

**SUPREME COURT OF NIGERIA**  
30TH APRIL, 2010, SC. 30/2001  
**CORAM:- M. MOHAMMED, I. F. OGBUAGU,**  
**F. F. TABAI, C. M. CHUKWUMA-ENEH, M. S.**  
**MUNTAKA-COOMASSIE, JJSC**

SALZGITTER STAHL GMBH ..... APPELLANT  
AND  
TUNJI DOSUNMU  
INDUSTRIES LIMITED ..... RESPONDENT

---

PLEADINGS - Statements of claim - Averments - Admission - Averments not specifically traversed - As is the case with paragraphs 3 and 4 herein - Are presumed admitted (H1)

EVIDENCE - Evaluation - Exhibit G - Discrepancies in statement of claim - Effect - They are irrelevant to the force of Exhibit G - As account stated - Since defendant did not join issue with plaintiff on them (H1)

EVIDENCE - Proof - Nonreceipt of machine - Failure to tender letter - Defendant's failure to tender the letter - By which he conveyed his nonreceipt - Entitles plaintiff to invoke s. 149 (d) of Evidence Act (H2)

ACTIONS - Proof - Plaintiff's claim - Whether proved - As plaintiff has made out a prima facie case - He is entitled to have judgment in his favour - In view of defendant's failure to rebut same (H3)

EVIDENCE - Conclusiveness - Exhibit G - Effect as account stated - It precludes the parties from reopening the transactions - Which have informed its preparation and execution (H4)

WORDS & PHRASES - Evidence - "Prima facie" - Meaning - It means the nature of evidence which if accepted - Is sufficient to establish a fact - Unless rebutted (H5)

WORDS & PHRASES - Commercial law - "Account stated" - Mean-

ing - It means a balance - That parties to a transaction agree on - Either expressly or by implication (H6)

JUDGMENTS - Commercial law - Judgment sum - Award in foreign currency - Propriety - Our courts have jurisdiction - To give judgment in foreign currency - On the strength of the *Miliangos* case - Which overruled the *Havana* case (H7)

COMMERCIAL LAW - Judgment sum - Award in foreign currency - Rate of conversion - Applicable rate is that prevailing - At time of enforcing judgment - On the strength of the *Miliangos* case - Which overruled the *Havana* case (H7)

### ***FACTS***

The plaintiff/appellant sued defendant/respondent in the High Court of Lagos State claiming the sum of DM 127,305.49 (one hundred and twenty seven thousand, three hundred and five deutschmarks and forty nine pfennigs) being the balance of payment in respect of six (6) units of machinery sold and delivered to respondent in Lagos. Appellant also claimed interest on the sum at 9% per annum until total sum is liquidated. In its writ of summons, appellant had stated the naira equivalent of the sum as N34,689.91 (thirty four thousand six hundred and eighty nine naira, ninety one kobo), apparently at the prevailing exchange rate at the time of bringing the action. But it was subsequently amended as per the amended statement of claim to read N265,005.33 (two hundred and sixty five thousand and five naira thirty three kobo).

It was not in dispute that respondent had made some payments to appellant for the purchase and the sum now being claimed was only a balance from the total sum. This sum was stated in Exhibit G - a payment schedule prepared and executed by the parties two years after the delivery of the goods. Nevertheless, by its statement of defence, respondent alleged that it only received four (4) units out of the six (6) units of machinery ordered from appellant. It maintained that the unpaid balance was the cost of the two (2) units not received and as such it was not liable for it. Though D.W. 2 testified that respondent wrote a letter to appellant notifying it of the nonreceipt of the two (2) units, the letter was not put in evidence. After hearing,

trial court gave judgment to appellant as claimed. Dissatisfied, respondent appealed to Court of Appeal which allowed the appeal as it held that there were fatal discrepancies in the statement of claim and that Exhibit G alone could not impose absolute liability for the debt on respondent. Aggrieved, appellant has brought this appeal against the judgment of Court of Appeal.

### **ISSUES FOR DETERMINATION**

*“(a) Whether the payment schedule (Exhibit G) prepared and executed by the parties in 1975 (two years after the delivery of the goods) is not an ‘Account stated’ and if it is, whether the Court of Appeal was right to hold that the judgment of the trial court declaring the respondent liable to the appellant in the sum of DM 127,308.49 was not justified.*

*“(b) Whether after holding that ‘the Miliangos’ has overruled, ‘the Havana’ the justices of the Court of Appeal were right in proceeding to determine the appeal on the principle of the Havana.”*

**HELD** (Unanimously allowing the appeal per **CHUKWUMA-ENEH JSC**)

### ***PLEADINGS - Discrepancies in statement of claim***

1. At the trial the witnesses of both parties testified as pleaded. The trial Court spared no time and words in concluding thus:

*“The pleadings filed were inarticulate and incoherent. The evidence led by the parties did not improve matters. For an example, in paragraph 3 of the Statement of Claim, the plaintiff purported to itemize the consignments exported to the defendant/company with the cost of each consignment shown in the invoices. The total sum of the cost of the consignment shown on the invoices did not however tally with the total amount of the cost of the consignment contained in the agreed payment schedule pleaded in paragraph 4 of the Statement of claim”.*

That is as far as the discrepancies between paragraphs 3 and 4 of the Amended Statement of Claim have come to be.

One thing that is clear from the foregoing is that the defendant has not joined issue with the plaintiff on the discrepancies in the averments in paragraph 3 and 4 of the Amended Statement of Claim the crux of the issue in this case and upon which the lower court has relied to refuse the effects of exhibit G as an account stated. Indeed,

as found by the trial Court and I agree with it that no attempt has been made in the Statement of Defence to plead specifically in answer to paragraphs 3 and 4 of the Amended Statement of Claim. I find that the averments in paragraphs 3 and 4 of the Statement of Claim have not been traversed by the defence and are presumed admitted; otherwise it would amount to defeating the object of pleading - to settle the issues upon which the case between the parties is to be contested. (p. 1500 B)

***C Proof - Nonreceipt of machine - Failure to tender letter***

2. From the defence pleadings, it cannot be said that the defendant has pleaded any reason for repudiating liability as per the claim. Indeed, the defence witness i.e. DW2 under cross-examination on a crucial point has said that *“he did not bring the letter of the defendant/company wherein it informed the plaintiff/company that it did not receive the machine ordered”* i.e with regard to the 2 units of the consignments alleged as not received by the defendant.

If at all such letter has ever existed and has been sent to the plaintiff, it is strange that the defence has not seen it fit to call for it i.e. the original copy by a notice to produce at the trial. The plaintiff in the circumstances is entitled to invoke the provisions of Section 149 (d) of the Evidence Act in that regard. (pp. 1501 F/ 1502 A)

***F Plaintiff's claim - Whether proved***

3. Let me therefore, say categorically that based so far on my reasoning and findings above I have no misgivings in my mind that notwithstanding the discrepancies in paragraphs 3 and 4 of the Amended Statement of Claim upon which no issue has been joined in this matter that the plaintiff has made out a prima facie case for the defendant's rebuttal and in default of which judgment ought to have been entered in its favour. This is so even on exhibit G alone.

The discussion of this matter has been taken this far because of the lower Court's erroneous conclusion that the plaintiff has not firstly made out a prima facie case to warrant proceeding to consider the defendant's case in this matter. And I ask the question: Is the lower Court justified in so holding? My answer is clearly in the negative. (p. 1502 H)

***Exhibit G - Effect as account stated***

4. I am inclined to agree with the plaintiff that approaching the instant case from that standpoint, with respect, has beclouded the lower Court's reasoning to not recognizing exhibit G for what it is, i.e. as "an Account Stated". In my view, as an Account Stated it is incompetent for the parties to reopen the transactions between the parties, which have informed the preparation and execution of an account stated as exhibit G in this case. (p. 1503 D) B

***Evidence - "Prima facie" - Meaning***

5. Simply put the phrase i.e. "prima facie" (which applies as a rule of onus of proof in the law of Evidence) means as per evidence which if accepted, appears to be sufficient to establish a fact or sustain a judgment unless rebutted by acceptable evidence to the contrary. In other words, it is not conclusive. It is evidence (as distinct from proof) that is, on the first appearance. (p. 1504 B) C

***Commercial law - "Account stated" - Meaning***

6. The phrase "account stated" refers to the agreement itself or to the assent giving rise to the agreement. Simply put, it means a balance that parties to a transaction or business agree on, either expressly or by implication. In the Halsbury's Laws of England, 3<sup>rd</sup> Edition vol. 8 para. 439, the learned authors have represented account stated as E

*"where parties mutually agree that a certain sum is due from one to the other; an account stated is said to arise and the law implies a promise on the part of the one from whom such sum has been agreed to be due to pay the same, on which the party may sue without being put to proof of the details or correctness of the account."* (p. 1505 D) F

***Award in foreign currency - Propriety / Rate of conversion***

7. Issue 2 is on whether the plaintiff having claimed to recover the balance of the debt in DM 127,308.49, the trial court rightly has entered judgment in its favour in foreign currency in this case. The lower court has examined the issue from the standpoint of firstly, want of jurisdiction in the trial court to pronounce the said judgment in Deutschmarks and secondly, as to whether the trial court rightly has applied the exchange rate as at the date of judgment as against H

the date the debt has arisen or the date the action has accrued.

Our courts have always followed English cases in matters of this nature i.e. in entering judgment in foreign currencies in commercial cases. The Miliangos case has overruled the Havana case on the issue of jurisdiction to give judgment in foreign currency in England so that a judgment sum given in foreign currency is convertible to the local currency i.e. in sterling (as the Naira) at the time of enforcing the judgment. (p. 1508 D/ 1509 F)

**NOTABLE POINT OF INTEREST**

**CHUKWUMA-ENEH JSC**

*1. Our law on international trade is tied to English Law*

Apart from recognizing that our law in regard to international trade and commerce is tied to English Law, and is still growing, there is much to be said for so reasoning - that our courts follow the Miliangos case as to do otherwise will definitely militate against our citizens engaged in international trade and commerce as after all we have to recognize that we live in a globalized environment closely engaged in day to day trade and commerce with other countries. (p. 1510 G)

**REPRESENTATION**

Inam Wilson for the Appellant.

G. C. Igboke with H. N. Uche-Ubah (Mrs.) for the Respondent.

**CASES REFERRED TO**

Nwogo v. Njoku (1990) 3 NWLR 570 at 585

England (1996) 6 NWLR (Pt. 457) 668 @ 682

Ukaegbu v. Ugoji (1991) 6 NWLR (Pt. 196) 127

Duru v. Nwosu (1989) 4 NWLR (Pt. 113) 23 at 41

Ofondu v. Niweigha (1993) 2 NWLR (Pt. 275) 253

Melwani v. Chanshire Corporation (1955) 6 NWLR (Pt. 402) 438

Trade Bank Plc. v. Chami (2003) 13 NWLR (Pt. 836) 158 at 1984

Olaoyin Enterprises Ltd. v. S.J. & M. (1992) 4 NWLR (Pt. 235) 361

@ 385

United Bank For Africa PLC v. BTL industries Ltd. (2004) 18 NWLR (Pt. 904) 180

Okonkwo v. C. C. B. (Nig) PLC & 2 ors. (2003) 8 NWLR (Pt. 822) 347 @ 352

Agwunedo & 7 ors. v. Onwumere (1994) 1 NWLR (Pt. 321) 375 @ 386-387

Metronex (Nig.) Ltd. v. Griffin George Ltd. (1991) 1 NWLR (Pt. 169) 651 @ 659

Bendel State & 2 ors. v. United Bank For Africa Ltd. (1986) 4 NWLR (Pt. 337) 547 @ 463

Olaogun Enterprises Ltd. V. Saeby Jernstoberi & Maskinfabrik (1992) 4 NWLR (Pt.535) 361

Olaogun Enterprises Ltd. V. Soe by Jeensloberi and Maskinfabeik (1992) 4 NWLR (Pt.235) 361 at 385

### ***LEAD JUDGMENT BY CHUKWUMA-ENEH JSC***

The Plaintiff/Company has claimed against the Defendant/Company in this action instituted in the Lagos State High Court, *"the sum of DM127,305.49 (N34,689. 91) being the balance of payment in respect of Universal Coating and Laminating Plant for artificial leather sold by the plaintiff and delivered to the defendant in Lagos. Also interest on the said sum of 9% per annum until the total sum is liquidated. The defendant has refused, failed and/or neglected to pay in spite of repeated demand."* It is important to state early enough that the naira equivalent of the German Currency as claimed in the Writ of Summons as N34,689.91k by the order of the trial court has been amended as per paragraph 9 of the Amended Statement of Claim to read N265,005. 33k. Both parties have filed and exchanged their respective pleadings and at the hearing have called witnesses in proof of their respective cases. In the final analysis, the trial court has found in favour of the plaintiff and has in entering judgment in respect of the two questions it has identified in its judgment reasoned and pronounced in these terms:

*"The defence of the defendant/company is that the plaintiff/company did not ship certain 2 units of machinery, that is part of the consignment ordered and for this reason was not liable for the sum of DM 127,308.49 claimed by the plaintiff/company. The reason for the defendant/company's repudiate (sic repudiation) of liability for the claim came out only in evidence at the trial. The defence must therefore fail on the ground that the fact upon which the defendant/company sought to repudiate liability for the plaintiff/company's claim was not pleaded. The evidence therefore led on this unpleaded fact*

goes to no issue.

*In case I am wrong in holding that these facts upon which evidence was lead are not pleaded, I must still find that the defence fails because the evidence led to show that the plaintiff/company shipped only 4 units of machinery in place of 6 units therefore was not satisfactory.*

*Upon the pleading filed in this case the preponderance of evidence led at the trial weighs in favour of the plaintiff/company. I hold that the plaintiff/company has succeeded in proving its claim."*

On the second question identified by the trial court it has reasoned and entered judgment as follows:

*"The defendant/company which filed its Amended Statement of Defence after the plaintiff/company had made their amendment to paragraph 9 of the Amended Statement of Claim did not plead specifically in answer to the said amendment. I hold therefore that the defendant/company did not join issue with the plaintiff/company as to whether or not the Naira equivalent to DM 127,308.48 was N265,005.33. Further the defendant/company was not entitled to claim in German Currency as the issue was not raised in its defence. It is therefore immaterial that the defence counsel raised the issue in his final address. I will therefore enter judgment for the plaintiff/company against the defendant/company in the sum of DM 127,308.49 or N265,005.33 the naira equivalent."*

The defendant being totally dissatisfied with the decision (that is on the aforesaid 2 questions) has appealed the same to the Lagos Division of the Court of Appeal (Lower Court) upon a Notice of Appeal filed on 4/5/87 in which it has raised five grounds of Appeal. In the result, the parties have filed and exchanged their respective briefs of argument. In sum, the lower court in a unanimous decision has upturned the trial court's decision on the first question and on the 2<sup>nd</sup> question has by 2 to 1 majority also upturned the trial court's decision in that respect. In disparaging the quality of exhibit G, i.e. payment schedule settled by the parties, the lower court at page 227 of the record has stated thus:

*"I think learned counsel for the respondent has made a valid point that exhibit G can only have the effect of an admission, though he also added that it is in the nature of an account stated. But he seems to ignore or play down the effect of the inadequacies recog-*

nized in the plaintiff's case which, in my view, he cannot comfortably and safely do having regard to the true nature of exhibit G."

Also it has continued at p. 232 of the record by showing the inadequacies in the plaintiffs case thus:

*"To recapitulate some of the weak aspects of the respondent's case, exhibit F prepared by the respondent binds it that an amount of DM 145,994.40 was paid by the appellant but does not bind the appellant that it was paid in bits and places. Exhibits A -E (the invoices) do not bind the appellant as they were not signed or acknowledged by it, nor were they accompanied or supported by way bills to show that the goods were duly delivered to and receipted for by or on behalf of the appellant. There are discrepancies in figures as pleaded and given in evidence by the respondent as much so that it is not clear where the truth of its case lies. The only witness for the respondent testified that four invoices covered the respondent's claim whereas seven invoices were relied on in the pleading and admitted in evidence. The state of affairs was not explained. Exhibit G has been shown not to be 7 capable of standing alone to impose absolute liability on the appellant. I think the judgment of the lower court putting liability on the appellant is difficult to reasonably justify in all the circumstances."*

(underlining mine for emphasis)

And at page 231 of the record it has found that:

*"The appellant's position is that the payment schedule was signed in anticipation of the respondent supplying all the Units of consignment agreed. That may look clumsy both in arrangement and in argument. But the evidence as a whole, judging from the testimony of the plaintiff's only witness and the discrepancies between the figures appearing on the invoices and the claim, does not show that the respondent proved its claim."*

Aggrieved by the decision as a whole the plaintiff has now appealed to this court by a Notice of Appeal as at page 246 of the record dated 3/11/1996 and therein has raised 2 grounds of appeal. The parties have therefore filed and exchanged their respective briefs of argument. At the oral hearing of the appeal both parties have respectively adopted and relied on their respective briefs of argument. The defendant/respondent however, in the course of further submission on its brief of argument before us has withdrawn issue

two and the argument rendered in its support. It has more or less conceded to the plaintiff/appellant's case on its issue two for determination. The defendant's issue 2 has been struck out accordingly. The plaintiff and defendant are respectively the appellant and respondent in this court. The plaintiff/appellant in its Amended brief of Argument has raised two issues for determination as follows:

*“(a) Whether the payment schedule (Exhibit G) prepared and executed by the parties in 1975 (two years after the delivery of the goods) is not an ‘Account stated’ and if it is, whether the Court of Appeal was right to hold that the judgment of the trial court declaring the respondent liable to the appellant in the sum of DM 127,308.49 was not justified.*

*(b) Whether after holding that “the Miliangos” has overruled, “the Havana” the justices of the Court of Appeal were right in proceeding to determine the appeal on the principle of the Havana.”*

The defendant/respondent on its part has filed its brief of argument on 16/10/2006. It also has raised two issues for determination as follows:

*“1. Whether, having regard to the discrepancies between various amount referred to in the plaintiff pleading, and between the pleading and the evidence led, tendered and admitted, the Honourable Justices of the Court of Appeal were right in setting aside the judgment of the High Court, Lagos State.*

*2. Whether the Court of Appeal (and indeed the Nigerian Courts) are immutably and inexorably bound by the decision in Miliangos case a foreign judgment.”*

I have all the same set forth issue two above for purposes of completeness of the Record of this matter in so far as it is relevant in that respect.

The plaintiff in its brief of argument upon the facts and peculiar circumstances of this matter has attacked the approach of the lower court for blindly following the principle clearly and firmly settled in *Aromire v. Awoyemi* (1972) 2 SC 1, and *Duru v. Nwosu* (1989) 4 NWLR (Pt. 113) 23 at 41 to the effect that a plaintiff firstly, has to establish a prima facie case before the need to consider the defendant's case can arise even as that approach in the instant case flies in the face of Exhibit G-a payment schedule and otherwise “an account stated” prepared and executed by the parties and which even then

has been clearly pleaded and upon which pertinent evidence also has been given by both parties. Even more so as the lower court has found that Exhibit G can only have the effect of an admission and in the nature of an account stated and whereof the sum of DM 127,302.89 has been agreed as due and payable by the defendant to the plaintiff. In defining the import of “account stated” it has referred to the opinion of Cheshire, Fifoot and Furmstan’s Law of Contract, Chitty on Contract, 29<sup>th</sup> Edition Vol. 1, Footnote 1028 at page 1748 paragraph 29-191 citing Camillo Tank SS Co. Ltd. V. Alexandria Engineering Works (1921) 38 TLR 134 at 143. In the light of the foregoing opinion the plaintiff has argued that once an account stated is established that a prima facie case is also established as in this case as per Exhibit G and thus the burden shifts to the defendant to disprove liability or its indebtedness, in this case in the sum of DM 273,302.89 as due and payable by the defendant to the plaintiff.

Continuing, on the definition of “prima facie case” it has referred to Onagoruwa v. State (1993) (Pt. 303) 49 & 81F per Tobi JCA (as he then was); Trade Bank Plc. V. Chami (2003) 13 NWLR (Pt. 836) 158 at 1984 and Black’s Law Dictionary (6<sup>th</sup> Edition) at page 1189 to contend that by Exhibit G alone the plaintiff has made out a prima facie case to warrant calling for a rebuttal evidence from the defendant on its indebtedness at this point in the sum of DM 127,308.49 as supported by Exhibit G or a judgment in the absence of discharging that burden. It has decried the lower court’s preoccupation with discrepancies or inadequacies in the accounts of the plaintiff’s case i.e. as to whether the importation is covered by 4 or 6 invoices including exhibits A-E and their costs; and which it contends does not show any shortfall in delivery otherwise the defendant would not have signed exhibit G as against evaluating the defence evidence or any other evidence called in rebuttal of the plaintiffs case. And that it is noteworthy that the defendant has not so far asked that the shortfall in the consignments shipped be made good even since exhibit G has come into evidence in 1975. Further to the above, the plaintiff has pointed to the lower court being misled to concluding that Exhibit G has been prepared in anticipation of further shipments by the erroneous submission by the defendant that the importation has been between 1971 and October 1975 as against 1971 and 1973 wherefore exhibit G has been prepared and executed in 1975 to sort out

the discrepancies in the accounts of their transactions and truly as encompassed in the account stated of 1975 i.e. exhibit G. The plaintiff has made the point that the defendant has so far not repudiated exhibit G and which clearly could not have been predicated on an anticipated shipments. And so, has submitted that any evidence in  
B that regard goes to no issue as not pleaded. Furthermore, it has made the point that exhibit G being a valid contract has laid down the manner of settlement of the value of the goods sold and consigned to the defendant between 1971 and 1973 and therefore is binding  
C on the parties; wherefore it is the court's duty in that respect to give it effect by enforcing it. See *Afrotech v. MIA & Sons Ltd.* (2001) 12 SC (Pt. 11) 1 at 15. And that the issue of the discrepancies in the figures in the invoices have been over flogged in the face of the counterbalancing evidence as per exhibit G which has been reached after sorting  
D out these discrepancies in the accounts of both parties. It is submitted that the defendant is prima facie on exhibit G now indebted to the plaintiff on the balance in the sum of DM 127,308.49. The court is urged to so find.

Issue No. 2, that is, on the want of jurisdiction of the trial court  
E to enter judgment in this matter in the plaintiffs favour in foreign exchange i.e. Deutschmarks, a question raised suo motu by the lower court as well as the legal rationale of the trial court applying the exchange rate as to the date of judgment rather than the date the debt has arisen or the action is instituted. The plaintiff has submitted that  
F the current legal position is as given in the dissenting judgment of Ayoola JCA (as he then was) which has followed the principle of *Miliangos v. George Frank (Terlides) Ltd.* (1976) AC 443 otherwise known as "Miliangos case" which has departed from the principle in  
G the case of *United Railway of Havana v. Ragla Warehouse Ltd.* (1961) AC 1007 otherwise known as "Havana case". The plaintiff makes the point that Nigerian Law in this regard has always followed English Law which currently on this point is as per *Miliangos case*. See *Metronex (Nig) Ltd v. Graffm & George Ltd.* (1991) 1 NWLR (Ft. 169) 651 at  
H 659 D-E, *Olaogun Enterprises Ltd. V. Soe by Jeensloberi and Maskinfabeik* (1992) 4 NWLR (Pt. 235) 361 at 385 C-F and *Erik Emborg Export A/S. v. Jos International Breweries Plc.* (2003) 5 NWLR (Pt.814) 505 at 533 F-G. Having referred to Sections 7 (a) and 28 of the Exchange Control Act 1962 it is submitted that nothing in their

provisions has inhibited the courts from expressing judgment in foreign currency. The court is urged to uphold the submission and overall to allow the appeal and restore the judgment of the trial court.

The defendant in its brief of argument on issue one has strenuously argued that the onus is on the plaintiff here to prove its case by calling credible evidence consistent with its pleadings. See *Nwogo v. Njoku* (1990) 3 NWLR 570 at 585 A-B. It submits that the plaintiff has not made out a prima facie case for the onus of proof to shift to the respondent but that the plaintiff has failed in that regard. See *Aromire v. Awoyemi* (supra) and *Duru v. Nwosu* (supra). To justify this submission it is contended that in the face of obvious discrepancies between the costs of the items as in paragraphs 3 and 4 of the Statement of Claim and the 7 invoices pleaded by the plaintiff amounting to the sum of DM 298,485.29 vis-a-vis a deposit of DM 41,583.37 and the balance due in the sum to DM 256,901.92 as against the agreed sum of DM 273,302.89 as shown in exhibit G as the total amount payable as a whole on the imported items and the balance of DM 127,308.49, that these figures run counter to the averments in paragraphs 3 and 4 of the statement of claim, which go to support the contention that the plaintiff has not raised a prima facie case for the onus to shift to the defendant to rebutt. It is therefore contended that exhibit G in all the circumstances is no better than a promise to pay debt and which proposition is rebuttable by proving that the debt does not exist after all; and so, that exhibit G cannot stand alone against no evidence to support the plaintiffs contention that it is meant to resolve all the discrepancies in the parties accounts in this case.

Finally, that in the face of pleadings the discrepancies in their accounts between the figures in the invoices as per the 5 invoices i.e. exhibits A to E produced at the trial and seven invoices pleaded and given in evidence and in as much as they are the only materials placed before the court do not relate to exhibit G in this case, clearly show that the plaintiff has failed to discharge the initial onus of raising a prima facie case to warrant considering the defendant's case.

It is submitted as a fundamental flaw that Exhibit G has made no reference whatsoever to the contract or the invoices to which it has attempted to relate. The defendant has urged the Court in dismissing this ground of appeal even although it has conceded issue 2 of the plaintiff issues for determination to go further in the same swoop

to dismiss the appeal in toto.

I think the facts and circumstances as set out herein and as contained in the extracts of the quotes in extenso culled from the judgments of both the trial and lower Courts will serve as sufficient materials to deal with the points of law that have arisen to be considered in this matter. I shall however recapitulate, if need be, on further facts as per the record in the course of this judgment. This case has been fought on the pleadings and the documents pleaded therein and tendered at the hearing as well as the testimonial evidence of the witnesses of the parties. The important question to answer has arisen from the way the lower Court has dealt with this matter, that is to say, whether or not the plaintiff has made out a prima facie case calling for rebuttal by the defendant. In that light, I have to start by examining the averments as per the pleadings of the parties so as to crystallize, if at all, the issue(s) that have been joined on the parties' pleadings. This has to be so as he who asserts has the onus to prove his assertion by calling credible evidence consistent with his pleadings to prove his case as facts not pleaded go to no issue. See *Emegokwue v. Okadigbo* (1973) 4 SC 113. I find the trial Court's review of the averments in the pleadings in this matter very cogent and apt that I adopt it and proceed to set it out as per pages 98 - 100 of the record as follows:

*"In paragraph 1 and 3 of the Amended Statement of Claim, the plaintiff, averred that the plaintiff was an exporting company registered in Western Germany with a registered office at 4000 Dusseldorf 1 and that the defendant was a limited liability company registered under the companies Acts of 1968.*

*By its amended Statement of Defence, the defendant admitted the plaintiffs averment in paragraphs 1 and 2 of the Amended Statement of Claim. In paragraph 3 of its Amended Statement of Claim, the plaintiffs averred that between 1971 and 1973, the defendant imported items of machinery from the plaintiff. The plaintiff therein set out the description of each item of imported machinery and cost.*

*In answer to paragraph 3 of the plaintiff's Amended Statement of Claim, the defendant averred that in July, 1975 the plaintiff orally agreed to supply for export and installation in Nigeria 6 complete units of Universal Coating and Lamination plant for Artificial*

*Leather in accordance with the specifications of the defendant's agents and insurers in Germany, namely, Hermes, at a total cost of DM273,312.89.*

*In paragraph 4 of its Amended Statement of Claim, the plaintiff averred that on the 23/7/75 a payment schedule was agreed by the parties. The amount payable, the currency in which it was payable and the date to be paid were set out. The total sum in the payment schedule came to DM 273302.89.* B

*(Underlining mine for emphasis).*

*In paragraph 5 of its Amended Statement of Claim, the plaintiff averred that the defendant made irregular payments which totaled DM 145,994.49, between 30/10/75 and 7/9/77 leaving an unpaid balance of DM 145,994.40* C

*In paragraph 6, 7 and 8, the plaintiff pleaded, among others that demands for the debt were made upon the defendant who however neglected to pay it.* D

*In paragraph 10 of the Statement of Claim, the plaintiff set out documents upon which it would rely at the trial. These documents include invoices with numbers and dates, schedule of payment agreed between parties dated 23/7/75 and letters exchanged between the parties.* E

*In its further defence, the defendant denied all the plaintiff's averments in paragraphs 4 to 10 of the Amended Statement of Claim and pleaded its case thus: The defendant averred that a payment schedule was agreed for the 6 units of plant and signed by the parties. By the agreement, further payments were to be made in Naira to Salzgitter (W.A.) Limited, Lagos For shipments of machinery actually received by the defendant.* F

*(Underlining mine for emphasis).* G

*The defendant averred that contrary to the agreement, the plaintiff irregular shipments of 4 units of the plant between 1975 and 1977 and these without knowledge and approval of the defendant's agents and insurers. The defendant however duly paid the cost of the 4 units of plant shipped which was DM 145,994.40 inclusive of 9% interest.* H

*The defendant denied liability for the sum of DM 127,308.49 (N34,659.91) or any sum at all.*

*The defendant pleaded that the plaintiff's claim be dismissed*

and set out documents it would rely upon at the trial. These include Proforma Invoice issued in 1970 for P. V. C. Laminating Leather Plant complete with installation and letter from Salzgitter (W.A.) Limited in 1971 about the plaintiff's difficulties in shipping the components according to agreed schedule."

B The foregoing represents the state of the pleadings of both parties here. **At the trial the witnesses of both parties testified as pleaded. The trial Court spared no time and words in concluding thus:**

C **"The pleadings filed were inarticulate and incoherent. The evidence led by the parties did not improve matters. For an example, in paragraph 3 of the Statement of Claim, the plaintiff purported to itemize the consignments exported to the defendant/company with the cost of each consignment**  
D **shown in the invoices. The total sum of the cost of the consignment shown on the invoices did not however tally with the total amount of the cost of the consignment contained in the agreed payment schedule pleaded in paragraph 4 of the Statement of claim".**

E That is as far as the discrepancies between paragraphs 3 and 4 of the Amended Statement of Claim have come to be.

One thing that is clear from the foregoing is that the defendant has not joined issue with the plaintiff on the discrepancies in the averments in paragraph 3 and 4 of the  
F Amended Statement of Claim the crux of the issue in this case and upon which the lower court has relied to refuse the effects of exhibit G as an account stated. Indeed, as found by the trial Court and I agree with it that no attempt has been made  
G in the Statement of Defence to plead specifically in answer to paragraphs 3 and 4 of the Amended Statement of Claim. I find that the averments in paragraphs 3 and 4 of the Statement of Claim have not been traversed by the defence and are presumed admitted; otherwise it would amount to defeating the  
H object of pleading - to settle the issues upon which the case between the parties is to be contested. See: Ukaegbu v. Ugoji (1991) 6 NWLR (Pt.196) 127 and Omuka v. Omogui (1992) 3 NWLR (Pt. 230) 393. The trial Court therefore, rightly in my view has found as totally misconceived the defence making heavy weather of these

figures which are at variance with one another. The defence counsel in his address has also be laboured upon these discrepancies between paragraphs 3 and 4 of the Amended Statement of Claim. However, it is trite law that counsel's address cannot however brilliant and logical constitute evidence in a matter; and so any submission on facts not pleaded goes as to no issue. See: Tapchang v. Lakret (2000) 13 NWLR (Pt. 684) 381, Kazeem v. Mosaku (2007) 17 NWLR (Pt. 1064) 523 at p. 535, Ohaeri v. Akabueze (1992) 2 NWLR (Pt. 221) 1, Ofondu v. Niweigha (1993) 2 NWLR (Pt. 275) 253 and Allied Bank (Nig) Ltd. V. Akubueze (1997) NWLR (Pt. 509) 374.

From the foregoing reasoning therefore, the trial Court and again rightly in my view held in the circumstances that the defendant must be deemed to have admitted that it has imported the items of the consignments pleaded in paragraph 3 of the Amended Statement of Claim in that a fact not specifically traversed is presumed admitted. See: Samson Ajibode v. Mayowa & Anor. (1978) 9-10 SC. 1 at 6; Eko Odume v. Ume Nnadu & Ors. (1964) 1 ANLR 329.

To throw more light on the above, the plaintiff has pleaded the total cost of all consigned goods exported to the defendant to be in the sum of DM273,302.89 as per exhibit G, the payment schedule and has credited the defendant with having paid the sum of DM 145,994.40 leaving a balance of DM 145,994.40 as per the claim. However, the defendant in paragraph 6 of the Amended Statement of Defence has stated that DM 145,994.40 which it has paid is for only 4 units of the machinery shipped by the plaintiff to the defendant. It has therefore denied liability for the sum of DM 127,308.49. ***From the defence pleadings, it cannot be said that the defendant has pleaded any reason for repudiating liability as per the claim. Indeed, the defence witness i.e DW2 under cross-examination on a crucial point has said that "he did not bring the letter of the defendant/company wherein it informed the plaintiff/company that it did not receive the machine ordered" i.e with regard to the 2 units of the consignments alleged as not received by the defendant.*** This piece of evidence has not helped the defence case. The weight that could have been attached to the letter in the defence case should not be underestimated; it would have thrown the plaintiffs case into disarray and thus would have conclusively sealed the fate of the plaintiff's claim for the sum of

DM 127,308.49. Besides, **if at all such letter has ever existed and has been sent to the plaintiff, it is strange that the defence has not seen it fit to call for it i.e. the original copy by a notice to produce at the trial. The plaintiff in the circumstances is entitled to invoke the provisions of Section 149 (d) of the Evidence Act in that regard.**

As rightly found by the trial Court the reason for repudiating liability has come out in evidence at the trial and not having been pleaded that piece of evidence goes to no issue. See: Chief Sule Jumbo & Ors. V. Aminu Asani & Ors. (unreported) SC. 343/87 of 13/3/1970; Emegokwue v. Okadigbo (1973) 4 SC. 113. Normally the court will not allow such evidence to be led. Even so, the trial Court has found on the other hand that the defence evidence of receiving only 4 units out of 6 units as alleged shipped to it as unsatisfactory; and I have seen no reason to disagree.

In regard to exhibit G, the payment schedule, the trial court has made very solid finding of fact as at p. 104 of the record thus:

*"The parties are not disputing the fact that there was a business transaction in consequences of which the plaintiff/company shipped certain consignments is (sic) that the total cost of the consignments was DM 273,302.89 as shown in the agreed payment schedule. The plaintiff/company however credited the defendant/company with DM 145,994.80 as payments received in respect of these consignments. An outstanding balance of DM 127,308.49 being the difference between DM 273,302.89 and DM 145,994.40 is the amount which the plaintiff/company is claiming from the defendant/company by this action.*

*On the part of the defendant/company, there is the admission that the total sum of the most of the consignments agreed to be shipped was DM 273,302.89 and in fact the Managing Director of the defendant/company equally admitted that it paid DM 145,494.40. Its case however is that the DM 145,404.40 paid was for consignments consisting of 3 units shipped and received. The defendant/company therefore denied liability for the plaintiff/company's claim of DM 127,308.49 or any sum at all."*

**Let me therefore, say categorically that based so far on my reasoning and findings above I have no misgivings in my mind that notwithstanding the discrepancies in paragraphs 3**

**and 4 of the Amended Statement of Claim upon which no issue has been joined in this matter that the plaintiff has made out a prima facie case for the defendant's rebuttal and in default of which judgment ought to have been entered in its favour.**

See: *Duru v. Nwosu* (supra). **This is so even on exhibit G alone.**

**The discussion of this matter has been taken this far because of the lower Court's erroneous conclusion that the plaintiff has not firstly made out a prima facie case to warrant proceeding to consider the defendant's case in this matter. And I ask the question: Is the lower Court justified in so holding? My answer is clearly in the negative.**

This posture by the lower court is evident wherefore after reviewing exhibit G, the payment schedule i.e. "an account stated" prepared and signed by the parties it has concluded at page 232 of the record thus:

*"The said exhibit G which would have been prima facia (sic) evidence of the claim has no foundation as it appears there was no debt after all..."*

**I am inclined to agree with the plaintiff that approaching the instant case from that standpoint, with respect, has beclouded the lower Court's reasoning to not recognizing exhibit G for what it is, i.e. as "an Account Stated". In my view, as an Account Stated it is incompetent for the parties to reopen the transactions between the parties, which have informed the preparation and execution of an account stated as exhibit G in this case.** I shall come back to this point later on. All the same at page 272 of the record the lower court has treated exhibit G as an "account stated" wherefore it stated thus:

*"I think learned Counsel for the respondent has made a valid point that Exhibit G can only have the effect of an admission though he also added that it is in the nature of an Account Stated"*

Having so found as per exhibit G as an account stated, I now should deal with the question whether the lower court should not have gone further to recognize its implication in law for so holding, more so in the context of this case.

Before dealing with exhibit G and its implications to this matter it is necessary to ascertain the meaning of the phrase "prima facie case" or "prima facie evidence" and so put the plaintiff's case in this matter in its proper perspective, that is to say, against the defendant's

contention that the plaintiff has not made out a prima facie case here. The principle that a plaintiff has to establish a prima facie case in matters between him and the defendant before the defendant's case will have arisen to be considered is well founded as per the decisions of this Court in AROMIRE V. AWOYEMI (supra) and DURU V NWOSU (supra). The lower Court has proceeded to consider this case from that standpoint. ***Simply put the phrase i.e. "prima facie" (which applies as a rule of onus of proof in the law of Evidence) means as per evidence which if accepted, appears to be sufficient to establish a fact or sustain a judgment unless rebutted by acceptable evidence to the contrary. In other words, it is not conclusive. It is evidence (as distinct from proof) that is, on the first appearance.*** The phrase "prima facie case" when it is used in the context of such matters signifies that at the close of the plaintiffs case, the case is not sufficient; that is to say where the plaintiff fails to led factual evidence or legal grounds, see: DURU V NWOSU (supra), and Aromire v. Awoyemi (supra) In such cases, the Court does not take into account at that stage the evidence called for the defence. See also section 136(1) of the Evidence Act as construed in Dura v. Nwosu (supra) - per Nnamani JSC (of blessed memory).

Applying the meaning of the phrase "prima facie case" as adumbrated above to the facts and circumstances of this matter even more so on the backdrop of my finding that the lower court has erred in rejecting exhibit G as an account stated, I have no doubt in my mind that even on exhibit G as an Account Stated alone that the plaintiff has established a prima facie case for calling for the defendant's rebuttal of Exhibit G as an account stated and as constituting a prima facie evidence of the plaintiffs case of the defendant's indebtedness to it in this matter. Exhibit G is founded on contract binding on the parties until it is set aside.

I think I must make myself clearer on the issue of exhibit G - the payment schedule i.e. as at page 140 of the record which I find to be an account stated. It has all the requisites of an account stated, and it is set out as follows:

"EXHIBIT "G"

SALZGITTER STAHL GMBH  
EXPORT

PAYMENT SCHEDULE

Total sum due (without interest	DM 273,308.89	
1. Difference between		
sum of Debt Notes	DM55,400.97	
and sum of Credit Notes	DM39,000.00	
	DM16,400.97	B
Payable in Naira at once to SWA	16,400.97	
2. Payable in DM end of Sept. 1975	24,594.46	
3. Payable in DM on	31/12/75	37,307.46
„ „	30/6/76	39,000.00
„ „	31/12/76	39,000.00
„ „	30/6/77	39,000.00
„ „	31/12/77	39,000.00
„ „	30/6/78	39,000.00
	<u>DM273,302.89</u>	D

4. Interests at p.a. as from the original due dated to the paid in 3 instalment on 31/12/78,”

***The phrase “account stated” refers to the agreement itself or to the assent giving rise to the agreement. Simply put, it means a balance that parties to a transaction or business agree on, either expressly or by implication. In the Halsbury’s Laws of England, 3<sup>rd</sup> Edition vol. 8 para. 439, the learned authors have represented account stated as***

***“where parties mutually agree that a certain sum is due from one to the other, an account stated is said to arise and the law implies a promise on the part of the one from whom such sum has been agreed to be due to pay the same, on which the party may sue without being put to proof of the details or correctness of the account.”***

This definition recognizes that an account stated is founded on contract and otherwise a settled account which is not subject to be reopened particularly where settled in full knowledge of the facts as in this case and may be proceeded with without proving the correctness of the account. See: BURROUGHS ADDING MACHINES LTD V. ASPINALL 41 T. R. R. 152.

In E. WILLIAMS FARNWORTH, CONTRACTS paragraph 4.4 of 286 (1982) the learned author has stated respecting an account stated thus: “If a creditor or debtor wish to compromise or

liquidate a disputed or unliquidated debt, they may do so by either a substituted contract or accord. If however, their agreement is in the nature of a computation, it is called an account stated. Account stated then is a manifestation of assent by both parties to the stated sum as an accurate computation of the debt”. Again, the definition runs on the same footing as the earlier one I had stated above. It recognizes that an account stated represents an accurate computation of a debt as in this case.

However, Lord Mansfield C.J. in *TRUMAN V. HURST*, I.T.R. 42; 13 C. L. J. 165 has in unison stated that account stated is “an agreement by both parties that all the items are true”, again, this definition is in complete consonance with the definitions stated above.

I must however refer to the case of *MURITALABI ALHADJI V. A KESSLER* (1934) 11 N. L. R. 156 where Graham Paul J. of the Divisional Court has said on the issue of an account stated that,

*“in these proceedings it is not competent for the plaintiff to reopen the transaction between himself and the defendant .....Account stated is a contract between the parties binding upon them unless and until it is set aside, and it is an implied condition that an account stated may be sued upon without proof of its correctness. If a party to such contract wishes the Court to set it aside, he must bring a claim specifically for that purpose.”*

I agree with approval the propositions of law as stated in the immediate cited case also. It has showed that an account stated apart from being a contract binding on the parties can only be set aside as any other contracts on the well established grounds in law and otherwise an account stated cannot be reopened or lightly challenged on its correctness.

I am aware of the definition of “account stated” as set out at pages 228-229 of the record as the opinion of “Cheshire, Fifoot and Furmstain’s Law of Contract 11th edition cited by the lower Court in its judgment. From the following extracts of the quotes from the judgments of the Courts and learned authors arise the presupposition that once an account stated has been made out as I hold the plaintiff has done in this case, a prima facie case has been established and the onus is on the defendant as here to disprove liability. See *Camillo Tank SS Co. Ltd v. Alexandria Engineering Works* (supra).

Having so concluded, it seems to me wrong for the lower

Court to resort to the discrepancies in the averments in paragraphs 3 and 4 of the Amended Statement of Claim, which the defendant never controverted to override and indeed re-open a settled account of the parties herein as per exhibit G and with respect to erroneously hold that there is no debt owed after all. This is even more so when there is no claim before the Court to set aside exhibit G or reopen the account stated like every other contract on grounds of fraud; this is usually the case where a party is alleging fraud, mistake of fact, undue influence, want or failure of consideration as the case may be. The defendant has not so contended on any of those grounds here. What has so far emerged from the instant transaction between the parties herein as can be gathered from the totality of their cases is that there have been discrepancies in the accounts between them as per the figures in the invoices of the consigned goods to the defendant and by much the most satisfactory solution is that they have on their own decided to sort out these discrepancies on the disputed accounts as they know the details of their transactions and have with the spirit of give and take resolved the disagreements and have reached an agreed sum as per exhibit G an account stated which is binding on them. Exhibit G as an account stated is founded upon contract. The Court will be failing in its duty to decline to enforce their agreement all things being equal as here.

For the lower Court to hold that exhibit G has been executed in anticipation of future supplies is with respect absurd and unsustainable on the backdrop of the pleadings and evidence tendered by the parties in this matter and my findings. I agree with the plaintiff that the lower court may have been wrong footed in that regard by its misapprehension as to the effect that the goods have been delivered between 1971 and 1973 followed by the preparation and execution of exhibit G in 1975 as against that the goods have been delivered between 1971 and 1975 as contended by the defendant. And it is also worth noting that the defendant has accepted the goods as per the said invoices i.e. exhibits A to E without any protest between 1973 and 1975 that is since the making of exhibit G signifying that the transaction is wholesome and acceptable to it. It cannot now resile from it. I must all the same repeat that the items in question are known to the parties and there is no fraud or undue influence proved. Therefore this court will infer from the circumstances that the parties

have agreed to overlook the discrepancies hence the preparation and execution of exhibit G. in 1975 by the parties. See: Maund v. Allies 5 JUR 860, L. C. The defendant therefore cannot be heard now to complain, on an afterthought so belatedly. Even then, ordinarily in an action for debt in which the indebtedness is not denied, this court would be right to set aside the judgment of the lower court and enter judgment for the plaintiff.

In the words of the lower Court, I also find the defence case in this matter “clumsy both in arrangement and in argument” and must fail and so, not having discharged the onus on it (defendant) on its indebtedness to the plaintiff in the sum of DM127,308.49 as per the claim and I so find. Therefore, the defendant is liable to the plaintiff as per its claim.

I resolve issue one in the plaintiffs favour.

***Issue 2 is on whether the plaintiff having claimed to recover the balance of the debt in DM 127,308.49, the trial court rightly has entered judgment in its favour in foreign currency in this case. The lower court has examined the issue from the standpoint of firstly, want of jurisdiction in the trial court to pronounce the said judgment in Deutschmarks and secondly, as to whether the trial court rightly has applied the exchange rate as at the date of judgment as against the date the debt has arisen or the date the action has accrued*** snowballing into whether the plaintiff has properly pleaded and proved the case of the conversion of the exchange rate of the naira and also whether the subsequent amendment of paragraph 9 of the statement of claim to state the naira equivalent in the sum of N265,005.33 is proper.

Firstly, I have gone through the trial court’s ruling on the amendment of paragraph 9 of the Amended Statement of Claim and on the conversion of the exchange rate of the Naira and for stating the Naira equivalent to the Deutschmarks as claimed as partly set out above in this judgment and I unequivocally uphold the same. The ruling cannot be faulted in its reasoning; even more so for the additional reasons I have given herein.

The judgment in this case has been entered for the plaintiff in the sum of DM 127,308.49 or N265,005.33. I have observed in this decision that by a majority of 2 to 1 the lower court has found for the

defendant on both questions raised under issue 2 thus has reversed the trial court on the issue. The majority opinion of the lower court seems to follow the principle established in the Havana case in applying the exchange rate as at the time when the debt has arisen and has become due while the minority opinion has rationalized its decision on this point on the principle established in Miliangos case a later case that has overruled the Havana case. I dare say on a close scrutiny of the two cases that it has been showed that the difference of the principles grounding the two cases is centered principally on which time of the conversion is most just that is to say - it is at the date the debt has arisen, and become due, or the date the action has accrued or at the time of entering judgment in the matter. B C

In the Havana case there has been default in meeting instalmental payments schedule, the Law Lords in that case held that the provable sum in Dollars has to be converted into Sterling at the exchange rate prevailing when the debt has fallen due and has not been paid and that the English courts have no jurisdiction to give judgment in foreign currency. In this country and I agree with the majority opinion as stated in Melwani v. Chanshire Corporation (1955) 6 NWLR (Pt. 402) 438, that apart from Section 17 of the Admiralty Jurisdiction Decree No. 59 of 1991 giving specifically limited jurisdiction to the Federal High Court to give judgment in any foreign currency in Admiralty matters there is no general principle to give judgment in foreign currency as such. In the Miliangos case the plaintiff has sued the defendant in England in Swiss Francs for goods sold and delivered to the defendant and unpaid for. The judgment in that case has been decreed in Swiss Francs being the currency by which the parties have transacted their contract. However **our courts have always followed English cases in matters of this nature i.e. in entering judgment in foreign currencies in commercial cases. The Miliangos case has overruled the Havana case on the issue of jurisdiction to give judgment in foreign currency in England so that a judgment sum given in foreign currency is convertible to the local currency i.e. in sterling (as the Naira) at the time of enforcing the judgment.** D E F G H

This decision has been followed in a number of cases here including Metroner (Nig) Ltd v. Griffin & George Ltd. (1991) 1 NWLR (Pt. 169) 651, at Olaogun Enterprises Ltd. V. Saeby Jernstoberi &

Maskinfabrik (1992) 4 NWLR (Pt.535) 361 and Erik Emborg Export A/S case (supra).

I must however recap that it is a settled principle that where there are two conflicting decisions of the House of Lords, the House cannot be bound by both decisions; it is only fundamental that it is free to choose between the two decisions. See: *Okegbu v. The State* (1977) 2 FCA 134 NCAR 218. In the circumstances vis-a-vis of the two cited cases, it is beyond argument that the House is not bound to follow a decision of its own if it is satisfied that the decision has been given per incuriam as the *Havana* case. On this basis our courts should prefer the *Miliangos* case reflecting current judicial opinion in matters of this nature; and even more so as it has overruled the *Havana* case and is most just in the circumstances. And so, where the proper law of a contract dictates that a judgment should be expressed in foreign currency our courts should follow the principle in the *Miliangos* case for its compelling justice in such matters.

The two cases (i.e. the *Havana* case and *Miliangos* case) it must be emphasized are of persuasive authorities in our courts. However, I seem to agree with the pronouncement of the minority opinion that:

*“Nigerian law on the question of jurisdiction of the Courts to give judgment expressed in foreign exchange has always followed English Law as then crystallized in the Havana case. With the demise of the Havana case compelling justice that underline the decision in the Miliangos case should be embraced in this country.”*

First of all, I agree with the plaintiff that nothing in Sections 7 (a) and 28(1) of the Exchange Control Act 1962 (not having been repealed at the time) has prohibited expressing judgment in foreign currency.

Apart from recognizing that our law in regard to international trade and commerce is tied to English Law, and is still growing, there is much to be said for so reasoning - that our courts follow the *Miliangos* case as to do otherwise will definitely militate against our citizens engaged in international trade and commerce as after all we have to recognize that we live in a globalized environment closely engaged in day to day trade and commerce with other countries.

The plaintiff has referred to and highlighted on the current statement of the law in this regard in *Mann. Legal Aspect of Money*

4<sup>th</sup> Edition at page 347 that:

*"In England the law had a long development which began in the early 17<sup>th</sup> Century and in modern times led to many problems and difficulties and series of criticisms on a national and international level. But the history became uninteresting and worthless and the accumulated case law rendered obsolete, when in 1975 the law was radically changed by a remarkable piece of judicial legislation. It has resulted in a pattern, which allows the law to be stated in a few simple sentences and produce, wholly satisfactory solutions so as to leave no room for academic discussion.*

*It is now clear that English law does not require any foreign money to be converted into sterling for the purpose of instituting proceedings, on the contrary, where the plaintiff claims a sum of foreign money, he is both entitled and bound to apply for judgment in terms of foreign money and it is only at the stage of payment or enforcement that conversion into sterling at the rate of exchange prevailing takes place."* See page 242 of the Record.

There can be no doubt the above extract of the learned author — represents the current judicial opinion hence the Miliangos case.

I have here made a case for our courts to follow English decisions on the subject-matter in this case as per the Miliangos case which case respectfully in my view promotes better justice in that the time of conversion of the exchange rate is at the time of enforcing judgment also it has rightly overruled the Havana case on the question of jurisdiction to give judgment in foreign currency. As the plaintiff has contended and I agree, there is a lot of sense in submitting that in international trade, public policy demands that goods sold and delivered as here between the parties should be paid for and that it is not right to make a foreign exporter as the plaintiff here to lose out due to technicalities. One has to bear in mind as in cases as this one that in a globalized world a country like Nigeria may suffer from being blacklisted for untoward conducts of its citizens in international trade and commerce. Even then, in my view the Miliangos case appears more just; and so our courts should stay the course to be and remain one i.e. in conformity with other jurisdictions on this issue.

In sum, therefore, I agree with the minority opinion that with the demise of the Havana case that the decision in the Miliangos case

should be followed by our courts. I therefore resolve issue 2 in favour of the plaintiff; and in that regard thus uphold the minority opinion of the lower court on this point.

In the final analysis, there is merit in this appeal and it should be allowed. I allow it and set aside the majority judgment of the lower court and restore the decision of the trial court with the cost of N50,000.00 to the plaintiff/appellant.

### **MOHAMMED JSC**

This is an appeal against the judgment of the Court of Appeal Lagos Division given on 8<sup>th</sup> February, 1996. By that judgment the Court of Appeal reversed the decision of the trial Lagos State High Court which had earlier entered judgment in favour of the Appellant as Plaintiff against the Respondent/Defendant in the sum of DM127,308.49, in foreign currency or its Naira equivalent being the sum of N265,0005.33 at the then current exchange rate.

The two issues arising for determination as identified in the Appellant's brief of argument are:-

*(a) Whether the payment schedule (Exhibit "G") prepared and executed by parties in 1975 (Two years after the delivery of the goods) is not an "Account Stated" and if it is, whether the Court of Appeal was right to hold that the Judgment of the trial Court declaring the Respondent liable to the Appellant in the sum Of DM127,308.49 was not justified.*

*(b) Whether after holding that "the Miliangos" has over-ruled the Havana" the justices of the Court of Appeal were right in proceeding to determine the appeal on the principle of the Havana."*

Similar issues though differently framed, were identified in the Respondent's brief of argument. At the hearing of the appeal on 8<sup>th</sup> February, 2010, the learned Counsel to the Respondent conceded the appeal on the second issue for determination when he agreed with the present state of the law in Nigeria that Nigerian Courts now have jurisdiction to give judgment in foreign currencies. With this development, the issue No. 2 in both the Appellant's and Respondent's briefs of argument had ceased to be an issue for determination in this appeal.

On the only remaining issue for determination which is

whether or not on the evidence on record, particularly the mutual agreement on schedule of payment between the parties Exhibit 'G' which clearly stated the amount due to the Plaintiff/Appellant, the Court below was wrong in refusing to give it its evidential value of a new agreement binding between the parties. I therefore, entirely agree with my learned brother Chukwuma-Eneh, JSC in his judgment that this appeal deserves to succeed. B

Accordingly, I allow this appeal, set aside the judgment of the Court of Appeal given on 8<sup>th</sup> February, 1996 and in its place, restore and affirm the judgment of the trial Lagos High Court in favour of the Plaintiff/Appellant. I abide by the order on costs in the lead judgment. C

### OGBUAGU JSC

This is an appeal against the Judgment of the Court of Appeal, Lagos Division (hereinafter called "the court below") delivered on 8<sup>th</sup> February, 1996, allowing the appeal of the Respondent and setting aside the Judgment of the High Court of Lagos State - per Thomas, J. delivered on 24<sup>th</sup> April, 1987 in favour of the Appellant. D E

Dissatisfied with the said decision, the Appellant has appealed to this Court on five (5) grounds of appeal. It has formulated two (2) issues for determination, namely,

"a) *Whether the payment schedule (Exhibit "G") prepared and executed by parties in 1975 (two years after the delivery of the goods) is not an "Account Stated" and if it is, whether the Court of Appeal was right to hold that the judgment of the trial court declaring the Respondent liable to the Appellant in the sum of DM127,308,49 was not justified.* F G

b) *Whether after holding that "the Mintages" has over-ruled "the Havana" the justices of the Court of Appeal were right in proceeding to determine the appeal on the principle of the Havana".*

On its part, the Respondent originally, formulated two Issues for determination but it later on the date of hearing the appeal, withdrew Issue No. 2 and all the arguments in respect thereof in the Brief and left one lone issue, namely, H

*"Whether, having regard to the discrepancies between various amounts referred to in the plaintiff (sic) pleading, and between*

*the pleading and the evidence led, tendered and admitted, the Honourable Justices of the Court of Appeal were right in setting aside the judgment of the High Court, Lagos State”.*

I note that the Appellant, did not state under which grounds of appeal, their said issues, were distilled from. The Respondent did not also disclose or state under which ground its said lone issue, was formulated or distilled from. The consequence is firmly settled in so many decided authorities of the two Appellate Courts. However, in order to save time and in the interest of justice more so as the said issues or issue respectively, are or is narrow; I will go ahead and deal with the merits of the appeal.

The Appellant- a German Export Company, between 1971 and 1973, supplied certain machineries to the Respondent which is a manufacturing Company in Nigeria. The Respondent, did not pay in accordance with the payment schedule in Exhibit G. The invoices evidencing the said supply, are Exhibits A,B,C,D and E which were admitted in evidence. In Exhibit “G”, the parties agreed that the sum of DM 273, 302.89 would be due and payable by the Respondent to the Appellant. Between 13<sup>th</sup> October, 1975 and 7<sup>th</sup> September, 1977, it is not in dispute that the sum of DM 145, 994.40, had been paid by the Respondent leaving a balance of DM 127,308.49 due and payable -See Exhibit F. The Appellant sued for this balance or its equivalent in Naira as at the date of the suit which is N34,659.91. See paragraph 9 of the Amended Statement of Claim. It also claimed interest on the said amount at the rate of 9% (nine per cent) per annum until the liquidation of the Judgment debt. The trial court, found in favour of the Appellant. As noted above, the court below reversed the said Judgment, hence the instant appeal.

When this appeal came up for hearing on 8<sup>th</sup> February, 2010, both learned counsel for the parties, adopted their respective Brief. While Wilson Esqr., the learned counsel for the Appellant, urged the Court to allow the appeal, the leading learned counsel for the Respondent - Igbokwe, Esqr., urged the Court to dismiss the appeal. He had told the Court that he was withdrawing their Issue 2 and all the argument in support of or respect thereof. Thereafter, Judgment was reserved till to-day.

In my respectful view, Exhibit “G” which is a payment schedule agreed to by the parties, is binding on them as both of them,

signed it. This document was pleaded by both parties. See paragraph 4 of the Appellant's Amended Statement of Claim and paragraph 3 of the Amended Statement of Defence. In evidence, the PW1 at page 65 of the Records, testified in support of its said pleading while the DW1, identified the said document at page 84 of the Records. In effect, the Respondent, admitted the existence and contents of Exhibit "G". At page 227 of the Records, the court below - per Uwaifo, JCA (as he then was), after referring to part of the submission of The learned counsel for the Appellant-viz

"..... *This is because Exhibit G can only have the effect as an admission. It is of the nature of an account stated*".

Stated inter alia, as follows:

*"I think learned counsel for the respondent (now Appellant) has made a valid point that exhibit G can only have the effect of an admission, though he also added that it is in the nature of an account stated". [the underlining mine]*

Apart from the fact that it is now settled that parties are bound by their pleadings - See the cases of *Emegokwue v. Okadigbo* (1973) 4. C. J 13; *North Brewery Ltd v. Mohammed* (1973) 1 NMLR 19; *Okagbue & ors. v. Janet Romaine* (1982) 5 S.C. 133 @ 150-159 and *National Investment & Properties Co. Ltd. v. The Thompson Organization Ltd. & ors.* (1969) NMLR 99 just to mention but a few, the binding effect of a document signed by a party, was stressed by this Court – per Onu, JSC in the case of *Agwunedo & 7 ors. v. Onwumere* (1994) 1 NWLR (Pt. 321) 375 @ 386-387; (1994) 1 SCNJ 106 @ 136. See also the cases of *Chief Okoya & 2 ors, v. Santilli & 2 ors.* (1994) 4 SCNJ. (Pt.II) 333 @ 353 - per Belgore, JSC (as he then was later CJN) citing the case of *Egbase V. Oriareghan* (1985) 2 NWLR (Pt.10) 884, 899 - 910 and *Okonkwo v. C. C. B.* (Nig) PLC & 2 ors. (2003) 8 NWLR (Pt. 822) 347 @ 352: (2003) 2 SCNJ. 90 @ 106 just to mention but a few. There is nothing in Exhibit "G" to suggest that it was made in anticipation of further supplies -Exhibit G stated the fact of "total sum due" without interest. It is to be stressed that any evidence given contrary to the pleadings, go to no issue. See also the case of *Kalu Njoku & ors, v. Ukwu Erne & ors.* (1973) 5 S. C. 293

At page 107 of the Records, the trial court held inter alia, as follows:

*“Upon the pleadings filed in this case the preponderance of evidence led at the trial weighs in favour of the Plaintiff/Company. I hold that the Plaintiff/Company has succeeded in proving its claim”.*

I agree. Afterwards, documentary evidence is the Best evidence. See the case of the Attorney-General, Bendel State & 2 ors. v. United Bank For Africa Ltd. (1986) 4 NWLR (Pt. 337) 547 @ 463 - per Oputa, JSC. It is also settled that an Appellate Court such as this Court, is in as good a position as a trial court in the evaluation of documentary evidence pursuant to Order 8 rule 12 (2) of the Rules of this Court. See also the case of Gonzee Nig. Ltd, v. Nigeria Educational Research & Development Council & 2 ors. (2005) 6 S.C. (Pt. 1) 25 @ 35; (2005) All FWLR (Pt.274) 235 @ 248.

I hold that Exhibit G, qualifies as an account stated. This is because, as rightly submitted in the Appellant’s Brief of Argument at page 9 paragraph 4.1.9, the learned Authors of Cheshire, Fifoot and Furmaston’s Law of Contract, 11<sup>th</sup> Edition also referred to by the court below, a plaintiff who sues upon an account sidled, proceeds on the assumption that the defendant has admitted a debt due to him. On the other hand, it is applicable when the parties, after a series of mutual dealings, have agreed to make up their accounts, to set off one item against another and to be answerable only for the balance.

Before concluding this Judgment, it is no longer in doubt and this is settled that parties can make an agreement or enter into a contract, to pay in foreign currency and a Nigerian court, can in its discretion, award same accordingly. See the cases of Metronex (Nig.) Ltd. v. Griffin George Ltd. (1991) 1 NWLR (Pt. 169) 651 @ 659; Olaoyin Enterprises Ltd. v. S. J. & M. (1992) 4 NWLR (Pt. 235) 361 @ 385; Broadline Enterprises Ltd. v. Monterey Maritime Corporation & anor. (1995) 9 NWLR (Pt. 417) 1; (1995) 10 SCNJ. 1 @ 26 citing Miliangos v. George Frank (Textiles) Ltd. (1975) 3 All E. R. 801; U. B. A Ltd. v. Odusote Bookstores Ltd. (1995) 9 NWLR (Pt. 421) 558; (1995) 12 SCNJ. 175; Prospect Textiles Mills (Nig.) Ltd. v. I. C. I. PLC England (1996) 6 NWLR (Pt. 113) 668 @ 682 and United Bank For Africa PLC v. BTL industries Ltd. (2004) 18 NWLR (Pt. 904) 180 C. A. just to mention but a few. This fact, was conceded by the learned counsel for the Respondent at the hearing of the appeal hence his withdrawal of their said Issue 2.

I have had the advantage of reading before now, the lead Judgment of my learned brother, Chukwuma-Eneh, JSC. just delivered. I agree with his reasoning and conclusion and save to say or add that Issue 2 of the Appellant having been withdrawn and struck out on the hearing date of this appeal, is no longer of any moment. I too, allow the appeal which is meritorious. I too, set aside the said Judgment of the court below and I hereby and accordingly restore the said Judgment of the trial court which is sound. Costs follow the event. I too, award N50,000.00 (Fifty thousand Naira) costs in favour of the Appellant payable to it by the Respondent.

C

### **TABAI JSC**

I was privileged to read, in draft, the lead judgement of my learned brother Chukwuma-Eneh JSC, and I agree entirely with the reasoning and conclusion therein. The agreed payment schedule is *Exhibit 'G'*.

By *Exhibit 'G'* the sum of DM 273,302.89 was due and payable to the Appellant by the Respondent. The undisputed evidence is that the Respondent paid DM 145,994.40 leaving a balance of DM 127,308.49. The Respondent defaulted in paying the said balance which Naira equivalent at the time the suit was filed was N34,659.91. These facts were pleaded and proved in evidence.

In his judgement at Page 107 of the record, the learned trial Judge concluded as follows:

*“Upon the pleadings filed in this case, the preponderance of evidence led at the trial weighs in favour of the Plaintiff Company. I hold that the Plaintiff Company has succeeded in proving its claim”.*

I agree entirely with the above conclusion. It is supported by the documentary evidence especially *Exhibit 'G'* and there was therefore no basis for any interference by the Court below. For the foregoing and the fuller reasons very ably set out in the lead judgement, I also allow the appeal. I abide by the consequential orders including the orders on costs in the lead judgement.

H

**MUNTAKA-COOMASSIE JSC**

I read in advance the lead judgment of my learned brother Chukwuma-Eneh JSC just delivered with which I entirely agree. For the same reasons contained in the aforesaid lead judgment, which I respectfully adopt as mine, I too allow the appeal.

The two issues incidentally identified by both parties, were amply thrashed out by my learned brother Chukwuma-Eneh JSC; who arrived at a correct conclusion. The only live issue, i.e issue No 1, was not given fair treatment by the lower court. The new mutual agreement by both parties was not accorded the face value it deserved. That alone made the decision of the learned justices of the court below untenable. They completely derailed. That being the case the appeal herein is meritorious same is hereby allowed. The decision of the trial court is restored and affirmed by me. I endorse the order as to costs.

E

F

G

H