial judge reiterated the law that parties are bound by the agreement they entered into. He concluded that non-compliance with conditions agreed to by parties to the contract amounted to breach of that contract. He therefore, found the termination of the contract by the defendants to be wrongfully done. C

Now, it is clear from the record of appeal that the terms of the contract between the parties were embedded in Exhibit ‘F’ and ‘B’ that is the letter of Award and the Format Contract. The provisions for termination of the contract is contained in clause 21.01 of Exhibit ‘B’. It provides as follows: D

“2107 Upon the occurrence of any of the followings, the Employer may terminate the contract viz:

- i. *If any or all of the work to be performed under this contract is abandoned by the contractor; or.....* E
- ii. *If the employer determines that the contract schedule is not being maintained or the contractor Is violating any of the conditions or provisions of this contract or refusing or failing to perform properly or in good faith all or any portion of the work and refuses to remedy any default within seven [7] days after receipt of written notice or default form, or fails to provide satisfactory evidence that such default will be corrected, the employer may, without notice to contractor’s guarantor or sureties, if any withhold any amounts otherwise due under the contract and/or terminate by written notice contractor’s right to proceed with all or any portion of the work.:”* F G

Prior to the signing of Exhibit ‘B’ by the parties, an Award letter dated 3rd June, 1997, Exhibit ‘F’, was offered to the appellant by the 1st respondent. Paragraph 3 thereof provides as follows: H

“3. Upon acceptance of this offer, relevant agreement forms shall be prepared for your signature. Thereafter, you will be expected to carry out your obligation under the contract in accordance with the terms and conditions therein, failing which the management

shall not hesitate to determine the contract accordingly." [Underlining for emphasis].

It is clear again from the two exhibits quoted above that the award of contract was dated 3rd of June, 1997, [Exhibit 'F']. Exhibit 'F' provides that the contract between the parties was to commence after Exhibit 'B' was signed by the parties. The execution and the signing of the agreement were done on 30th of July, 1997 and 3rd of August, 1997 respectively. The agreement allowed the plaintiff/appellant two weeks from the date of signing the contract within which to commence work on the site. That period of two weeks would terminate, according to the finding of the learned trial judge, on the 18th of August, 1997. The termination letter [Exhibit 'D'] however, was written and served on the appellant on the 14th of August, 1997, four days before the expiration of the two weeks period. ***I agree with both the learned counsel for the appellant and the trial court that the breach of contract between the parties had indeed taken place as the provision made in written agreement, Exhibit 'F' was not fully complied with by the respondents.*** The respondents were indeed in a hurry to revoke the said contract from the appellant and to make a new award of same to another contractor that is, the 3rd respondent as there were still four more days for the appellant to mobilize to site. ***For whatever reason the termination of the contract was made, it is pertinent to remind the respondents that both themselves as a party to the contract and the court that heard them initially and the appellate court, are bound by the terms of the contract. Neither of the parties to the contract nor the court can be allowed to bring into the contract any extraneous term not agreed upon by the parties.*** ***Further, it is not the duty of the court to make contract for the parties, as its primary role is to interpret and enforce the terms of the contract as agreed to by the parties.*** See: INTERNATIONAL TEXTILE INDUSTRY (NIG.) 1 LTD. V. ADEREMI [1999] 8 NWLR [part 614] 268. KOIKOI V. MANGNUSSON (1999) 8 NWLR [part 615] 492.

There is another finding by the trial court that as per Exhibit 'H', the drawings and specifications were not handed over to the plaintiff by DW1 in line with clause 18.01 of the agreement. Further, that court made another finding that the respondents were not in

compliance with the requirement of clause 21.01 of the agreement which provided for seven (7) days Notice to be given to the plaintiff to commence work and not outright termination as carried out by the respondents. This is another breach of the contractual terms. It was thus wrong of the court below, in my view, to hold, as it indeed, did, that there was no breach of contract by the respondents. B

Before I am done on issue No.1, it has been agitating my mind to say a word on the practice with the respondents as found by the court below that it was common practice that a contractor could be called upon to commence work on site well before formal execution of the contract which was more of ceremony than reality and that there was evidence to that effect by DW1. I have carefully gone through the record before me. ***I found that the respondents had averred in paragraph 6 of their statement of defence that it was normal practice in the 2nd defendant's contract to commit a contractor to commence work before formal execution of contract agreement. This averment was never backed up by any evidence. Although the court below found that DW1 testified to that effect. I however, could not find any shred of evidence from the testimony of DW1 in that respect. That, perhaps, was why the trial court itself did not make any finding on that "normal practice". Now, the trite position of the law of pleading is that where an averment has not been supported by evidence, that averment is deemed abandoned and must be struck out by the court.*** See: AWOJUGBAGBE LIGHT INDUSTRY V. CHINUKWE [1995] 5 NWLR [part 390] 379; OLANREWaju V. BAMIGBOYE [1987] 3 NWLR [part 60] 353; BUHARI V. INDEPENDENT NATIONAL ELECTORAL COMMISSION & ORS. [Supra]; OLUBODUN & ORS. V. LAWAL [2008] 6 SCNJ 269; ANYA V. IMO CONCORD HOTEL LTD. & ORS. [2002] 12 SCNJ 145. D E F G

Thus, one begins to wonder on what basis did the court below make it's finding on such "normal practice"? Courts of law, as I observed earlier, are not to manufacture evidence in a bid to help or assist, as it were, any of the parties. They are an umpire, having no interest on the matters brought before them. All parties must be seen and treated to be the same. The imaginary scale of justice must be directed to tilt toward that party whose case appears more just and more acceptable than that of the other side. H

Finally on this first issue, I agree with the trial court that since breach of contract has been established against the defendants/respondents, the appropriate remedy to which the plaintiff/appellant is entitled to is payment of compensation in form of damages. I resolve issue No.1 in favour of the appellant.

Appellant's Issue No.2 challenges the power of the court below to engage in re-evaluation of the evidence placed before the trial court. I think it is helpful to re-iterate the general principles of the law and practice on the evaluation and or, re-evaluation of evidence in both our trial and appellate courts as the case may be. The practice in a trial court is this: two sets of evidence are normally laid before the learned trial judge. One set by the plaintiff and the other set by the defendant. These are all geared towards justifying the averments each of the parties made in his/its pleadings. After the completion of evidence and perhaps closing addresses [where necessary] by the parties, it is now the duty, of the learned trial judge to first of all put the totality of the testimony adduced by both parties on an imaginary scale, that is, he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then observe which is heavier NOT by the NUMBER of witnesses called by each party, but by the quality or probative value of the testimony of those witnesses. In determining which side is heavier, the learned trial judge will need to have regard to whether the evidence is relevant, conclusive, admissible and more probable than the one adduced by the other party. It is to be noted that any evidence that was rejected by the trial judge should not find a resting place on that imaginary scale. The totality of the evidence should be considered in order to determine which has weight and that which carries no weight at all. Although civil cases are won on a preponderance of evidence, yet it has to be preponderance of admissible, relevant and credible evidence that is conclusive and which commands such probability that is in keeping with the surrounding circumstances of the case on hand. Thus, in deciding whether a certain set of facts given in evidence by one party in a civil case before a trial court is preferable to another set of facts given in evidence by the other party, the trial judge, after a summary of all facts, must place the two sets of facts on that imaginary scale, weighs one against the

other and then decides upon preponderance of credible evidence which weighs more, accepts it in preference to the other and then applies the appropriate law to it. If that law supports the claim which has been established by evidence, then a finding is made by the trial judge in favour of the plaintiff. If otherwise, then the plaintiffs claim must be dismissed. The trial judge must not also lose sight of any admission of material facts that may have been made by anyone of the parties so as to add more weight to the evidence adduced by the other. This is precisely why the totality of the evidence must be considered and why a trial judge must weigh the conflicting evidence adduced by both parties and then draw his conclusions. See the cases of: MOGAJI & ORS. V. ODOFIN & ORS. [1978] 3 SC 91 at page 95; DIBIAMAKA V. OSAKWE [1989] 3 NWLR [part 107] 101 at page 111-112; ONWUKA V. EDIALA (1989) 1 NWLR [part 96] 182 at page 208-209. That may be the reason behind further pronouncements made by this court on the matter of re-evaluation of evidence at the appellate level. **ONU, JSC, for instance, in the case of EBOADE V. ATOMESIN [1997] 5 NWLR [part 506] 490 at page 507-508, stated as follows:**

“The duty of appraising evidence given at a trial court is pre -eminently that of the court that saw and heard the witnesses, and it is also the right of the court to ascribe values to such evidence. The Court of Appeal may not disturb the judgment of the trial court if it is supported by evidence even in the slightest degree just because it would have come to a different conclusion on the same facts.”

See: MOGAJI V. ODOFIN (Supra); NZEKWE V. NZEKWE [1989] 2 NWLR [part 104] 373 at page 393; ATANDA V. AJANI [1989] 3 NWLR [part 111] 511 at page 539; KAMALU V. UMUNNA [1997] 5 NWLR [part 505] 321 at page 337.

Thus, it is only when the trial court fails to comply with such requirements in the evaluation of evidence that could cause a miscarriage of justice to one of the parties that the appeal court could interfere to save the situation, as it were.

My perusal through the printed record of appeal before this court shows that in his judgment, the learned trial judge after reproducing the claim of the plaintiff, summarized the facts as presented by the plaintiff and the exhibits tendered in support of the plaintiffs case

[page 66 - 67 of the record of appeal]. He then summarized the case as presented by the defendants [page 67 - 69]. He then proceeded to weigh the evidence as presented by the plaintiff against that of the defendants. He then came up with his findings where he found the termination of the contract between the parties was wrongfully done.

B The learned trial judge then applied the appropriate law [page 72 - 73] and gave judgment in favour of the plaintiff. ***I, for one, honestly, find nothing wrong in the procedure adopted by the learned trial judge although the court below faulted it.*** In faulting the trial court's exercise in arriving at its decision, the court below, per ***MUNTAKA-COOMASSIE. JCA***, [as he then was] commented, inter alia:

"It is surprising that the trial court which heard and seen[sic] the witnesses testifying failed to make good use of this unique opportunity and to make a sound finding of facts on this point. Instead it appears that the learned trial judge did not consider that point as essential and over looked same.

This is a situation where the learned trial judge failed to properly evaluate (sic) the evidence that was adduced. He has heard the evidence and seen the witnesses testifying but failed to evaluate the evidence that was adduced. He, in other words, failed to use the unique opportunity for hearing and seeing the witnesses. In such a situation, what will be the role of the appellate court? [sic] I believe in such a situation, this court, as an appeal court is duty to intervene and evaluate such evidence in the overall interest of justice. This rely [sic] constitutes one of the exceptions to the general rule that Appellate courts ought not to interfere with the findings fact of trial courts which had the unique opportunity of seeing and hearing the witnesses give evidence and observing their demeanor[sic] in the witness box. As I stated earlier on [sic] there are a number of exceptions to this rule, a major exception being that where, as in this case, such findings are in fact interference from findings properly made, the court of appeal is in good position as the trial court to come to a decision."

I do not fancy that line of reasoning adopted by the court below as there is, to my mind, nothing perverse concretely and convincingly shown by that court which is capable of causing miscarriage of justice to the respondents. The respondents were validly found by

the trial court to be at fault. It was not the trial court that manufactured the evidence before it. Both parties called witnesses in support of their own side. The learned trial judge could not be expected to do anything better than to weigh on his imaginary balance, all that was laid in evidence before him. This, he did and he preferred the evidence placed by the appellant. The court below should remember that it was not in that status, sitting as a first instance court. It was deciding the matter before it on appeal. And an appeal has been defined by this court, per OPUTA, JSC, in the case of OREDOTIN V. AROWOLO [1989] 4 NWLR [part 114] 172 at page 211, to be:

“an invitation to a higher court to review the decision of a lower court to find out whether on proper consideration of the facts placed before it, and the applicable law, that court arrived at a correct decision. See: further: EGBA V. ADEFARASIN [1987] 1 NWLR [part 47] 3 at page 23; ONIFADE V. OLAYIWOLA [1990] 7 NWLR [part 161] 130 at page 157; ADEGOKE MOTORS V. ADESANYA [1989] 3 NWLR [part. 109] 250.

This, therefore, means that an appeal cannot be taken by a higher court to be a retrial of the case placed before it by way of appeal. It’s jurisdiction is invoked in the review of the whole proceedings including all interlocutory decisions given in the trial in so far as there is an appeal on them and they form part of the appeal process. In doing so however, this court handed a stern warning to all appeal judges that:

“It is trite law that a court of appeal should not easily disturb the findings of fact of a trial judge who had the singular opportunity of listening to the witnesses and watching their performance. It is also settled law that such findings of fact or the inferences from them may be questioned in certain circumstances such as where the appellate court is satisfied that the advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge’s conclusion, and for that reason the court of appeal finds that the decision is perverse, or where the facts found by the trial judge are wrongly applied to the circumstances of the case or where the inference drawn from those facts are erroneous or indeed where the findings of facts are not reasonably justified or supported by the credible evidence given in the case, a court of appeal is in as much a good position to deal with the facts

and findings as the court of trial. See: Benmarx V. Austin Motor Co. Ltd. [1955] A.C, 270 at 374 - 376. Thomas V. Thomas [1947] A.C-484 at 487 - 488; Fabumiyi & Ors. V. Williams [1956] SCNLR 274; [1956] 1 FSC 87; [1956] SCNLR 274 and Akinola & Ors. V. Oluwo & Ors. [1962] 1 SCNLR 352; [1962] All NLR 225."

B In the light of the above therefore, it is wrong of the court below, in my humble view, to hold that the relevant findings of the learned trial judge do not support the evidence properly adduced before him. The said evidence, the trial court further observed, was
C credible and unchallenged by the cross-examinations of the respondents' counsel at various stages of the proceedings. The court below however, concluded that the decision of the trial court was a mere conjecture not supported by evidence. It was perverse and led the court below to safely interfere with the findings of the trial court.

D The clear exhortations of this court against an appeal court entering into the arena and substituting its own views to that of the trial court has been supported by a litany of cases. Suffice it to mention but only a few, such as: FOLOMUSO V. ADEREMI [1975] NWLR 128; AKINLOYE V. EYIYOLA & ORS. [1968] NWLR 92 at page 95
E ; BALOGUN V. AGBOLA [1974] 10 SC 111. In fact, in the case of Victor WOLUCHEM & ORS. V. CHIEF SIMON GUDU & ORS. [1981 5 SC 178 at page 197 - 198; Nnamani, JSC, said:

*"The principles under which an appeal court would interfere with the findings of a lower court have been laid down by several
F authorities of this court and courts in common law jurisdictions. It is now settled law that if there has been a proper appraisal of evidence by a trial court, a court of appeal ought not embark on a fresh appraisal of the same evidence in order merely to arrive at a different
G conclusion from that reached by the trial court. Furthermore, if a court of trial unquestionably evaluates the evidence then it is not the business Court of Appeal to substitute its own views for the views of the trial court."*

H But where genuine cases have been pointed out by any of the parties which will warrant interference by a higher court, then the higher court has every latitude to exercise its power of stepping into the shoes of the trial court with a view to correcting the wrongs committed by the trial court in the interest of justice. See: KUFORIJII VS. V. Y. B. LTD. (1981) 6-7SC 25 at page 46. The circumstances which

will warrant such an interference are:

- (i) Where the judgment of the trial court can be shown to be affected or is full of material inconsistencies and inaccuracies,
- (ii) where the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or
- (iii) where the trial judge has gone completely wrong and ; B
- (iv) where the trial court takes a decision which is clearly perverse.

See: ONOWAN & ANOR V. ISERHIEN [1976] NWLR 263 at 265; NABHAM V. NABHAM [1967] NWLR 192. C

I resolve issue No. 2 in favour of the appellant.

Appellant's third issue is on damages granted to the plaintiff/appellant by the trial court which was in the sum of N14,193,569.68. The court below set aside that award of damages. Learned counsel for the respondents submitted that the position taken by the court D below is unassailable having regard to the state of pleadings and evidence in the case.

From the record of appeal, the claims for the sum of N28,387,137.35 being anticipated loss of profit from the contract and that of N30,000,000.00 as general damages for loss of goodwill, E reputation, and cost of demolition on site were made as 'alternative' claims in the statement of claim. The trial court, on the claims generally by way of declaration, injunction, anticipated loss of profit and general damages for goodwill et cetera as contained in paragraphs F 36 and 37 of the statement of claim, held as follows:

"For wrongful termination of the contract the plaintiff claims injunction and in the alternative they claim damages. Injunction as rightly submitted by the leading counsel for the plaintiff cannot be claimed here as the circumstance of the case now stands. 3rd defendant had since commenced work on the orders of the 1st defendant albeit the order of the Honourable Court not to do so until this case is finally determined. The plaintiff will have to resort back to the alternative of claiming damages.....Therefore, payment of damages is what is now open for the plaintiffs. And as held in Supreme Court case of GEORGE ONAGA & FOUR ORS. V. MICHU & CO. [1961] 2 SCNLR 101 at page 103 per UNSWORTH FJ. H

"An aggrieved contractor is entitled to any balance of payment for work done and also to toss of profit on the work he has been

prevented from doing’.”

The learned trial judge, went on to observe as follows

“*In this case pw1 was employed by the plaintiff to work on the bill of quantity for the contract terminated and assess the profit margin. He did so and arrived at 30% of the contract sum. Although the evidence of PW1 stand [sic] uncontradicted and unchallenged being an expert evidence it should only be persuasive and not conclusive. This is more so that acting as an arbitrator he only acted for and on behalf of one party against the order. The plaintiffs must none-theless be entitled to damages which should be reasonable in the circumstance.*”

This I compute at 15% of the contract rate.

This comes up to N14,193,569.68 which I hereby award the plaintiff.”

In their brief of argument before the court below, the respondents herein, who were the appellants did not formulate any issue relating to damages. There was therefore nothing for the appellant [respondent at the court below to respond to]. The appellant, however, filed a cross-appeal solely on the issue of damages at the court below. It also filed it’s cross appellant’s brief. The cross-respondents filed no cross-respondents’ brief. The court below found and held in that respect as follows:

“*On the issue of cross appeal which was filed with the Respondents Brief, I discovered as a fact that it was actually filed. It is my view that, despite all odds, it was properly before this court. I have earlier on, reproduced the issue which was based on one ground, namely, that the learned trial judge applied wrong principle of law in arriving at N14,193,569.68 only as plaintiffs anticipated loss of profit....*”

I have closely considered the sole ground filed in respect of the Cross-Appeal and issue distilled therefrom and the submissions of the learned counsel for the Cross-Appellant. It is to be noted that the Appellant [sic] in the main appeal did not respond to the submissions of the Cross-appellant’s counsel on the ground that the said Cross-Appeal was not properly and distinctively filed. This court earlier on agreed that the said Cross-Appeal would be rightly filed as was done by the Cross-Appellant[s].

I have checked the record especially the evidence and discov-

ered that the learned trial judge did not totally accept evidence of PW1 as Gospel Truth. He in fact in a way rejected that evidence on profit margin. He cannot see the relevance and propriety of the evidence of PW1 against the Appellants. He distanced himself from the 30% of the contract amount given by the PW1 and dished out his own compensation which is 15% of the total cost of the contract. B
Further to the above, the appellant herein as the Cross-Respondent has failed to react to the submissions of the Cross-Appellant's counsel as the measure of damages recoverable in the instant case. But that does not mean that the Cross-Appellant shall succeed, the cross-ap- C
peal shall be determined on the basis of strength of the submissions of the Cross-Appellant. Now, it is trite law, that an Appellate court shall not disturb the award of damages by a Trial Court. The award of damages can only be altered by an appellant court when the award is shown to be either manifestly too high or manifestly too low was D
made of a wrong principle of law that the appellate court is convinced that the award is made as an entirely erroneously estimate. I agree with the learned trial judge that the evidence of the so called expert PW1 is most unhelpful. He has failed to show how he arrived E
at the figure of 30% of the contract price. An expert opinion is only necessary and relevant when the expert finishes [sic] such scientific or technical detailed information that will convince the court on the correctness of the estimate. The learned trial judge in the instant case computed the profit margin at 15% of the contract price. Although F
the figure will appear to be arbitrary, there is no evidence adduced by the Cross-Appellant to show that the amount is either too low or too high. Further, I am not convinced by the submission of the Cross-Appellant's counsel that the award is made as an entirely wrong estimation. The Appellant/Cross-Respondent did not appeal against the G
award of damages as mentioned above, had it done so, one would examine the propriety of awarding the damages for profit margin which was claimed in the alternative to the other claims which were granted. In any event, I am not convinced that I should alter the award of the damages. And most importantly having regard to my H
finding that as the evidence adduced the trial court ought to have found for the Appellant/Cross-Respondent, I adjudge that the Cross-Appeal fails and is dismissed by me.

In the result, the appeal of the Appellants succeeds and is

hereby allowed, the judgment and Orders of the trial court entered in this matter are hereby set aside. The claims of the Respondent before the lower court are dismissed in their entirety. The Cross-Appeal of the Respondent on the question of damages is dismissed."

[Underlining supplied for emphasis]

B After having perused the record of appeal, it is my observation that I could not see the Notice of Cross-Appeal filed by the cross-appellant, although the court below stated that the cross-appeal was in fact filed and, despite all odds, the cross-appeal was found to be properly placed before that court. That was why perhaps, the cross-respondents did not respond. The court below also found that the learned trial judge applied wrong principles of law in arriving at the sum of N14,193,569.68 awarded to the plaintiff as anticipated loss of profit. It was a finding of the court below also that the learned trial judge did not totally accept the evidence of PW1 as Gospel Truth and he in a way rejected that evidence on profit margin. The court below found again that the learned trial judge distanced himself from the 30% of the contract sum given by PW1 but the learned trial judge 'dished' out 15% as his own award of compensation. The court below re-iterated the trite law on compensation made by a trial court and such award on compensation is not to be altered by an appellate court except where the award is shown to be either manifestly too high or manifestly too low or where it was made on a wrong principle of law. Further findings by the court below on the issue of damages are that PW1 failed to show how he arrived at the figure of 30% of the contract price. It also found the percentage arrived at by the learned trial judge that is 15% of the contract price was arbitrary as there was no evidence in support. The court below was not convinced by the submission of the cross-appellant's counsel that the award was made as an entirely wrong estimation. That court found again that the appellants/cross-respondents before it, did not appeal against the award of damages. The court below ended with the following holdings:

H *"I am not convinced that I should alter the award of the damages. And most importantly having regard to my finding that as the evidence adduced at the trial court ought to have found for the appellant/cross-appellant [sic], I adjudge that the Cross-Appeal fails and is dismissed by me."*

With utmost respect, there is a little confusion in the way the matter of the award of damages made by the trial court was handled by the court below. The court below seemed to have blown both hot and cold at the same time.

In the first instance, it is wrong of the court below to say that the evidence of PW1 was rejected by the trial court. What the record has in that respect reads as follows:

“In this case PW1 was employed by the plaintiff to work on the bill of quantity for the contract terminated and assess the profit margin. He did so and arrived at 30% of the contract sum. Although the evidence of PW1 stand(s) uncontradicted and unchallenged being an experts [sic] evidence it should only be persuasive and not conclusive. This is moreso that acting as an arbitrator he only acted for and on behalf of one party against the other”.

Earlier on, in his evidence in chief, PW1 narrated to the trial court how he arrived at the 30% of the contract sum. He stated, inter alia, as follows;

“I was to work out the profit margin for the contract. I did so and arrived at 30% of the contract sum as the profit margin. That is N28,387,739.35 of N94,623.83. In every item in a Bill of Quantity consist of material, labour, profit and overhead and plants where the case may be. When I looked at the components I found that 30% margin is to be granted. A month after if the cost of material change [sic] it affects the profit margin. At times it may stabilize.”

The witness said he was an independent professional. He was a Quantity Surveyor holding an H.N.D in Quantity Survey; a member of Nigerian Quantity Surveyor and a member of the Institute of Construction Industry Arbitrators. He stated categorically that he was not in the employment of the plaintiff company. In spite of the testimony of PW1 and the findings of the trial court it is to me, inexplicable, how the court below arrived at its findings as contained on pages 195- 196 of the record of appeal. Hereinbelow is what the court below found:

“In the record of proceedings there the issue of damages has not been thrashed out by the respondents. The nature of the damages to be awarded has not been dearly stated. One cannot deduce from the claims whether it was the special damages or general damages that were claimed. There is no credible evidence before the

court to determine what damages could be awarded. The evidence of PW1, the so called expert witness and arbitrator, is no evidence at all. He was called by the respondent to give evidence against the appellant, his position, vis-a-vis the whole scheme was not stated. He was only to work out the profit margin for the contract based on the bill of Quantity produced before him by Kay Dee Ventures, dated 18th day of March, 1996. He arrived at 30% of the contract sum as the profit margin. From where, for example, the Bill of Quantity was produced. Was it after the termination of the contract or before? Under cross examination PW1 stated that "I am not in the employment of the plaintiff Company. I was assigned the job of working out profit margin only. I am an independent professional."

It is in evidence that the contract was terminated on 29/8/97. It was actually awarded on 3/6/97. The Bull [sic] of Quantity tendered for identification was said to be taken to the PW1 by the PW2 on 18/3/96 -The evidence of PW2 on p55 of the record shows that the respondent were [sic] not furnished with Bill of Quantity etc. despite repeated demand. He said "We wrote serval [sic] letters demanding the Bill of Quantity [sic] and the drawing. The last was in September, 1997. Where then did the respondent get the Bill of Quantity and handed it over to the so called "Independent Professional" on 18/3/96?

The evidence of PW1 was destroyed and completely unreliable, no reasonable Tribunal can act on it. That being the case the decision of the trial court, with tremendous respect, cannot stand and I so hold." The above, to me, is a complete reassessment of the evidence of PW1, which the court was not invited to do and which, ordinarily, it has no power to do in view of the trite position of the law that except where the trial court fails, neglects to properly evaluate the evidence or erroneously does so or the conclusion reached is not supported by the evidence on record, et cetera. See: COL. NICHOLAS AYANRU [RTD.] V. MANDILAS LTD. [2007] 4 SCNJ 388; GEN. MUHAMMADU BUHARI V. INDEPENDENT NATIONAL ELECTORAL COMMISSION & ORS. [2008] 12 SCNJ 1; HON. GOZIE AGBAKOBA V. INDEPENDENT NATIONAL ELECTORAL COMMISSION & ORS. (2008) 12 SCNJ 619; JIMOH GARUBA V. ISIAKO YAHAYA [2007] 1 SCNJ 352.

Further, **it was the finding of the trial court that the evi-**

dence of PW1 was neither discredited nor challenged by the respondents. The trite position of the law here, too, is that any evidence that is unchallenged or uncontroverted, the trial court has a duty to act on it where credible. See: ADA V. THE STATE [2008]

4SCNJ 288; HON. INAKOJU & ORS. V. ADELEKE [2007] 1 SCNJ 1; ODEBUNMI & ANOR V. ABDULLAHI [1997] 2 SCNJ 112; EBUNIKE & ANOR V. AFRICAN CONTINENTAL BANK LTD. [1995] 2 SCNJ 58. **I think I should state that the learned trial judge himself reduced the efficacy of the weight of PW1's evidence, when he stated that although the evidence of PW1 stood uncontradicted and unchallenged being an expert evidence it should only be persuasive and not conclusive.** No authority was cited in support of that proposition. The trite position of the law in relation to expert evidence is that an expert must be called as a witness before he can give evidence in court and his evidence is necessary where he can furnish the court with scientific or other information of technical nature that may be outside the experience and knowledge of the judge. See: ATTORNEY - GENERAL OF THE FEDERATION & ORS. V. ALHAJI ATIKU ABUBAKAR & ORS. [2007] 4 SCNJ 456, That was the position of PW1 before the trial court. There was no basis for the interference by the court below on the findings of the trial court on that expert's evidence.

On the reduction of compensation from 30% averred by PW1 to 15% by the learned trial judge; the trite law is that where a plaintiff claims more than he can prove, he is awarded the lesser amount. In this respect, I think the learned trial judge had exercised his discretion, judicially and judiciously, falling back on the evidence of PW1 to grant 15% of the contract sum to the appellant.

Where there is a breach of contract of fundamental nature such as the one in this appeal, the plaintiff who suffered as a result thereof, deserves to go home fully compensated. But as the learned trial judge had exercised his discretion to reduce the rate from 30% to 15%, I am loathe to interfere with that award. I resolve issue No. 3 in favour of the appellant.

Finally, this appeal is full of merit and it is hereby allowed by me. Accordingly, the judgment of the court below is hereby set aside.

I restore and affirm the judgment of the trial court in its entirety. The appellant is entitled to N50,000,00 costs from respondents.

ONNOGHEN JSC

B I have had the benefit of reading in draft the lead judgment of my learned brother *MUHAMMAD JSC* Just delivered.

I agree with his reasoning and conclusion that the appeal has merit and should be allowed.

C It is now settled law that in matters of contract, as in the instant case, in which the terms and conditions of contract are embodied in a written document, the parties and the court will not be allowed to read into the contract extraneous terms on which they reached no agreement as the court cannot make a contract for the parties. The D primary duty of the court in the circumstance is limited to interpretation and enforcement of the terms of the contract as agreed by the parties thereto - See *Koiki vs Magnusson (1999) 8 NWLR (Pt 615) 492; Int. Textile Ind. (Nig) Ltd vs Aderemi (1999) 8 NWLR (Pt. 614) 268*,

E In the instant case, *exhibit B* is the contract document binding the parties and was executed on 3rd day of August, 1997. It gives the appellant a period of two [2] weeks to mobilize to site which would have expired on 18th day of August, 1997 but the contract was terminated before 18th day of August, 1997. *Exhibit D* which initiated the F process of termination of the contract was written on 14th day of August, 1997. *Exhibit D* which was to serve as last warning to lead to the termination was written within four (4) days of the grace period of two (2) weeks from the signing of exhibit B.

G The drawings and specification for the construction work were also not handed over to the appellant as agreed in the contract, before the termination of the contract by the respondent. The question is, without the drawings and specification how was the appellant to have carried out the construction works envisaged in the contract. It H is apparent that the respondents did everything possible to ensure that appellant did not perform the contract.

In view of the glaring facts on record based on the evidence at trial, I hold the view that the lower court was in error, when it set aside the findings of fact by the trial court and the judgment of that

court to the effect that the respondents were in breach of the contract between the parties.

It is for the above reasons and the more detailed ones contained in the lead judgment of my learned brother *MUHAMMAD JSC* that I too find merit in this appeal which is accordingly allowed by me. B

I abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal allowed.

C

TABAI JSC

I read in draft the lead judgment of my learned brother *TANKO MUHAMMAD JSC* and I entirely agree with his reasoning and conclusion that there is merit in the appeal which should therefore be allowed. D

By way of emphasis I wish to restate the principles of law that parties to a contract are deemed to have voluntarily entered into it and therefore bound by its terms. Where the contract is reduced into writing, it is that document that invariably constitutes the guide to its interpretation. And the parties will not be allowed to read into such contract terms upon which they reached no agreement and thus not forming part of the contract. These principle were applied in *BABA V NIGERIAN CIVIL AVIATION TRAINING CENTRE ZARIA & ANOR* (1991) 5 N.W.L.R (Part 155) 239; *ALLIED TRADING CO. LTD v G.B.N. LINE* (1985) 2 N.W.L.R. (Part 5) 74. E F

In the instant case the learned trial Judge considered the evidence and made clear findings of facts at pages 71-72 of the record. With respect to the contract the learned trial judge stated in part at page 71 of the record thus: G

“The learned counsel for the Defendants had rightly submitted that Exhibits “B” speaks for itself. The agreement executed on the 30/7/97 and signed on the 3/8/97. DW1 wrote Exhibit “D” on 14/8/97 four days before the grace period of 2 weeks had expired and it was to expire as last warning. This in my opinion is premature as the 2 weeks allowed by Exhibit “B” had not yet expired.....” H

These findings remain immutable and there can be no basis therefore for any interference with them. By the clear terms of Ex-

hibit “B” the Plaintiffs/Appellants had clear two weeks from the 3rd of August 1997 within which to move to site. They had up to the end of the 17th of August 1997 within which to move to site in the due execution of contract. In other words, the 14 days period within which the Plaintiffs/Appellants were to move to site could only have expired on the 18th of August 1997.

However, Exhibit “D” the letter of termination of the Appellant was written and served on the Appellant on the 14th of August 1997. I agree entirely with the Appellant that the termination was premature and a clear breach of the contract.

For the foregoing reasons and the fuller reasons very ably highlighted in the lead judgment, I also allow the appeal with costs which I also assess at N50,000.00 in favour of the Appellant.

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OGEBE JSC

I had a preview of the lead judgment of my learned brother Ibrahim Tanko Muhammad JSC just delivered and I agree entirely with his reasoning and conclusion. The Court of Appeal wrongly reversed the trial court for reasons ably stated in the lead judgment. Accordingly I allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the trial High Court with costs as assessed in the lead judgment.

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ADEKEYE JSC

I have read before now the judgment just delivered by my brother I.T. Muhammad, JSC. My Lord had meticulously considered all the issues raised for determination before allowing the appeal. I agree with his reasoning and conclusion that the appeal be allowed. The facts of the case are as narrated by my brother in his leading judgment. The undisputed facts before the court were that

(a) The appellant before this court who was the plaintiff before the trial court bided for and was awarded the contract for the construction of Link 111 Keffi Road Alignment from Keffi to Airport Expressway Abuja on 3rd of June 1997 by the 2nd respondent as the 2nd defendant for a contract sum of N994,623,797.84. The letter of award for the contract was admitted in evidence as Exhibit F.

(b) Both parties eventually entered into a contract executed on the 3rd of August 1997 - Exhibit B before the trial. Exhibit B defined the rights and obligations of the two parties to the contract. Exhibit B the contract provided for-

(1) 14 days from the date the contract was executed for the appellant to mobilize to site. B

(2) 7 days notice required before termination of the contract. The respondent terminated the contract before the expiration of the 14 days stipulated in the contract on the ground that the appellant failed to mobilize on site despite repeated demands. C

The appellant further explained that it had mobilized to site – as equipment and his workers were already there but could not commence elaborate construction work because the Bill of Quantity, Drawings and Specifications were not handed over to the company by the 2nd respondent. The Bill of Quantity was tendered and admitted in evidence as Exhibit A. The trial court carried out an analytical evaluation of the evidence of both sides - which involved arithmetical calculation of the time aspect of the contract. The contract, Exhibit B, executed on 3/8/97 provided for 14 days for the contractor to move to site. The period of 14 days would extend to 18/8/97. The respondents wrote Exhibit D to terminate the contract on 14/8/97. The period given to the contractor by the contract to mobilize to site was to expire on 18/8/97. The trial court concluded that the process of termination embarked upon by the respondent at that stage was premature. Further, Clause 21.01 of Exhibit B, the contract, allowed for 7 days notice to be given before termination of the contract which the respondents did not comply with. In the fact of the foregoing lapse, the trial court found that the contract was wrongfully terminated. An award of N14,193,569.68 was made as damages to the plaintiff/appellant. The court below upheld this judgment and in allowing the appeal of the respondents, gave reasons that- E F

(1) It was satisfied with the evidence of DW1 that it was the practice of the defendants to order a contractor to mobilize to site and commence construction work even before the formal execution of the contractual agreement, which is just a formality. H

(2) That the plaintiff/appellant failed to mobilize to site and commence construction work there. The respondents were thereby justified in terminating the appointment.

The court cannot shut its eyes to the evidence on record particularly based on Exhibits B and F, which clearly defined the nature and terms of the contract between the parties. It is very clear that the parties made time an essence of the contract as days were stipulated for performance. In order to debunk the conclusion of the lower court, I wish to reiterate the basic principles of the law of contract as follows

That if parties have agreed between themselves upon the conditions for the formation of a contract, and these conditions were embodied in a document, then they are bound by the terms and conditions set down on the documents. Having so bound themselves it is not the duty of the court to make a contract for the parties. *Afrotech v. MIA & Sons Ltd. (2000) 12 SC pt. 11 pg. 1* *Owoniboy Technical Services Ltd. v. U.B.N. Ltd. (2003) 15 NWLR pt. 844 pg. 545*

The parties are bound by the terms of Exhibit B and they cannot opt out of same. Where the parties have by mutual agreement provided for the time for the satisfaction of a condition, time becomes of essence of the agreement and any breach of that condition has the effect of putting an end to the contract. In the agreement between the appellant and the respondents, Exhibit B provided for-

- (a) 14 days period from the date of Exhibit B the 3rd of August 1997 to mobilize to site
- (b) 7 days notice must be given before termination is done
- (c) 6 months to complete the contract Both parties are bound by the foregoing terms.

Niger Insurance v. Abed Brothers (1976) 7 SC pg. 35.

Leyland (Nig.) Ltd. v. Dizengoff (1990) 2 NWLR pt. 134 pg. 610. *Gamla (Nig.) Ltd v. New (Nig.) Bank PLC (1999) 12 NWLR pt. 631 pg. 408 at 409.*

The lower court depended on the evidence of DW1 to enforce the practice of the respondent in the Construction Industry of expecting a contractor to mobilize to site and commence construction work before the formal execution of the contract which is just a mere formality (vide page 192 of the Record).

It is a well established rule that no evidence of custom or practice can override the terms of a written contract, though a contract may be subject to terms that are implied by custom or trade usage, the latter

does not apply to the agreement Exhibit Leyland (Nig.) Ltd v. Dizengotf (1990) 2 NWLR pt.134 pg. 610 British Crane Hire Corporation v. Ipswich Plant Hire Ltd. (1975) Q.B. 303

On the very important issue of evaluation of evidence which my Lord considered in the leading judgment; I shall only add a few words by way of emphasis. The attitude of the appellate court where evaluation of evidence and findings of fact are based on credibility of witnesses is that credibility of a witness is a matter for a trial court and not for an appellate court. The witness is seen by a trial court whereas the appellate court only reads the evidence of the witness from record and it is not in a position to determine the credibility of the witness. Demeanour is a vital area of credibility and it is only the trial court which sees and watches the demeanour of the witness. It is within the exclusive role of the trial court to watch the mannerism, habits and idiosyncrasies of the witness and attach probative value to the evidence presented before it.

An appellate court will also not make it a habit to interfere with a finding of fact of a trial court where such finding is supported by the pleadings and evidence both oral and documentary where the trial court unquestionably evaluates the evidence and justifiably appraises the facts, it is not the business of an appellate court to substitute its own view for those of the trial court. What an appellate court is required to do is simply to find out from the record whether there is on record evidence which the trial court could have acted on or which its findings are based. An appellate court is however expected to interfere only in exceptional circumstance where such finding is perverse, not supported by evidence, or had occasioned a miscarriage of justice, or where the trial court failed to exercise its discretion judiciously or judicially, or has exercised such discretion frivolously or arbitrarily, in a situation where an appellate court has substituted its own view of the evidence for that of the trial court, miscarriage of justice will definitely occur from adopting such a course of action.

Sanni v. Ademiluyi (2003) 3 NWLR pt. 807 pg. 381

Eya v. Qudus (2001) 15 NWLR pt. 737 pg. 578

Wilson v. Oshin (2000) 9 NWLR pt. 673 pg. 442

Akague v. Ogu (1976) 6 SC pg. 63

Odofin v. Ayoola (1984) 11 SC 72

Oliugbo v. Umeh (2004) 6 NWLR pt. 870 pg. 621

Woluchem v. Gudi (1981) 5 SC pg. 291

Maja v. Stocco (1968) 1 ALL NLR pg. 141

Mogaji v. Odojin (1978) 4 SC pg. 91 .

Ebba v. Ogodo (1984) 1 SCNLR pg. 372

University of Lagos v. Olaniyan (1985) 1 NWLR pg. 1 pg. 156

B It is a general rule that where parties enter into a contract, they are bound by the terms thereof and the court will not allow to be read into such a contract, terms on which there is no agreement – Baba v. Nigerian Civil Aviation Training Centre (1991) 5 NWLR pt. 192pg. 388 Koiki v. Magnusson (1999) 8 NWLR pt. 615 pg. 492

C With fuller reasons given by my brother in the lead judgment, I also allow the appeal and adopt the consequential orders as mine.

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