

SUPREME COURT OF NIGERIA

24TH JUNE, SC.2011/2003

**CORAM:- D. MUSDAPHER, C. M. CHUKWUMA-ENEH, O.
O. ADEKEYE, S. GALADIMA, B. RHODES-VIVOUR, JJSC**

G.N. NWAOLISAH

(trading under the name APPELLANT
and style of G.B. VITALIS CO. NIG.)

AND

PASCHAL NWABUFOH

(trading under the name and style of
PASKODI MARITIME AGENCIES) RESPONDENT

APPEALS - Leave - Meaning - By virtue of 1999 Constitution s. 233
and Supreme Court Act s. 22 - It means permission (H1)

APPEALS - Leave - Failure to obtain - Effect - Where it is required -
Such failure will render the appeal incompetent - As no jurisdiction is
conferred on the appellate court (H2)

APPEALS - Nature of - How determined - It is based on proper
examination of the grounds and their particulars - To ascertain if they
involve questions of law or mixed law and facts or facts alone (H3)

APPEALS - Grounds of law - Raised without leave - Propriety - By
1999 Constitution s. 233 (2)(a) - Leave of neither Court of Appeal
nor that of Supreme Court is required to bring the appeal (H4)

CONTRACTS - Determination of - It is not the duty of court to make
contract between parties - Court is to construe the surrounding cir-
cumstances so as to attest the intention of parties (H5)

APPEALS - Unchallenged findings - Appellate court is not to inter-
fere - Save there are exceptional circumstances (H6)

CONTRACTS - Frustration - Meaning - Contract is not frustrated -
Merely because its execution becomes more difficult and has to be
carried out in a manner - Not envisaged at the time of its negotiation
(H7)

CONTRACTS - Execution - Time limit - Performance of a contract -
Must be rendered within a reasonable time - In the absence of any
specified time - Failure to do so will constitute a breach (H8)

CONTRACTS - Discharge - By breach - It is discharged by breach
where a party has acted contrary to the terms - Either by non per-
formance or by performance contrary to the terms (H9)

CONTRACTS - Breach - Remedies - In consideration of remedies for
breach - Aggrieved party can institute action for compensation in the
form of damages (H10)

FACTS

In August 1983, appellant travelled to Italy and placed order for 730 cartons of neoprene glue mastic 66. The goods were shipped in a 20 feet container. At the time appellant placed order for the items and shipped them to Nigeria, Neoprene was not affected by any import prohibition. In July 1984 when the goods arrived Nigeria via Port Harcourt wharf, Neoprene glue has come under import li-
cense by operation of Law. The items could not be cleared without obtaining import license to that effect. Appellant engaged the serv-
ices of a maritime clearing agent to clear the goods. The clearing agent regrettably breached the terms of the agreement. Consequently, appellant terminated the agreement and sued him at High Court of Anambra State, Onitsha for breach of contract. The goods were there-
after placed under seizure by the Department of customs and excise in Port Harcourt. Appellant was later introduced to respondent in October 1984. Respondent demanded for the sum of N25,000 (Twenty Five Thousand) naira and gave an oral undertaking to clear the container within one month from August 1984. The understand-
ing then was that these fees included the cost of procuring a license for clearing the goods. Respondent failed to keep to his promise.

Respondent did not deny the contract with appellant or that his charges did include the contractual obligation to procure the im-
port licence. Respondent claimed to have procured a licence for N10,000 but failed to use it to clear the container of goods. Appel-
lant placed the value of the goods at \$172,200.00 (US Dollars); while respondent quoted the value at \$4,860.84 (US Dollars). The parties

supported their respective stand with documents like sales Invoice, original Bill of Lading, Marine Certificate of Insurance, letter of arrival of container in Nigeria, letter from Respondent to appellant dated 7th April 1986 requesting for documents to facilitate clearing of the goods and letter from Bassi Marchini & Co. Italy demanding for payment of the goods. Appellant subsequently received a letter dated 2nd of February 1988 from Nigeria ports Authority informing him that his container was declared as over time cargo and sold as lot 119 in the 1985/86 overtime cargo sales. This prompted appellant to sue respondent at High Court of Anambra State, Onitsha for breach of the alleged agreement entered to clear the container. The Court dismissed the suit and held that both parties are “in pari delicto”, hence the contract is unenforceable. Aggrieved, appellant filed an appeal at Court of Appeal, Enugu Division. The Court allowed the appeal in part. Dissatisfied further, appellant further appealed to Supreme Court. Meanwhile, respondent has raised preliminary objection on the ground that appellant did not obtain the leave of Court of Appeal nor that of Supreme Court before filing the present appeal.

ISSUE FOR DETERMINATION

Whether the learned justices of the court below were right in affirming the decision of the trial court that the parties are in pari delicto with regards to who breached the contract.

HELD (Unanimously dismissing the preliminary objection and allowing the appeal per **ADEKEYE JSC**)

APPEALS - Leave - Meaning

1. By virtue of section 233 of the 1999 Constitution of Nigeria and section 22 of the Supreme Court Act Cap 15 Laws of Nigeria 2004, the word leave means permission. Therefore an appellant is bound, where necessary to seek the formal permission of the court below before setting an appeal in process. (p. 2020 H)

APPEALS - Leave - Failure to obtain - Effect

2. Leave of court where it is required is a condition precedent to the exercise of the right to appeal. Thus failure to obtain leave where it is required will render any appeal filed incompetent as no jurisdiction can be conferred on the appellate court. Hence an appeal from the Court of Appeal to the Supreme Court on grounds other than of law

alone is incompetent and invalid unless leave of either the Court of Appeal or the Supreme Court is first sought and obtained.
(p. 2021 A)

APPEALS - Nature of - How determined

B 3. In this application, the determining factors of the nature of the appeal are the grounds of appeal and not the issue formulated from the grounds. The grounds of appeal will reveal the classification of the appeal whether the appeal involves questions of law, or of mixed law and fact or facts alone. The Respondent has to go beyond the concurrent findings of fact of the two lower courts to examine the grounds of appeal filed and their particulars to determine whether leave of the lower court or the Supreme Court is required to pursue this appeal. (p. 2021 C)

D

APPEALS - Grounds of law - Raised without leave - Effect

4. I have gleaned through the Notice of appeal filed by the appellant on 24/6/03 and scrutinized the four grounds of appeal raised and their particulars. It is my conclusion that they are all grounds of law going by the decided case of this court like *Ogbechie & Ors v. Gabriel Onochie & Ors* (1986) 3 SC.54.

It is further regular even if one only of the four grounds of appeal is found to involve a question of law, as that ground can on its own sustain the appeal.

F By virtue of section 233 2(a) of the 1999 Constitution leave of the lower court or this court is not required to bring this appeal notwithstanding that the appeal involves the concurrent findings of the High Court and the Court of Appeal. There is no law that the right of appeal as of right does not extend to the concurrent findings of fact of the Court of Appeal or the High Court. The objection is hereby overruled. (p. 2021 E)

CONTRACTS - Determination

H 5. Parties tendered a lot of documents in the course of the trial in respect of their case. In the pleadings and in the evidence before the court the respondent admitted that the contract was frustrated by the agreement of 19th of July 1985, and that even if the contract was not frustrated by the agreement of 19th of July 1985, the plaintiff

will only be entitled to the sum of N77, 500 from which he will pay the sum of N20, 500 to Friday Amechi. The foregoing is a clean and clear admission that there was a contract between the parties and that he was ready to return the sum he collected under the contract for reason of services not rendered. The learned trial Judge was right to caption the scenario as a delictum which in plain language means a wrongful act or omission giving rise to a claim for compensation. It is not the function of the court to make contracts between the parties. The court's duty is to construe the surrounding circumstances including written or oral statements so as to attest the intention of the parties. Where the correspondence exchanged between the parties are read together, it can be assumed that the parties have come to an agreement. (p. 2022 F)

APPEALS - Unchallenged findings

6. Surprisingly and regardless of holding the foregoing view the court below came to the conclusion that the parties were in *pari delicto* on the basis that they actually set out to commit a crime or tainted matter as there was the talk of bribing customs officials and that the contract was frustrated. Whereas there was no evidence from the trial court to substantiate the allegation of forgery or illegality. On the allegation of bribing customs officials, the trial court held that respondent did not testify that the plaintiff actually gave him money for that purpose. The trial court held that the obligation by the respondent to secure the import licence was *ex facie* lawful *ab initio* and not intended to create a legal impossibility. The lower court did not make findings that the parties set out to commit a crime or engage in a tainted enterprise. The Respondent did not dispute or appeal against the foregoing. These findings remain subsisting and impeccable. Court of Appeal have no reason to interfere with unchallenged and undisputed findings of fact of the trial court, when there are no exceptional circumstances calling for such intervention. The court below had no reason to re-evaluate the evidence already dismissed by trial court without justification and in the circumstance arrived at its own conclusion. The lower court cannot rely on a non-existent evidence before trial court to hold that appellant was contributorily responsible for breach of the contract between the parties. (p. 2025 H)

CONTRACTS - Frustration - Meaning

7. A contract is not frustrated merely because its execution becomes more difficult or more expensive than either party originally anticipated and has to be carried out in a manner not envisaged at the time of its negotiation. (p. 2027 F)

B

CONTRACTS - Execution - Time limit

8. Finally the law is that time is of essence where the parties have expressly made it so, or where circumstances show that it is intended to be of essence or where a definite time is fixed for execution of a mercantile and the contract even though time is not expressly made of the essence, Thus failure to perform the contract within the limit will constitute a breach. Performance must be rendered within a reasonable time in the absence of any specification as to time in the contract itself.

D

It is apparent that time is of essence in this contract. The parties embraced this in their contractual obligation. After the respondent was charged his fees for the clearance of the appellant's container and the procurement of an import licence he promised to perform within one month. Moreover, the subject matter of the contract is a container shipped into Port Harcourt wharf which according to commercial practice must be cleared and evacuated from the Wharf within a stipulated time. (p. 2027 G)

E

CONTRACTS - Discharge - By breach

9. A contract can be discharged by breach. A breach of contract means that the party in breach has acted contrary to the terms of the contract either by non-performance or by performing the contract not in accordance with its terms or by a wrongful repudiation of the contract. A party who has paid money to another person for a consideration that has totally failed under a contract is entitled to claim the money back from the other. (p. 2029 C)

G

CONTRACTS - Breach - Remedies

10. In the consideration of remedies for breach of contract, the options open to a party to a valid contract is an action for damages in breach of the contract.

I find, based on these documents that the value of the goods

in the container is \$172,200.00 (One Hundred and Seventy two Thousand, Two Hundred Dollars). Coupled with this fact, I agree with the observation in the lead judgment of the lower court that it is not possible to clear goods worth N6,000, according to the price posted by the respondent, with N57,000.00 charged by respondent the Clearing Agent. The appellant is therefore entitled to the sum B
\$172,200.00 (One Hundred and Seventy two Thousand, Two Hundred Dollars) claimed as special damages, I am not inclined to grant the relief for interest at the rate of 25% from 17th April, 1986 for the simple reason that the rate of exchange between Naira and U. S C
Dollar in 1986 was 1 to 1.5 but now swings between N153 to N155 to one dollar. (p. 2029 F)

NOTABLE POINTS OF INTEREST

ADEKEYE JSC

1. Latin phrase “in pari delicto” - Meaning

I find it convenient at this stage to unveil that Latin phrase “IN PARI DELICTO”. This is a Latin phrase for “in equal fault”. It is a legal term used to indicate that two persons or entities are equally at fault, whether the malfeasance in question is a crime or tort. The phrase is E
most commonly used by courts when relief is being denied to both parties in a civil action because of wrong doing by both parties. The phrase means in essence, that since both parties are equally at fault, the court will not involve itself in resolving one side’s claim over the F
others, and whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim. The doctrine is similar to defence of unclean hands, both of which are equitable defences.

Comparative fault and contributory negligence are not the same as in pari delicto though all of these doctrines have similar policy G
rationales. The same principle can be applied when neither party is at fault if they have equal right to the disputed property in which case the maxim of law becomes in equal Jure (melior est conditio possidentis). Again the court will not involve itself in the dispute with- H
out a superior claim being brought before it. (p. 2022 B)

2. Interpretation of the word “frustration” in Law of Contract

I am sure the word frustrate here was used in its ordinary, simple and straight forward meaning which according to Black Law Dictionary,

8th Edition is the prevention or hindering of the attainment of a goal. The entire prevailing circumstance of the case does not give rise to frustration with the connotation and meaning it has in the law of contract.

B Frustration occurs wherever the law recognizes that without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it radically different from what was undertaken by the contract.

C The events which have been listed by the court to constitute frustration are:

- (1) Subsequent legal changes or statutory impossibility
- (2) Outbreak of war
- (3) Destruction of the subject matter of the contract or literal

D impossibility

(4) Government acquisition of the subject matter of the contract.

E (5) Cancellation by an unexpected event like where other party to a contract for personal service, dies or where either party is permanently incapacitated by ill-health, imprisonment etc., from rendering the service he has undertaken. (p. 2026 H)

REPRESENTATION

F Mr. A. C. Anaenugwu with V. I. P. Ozumba, for the Appellant
Chief Ikenna Egbuna with P. Nwachukwu, for the Respondent

CASES REFERRED TO

- Nyambi v. Osadin (1997) pt. 485 pg.1
- G Chidiak v. Laguda (1954) NMLR pg. 123
- Ohima v. Onuyuna (1996) 4 NWLR pt.443 pg.449
- Edwards v. Bairston & Anor (1955) 3 A.U.E.R pg, 46
- Olanrewaju v. Ogunleye (1997) 3 NWLR pt.485 pg.12
- Kashasadi v. Noma (2007) 13 NWLR pt. 1052 pg. 510
- H Awote v. Owodunni (No 1) 1986 5 NWLR pt.46 pg. 94
- Adejumo v. Ayantegbe (1989) 3 NWLR pt, 110 pg. 417
- Comex Ltd v. N.A.B Ltd (1997) 3 NWLR pt. 496 pg. 543
- Benmax v. Austin Motor Co. Ltd (1945) AUER 326 at pg. 327
- Nalsa Team Associates v. N.N.P.C (1991) 8 NWLR (pt. 212) pg 652

S.P.D.C. Nig Ltd v. Alcatel Nig Ltd (2006) 1 NWLR (pt. 960) pg. 199
Dr. Edwin U. Onwudume v. F.R.M. (2006) 10 NWLR pt. 988 pg.382
Dairo v. Union Bank of Nigeria Plc & Anor (2007) 16 NWLR (pt. 1059) pg. 99

STATUTES & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, s.233 (2) (a) (3)
Customs Tariff (Import Prohibition Order) No.2 1984
Supreme Court Act Cap.15 LFN 2004, s.22
Supreme Court Rules 2002, O.2 r.32

BOOK REFERRED TO

Blacks Law Dictionary 8th Edition

LEAD JUDGMENT BY ADEKEYE JSC

By a notice of Appeal filed at the Supreme Court of Nigeria Registry on the 24th day of June, 2003, the appellant G.N.N. Nwaolisah appealed against part of the judgment of the Court of Appeal Enugu delivered on the 15th of May 2003.

In the High court of Anambra state sitting at Onitsha, G.N. Nwaolisah, a businessman trading under the name and style of G.B. VITALIS CO. (NIG.) as plaintiff, in paragraph 25 of his amended statement of claim sued the defendant now appellant before this court, Paschal Nwabufoh, a clearing agent operating under the name and style of Paskodi Maritime Agencies claiming as follows:-

(i) The sum of N57,000.00 (fifty seven thousand Naira) as special damages being money had and received by the defendant from the plaintiff for a consideration that has wholly failed.

(ii) The sum of \$172,200 U.S. dollars as special damages C.I.F. value of the goods shipped from Italy.

(iii) Interest on the above sum of money at the rate of 25% (twenty five percent) from 17th April 1996 up till date of judgment

(iv) General Damages as may be assessed by the court.

The facts of the case in brief are that in August 1983 G.N. Nwaolisah, a businessman travelled to Mezzago, a town in Italy and placed order for 730 cartons of neoprene glue mastic 66, which is a variety of adhesive gum. The goods were shipped in a 20 feet container to Nigeria on board the vessel "SS Irmas Dilmas. At the time

the appellant placed order for the items and shipped them to Nigeria. Neoprene was not affected by any import prohibition. In July 1984 when the goods arrived in Nigeria via Port Harcourt wharf, Neoprene glue has come under import license by operation of Law. The items could not be cleared without obtaining import license to that effect. The goods arrived in Nigeria in July 1984. The appellant engaged the services of Mr. John Okorie operating under the name and style of Jomo Agencies (Nig) to clear the goods. His services included securing an import license for the purpose. The agreement between the parties was that clearing of the items would be done within one month. The clearing agent failed to keep to his promise, and the appellant terminated the agreement and sued him at Onitsha High Court for breach of contract. The goods were thereafter placed under seizure by the Department of customs and excise in Port Harcourt. He was introduced to and engaged the service of the respondent in October 1984. He demanded for a sum of 25,000 naira and gave an oral undertaking to clear the container within one month from August 1984. The understanding then was that these fees included the cost of procuring a license for clearing the goods. He not only failed to keep to his promise but he demanded for more money while the appellant gave him the necessary documents for clearing the goods. The respondent not only failed to clear the container he also refused to repay the sum of money he collected for his aborted promise.

The respondent did not deny the contract between the parties or that his charges did include the contractual obligation to procure the import licence. The Respondent claimed to have procured a licence for N10, 000 but failed to use it to clear the container. The appellant placed the value of the goods at \$172,200.00 (Us Dollars) and the Respondent quoted the value as \$4,860.84, both amounts are supported by certificate of value issued by the vendor of the adhesive gum in Italy. The parties supported their respective stand with documents like sale Invoice, original Bill of Lading, Marine certificate of Insurance, Letter of Arrival of container in Nigeria, Letter from Respondent to appellant dated 7th April 1986 requesting for documents to facilitate clearing of the goods and letter from Bassi Marchini & Co Italy demanding for payment of the goods. The appellant consequently received a letter dated the 2nd of February 1988

from Nigeria ports Authority informing him that his container was declared as over time cargo and sold as lot 119 in the 1985/86 over-time cargo sales. The appellant sued the respondent for breach of the alleged agreement entered to clear the container.

In the judgment of the trial court delivered on the 26th of September 1987 the learned trial Judge dismissed the suit with costs of N5,000 assessed in favour of the respondent. Being aggrieved by the outcome of the suit, in the High court of Anambra State, the appellant filed an appeal in the Court of Appeal, Enugu. B

Three issues were formulated for determination in the appeal at the lower court. In the judgment of that court delivered on the 13th of May 2003, resolved two issues in favour of the appellant but on the third issue which the lower court rated as touching upon a substantive matter, the court found same against the appellant. The appellant made a further appeal to this court on that portion of the judgment. Parties exchanged briefs. At the hearing of this appeal on the 5th of April 2011, the appellant adopted and relied on the appellant's brief filed on 22/1/11 and the appellant's reply brief filed on 28/3/33. The only issue distilled for determination in this appeal reads: C D

"Whether the learned justices of the court below were right in affirming the decision of the trial court that the parties are in pari delicto with regards to who breached the contract." E

The Respondent raised a similar issue in the Respondent's brief deemed filed on the 2nd of February 2011.

The Appellant submitted in respect of this issue by recapitulating the judicial and evidential rules of the trial court's decision that parties are in pari delicto on the issue of breach of the contract. The trial court concluded that the crucial factor in the contract between parties were that the respondent would clear the container at the Port Harcourt wharf and deliver same at Onitsha. Their agreement was however predicated on the defendant obtaining the requisite import licence and his fees covered the procurement of the licence. The appellant trusted and was assured by the respondent that the task would be accomplished within one month. The appellant referred to the finding of the learned trial Judge that the respondent testified as pleaded in paragraph 11 of the Amended statement of Defence that he purchased an import licence for N10,000 to the knowledge of the plaintiff but the import licence was not tendered in F G H

evidence, and neither did he use it to clear the appellants goods. The trial court concluded that the appellant was equally at fault because he failed to furnish the respondent with certain documents necessary to procure the licence. The bone of contention of the appellant was that the learned trial Judge had once ruled that the evidence was not specifically pleaded by either party, and was therefore expunged from the record. The appellant went on to explain the stand of the Court of Appeal which came to the conclusion that any evidence tendered and rejected or withdrawn and abandoned or ruled to be irrelevant on the ground that it is not pleaded ought not to be used to ground a case for a party for it would amount to using or relying on a non-existent or void fact to buttress or ground a decision. The trial court cannot be allowed to overrule itself based on facts rejected. The appellant is of the view that having reversed the trial court in that manner, the lower court ought to have answered issue three in the negative and resolve same in favour of the appellant. In effect the conclusion of the appellant is that this appeal be allowed in that the learned judge based his conclusion that the parties are in *pari delicto* on evidence which he had expunged in an interlocutory ruling before his final judgment. The lower court was also of the impression that the trial court could not in the final judgment make use of evidence earlier expunged during the trial. The court below was therefore wrong to hold that there was evidence of frustration where none were pleaded and proved and when the trial court did not so find.

The court is urged to resolve the only issue in this appeal in favour of the appellant and allow the appeal. The appellant supported the submission with cases of *Olaniyan & Ors v. University of Lagos & Anor* (1985) 2 NELR pt.9 pg. 599, *Obi Okudo v. I.G.P. & Ors.* (1998) 1 NWLR pt.535 pg. 335, *Adejumo v. Ayantegbe* (1989) 3 NWLR pt, 110 pg. 417, *Awote v. Owodunni* (No 1) 1986 5 NWLR pt.46 pg. 94, *Ohima v. Onuyuna* (1996) 4 NWLR pt.443 pg.449, *Daniel v. Ineri* (1995) 1 NWLR pt. 3 pg. 541, *Margareth Chinyere Stitich v. A.G. Federation & Ors* (1986) 5 NWLR pt.46 pg. 1007.

The Respondent in his reply urged and submitted that the conclusion of the two lower courts that the parties are *IN PARI DELICTO* OR equally delectable, relying on the authority sale of goods by P.S. Atiya - 6th Edition and the Nigerian commercial Law and Practice Vol. I by Hon. Justice Olakunle Orojo 1983 solution at pg. 1052,

paragraph 13.”

The duty of obtaining an import licence must be on the importer, and according to the general Law of Sale of Goods which applies to import and export trade, obtaining an import licence is a pre-importation issue and has nothing to do with a clearing agent. The appellant cannot transfer his responsibilities as an importer to obtain licence on a clearing agent. Furthermore as at the time he engaged the services of the Respondent he was in breach of the Law of the Land. The customs officials apprehended him for importing without licence and the goods were placed under seizure and investigation which the lower court cannot interfere with save and except there are special circumstances to that effect. He supported the foregoing submission with cases as follows Alhaji Saibu Otun and 3 Ors v. Sindiku Ashiru Otun and ors (2004) 14 NWLR pt.893 pg, 381.

Miss Ifeyinwa Oguejefor v. Daniel Chiejina Ogoeji for (2006) 3 NWLR pt.966 pg. 205.

Dr. Edwin Udegbumam Onwudume v. F.R.M. (2006) 10 NWLR pt. 988 pg.382

I have carefully considered the evidence of the parties predicated on the pleadings, oral evidence, documents tendered; and the briefs filed in support of the appeal. The single issue raised for determination is straight forward and within narrow limit. The reasoning and findings of the lower court, affirming the judgment of the trial court had seventy-five percent settled the germane issue in this appeal. For the sake of emphasis I will repeat this crucial single issue which reads-

“Whether the learned justice of the court below were right in affirming the decision of the trial court that the parties are in pari delicto with regard to who breached the contract.”

This court tries to rely on the evidence before the trial court which had that exclusive advantage of seeing and hearing the witnesses and watch their demeanour in the witness box.

Before going further into this appeal, I have a duty to consider the Respondent Notice of preliminary objection. The Respondent of the 7th of December 2010 filed a Notice of Preliminary objection pursuant to order 2 Rule 32 of the Supreme Court Rules and section 233(3) of the 1999 Constitution. The learned counsel for the appel-

lant incorporated the argument and submission in support of the objection in the Respondent's brief deemed filed 2nd of February 2011. In the objection, the Respondent prayed this court for an order dismissing or striking out the appeal on the ground of incompetence as neither the leave of the court below nor that of this court
B were obtained before appealing against the concurrent findings of the two lower courts that "the parties are IN PARI DELICTO and the contract between them is unenforceable." In his argument the Respondent referred to the concurrent findings of the two lower courts.
C He drew attention to the only issue in this appeal which reads:-

"Whether the learned Justices of the courts were right in affirming the decision of the trial court that the parties are IN PARI DELICTO with regard to who breached the contract." It is the contention of the Respondent that this issue posed the question whether
D the appellant can rightfully appeal against these concurrent findings of the lower courts without first obtaining the leave either of the court below or that of this court. The Respondent gave the answer in the negative placing reliance on the provisions of order 2 Rule 32 of the Supreme Court Rules, section 233(3) of the 1999 constitution, and
E the case of Calabar Central Co-operative Thrift and credit society Ltd & 2 Ors v. Bassey Ebong Ekpo (2008) 6 NWLR pt. 1093 pg. 962 at pg. 410 para. F - G. The respondent submitted that one of the factors which give a court jurisdiction is that the action is initiated by due
F process of law. Since the appellant failed to apply for leave to appeal either at the court below or in this court- the appeal is incompetent and same must be dismissed.

The appellant in the Appellant's Reply Brief filed on 28/3/11 submitted that the Respondent have completely misapprehended the
G legal basis upon which an appellant seeks leave of this court or the court below to appeal- and have totally misconstrued the purport and import of order 2 Rule 32 of the Supreme Court Rules vis-a-vis the provisions of section 233 (2) of the 1999 constitution as regards when to appeal as of right or by leave. The appellant examined the
H provisions of both laws and came to the conclusion that leave to appeal is required in respect of matters which fall under the provisions of subsection 233 (3) of the 1999 Constitution as against under the provision of 233 (2) where appeal is as of right. Where the grounds of appeal are predicated on questions of mixed law and facts or facts

alone, leave is a pre-condition and the appeal has to be predicated on a prior leave obtained from the court below or this court. The contrary is the position where appeals involve questions of law alone as no leave of this court or court below is required in that circumstance. In an application of this nature the proper procedure is to take a hard look as to the grounds of appeal which will reveal the nature of the appeal, that is, whether the appeal involves question of law or of mixed law and fact or facts alone. The Respondent glossed over this important aspect of the appeal. The appellant examined the four grounds of appeal from which the single issue in this appeal is formulated and concluded that they are all issues of law in line with section 233 (2) of the 1999 constitution. The appellant contended that even if only a ground of appeal out of many in the Notice of appeal is a ground of law, it alone can sustain the Notice of Appeal. The appellant made reference to the case of *Dairo v. Union Bank of Niger plc & Anor.* (2007) 16 NWLR pt. 1059 pg. 99 at 134. *Mohammed v. Olawunmi* (1990) 2 NWLR pt. 133 pg. 458.

The appellant distinguished the case of *Calabar Central Co-operative Thrift & Credit society Ltd & 2 ors. v. Bassey Ebong Ekpo* (2008) 6 NWLR pt. 1068 pg. 362, as the ground of appeal attached to the preliminary objection involved a question of fact and leave was necessary to bring the appeal.

I have carefully considered the argument and submission of both parties in respect of this preliminary objection. The contention of the Respondent is that this appeal being against the concurrent findings of the High court and the Court of Appeal on the issue that parties were in *pari delicto* and the contract therefore unenforceable, the appellant required leave of this court or of the court of Appeal to bring this appeal. The appellant raised the objection pursuant to section 233 (3) of the 1999 Constitution, and Order 2 Rule 32 of the rules of the Supreme Court as amended in 2002.

The relevant provisions are hereby reproduced Sections 233 (2) & (3) of the 1999 Constitution.

Section 233 (2) stipulates that - An appeal shall lie from decisions of the courts of Appeal to the Supreme Court as of right in the following cases-

(a) Where the grounds of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court

of Appeal.

(b) Decisions in any civil or criminal proceedings on questions as to the interpretation or application of this constitution.

(c) Decisions in any civil or criminal proceedings on questions as to whether any of the provisions of chapter IV of this constitution has been, is being or is likely to be, contravened in relation to any person.

(d) Decision in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or has affirmed a sentence of death imposed by any other court.

(e) Decisions on any question

(i) Whether any person has been validly elected to the office of president or vice president under this constitution.

(ii) Whether the term of office of president or vice president has ceased.

(iii) Whether the office of president or vice president become vacant and

(f) Such other cases as may be prescribed by an act of the National Assembly.

E Section 233 (3)

“Subject to the provisions of Subsection (2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or Supreme Court.

F Order 2 Rule 32 of the Supreme Court Rules

“Where in an appeal to the court from the court below, the court below has affirmed the findings of fact of the court of first instance any application to the court in pursuance of its jurisdiction under section 233(3) of the constitution for leave to appeal shall be granted only in exceptional circumstance”

Order 2 Rule 32 of the Supreme Court Rules 2002 as amended deals with the practice and procedure of appeal while section 233 of the 1999 constitution deals with the substantive law in respect of appeals from the Court of Appeal to the Supreme Court.

H ***By virtue of section 233 of the 1999 Constitution of Nigeria and section 22 of the Supreme Court Act Cap 15 Laws of Nigeria 2004, the word leave means permission. Therefore an appellant is bound, where necessary to seek the formal permission of the court below before setting an appeal in proc-***

ess.

Leave of court where it is required is a condition precedent to the exercise of the right to appeal. This failure to obtain leave where it is required will render any appeal filed incompetent as no jurisdiction can be conferred on the appellate court. Hence an appeal from the Court of Appeal to the Supreme Court on grounds other than of law alone is incompetent and invalid unless leave of either the Court of Appeal or the Supreme Court is first sought and obtained. B

Nalsa Team Associates v. N.N.P.C (1991) 8 NWLR (pt. 212) pg 652. C
S.P.D.C. (Nig) Ltd v. Alcatel (Nig) Ltd (2006) 1 NWLR (pt. 960) pg. 199. Nyambi v. Osadin (1997) pt. 485 pg.1. Olanrewaju v. Ogunleye (1997) 3 NWLR pt.485 pg.12.

In this application, the determining factors of the nature of the appeal are the grounds of appeal and not the issue formulated from the grounds. The grounds of appeal will reveal the classification of the appeal whether the appeal involves questions of law, or of mixed law and fact or facts alone. The Respondent has to go beyond the concurrent findings of fact of the two lower courts to examine the grounds of appeal filed and their particulars to determine whether leave of the lower court or the Supreme Court is required to pursue this appeal. D E

I have gleaned through the Notice of appeal filed by the appellant on 24/6/03 and scrutinized the four grounds of appeal raised and their particulars. It is my conclusion that they are all grounds of law going by the decided cases of this court like Ogbechie & Ors v. Gabriel Onochie & Ors (1986) 3 SC.54. F
Paul Nwadike & Ors v. Cletus Ibekwe & ors (1987) 12 SC Pg. 14. (Fatoyinbo v. Williams (1956) 1 PSC 87, Kashasadi v. Noma (2007) G 13 NWLR pt. 1052 pg, 510, Comex Ltd v. N.A.B Ltd (1997) 3 NWLR pt. 496 pg. 543, Benmax v. Austin Motor Co. Ltd (1945) AUER 326 at pg. 327, Edwards v. Bairston & Anor (1955) 3 A.U.E.R pg, 46, Cooper v. Stubbs (1925) 2 KB pg. 277, Chidiak v. Laguda (1954) INMLR pg. 123. H

It is further regular even if one only of the four grounds of appeal is found to involve a question of law, as that ground can on its own sustain the appeal. Dairo v. Union Bank of Nigeria Plc & Anor (2007) 16 NWLR (pt. 1059) pg. 99, Mohammed v.

Olawunmi (1990) 2 NWLR (pt. 1330 pg. 458.

By virtue of section 233 2(a) of the 1999 constitution leave of the lower court or this court is not required to bring this appeal notwithstanding that the appeal involves the concurrent findings of the High Court and the Court of Appeal.

B There is no law that the right of appeal as of right does not extend to the concurrent findings of fact of the Court of Appeal or the High Court. The objection is hereby overruled.

C I find it convenient at this stage to unveil that Latin phrase “IN PARI DELICTO”. This is a Latin phrase for “in equal fault”. It is a legal term used to indicate that two persons or entities are equally at fault, whether the malfeasance in question is a crime or tort. The phrase is most commonly used by courts when relief is being denied to both parties in a civil action because of wrong doing by both parties. The phrase means in essence, that since both parties are equally at fault, the court will not involve itself in resolving one side’s claim over the others, and whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim. The doctrine is similar to defence of unclean hands, both of which are equitable defences.

E Comparative fault and contributory negligence are not the same as in pari delicto though all of these doctrines have similar policy rationales. The same principle can be applied when neither party is at fault if they have equal right to the disputed property in which case the maxim of law becomes in equal Jure (melior est condition possidentis). Again the court will not involve itself in the dispute without a superior claim being brought before it. Parties tendered a lot of documents in the course of the trial in respect of their case.

G In the pleadings and in the evidence before the court the respondent admitted that the contract was frustrated by the agreement of 19th of July 1985, and that even if the contract was not frustrated by the agreement of 19th of July 1985, the plaintiff will only be entitled to the sum of N77, 500 from which he will pay the sum of N20, 500 to Friday Amechi. The foregoing is a clean and clear admission that there was a contract between the parties and that he was ready to return the sum he collected under the contract for reason of services not rendered. The learned trial Judge was right to caption the scenario as a delictum which in plain language means a wrongful

act or omission giving rise to a claim for compensation. It is not the function of the court to make contracts between the parties. The court's duty is to construe the surrounding circumstances including written or oral statements so as attest the intention of the parties. Where the correspondence exchanged between the parties are read together, it can be assumed that the parties have come to an agreement. B

Omega Bank (Nig) Plc v. O.B.C Ltd (2005) 8 NWLR (pt. 928) pg. 547; Nnaji v. Zakhem Con. (Nig) Ltd 2006 12 NWLR (pt.994) pg. 297; Udeagu v. Benue Cement Co. Plc. (2006) 2 NWLR (pt. 965) C pg. 600.

In an effort to establish whether parties are in *pari delicto* or equally delectable in that they contributed to the breach of the contract, I shall restate the evidence before the trial court.

The appellant at pg. 44 line 19 to page 45 line 8 of the Record said- D

"At the time I ordered the goods, they were under open general licence but at the time they arrived they were under specific import licence. At the time the goods were ordered import licence was not required but at the time it arrived import licence was required. I have been in import business for some time. The money I paid to the defendant includes money for procuring import licence. I do not know the procedure for obtaining import licence." E

From the foregoing by the time the container of adhesive he purchased from Mezzago in Italy arrived in Nigeria via Port Harcourt Wharf in July 1984 the appellant was under strict responsibility under the Customs Tariff (Import Prohibition Order) (No 2) 1984 to procure an Import Licence for his goods. F

The learned trial Judge summarized the situation at pg. 131 line 5 to pg. 132 line II as follows- G

"I now move to consider the effect of import prohibition No 2 Order 1984. Parties agreed that when order for the goods were placed they were under open general licence which in effect means the goods could be imported and cleared without licence. But when the goods arrived in Nigeria they had come under specific import licence, that is, the goods could no longer be imported into Nigeria without first obtaining an import licence, it is necessary here to draw a distinction between goods under absolute prohibition and "goods subject to" licence. The former cannot be imported into Nigeria under any cir- H

cumstances and cleared with or without any licence. Any contract to clear such goods is illegal and unenforceable. The importer would be prosecuted for infraction of the law. On the other hand “goods subject to license could be imported and cleared subject to licence being first obtained. The plaintiff’s goods fall into the second category and his contract with defendant is ex-facie lawful ab initio. The defendant knew of the situation and charged his fees to include procurement of import licence which is an integral part of the contract. The defendant did not repudiate the bargain as being unlawful”

The learned trial Judge concluded at pg. 132 lines 26 - 28 and pg. 133 lines 1 - 8 that-

“In the crucial and decisive question- who as between the plaintiff and the defendant was in breach of contract? It is the finding of the court that defendant contracted with the plaintiff to clear the goods at Port Harcourt Wharf and deliver same at Onitsha. He charged his fees to include procurement of import licence. The parties realized that the goods could not be cleared without it. Their agreement was therefore predicated on the defendant obtaining the requisite import licence. The plaintiff trusted and was assured by the defendant that the task would be accomplished within one month”

The trial court further held that:

“He testified as pleaded in paragraph 11 of the Amended Statement of Defence that he purchased an import licence for N10, 000 to the knowledge of plaintiff. The import licence was not tendered in evidence.”

There is that lacuna in the case of the Respondent a clearing agent of many years standing according to his evidence at Pg. 60 lines 6-7 of the Record that if he purchased an import licence, why did he fail to clear the goods of the appellant within the stipulated time.

The learned judge turned his searchlight to the evidence of the respondent and predicated his conclusion that parties were in pari delicto based on the under mentioned-

“But the defendant could not pluck the licence from thin air, manufacture, perform magic, invoke or conjure it. He required certain essential materials documents to enable him apply for it. The plaintiff admitted in cross- examination that he did not furnish the materials/documents requested by the defendant in Exhibits P and H.”

In short the trial court reasoned that the appellant was at fault because the appellant failed to furnish the respondent with certain vital documents required for procuring the import licence.

The evidence about non supply of documents formed one of the issues for determination before the Court of Appeal. The lower court was able to read between the lines and resolved the issue in favour of the appellant while the court had this to say-

“The court below relied on documents tendered by the respondent to arrive at the conclusion that when he requested for some documents for the procurement of import licence none was supplied. It is indeed surprising and intriguing to say the least at the conclusion reached by the judge as the learned trial Judge had in an earlier ruling during the course of the trial of this case held as follows-

I am of the view that any other requirement/method for the procurement of the import licence outside the illegal means of bribe pleaded is a material fact and ought to have been pleaded. The requirement is more than a fact relevant to a material fact which need not be pleaded. The material having not been specifically pleaded by either party evidence on the matter goes to no issue. The evidence having been allowed should be disregarded as irrelevant and is accordingly expunged.”

The ruling of the trial court under reference is at pages 56-58 of the Record. It was the subject of an appeal to the Appeal Court, Enugu as Appeal No.CA/E/189/95 filed by the respondent which was subsequently dismissed on the 25th of November 1997.

The court below went further on the issue to say in this judgment that

“The point being made now is this - having expunged these pieces of evidence not contained in the pleadings on either side as he held, from where then did he get the new evidence to make the untoward and I would add a seemingly ungainly somersault. Evidence tendered and rejected or withdrawn and abandoned or ruled to be irrelevant on the grounds that it is not pleaded ought not to be used to ground a case for a party for it would amount to using or relying on nonexistent fact a void to buttress or ground a decision. The court below cannot be allowed to overrule itself based on facts rejected earlier on in the circumstances. I hold that the respondent did not in fact plead what the lower court said it pleaded.”

Surprisingly and regardless of holding the foregoing view

the court below came to the conclusion that the parties were in pari delicto on the basis that they actually set out to commit a crime or tainted matter as there was the talk of bribing customs officials and that the contract was frustrated. Whereas there was no evidence from the trial court to substantiate the allegation of forgery or illegality. On the allegation of bribing customs officials, the trial court held that the respondent did not testify that the plaintiff actually gave him money for that purpose. The trial court held that the obligation by the respondent to secure the import licence was ex facie lawful ab initio and not intended to create a legal impossibility. The lower court did not make findings that the parties set out to commit a crime or engage in a tainted enterprise. The Respondent did not dispute or appeal against the foregoing. These findings remain subsisting and impeccable. The Court of Appeal have no reason to interfere with the unchallenged and undisputed findings of fact of the trial court, when there are no exceptional circumstances calling for such intervention. The court below had no reason to re-evaluate the evidence already dismissed by the trial court without justification and in the circumstance arrived at its own conclusion. The lower court cannot rely on a non-existent evidence before the trial court to hold that the appellant was contributorily responsible for breach of the contract between the parties.

The respondent pleaded in its amended Statement of Defence as follows -

Paragraph 22

“Paragraph 22 of the Statement of Claim is false. The goods could not be cleared as a result of the inability of the parties to obtain import licence.

Paragraph 24

“Paragraph 24 is false

The contract was frustrated and rooted in misrepresentation.”

I am sure the word frustrate here was used in its ordinary, simple and straight forward meaning which according to Black Law Dictionary, 8th Edition is the prevention or hindering of the attainment of a goal.

The entire prevailing circumstance of the case does not give rise to

frustration with the connotation and meaning it has in the law of contract.

Frustration occurs wherever the law recognizes that without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it radically different from what was undertaken by the contract”

The events which have been listed by the court to constitute frustration are:

- (1) Subsequent legal changes or statutory impossibility
- (2) Outbreak of war
- (3) Destruction of the subject matter of the contract or literal impossibility
- (4) Government acquisition of the subject matter of the contract.
- (5) Cancellation by an unexpected event like where other party to a contract for personal service, dies or where either party is permanently incapacitated by ill-health, imprisonment etc., from rendering the service he has undertaken.

Davies Contractors Ltd. v. Fareham DC (1956) AC 696, Akanmu v. Olugbode (2001) 13 WRN 132, NBCI v. Standard (Nig) Eng Co. Ltd. (2002) 8 NWLR (pt. 768) pg, 104, Obayuwana v. The Governor of Bendel State (1982) SC pg.167, Taylor v. Caldwell (1863) 3 B & Y S 826, J. P Dawodu v. B. Anderson & Co, Ltd (1925) 6 NLR Pg. 105, Adu v. Makanjuola (1944) 10 WACA Pg. 168.

A contract is not frustrated merely because its execution becomes more difficult or more expensive that either party originally anticipated and has to be carried out in a manner not envisaged at the time of its negotiation.

Davies Contractors Ltd v. Fareham N.D.C (1956) AC 696, Tsakineglon & Co. v. Noble Thorh G.M.B.H (1962) A. C 93.

Finally the law is that time is of essence where the parties have expressly made it so, or where circumstances show that it is intended to be of essence or where a definite time is fixed for execution of a mercantile and the contract even though time is not expressly made of the essence, Thus failure to perform the contract within the limit will constitute a breach. Performance must be rendered within a reasonable time in

the absence of any specification as to time in the contract itself.

It is apparent that time is of essence in this contract. The parties embraced this in their contractual obligation. After the respondent was charged his fees for the clearance of the appellants container and the procurement of an import licence he promised to perform within one month. Moreover, the subject matter of the contract is a container shipped into Port Harcourt wharf which according to commercial practice must be cleared and evacuated from the Wharf within a stipulated time.

Despite his claim to professional competence as a clearing Agent of many years standing, and he had on previous occasions obtained import licence this trial should not have posed any problem. He knew the process, the procedure and necessary documents required to procure a licence. He entered the agreement with the appellant in October 1984. He dilly-dallied so much that he came to demand for an extra sum of N35, 000.00 in February 1985 and introduced an outsider into the contract for the purpose of securing the money. On the 7th of April, 1986 the respondent wrote to the appellant asking for certain documents to facilitate the clearance of the goods. That was almost two years after he entered into the contract to clear the goods within one month. The respondent failed to clear the container, while the appellant lost the goods which had arrived in the country since July 1984.

Of course, the container of adhesive gum was sold by the Nigerian Ports Authority, Port congestion Tasks force as an overtime cargo/ Lot 119 in the 1985/1986 overtime cargo sales. It is no gain saying that both courts proceeded from a wrong platform to find that the parties were in *pari delicto* as to who breached the contract. I conclude that the respondent is blameworthy for the breach of this contract for reasons that -

(1) He resorted to antics which made clearance of the container of adhesive gum impossible.

(2) As a clearing agent of many years standing he knew the documents to collect from the appellant to facilitate the procurement of the import licence right from the inception of the contract

(3) It is apparent from his activities that he was not used to clearing through the transparent and legal means.

(4) He did not enjoy the co-operation of the appellant in his device to extort him by incessantly asking for money.

(5) Even the licence he purchased with N10,000 belonged to a shoe-company and not for clearance of adhesive gum.

(6) He waited for two years into the contract on 7th April 1986 to ask for basic documents like

(a) Tax Clearance Certificate

(b) Certificate of Incorporation.

I set aside the judgments of the two lower courts as being perverse. The next issue to be determined is the claim of the appellant for damages.

A contract can be discharged by breach. A breach of contract means that the party in breach has acted contrary to the terms of the contract either by non-performance or by performing the contract not in accordance with its terms or by a wrongful repudiation of the contract. A party who has paid money to another person for a consideration that has totally failed under a contract is entitled to claim the money back from the other. Pan Bisbilder (Nigeria) Ltd. v. First Bank Nig. Limited (2000) 1 SC 71 at pg 86; Haido v. Usman (2004) 3 NWLR (pt. 859) pg.65.

As I mentioned earlier in this judgment the respondent is not disputing the appellant's claim for N52, 000.00 (Fifty two thousand Naira) as special damages being money had and received by the respondent from the appellant for a consideration which totally failed.

In the consideration of remedies for breach of contract, the options open to a party to a valid contract is an action for damages in breach of the contract. Ben-Nelson (Nig.) Ltd. V. Moro Local government, Kwara State (2001) 8 NWLR pt. 1037, pg. 623.

The appellant claimed the sum of \$172,200.00 US Dollars as special damages. The respondent disputed the amount and testified that Exhibit X put the amount as 4,860.84 (Four thousand, Eight Hundred and sixty Dollars, Eighty four cents). The appellant tendered Exhibits A and Exhibit F (Exh.4) which put the amount as \$172,200.00 (one Hundred and seventy two Thousand, Two Hundred Dollars). The trial court dismissed this amount as the appellant failed to give evidence of how he settled this amount with his creditor

in Italy.

I have carefully scrutinized exhibits A, F, and X tendered by the parties, I discovered that Exhibits A and the photocopy which is Exhibits F or 4 contains the authentic amount paid by the appellant to Bassi Marchini & CO. S. P. A Mazzago Italy being the selling price for the consignment of Neoprene glue Mastic 66. This amount is confirmed by the letter Exhibits T dated 1/7/86 from Bassi Marchini & CO. S.P.A captioned. Re settlement of debt of U.S \$172,200.00 (one Hundred and seventy two Thousand, Two Hundred Dollars) to the appellant while Exhibit X from the same Company covering the same consignment is the Freight prepaid amount from Mazzago Italy to Onitsha via Port Harcourt. According to Exhibits X the amount is described as "Amount for North Italian Port Sea Freight Expenses total amount C & F Port Harcourt U.S \$4,860.84 (Four thousand, Eight Hundred and Sixty Dollars, Eighty four Cents).

On Exhibits G - a Bill of lading- the consignment is described as pre-paid under Haulage Charge. ***I find, based on these documents that the value of the goods in the container is \$172,200.00 (One Hundred and Seventy two Thousand, Two Hundred Dollars). Coupled with this fact, I agree with the observation in the lead judgment of the lower court that it is not possible to clear goods worth N6,000, according to the price posted by the respondent, with N57,000.00 charged by respondent the Clearing Agent. The appellant is therefore entitled to the sum \$172,200.00 (One Hundred and Seventy two Thousand, Two Hundred Dollars) claimed as special damages, I am not inclined to grant the relief for interest at the rate of 25% from 17th April, 1986 for the simple reason that the rate of exchange between Naira and U. S Dollar in 1986 was 1 to 1.5 but now swings between N153 to N155 to one dollar.***

In sum, this appeal has merit and it is hereby allowed. The concurrent judgments of the trial court and lower court are hereby set aside. I assess the costs of this appeal as N50, 000.00.

MUSDAPHER JSC

I have read before now the judgment of my colleague, Adekeye JSC with which I entirely agree, for the same reasons so elo-

quently canvassed in the judgment which I adopt as mine, I too, do not agree that the contract entered between the parties was tainted with illegality or that the parties were in *pari delicto*. I accordingly find merit in the appeal and abide by the order contained in the aforesaid judgment including the order as to costs.

B

CHUKWUMA-ENEH JSC

I have read the lead judgment prepared and delivered by my learned brother Adekeye JSC in this matter. I agree with his reasoning and conclusion that the appeal is meritorious and should be allowed. I endorse all the orders contained therein.

C

GALADIMA JSC

D

I have had the benefit of reading in draft the leading judgment of my learned brother ADEKEYE, JSC just delivered. I agree with the reasoning and conclusion therein that the appeal has merit and it is allowed.

This case started at the High Court of Anambra State sitting at Onitsha. Appellant, as Plaintiff, in his amended Statement of Claim, claimed against the Defendant PASCHAL NWABUFOR, a clearing agent operating under the name and style of PASKODI MARITIME AGENCIES, as follows:-

E

1. The sum of N57, 000,00 (Fifty Seven Thousand Naira) as special damages being money had and received by the Defendant from the Plaintiff for a consideration that has wholly failed.

F

2. The sum of \$172,200 (One Hundred and Seventy Two Thousand, Two Hundred US Dollars)

G

3. Interest on the above sum of money at the rate of 25% from 17th April, 1986 up till date of judgment.

4. General Damages as may be assessed by the Court.

The facts leading to the foregoing claim have been summarized in the leading judgment. Essentially, the 730 cartons of variety of adhesive gum imported by the Appellant were shipped from Italy to Nigeria, via Port Harcourt Wharf, at a time when the goods were not affected by the Customs demand for the import licence. However, in July, 1984 when the goods arrived, neoprene glue had come

H

under specific import licence, and therefore could not be cleared without the procurement of an import licence. The Respondent who was engaged to clear the goods had been told that the Appellant had no import licence. He therefore charged his fee which included the cost of procuring a licence to enable him to clear the goods within one month from August, 1984. His fee was fully paid, yet he failed to honour his promises. This failure led to the goods being sold as over-time cargo. The Respondent both in his pleadings and oral testimony admitted that he was contracted to clear and deliver the goods including his obligation to procure the import licence for N10,000.00 (Ten thousand Naira) which he did; but he failed to explain why he did not use the licence to clear the goods. The Respondent disputed the value of the goods. While the Appellant put the value at \$172,200.00 the Respondent averred that it was \$4,860.84. However on 2/2/1988, the Appellant was informed through a letter from the Nigerian Ports Authority that his container was declared as over-time cargo and sold as Lot 119.

The Appellant sued the Respondent for breach of agreement to clear the container. In his judgment, the learned trial Judge Olike (J), on 26/9/1977, having held inter alia, that the parties are in pari delicto, dismissed the suit.

Being dissatisfied with the decision of the trial court, the Appellant appealed to the Court of Appeal, Enugu Division. 3 issues were distilled for resolution. On 13/5/2003 the court below resolved two issues in favour of the Appellant but on the third issue, which was rated as touching upon a substantive matter, the court found it against the Appellant.

It is therefore against the judgment of the court below in relation to this third issue that this appeal has been further brought to this Court predicated on 4 Grounds of Appeal. One issue has been formulated for determination by both parties thus:

“Whether the learned Justices of the Court below were right in affirming the decision of the trial Court that the parties are in pari delicto with regards to who breached the contract.”

Parties exchanged briefs. We took the appeal on 5/4/2011 when parties adopted their briefs. On this sole issue learned counsel for the Appellant relying on some excerpts from the judgment of the lower Court submitted that the Court below rightly held that the Respond-

ent would clear the Appellant's goods and deliver same to him at Onitsha. That their agreement was predicated on the Respondent taking the responsibility to obtain the requisite import licence and this was included in his fees. That the lower Court was also right when it held that the trial Court was wrong to decide that there was evidence of frustration where none were pleaded and proved. B

The Respondent on the other hand has contended that the responsibility of obtaining import licence lies squarely on the importer and this is a pre-importation issue and has nothing to do with the Respondent who is only a clearing agent. Furthermore that as at the time the Appellant engaged the services of the respondent; he was in breach of the relevant import regulations. C

Before considering the issue raised in this appeal, I shall first consider the preliminary objection filed and incorporated in the Respondent's brief. He prayed this Court for an order dismissing or striking out the appeal on the ground of incompetence, as neither the leave of the court below nor that of this Court was obtained before appealing against the concurrent findings of the two lower Courts that "the parties are in *pari delicto* and the contract between them is unenforceable." It is the contention of the Respondent that whether in view of the issue posed for determination herein, the Appellant can be said to have rightly appealed against the concurrent findings of the two Courts below without first obtaining the leave of the Court of Appeal or this Court. The Respondent's answer was in the negative, placing reliance on the provisions of Order 2 Rule 32 of the Rules of this Court; Section 233 (3) of the 1999 Constitution and the case of *CALABAR CENTRAL CO-OPERATIVE AND CREDIT SOCIETY LTD & 2 ORS V. BASSEY EKPO* (2008) 6 NWLR (pt. 1083) 352 at p. 410. D E F G

I agree with the learned Counsel for the Appellant that the Respondent has completely failed to comprehend the legal basis for which an Appellant can seek leave of this Court or the Court below to appeal. The purport of order 2 Rule 32 of the Rules of this Court and Section 233(3) of the 1999 Constitution (*supra*) are totally misconstrued. Leave to appeal is required in respect of matters which fall under the provisions of subsection 3 of S. 233 as against under subsection 2(a) of the said section 233, where appeal from the decision of the Court of Appeal to this court does not need leave, if the grounds H

of appeal involves question of law alone.

After my careful examination of the four grounds of appeal from which the single issue in this appeal has been formulated, I find that the grounds involve question of law and in line with subsection 2(a), of the Constitution leave is not required. The sole issue posed for our determination involves resolution of a legal issue. By virtue of Section 233 2(a) of the 1999 Constitution leave of the lower Court or this Court is not required to bring this appeal, notwithstanding the fact that this appeal involves the concurrent findings of the High Court and the Court of Appeal. It is for the foregoing reason that the objection is overruled.

Now to the consideration of the sole issue The Latin catch phrase “IN PARI DELICTO” simply means “in equal or mutual fault.” Where the fault is mutual the law will leave the case as it finds it. In other words since both parties are equally at fault, the court will not involve itself in resolving a claim of one party over the other and whoever possesses whatever is in dispute, may continue to do so in the absence of any superior claim. In this case, parties tendered so many documents during trial. In his pleadings and in evidence before the trial court the Respondent admitted that the contract was frustrated by the agreement of 19/7/1985 and that even if the contract was not frustrated by this agreement, the Appellant will only be entitled to the sum of N707,500.00 from which he will only pay N20,500.00 to one Friday Amechi. I consider this as a clear admission that there was existence of contract between the parties. The Respondent was quite ready to return the sum he collected under the agreement to render services which was not so rendered. The learned trial Judge was right when he held that there was agreement for the Defendant (Respondent herein) to procure an import licence for clearing of the goods. With regards to the issue of frustration, the learned trial Judge held at page 131 lines 18 - 28 of the Records that:

“On the other hand “goods subject” to licence could be imported and cleared subject to licence being first obtained. The Plaintiffs goods fall into the second category and his contract with the defendant is ex facie lawful ab initio. The defendant knew of the situation and charged his fees to include procurement of import licence which is an integral part of the contract. It is invariably what one would expect a clearing and forwarding outfit like the Defendant

to do. It is a lawful obligation and therefore a misconception to describe the contract between the parties as one intended to perform a legal impossibility.”

In view of the foregoing findings, the Court below had no legal basis or admissible evidence on which to come to the conclusion that the parties are “in pari delicto”. The trial Court which saw and heard the witness made findings of fact to the effect that the contract between the parties was legal, that the allegation of forgery and bribery made by the Respondent to secure the import licence were not proved; and that the obligation by the Respondent to secure the said licence was a legitimate and integral part of the contract which performance was not intended to create a legal impossibility. The Court did not find the conduct of parties or their evidence in Court to be indecent or obscene. It did not make any finding that the parties set out to commit a crime or engage in a tainted business. These findings support the Appellant’s case and are against the Respondent, whose duty it is to appeal against such findings. He is at liberty to do so. Without the benefit of a Cross Appeal or Respondent’s Notice, the Court below cannot overlook those findings and use them negatively to reach the same conclusion as the trial Court that the parties are in pari delicto.

The evidence about non supply of documents formed one of the issues for determination before the Court below. The Court resolved the issue in favour of the Appellant.

Finally, I consider in this case, that time factor was of essence. The parties embraced this in their contractual obligation. The Respondent promised to clear the Appellant’s container within ONE MONTH. He charged his fees to meet this target. Container shipped from abroad to Port Harcourt Customs port is the subject matter. Time is stipulated, usually, within which such goods must be cleared, otherwise it could be declared as overtime cargo and then auctioned. As a professional and experienced Customs Clearing Agent, the Respondent knew this. He was quite conversant with the process and procedure required for the procurement of necessary documents including the import licence. Agreement was concluded with the Appellant in October, 1984. He delayed until February, 1985 when he came to demand for extra sum of N35, 000.00. Two months thereafter i.e. on 7/4/1986 he now wrote the Appellant demanding for

certain documents to facilitate the clearance of the goods; that was almost two years after he entered into the contract to clear the goods within a month. The Appellant lost his consignment which landed at the Wharf since July, 1984. I cannot see how the two Courts below came to the conclusion that the parties were in *pari delicto* as to who
 B breached the contract. I find that the Respondent was blameworthy for the breach of contract in the circumstance of this case. In view of the foregoing I set aside the judgment of the two lower Courts for being perverse. I now consider the claim of the Appellant for dam-
 C ages. It is trite law that a party who has paid money to another person for a consideration that has totally failed under a contract is entitled to claim the money back from the other party. The Respondent is not disputing the claim of the Appellant for N57,000.00 as special damages being money had and received by the Respondent from
 D the Appellant for a consideration which totally failed. I have held that the Respondent breached the terms of contract. He acted contrary to the terms of contract. To my mind, the Appellant is entitled to this sum.

The Appellant also claimed the sum of \$172,200.00 (US Dol-
 E lars) as special damages. The Respondent disputed this amount. He testified that Exhibit x put the amount as \$4,860.84. (Us Dollars). The Appellant tendered Exhibits A and F (or a) which show the sum of \$172,200.00 The trial Court dismissed this claim. It held that the
 F Appellant had failed to give evidence of how he settled this amount with his creditor in Italy. Careful scrutiny of Exhibits A, F, and X tendered by the parties shows that Exhibits A and the photocopies, Exhibits 'F or 4', are the authentic amount paid by the Appellant to BASSI MARCHINI & Co. S.P.A. MAZZA CO, Italy, as the selling price
 G for the consignment of NEOPRENE GLUE MASTIC 56. Exhibits 'T' dated 1/7/86 confirm this sum. The value of the goods imported by the Appellant is \$172,200.00 The Appellant is entitled to this sum. I do not think the interest of 25% from 17/4/1986 is justified. The reason is that the rate of exchange between Naira and us Dollar in
 H 1986 was 1 to 1.5 but now varies between N153.00 to N155.00 to one US Dollar.

It is in the light of the foregoing and for more detailed reasons given in the leading judgment by my Learned Brother Adekeye, JSC, I too allow this appeal. It is meritorious. The concurrent judgments of

the trial High Court and the Court of Appeal are hereby set aside. I abide by the assessment of costs of N50, 000.00 in favour of the Appellant.

RHODES-VIVOUR JSC

I have had the advantage of reading the draft judgment of my learned brother Adekeye, JSC and I agree that this appeal should be allowed. Both courts below ruled that the parties were in *pari delicto* on the issue of breach of the contract.

In this court the sole issue formulated from four grounds of appeal reads:

“Whether the learned justices of the court below were right in affirming the decision of the trial court that the parties are in pari delicto with regards to who breached the contract”.

The respondent filed a Preliminary objection. The central issue being that an appeal on concurrent findings of both courts below that the parties are in *Pari Delicto* can only be entertained if the leave of this court or the Court of Appeal were obtained. In the absence of leave the appeal is incompetent and ought to be struck out or dismissed.

Order 2 Rule 9 of the Supreme Court Rules provides for Preliminary objections. The respondent is enjoined to give the appellant three days Notice before the hearing. The purpose of the rule is to ensure that the appellant is not taken by surprise, and he has adequate time to respond. These days, preliminary objections are argued in the respondent’s brief thereby obviating the need to file a separate Notice of Preliminary Objection, and to save time. Absence of the required Notice makes the Preliminary objection incompetent. See *Menakaya v. Menakaya* (1994) 5 NWLR pt.345 pg.512

A Preliminary objection should only be filed against the hearing of the appeal and not against one or more grounds of appeal. Consequently if it succeeds that is the end of the appeal. See: *NEPA V. ANGO* 2001 15 NWLR pt. 737 pg. 627.

Where other grounds of appeal can sustain an appeal a Preliminary objection should not be filed, rather a Motion on Notice should be filed against the offending grounds of appeal.

The respondent was right to file a Preliminary objection, be-

cause if it succeeds the appeal terminates. The issue is whether the appellant needs leave of the Court of Appeal or this court before he can file this appeal.

Section 233 provides for appeals as of right and appeals that need leave. It reads:

B *“233 (2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases-*

(a) Where the grounds of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal;

C *(b) Decisions of any civil or criminal proceedings on questions as to the interpretation or application of this Constitution;*

(c) Decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be, contravened in relation to any person;

(d) Decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or which the Court of Appeal has affirmed a sentence of death imposed by any other court;

(e) Decisions on any question -

(i) whether any person has been validly elected to the office of president or Vice-President under the Constitution;

F *(ii) whether the term of office of president or Vice-President has ceased,*

(iii) whether the office of president or Vice-President has become vacant, and

G *(f) Such other cases as may be prescribed by an Act of the National Assembly.*

(3) Subject to the provisions of subsection (2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court”.

H Leave means permission. Where an appeal is not as of right, leave under section 233 (3) of the constitution is a precondition that an applicant/appellant must seek and obtain before his appeal is entertained. The appeal would be declared incompetent and thrown out if the applicant failed to fulfil the pre-condition.

“An appeal to this court on grounds other than Law is incompetent if leave of the Court of Appeal or this court was not obtained. Leave must be obtained before there can be a valid appeal to this court. See: *Nwadike v. Ibekwe* 1987 4 NWLR pt. 67 pg. 718, *Obatoyinbo v. Oshatoba* 1996 5 NWLR pt. 450 pg. 531

In determining if an appeal is as of right or leave is required, the grounds of appeal must be thoroughly examined. Where the complaint in the ground of appeal is one of misunderstanding by the court of the law or misapplication of the law to the facts already established, it is a ground of Law. Where the ground of appeal disputes or questions the evaluation of facts by the court before applying the law, it is a ground of mixed law and fact. B
C

Furthermore and for emphasis where facts are not disputed but there is a wrong application of the law to undisputed facts; it is ground of Law. Ground of pure fact is much easier to determine. The four grounds of appeal read: D

GROUND 1

The learned Justices of the Court of Appeal erred in law in the following passage of their judgment, to wit-

“Now going back to the issue in question the expression “in pari delicto” connotes equal fault. Thus the expression when used imports a dereliction on both parties in not performing “what they ought to do, and where the end in view of what they hope to achieve involves a crime or a tainted matter; the court would not give effect to it. Invariably where the court finds that the fault is mutual the court leaves the case as it finds it. This is what the learned trial Judge did in this case.” E
F

GROUND 2

The learned Justice of the Court of Appeal misdirected themselves in law when they held that-

“At all times it is the duty of the importer to secure the import licence, when the contract was made between the parties, the Respondent included in his fees the cost of getting the import licence. However from the word go, it would seem that the contract particularly in respect of the manner of procuring the import licence was tainted. There is something obscene and I dare say indecent about the evidence of the Respondent in the court below on this crucial fact.” H

GROUND 3

The learned Justices of the Court of Appeal erred in law in holding that-

B *“However from the method being relied on to procure the Licence, there is noted a commission of a crime. The learned trial Judge had listened to the parties and it would appear he was not enamoured of the sullied stories being told by the parties hence he came to the conclusion he did. He had the favourable position of beholding the parties at first hand. This is a situation in which the court should exercise caution in substituting its findings to that of the trial court and having regards to the sinister and disquieting elements that feature in the case at the trial stage- what with agreement to bribe to get the licence - it would, I believe remiss on my part to fault the findings or conclusion drawn by the trial court.”*

D GROUND 4

The learned Justices of the Court of Appeal erred in law in holding thus-

E *“Now the Respondent had pleaded that if the contract was not frustrated, the appellant would have been entitled to the sum of N77, 500. On this point the Appellant’s counsel said no evidence was given that the contract was frustrated. I do not share this view of the learned counsel for the Appellant. Indeed the testimony of the Respondent was laced with his evidence that the contract was - direly frustrated by some activities of the appellant”.*

F In my view the grounds of appeal are all grounds of law, and the sole issue formulated from the four grounds is very much in order. It is therefore unnecessary to obtain leave. Section 233 (3) does not apply.

G In pari delicto means equal wrong/fault. Both courts below held that the parties were equally liable as regards to who breached the contract. I agree once again with the reasoning and conclusions in the leading judgment that those findings were wrong.

H