

SUPREME COURT OF NIGERIA
11TH MAY, 2012. SC. 278/2002
CORAM:- **A. M. MUKHTAR, F. F. TABAI, S. GALADIMA,**
N. S. NGWUTA, O. ARIWOOLA, JJSC

AFRICAN INTERNATIONAL
BANK LTD APPELLANT
AND
INTEGRATED DIMENSIONAL
SYSTEM LTD & ORS RESPONDENTS

APPEALS - Issues - Formulated from incompetent grounds - Fate -
Such issues are deemed incompetent - And must be struck out (H1)

APPEALS - Issues - Formulation from grounds - One issue can be
distilled from several grounds of appeal - But where impossible -
One issue must be raised from one ground (H2)

APPEALS - Issues - Determination - Appeal is decided on issues raised
- Hence grounds of appeal become extinguished - Once issues are
formulated (H3)

APPEALS - Issues - Determination - On single issue - Correctness of
- Where appellate court considers an issue fit to dispose appeal - It is
not bound to consider other issues raised (H4)

APPEALS - Issues - Meaning of - An issue is a point in dispute be-
tween parties - Which may be question of law or fact - Or combina-
tion of both (H5)

APPEALS - Issues - Formulation by court - Correctness of - Where
issues are proliferated by parties - Court can reformulate same - For
clarity sake (H6)

BANKING - Actions - Claim for interest - Exhibit E - Not pleaded -
Since appellant did not plea the exhibit - It is deemed that same was
not intended - To guide transaction between the parties (H7)

MORTGAGES - Debts - Recovery - Liability of parties - Where principal debtor and surety are jointly sued - Both are liable solely or jointly with others - But when severally sued - Each party is liable as principal debtor (H8)

APPEALS - Issues - Failure to consider - Fair hearing - Litigant can only complain about the failure - Where same is material - And has occasioned miscarriage of justice (H9)

CONTRACTS - Commercial transaction - Interest on debt - Is not ordinarily payable - In the absence of express - Or implied term in contract (H10)

COURTS - Contracts - Award of interest - Court can award interest as consequential order - Even where same is not claimed in writ of summons (H11)

FACTS

Plaintiff/appellant granted banking facilities to 1st defendant/respondent. 2nd respondent acted as guarantor and 3rd respondent charged his property as a security for the facilities. 1st respondent defaulted in payment of the facilities. Demand notice of repayment was served jointly on respondents by appellant. There was no positive response from respondents. Consequently, appellant instituted this action at the High Court of Oyo State, Ibadan judicial division. Appellant claimed the sum of N1, 782, 222. 78k as debt due and interest rate of 39% per annum until judgment is delivered. Appellant also claimed 10% interest per annum until final liquidation of debt. At the trial, appellant pleaded and called evidence that the applicable interest on the facilities had varied from time to time according to the Central Bank of Nigeria Monetary policy Guidelines which appellant was obliged to apply.

Respondents admitted that the facilities were still outstanding. However, respondents contended that appellant was not entitled to the amount claimed as it had applied arbitrary interest rates and charges in arriving at the amount claimed. Respondents contended that Exhibits T1, T2 and W governed the transaction. At the end, the court ruled in favour of appellant. However, it found that appellant did not

prove the variations that took place in the interest rate it applied to the facilities granted to 1st respondent. As such, the court based its judgment only on the amount lent to 1st respondent with interest at the rate agreed at the inception up till date of judgment and thereafter at 10% per annum until the judgment debt is fully liquidated. Both parties were dissatisfied with the judgment. Hence, respondents filed main appeal while appellant filed cross appeal at the Court of Appeal, Ibadan Division. The court partly allowed the main appeal and rejected the cross appeal. Aggrieved further, appellant filed appeal at Supreme Court. Respondents cross appealed and raised preliminary objections to the issues raised by appellant.

ISSUE FOR DETERMINATION

1. Whether the court of Appeal did not err when it held that the three issues formulated by the appellant herein on the main appeal were a mere elaboration of the two issues formulated by the Respondents and thus failed to consider and make a finding on the issues thus raised.

2. Whether the Court of Appeal did not completely misunderstand and mis-apply the law and principles governing the appropriate rates, mode of calculation and period of calculation of interest applicable to the first Respondent's indebtedness to the appellant.

3. Whether the Court of Appeal did not err when it held that the 3rd Respondent herein was sued as a surety and thus came to the erroneous conclusion that the action against him was premature and incompetent, on the premise that he had not been served with a demand notice.

4. Whether the Court of Appeal did not err when it refused to enter judgment for the appellant in accordance with the terms of its claim before the trial court.

5. Whether in the event that this Honourable court finds that the courts below were right in refusing to enter judgment for the appellant in accordance with the terms of its claim before the trial court, the judgments entered in favour of the appellant by the Courts below were not erroneous in terms of the amount awarded and the dates from which the calculation of interest were stated to commence.

6. Whether the Court of Appeal did not err when it failed to make finding on the second issue formulated for determination on the Cross appeal as to whether the liability of the 3rd Respondent

1638 AIB Ltd v. Integrated Dimensional System Ltd (2012) 5 KLR
was limited to N150,000.00 or N250,000.00 in any event.

HELD (Unanimously dismissing the main appeal and

allowing cross appeal per **ARIWOOLA JSC**)
B *APPEALS - Issues - Formulated from incompetent grounds*
1. Ordinarily, any issue formulated from an incompetent ground of appeal is itself incompetent and must be struck out. Issues are the important questions formulated for determination by the court and could be distilled from more than one ground of appeal. (p. 1653 D)

APPEALS - Issues - Formulation from grounds
D **2. Generally, issues are not meant to be formulated on each ground of appeal but raised or distilled out of a combination of the essential complaints of the appellant in the grounds of appeal. Therefore, issues must necessarily relate to facts or law decided by the court whose decision is appealed against. In other words, it is ideal to distil or formulate an issue from more than one ground of appeal but where this is not done or it is impossible, just only one issue may be raised from one ground of appeal. Therefore, a valid Notice of Appeal with one ground of appeal and a single issue for determination is sufficient to sustain an appeal.** (p. 1653 E)

APPEALS - Issues - Determination
G **3. There is no doubt that it is now an established practice that an appeal is decided upon the issues raised or formulated for determination of the court. In effect, when issues for determination are formulated, the grounds of appeal upon which they are based or from which the issues are formulated become extinguished or expired. The argument of the appeal is then based on the issues so formulated but not on the grounds.** (p. 1653 H)

APPEALS - Issues - Determination - On single issue
4. **Generally, it is the duty of an appellate court to consider all**

issues placed before it for determination. But where the court is of the view that a consideration of one of the issues is enough to dispose of the appeal, it is not under any obligation to consider all the other issues posed for determination. (p. 1656 C)

APPEALS - Issues - Meaning of

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5. What then is “an issue”? An issue is a point in dispute between two or more parties in an appeal. It may take the form of a separate and discrete question of law or fact or a combination of both. In other words, an issue is a point that has arisen in the pleadings of the parties which forms the basis of the dispute or litigation which requires resolution by a trial court. (p. 1656 D)

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APPEALS - Issues - Formulation by court - Correctness of

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6. However, where a court finds that there is proliferation of issues or the issues formulated or posed for determination are clumsy or not clear, a court is empowered to reformulate issues in an appeal. This is to give the issue or issues distilled by a party or the parties precision and clarity. (p. 1656 G)

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BANKING - Actions - Claim for interest

7. There is no doubt that Exhibits T1, T2 and W contained both the secured loan and secured overdraft. The two documents also contained the fixed interest the appellant was to charge on the loan and overdraft. The loan was to be for a short term. Each facility had its expiry date. The loan’s review or expiry date was 30/11/1987 while the overdraft facility was to expire on 31/01/88. I agree with the appellant that there was no express agreement between the parties as to what would happen if the 1st Respondent defaulted or failed to repay its indebtedness at the review or expiry dates of the facilities granted to it. But I am unable to agree that the court below erred in excluding the application of the general rules of banking practice and the mercantile custom of bankers. This was neither pleaded nor made the appellant’s case at the trial nor was it proved or established. In other words, it may mean that it was never intended to guide the transaction between the

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parties. At best the agreed interest rate could have continued to operate until the matter went to court when it would stop and the court's rate comes into operation. There is no doubt, the variation in the interest rates and turnover charged was as a result of the compound interest being charged on the facilities by the appellant. This variation on the interest rates, the trial court held was not proved and the court below also agreed that the variation was not proved hence it was not entitled to charge compound interest. Indeed, the issue of compound interest charged before the expiry date of the facilities was not properly before the court below. Before the trial court and in the pleading of the appellant there was no averment on either Exhibit E or mercantile custom of bankers for the purpose of charging interest. The trial court found that variation was not proved. The court below on this point agreed with the trial court that the appellant failed to prove by credible evidence the variation in the interest rates, hence failed to prove its entitlement to its claim as contained in its pleading. Indeed, apart from Exhibit E, now being sought to be used by the appellant as basis for variation of interest rates, not having been pleaded nor tendered in evidence before the trial court in proof of interest, the two last documents, Exhibits T1, T2 and W show clearly that the terms and conditions of the two facilities were separately and distinctively negotiated independently of Exhibit E. (pp. 1662 C/1669 A)

MORTGAGES - Debts - Recovery - Liability of parties

8. There is no doubt that Exhibit E was created to secure the facilities granted to the 1st Respondent by the Appellant. The 3rd Respondent therefore became a Mortgagor to the Appellant after he agreed to secure the loan and overdraft granted to the 1st Respondent, with his personal property. As shown on Exhibit E, the 1st Respondent was the principal debtor while the 3rd Respondent was the Surety. Where both were sued jointly they remained principal and Surety, to be liable solely or jointly with any other persons, firms or companies. But where they are sued severally, for the indebtedness of the 1st Respondent each of the 1st and 3rd Respondents stand as

principal debtor to be liable to pay, in which case each party shall be entitled to a formal demand for payment before any action could commence to enforce payment of the indebtedness. (p. 1666 C)

APPEALS - Issues - Failure to consider

9. There is no doubt, that, generally, the court below ought to have considered all issues placed before it for determination not being the final court on the matter. But a litigant can only be heard to complain if the issue not so considered is material and substantial in the particular circumstance. And if the appellant had suffered any miscarriage of justice. In the instant case, I am satisfied that no miscarriage of justice has occurred, the reason being that although the appellant has the right to exercise its power as a creditor under Exhibit E cumulatively, but in the instant action, Exhibit E, as an Indenture was only pleaded and used as regards 3rd Respondent's property offered, as security for the 1st Respondent's facilities granted by the appellant. The appellant failed to show in clear terms in its claim that it intended to proceed against the 3rd Respondent on his personal covenant to get him pay the debt as in the case of the 2nd Respondent. No wonder formal demand was not served on him by the Applicant. (p. 1670 F)

CONTRACTS - Commercial transaction - Interest on debt

10. There is no doubt that the Court below was right to the effect that the trial court was wrong in awarding interest as agreed in favour of the cross Respondent as pre-judgment interest. Ordinarily, interest is not payable on ordinary debt in purely commercial transaction, in the absence of a term to that effect expressly or impliedly in the contract or mercantile usage or custom of the parties or as may be contained in a statute. It may also be in place through fiduciary relationship between the parties. (p. 1674 G)

Contracts - Award of interest

11. However even where interest is not claimed in the Writ of Summons, the Court is entitled, in appropriate cases, to award

1642 A.I.B. Ltd v. I.D.S. Ltd (2012) 5 KLR Ariwoola JSC
interest in the form of consequential order. (p. 1675 E)

REPRESENTATION

Dr. Adewale Olawoyin with S. Loko (Miss), for the Appellant
O. A. Onadele, Esq., for the Respondents

B

CASES REFERRED TO

Ransome Kuti v. A-G Fed (1985) 2 NWLR (Pt.6) 211

Adeleke v. Aserifa (1986) 3 NWLR (Pt.30) 575

C Inyang v. Ebong (2002) FWLR (Pt.125) 703

Onifade v. Olayiwola (1990) 7 NWLR (Pt.161) 130

Erohonda v. Ekpechi (2003) FWLR (Pt.181) 1565

Ekpenyong v. Nyong (1975) 2 SC 71

Egbe v. Alhaji (1990) 1 NWLR (Pt.128) 546

D Ishola v. Ajiboye (1998) NWLR (Pt.532) 91

Okoro v. The State (1988) 12 SC 191

Latinde & Anor v. Bella Lajunfin (1989) 5 SC 59

State v. Ajie (2000) FWLR (Pt.15) 2831

Unity Bank v. Edward Bonari (2008) 2 SCM 193

E Ishola v. SGBN (1997) 2 NWLR (Pt.488) 405

Dada v. Ishinkalu (1995) 5 NWLR (Pt.395) 755

Ijale v. A.G. Leventis (1951) All NLR 762

RULES REFERRED TO

F Oyo State High Court (Civil Procedure) Rules 1988, O. 40 r. 7

BOOKS REFERRED TO

Black's Law Dictionary 9th Ed. p. 907

G Law of Guarantee 1st Ed. p. 162

LEAD JUDGMENT BY ARIWOOLA JSC

This is an appeal against the judgment of the Court of Appeal, Ibadan division, delivered on the 5th December, 2001. The present
H Appellant/Cross Respondent was the plaintiff before the trial court while the instant Respondents/Cross Appellants were the Defendants. The Plaintiff had claimed before the lower court as per its paragraph 24 of the further Amended Statement of Claim as follows:-

“Wherefore the Plaintiff claims from the defendants jointly and

severally the sum of one million, seven hundred and eighty two thousand two hundred and twenty two Naira seventy eight kobo (N1, 782,222.78) being the balance of banking facilities and interest thereon granted to the 1st Defendant by the plaintiff at its Ilora Branch Oyo State in 1985 and 1987 and jointly and severally guaranteed by the 2nd and 3rd defendants which sum was outstanding at the close of business on 11th August, 1993. The defendant defaulted in the payment of the said sum as agreed whereupon the plaintiff demanded its repayment from each and everyone of them who have notwithstanding such demand neglected, omitted and or refused to pay same. B C

2. The Plaintiff claims interest on the said sum of N1, 782,222.78 at the rate of 39% per annum from the 12th August 1993 until judgment is given and thereafter at the rate of 10% per annum until final liquidation of the judgment debt."

The parties filed and exchanged pleadings and the case proceeded to hearing. At the end of the trial, the trial court delivered its judgment on 27th October, 1997 wherein the court came to the following final conclusion:

"In the result, I find that the plaintiff has proved its case on the balance of probability. I therefore enter judgment for the plaintiff in the following terms:- E

1. The sum of N150, 000 with interest at 15% per annum with effect from 30th April, 1987 till today and thereafter at 10% per annum until the whole amount is finally liquidated.

2. The sum of N180,000 with interest at 19% per annum with effect from 6th November, 1987 till today and thereafter at 10% per annum until the whole amount is finally liquidated. F

The liability of the third defendant shall be limited to the sum of N250, 000 only while the liability of the first and second defendants are jointly and severally. The workings of interest shall be in conjunction with the Accountant of the High Court of Oyo State, Ibadan" (See page 53 of the record of appeal). G

Dissatisfied with the final judgment, the defendants filed a Notice of Appeal containing two grounds of appeal. Also dissatisfied with the judgment, the plaintiff filed a Cross Appeal. Both parties filed and exchanged briefs of argument. The Court below therefore heard the matter on the following processes:- H

Appellants brief of argument.

- Appellants reply to the Respondent/Cross Appellant's brief of argument.

- The Respondent/Cross Appellant's brief of argument.

- Cross Appellant's reply brief of argument to the Appellants' response to Cross appeal.

B At the end of the day the court below allowed the appeal, set aside the trial court's judgment delivered on 27/10/1997 and in its place ordered as follows:-

C *"Judgment is hereby entered for the plaintiff/respondent in the sum of N180, 000 with 19% interest thereon up to the expiry date of the loan on 30/11/87, there shall be 10% per annum interest thereon from 1/12/87 up till the date of the judgment on 27/10/97 and 10% per annum from 28/10/97 until the entire amount is fully liquidated.*

D *2. Judgment is also hereby entered for the same plaintiff respondent in the sum of N150, 000 with 15% interest per annum on the said sum up to the 31/1/88, 10% interest thereon from 1/2/88 up to the date of the judgment on 27/10/97, and 10% per annum from 28/10/97 until the entire sum is fully liquidated.*

3. The interest ordered shall be simple interest.

E *4. The parties are to meet at the office of the Deputy Chief Registrar of this court to calculate and arrive at the exact amount due to the respondent.*

F *5. The plaintiff/respondent's claim against the 3rd defendant/appellant, having been commenced prematurely is struck out.*

6. The appellants are awarded N5, 000 costs in favour of the respondent."

G The court below found that there was no merit in the cross appeal. Accordingly, same was dismissed with N5, 000 costs in favour of the cross respondent. Dissatisfied with the above judgment of the Court below delivered on 5th December 2001, the Respondent/Cross Appellant filed a Notice of Appeal with the leave of this court of 16/3/2010 on 25/3/2010 containing fourteen (14) Grounds of Appeal. Also dissatisfied, the Appellants/Cross Respondents themselves H filed their cross-appeal against a part of the judgment of the court below. The Notice of Cross Appeal has two grounds of Appeal. (Notice of Appeal is on pages 147-152 while the Notice of Cross Appeal is on pages 155-156, of the record of appeal). The appeal and cross appeal were argued on the following processes duly filed:-

- Appellant's brief of argument filed on 21/4/2010
- Respondents' brief of argument incorporating cross-appellants' brief of argument filed on 10/2/2011
- Appellant's reply brief of argument incorporating cross respondent's brief of argument filed on 26/7/2011.

The facts of this case briefly are as follows: The Appellant and 1st Respondent were into Banker/Customer relationship. The Appellant's claim in this case arose from the banking facilities granted by the Appellant to the 1st Respondent between 1984 and 1987. The 2nd Respondent is the Chief Executive Chairman of the 1st Respondent as well as a guarantor of the facilities granted the 1st Respondent by the Appellant. The 3rd Respondent was a third party, mortgagor who charged his property in Oyo town to the appellant as security for the loans granted to the 1st Respondent. The Appellant's claim before the trial high court was for the sum of one million, seven hundred and eighty two thousand, two hundred and twenty two Naira seventy eight Kobo (N1, 782,222.78) said to be the balance due on the 1st Respondent's account with the appellant at its Ilora branch as at 11th August, 1993 with further interest at the rate of 39% per annum from 12th August, 1993 until Judgment and 10% per annum until final liquidation of the debt. The appellant pleaded and called evidence that the applicable interest on the facilities had varied from time to time according to the Central Bank of Nigeria Monetary policy Guidelines which the bank was obliged to apply.

The Respondents admitted that the latter two facilities were still outstanding and had not been settled with the appellant. They however contended that the appellant was not entitled to the amount claimed by it on the facilities as it had applied arbitrary interest rates and charges in arriving at the amount claimed. It was the case of the 1st Respondent at the trial that the nature of the transaction was for fixed period with fixed interest rate and a "one off" transaction for the overdraft while the loan is renewable, but was not renewed despite the invitation from the Appellant so to do.

Various documents were tendered and admitted including Exhibits T1 & T2, W and E. The crux of the matter then was which of the Exhibits governs the transaction? Was it Exhibits W, T1, and T2 or E? The appellant relied on Exhibit E while the Respondents contended that Exhibits W, T1 & T2 applied with the contract period and

interests to be charged fixed. The trial court gave judgment in favour of the Appellant but refused to base its judgment on the amount outstanding on the 1st Respondent's statement of account. This decision was based on the opinion that the appellant did not prove the variations that took place in the interest rate applied by the Appellant to the facilities granted to the 1st Respondent. Instead, the trial Judge gave judgment to the appellant based on the sum lent to the 1st Respondent at the inception with interest at the rate agreed at the inception up till date of judgment and thereafter at 10% per annum until the judgment debt is fully liquidated.

As stated earlier, both parties were dissatisfied and so they filed their respective appeal and cross appeal to the court below. The court below in its unanimous decision allowed the defendants/appellants' appeal to some extent and rejected the cross appeal. In effect, the said judgment decided the following:

"1. That the plaintiff was not entitled to continue to charge interests at the agreed rate as awarded by the trial court upon the expiration of the facility. It was only entitled to damages for delayed payment which the court could grant at its discretion. The court proceeded to grant it at the court rate of interest.

2. That there was no demand before action from the 3rd defendant, who was held to be a surety/guarantor, the demand from the 1st defendant/was not sufficient. The claim against him was therefore struck out.

3. The Court found no need to consider the cross appeal in relation to the trial court limiting the liability of the 3rd respondent to N250,000 in so far as it had held that the case against him be struck out.

4. The interest chargeable was specified as simple interest."

Again, both parties were dissatisfied one way or another with the judgment of the court below hence the appeal and cross appeal to this court. The gist of the appellant's case here is as follows:-

"1. That the court below ought to have held that variation of interest was proved and so should uphold the claims before the trial court less what was found to be irregularly charged as bank charges and commission on turn over.

2. The 3rd Defendant/Respondent being a mortgagor, the provisions of exhibit E - Third Party Legal Mortgagor, made the demand

on 1st respondent sufficient for the action against him.

3. The court below was wrong not to have considered all the issues before it including that the liability of the 3rd respondent ought not to have been limited.

On the other hand, the Respondents/Cross Appellants case before this court briefly goes thus:- B

1. That the court below has no jurisdiction to grant the claims as originally presented in the trial court when that was not an issue at the court below.

2. That there was no special circumstance proved to justify C interference with the concurrent findings of the two courts below that the claims against the respondents as formulated at the trial court was not proved.

3. That the court below having found that the appellant was only entitled to damages upon the Expiry of the facility, ought not to D have awarded interest by way of damages when such claim was neither sought nor pleaded and proved.”

Before this court, as earlier stated, the appellant's Notice of Appeal is dated 18th March, 2010 and was pursuant to the court's E order granted on 16th March, 2010 filed on 25th March, 2010. From the fourteen (14) grounds of appeal, the appellant formulated the following six issues:-

“1. Whether the court of Appeal did not err when it held that the three issues formulated by the appellant herein on the main ap- F peal were a mere elaboration of the two issues formulated by the Respondents and thus failed to consider and make a finding on the issues thus raised.

2. Whether the Court of Appeal did not completely misunderstand and mis-apply the law and principles governing the appropriate rates, mode of calculation and period of calculation of interest applicable to the first Respondent's indebtedness to the appellant. G

3. Whether the Court of Appeal did not err when it held that the 3rd Respondent herein was sued as a surety and thus came to the erroneous conclusion that the action against him was premature and incompetent, on the premise that he had not been served with a demand notice. H

4. Whether the Court of Appeal did not err when it refused to enter judgment for the appellant in accordance with the terms of its

claim before the trial court.

5. *Whether in the event that this Honourable court finds that the courts below were right in refusing to enter judgment for the appellant in accordance with the terms of its claim before the trial court, the judgments entered in favour of the appellant by the Courts below were not erroneous in terms of the amount awarded and the dates from which the calculation of interest were stated to commence.*

6. *Whether the Court of Appeal did not err when it failed to make finding on the second issue formulated for determination on the Cross appeal as to whether the liability of the 3rd Respondent was limited to N150,000.00 or N250,000.00 in any event.’]*

It is at this point necessary to note that in proffering argument for the above issues, the appellant compressed them into only five issues. The Respondents in their joint brief of argument adopted the six issues formulated by the appellant in its brief of argument filed on 10/2/2011. Before proceeding further with the appeal, I need to look into the Preliminary objection raised by the Respondents clearly in their brief of argument to which the Respondents alluded when the appeal was heard. The said preliminary objection affects issues 2 and 4 of the issues formulated by the appellant.

ISSUE 2

This issue was said to have been formulated from grounds 3, 4, 5, 6, 7, and 13 of the grounds of appeal filed by the appellant. The Respondents contended that the said grounds of appeal sought to impugn the decision of the Court below on the basis that-

- Grounds 3 and 6 upon agreed terms ceasing to have effect upon expiry, the contract implies general or universal mercantile custom of bankers even if not expressly stipulated. Therefore the court below was in error to find that after expiry date, damages was payable as that did not take account of the peculiar status of bank which entitles them to charge prevailing rate. Agreed rate should therefore apply upon trial court finding variation not proved.

- Ground 4 - mercantile custom of bankers allowed charging of compound interest on accounts in debit on the absence of express agreement.

- Ground 5 - clause 5 of Exhibit E allowed charging of compound interest even if Exhibits T1 & T2 and W were silent on the issue.

The Respondents submitted that the issue does not arise from the case of the appellant as originally formulated on the pleadings. The Respondents referred to the appellant's case as epitomized in its pleadings at pages 37-39 of the record. The Respondents referred to the testimony at the trial, of PW1 and PW2 at pages 32-34 and 41-43 of the record. They contended that at the trial court, the appellant was emphatic that the contract in Exhibits T1, T2 and W does not have expiry date but now says that after the expiry date, instead damages (as decided by the court of below) mercantile custom of bankers should normally apply to charge interest at prevailing rate but because of the finding of the trial court that it has not been proved - then agreed rate should apply.

The Respondents contended that clearly that was not the appellant's case on the pleadings which was founded on a continue liability to pay interest up to date of judgment as vary from time to time on CBN guidelines. It was further contended that now that the Appellant felt bound by the findings of the court below that the facilities expired at the time stated on Exhibits T1 & T2 and W, it was shopping for authority to justify the trial court finding of agreed interest in the absence of a claim for damages. They submitted that the law is trite that a party cannot raise an appeal on issue which was not made on the pleadings even if the parties addressed the court on it except with leave of court. They relied on the following cases: *Ransome Kuti V. Attorney General of the Federation* (1985) 2 NWLR (Pt.6) 211 per Karibi-Whyte, JSC at page 2450 *Adeleke V. Aserifa* (1986) 3 NWLR (Pt.30) 575 *Inyang V. Ebong* (2002) FWLR (Pt.125) 703. It was contended that issue 2 therefore has its foundation on grounds of appeal dealing with matters that are foreign to the appellant's pleadings. In the circumstance they submitted that the issue is incompetent hence they urged the court to strike it out with all the grounds associated with the said issue.

Ground 13 - The Respondents contended that the ground did not challenge the decision of the court below as regards award of post-judgment interest but omission to state the commencement date for purposes of calculation. That this cannot amount to ambiguity in the order awarding interest. It is at worst an accidental slip in expressing the manifest intention of the court. This, the court can by itself, in the exercise of its inherent power, correct upon an application to it.

This, the appellant realized when it filed an application on pages 142-144 of the record but was not heard. The Respondents submitted that ground 13 is incompetent, hence should be struck out.

ISSUE 4

This issue appears a combination of two issues - 4 and 5 on page 9 paragraphs 2.1.4 and 2.1.5 of the appellant's brief of argument. The issue was said to have been formulated from Grounds 9, 10, 11 and 14 of the Grounds of appeal. The Respondents contended that it was formulated with a view to securing judgment for the appellant on the terms of its claim before the trial court. The trial court failed to grant the claim as formulated before it but the matter was not raised on appeal to the court below other than in the relief sought. They submitted that the issue is incompetent on the following grounds:-

In none of the appellant's grounds of appeal to the court below was there a challenge on the failure of the trial court to grant its claim founded on the debit balance in the account. All the appellant did was to challenge specific findings as to variation of interests which can only be integral part of its claim and on which even if successful would not have the effect of reviving its claim in its original form. They submitted that there was no decision on the matter by the court below hence the appellant raised no ground of appeal thereon. An issue which does not derive its source from a ground of appeal is incompetent. They relied on several decided cases including *A-G Lagos State V. Eko Hotels Ltd.* (2006) All FWLR (Pt.342) 1398 1449 *Erohonda V. Ekpechi* (2003) FWLR (Pt.181) 1565 at 1584.

Furthermore, the Respondents contended that issue 4 was not based on the decision of the court below because the issue of appellant's entitlement to its claim as formulated before the trial court was not there canvassed. Although the trial court expressly made adverse finding on Appellant's entries in the account on commission on turnover, and interests charged and therefore impliedly rejected the claim based on debit balance on the account- Exhibits U1-U73, the Appellant did not raise an appeal thereon to the court below which would have provoked a decision on the matter, especially as the effect of the trial court basing its judgment on the contract specially made on Exhibits T1, T2 and W is to exclude all debit balances in the account before the commencement of Exhibits T1, T2 and W.

The Respondents submitted that it is not in the character of this court to take appeal directly from the decision of the trial court, relying on a number of cases of this court including: - Gbadamosi V. Dairo (2007) All FWLR (Pt. 357) 812 at 827. Ladoja V. INEC (2007) All FWLR (Pt. 371) 934 at 996. Agbareh V. Mimra (2008) All FWLR (Pt.409) 559. Still on issue 4, the Respondents contended that it is a fresh issue which the appellant brought into the appeal without leave. It is obvious from the relief sought in the court below at page 71 of the record that the appellant was mindful of securing a reversal of the failure of the trial court to properly place the matter before the court below. There is no doubt as stated in Ground 9 that the court below expressed its view on the irregular manner of charging interest into the Respondents account. Yet even if the Appellant succeeds on that ground 9 it can only be related to the account as reconstituted by the trial court. Further still and in the alternative, the Respondents submitted that no special circumstance has been shown to enable this court to interfere with concurrent findings of the two lower courts. They contended that the trial court having failed to grant judgment as per the claim, arising from inability to hold that the appellant had proved its claim as formulated in paragraph 24 of the pleadings at page 34 of the record and therefore confining its decision to the contract in Exhibits T1-T2 and W. And the court below also holding that the appellant had not proved its claim by credible evidence, it became a concurrent decision rejecting the claim as formulated. They submitted that the Appellant can only restore the claim upon a ground of appeal showing that special circumstance for doing so or showing that the miscarriage of justice had been occasioned. Since no such exceptional circumstance is shown, then the issue is bound to fail, relying on *Awoyolu V. Aro* (2005) All FWLR (Pt.308) 1319.

Ground 11 -

The Respondents conceded that the ground arose from the decision of the court below in response to issue 1 in the Appellant's cross appeal at the court below. In its ground 2 in the cross appeal, the appellant challenged the decision of the trial court on its right to vary interest rate. But in its brief of argument the appellant found it difficult to pinpoint that part of the decision relating to a finding on the right to vary interest rate, because there was none. All that the trial court found was that there was no satisfactory evidence of varia-

tion. The issue before the trial court was whether variation was proved and it was on this that the court rendered its decision but not a challenge of the right to vary. The Respondents further contended that the issue dealt with in ground 11 of the appellant's grounds of Appeal never arose at the trial court and was therefore not properly
 B before the court below especially as no leave of court was sought and obtained to raise it as a fresh issue. They submitted that this court cannot competently deal with the issue associated with Ground 11 as now placed before it. The court is urged to strike out issue 4 and all
 C the grounds of appeal associated with it. Finally on the preliminary objection, the Respondents submitted that incompetent ground will contaminate the competent grounds to render the issue and all the other grounds incompetent. They urged the court to uphold the preliminary objection.

D In response to the Respondents preliminary objection, the Appellant submitted that those grounds of appeal referred to by the Respondents arose from the judgment of the court below, therefore they are competent. The appellant referred to pages 123-125, 131-132 of the record as the relevant pages where the grounds were
 E formulated from in the judgment of the court below. It was further submitted that it is a misconception for the Respondents to state that those grounds are incompetent. The objection therefore lacks merit as the decision appealed against is that of the court below from which
 F the grounds were distilled. The appellant urged the court to discountenance the argument and authorities cited in support.

On the second point of objection, the appellant contended that assuming without conceding that the trial court failed to grant the claim as formulated in the pleadings before it, and the matter was
 G not raised on appeal other than in the appellant's relief sought, it submitted that the Respondents had every opportunity to raise this point at the court below but refused or neglected to do so. On the accidental slip complained of by the Respondents, the appellant submitted that this can be corrected by this court under its general inherent
 H powers enshrined in section 22 of the Supreme Court Act, 1981. The preliminary objection is against issues 2 and 4 of the six (5) issues formulated by the Appellant in its Brief of argument. The said issues were said to be distilled from the following grounds:-

Issue 2 Distilled from grounds 3, 4, 5, 6, 7, and 13 of the

Grounds of Appeal.

Issue 4 Distilled from grounds 9, 10, 11, and 14 of the Grounds of Appeal.

The two issues 2 and 4 distilled from the said grounds of appeal which are being attacked are as follows -

Issue No.2

B

Whether the Court of Appeal did not completely misunderstand and mis-apply the law and principles governing the appropriate rates, mode of calculation and period of calculation of interest applicable to the 1st Respondents indebtedness to the Appellant.

C

Issue No.4

Whether the Court of Appeal did not err when it refused to enter judgment for the Appellant in accordance with the terms of its claim before the trial court, giving due allowance for the learned trial Judge's disallowance of the charges for commission on Turnover charged on the first Respondent's account.

D

As clearly shown above, issue No.2 was said to have been formulated from six grounds of appeal while issue No.4 was distilled from four grounds of appeal. ***Ordinarily, any issue formulated from an incompetent ground of appeal is itself incompetent and must be struck out. Issues are the important questions formulated for determination by the court and could be distilled from more than one ground of appeal.*** See Sunday Madagwa V. The State (1988) 12 SC (Pt. 1) 68. ***Generally, issues are not meant to be formulated on each ground of appeal but raised or distilled out of a combination of the essential complaints of the appellant in the grounds of appeal. Therefore, issues must necessarily relate to facts or law decided by the court whose decision is appealed against. In other words, it is ideal to distil or formulate an issue from more than one ground of appeal but where this is not done or it is impossible, just only one issue may be raised from one ground of appeal. Therefore, a valid Notice of Appeal with one ground of appeal and a single issue for determination is sufficient to sustain an appeal. There is no doubt that it is now an established practice that an appeal is decided upon the issues raised or formulated for determination of the court. In effect, when issues for determination are formulated, the grounds of appeal upon***

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which they are based or from which the issues are formulated become extinguished or expired. The argument of the appeal is then based on the issues so formulated but not on the grounds. Sanusi V. Ayoola (1992) 9 NWLR (Pt.265) 275, Joseph Saliba V. Road Yassin (2002) 3 SCM 95 at 104.

B In the instant appeal there may have been more grounds than necessary from which the two issues 2 and 4 complained about were said to have been formulated, on a careful reading of the grounds and the issues encompassing the grounds I am unable to see any harm done or damage caused to the substance of the matter. In the
C result, without any further ado, I am of the view that the objection lacks merit and same is accordingly overruled. The issues are not incompetent hence the appeal is to be considered on the issues raised.

Now to the consideration of the issues distilled by the appellant
D from the fourteen (14) Grounds of appeal as adopted by the Respondents in their brief of argument.

Issue No.1

Whether the Court of Appeal did not err when it held that the three issues formulated by the Appellant herein on the main appeal
E were a mere elaboration of the two issues formulated by the Respondents and thus failed to consider and make a finding on the issues thus raised.

The issue is said to have arisen from grounds 1 and 2 of the appellant's grounds of appeal, challenging the finding of the Court
F below to the effect that the three issues formulated by the Appellant herein on the main appeal below were a mere elaboration of the two issues formulated by the Respondent and the court's consequent failure to give adequate consideration to these issues. The particular
G issue which the Appellant contended that the Court below failed to consider and make finding on is issue No.1 formulated by the Appellant herein in its Respondent/Cross Appellant's brief of arguments. The appellant submitted that the finding of the court below, to the effect that the issues formulated by the Appellant herein for determination on the appeal before it were a mere elaboration of the two
H issues formulated by the Respondents led to injustice and ought to be reversed. The Appellant contended that the failure of the Court below to recognize and acknowledge the significance of the issues formulated by the Appellant, led to the inadequate consideration it

gave to the issues in its judgment. The appellant contended further that the arguments raised by the Respondents in the said issue No.1, were not open to them not being part of their case before the trial court and on the basis that the Respondents were stopped by their conduct from raising those issues at the state at which they sought to raise them. The appellant submitted that where a party to an appeal without seeking leave raises a fresh issue on the appeal, which was not raised in the Court of trial, such issue will be deemed incompetent and will be struck out. They relied on *Incar (Nigeria) Plc V. Bolex Enterprises Limited*. (2001) 9 NWLR (pt. 728) 646 at 665, *Salami V. Mohammed* (2000) NWLR (pt.673) 469 at 478. It urged the court to hold that the court below erred when it failed to give due and proper consideration to the issues formulated by the Appellant for its determination of the Appeal.

In response to issue No.1, the Respondents contended on the alleged incompetence of respondents 1st issue, that the issue of incompetence was not raised by it as a preliminary objection at the court below. They contended further that if the appeal was incompetent in any respect, the appellant ought to have objected to its being maintained and concluded as valid and then sought court's order to strike it out. But instead, all they argued was that the Respondents were stopped from contending that the facilities expired in 1987 and that the Respondents ought not to have raised it. They urged the court to resolve issue No.1 against the appellant.

At the court below, the appellant herein was the Respondent/Cross Appellant while the Respondents herein were the appellants/Cross respondents. As appellants, the Respondents had formulated two issues for determination of their appeal and the Respondent to the appeal formulated three issues. The court below had in its judgment opined as follows:

"The respondent formulated three issues as arising for determination in the appeal. The three issues are, in my view, mere elaboration of the two issues formulated by the appellants which are already set out above. I therefore consider it unnecessary to reproduce them in this judgment since I consider the two issues formulated in the appellant's brief as adequate for the purpose of resolving the issues raised in the appeal."

The issue No.1 of the three issues formulated by the appellant

herein at the court below, which was said to be wrongly jettisoned by the court below is as follows:-

B *“Whether, from the totality of the evidence before the lower court, it could rightly be said that the facilities granted to the 1st Appellant and secured by the guarantees of the 2nd Appellant and the third party, legal mortgage of the 3rd appellant were for a fixed term and whether it was open to the appellants to so contend.”*

The first of the two issues formulated by the Appellants in their brief of argument before the court below goes thus:

C *“Whether by the contract of the parties as in Exhibits T1, T2 and W, which specifically provided for the charging of interests up to a specified date when payment was to be made in bulk the lower court is right in giving judgment in the form that it did.”*

D ***Generally, it is the duty of an appellate court to consider all issues placed before it for determination. But where the court is of the view that a consideration of one of the issues is enough to dispose of the appeal, it is not under any obligation to consider all the other issues posed for determination.***

Onochie V. Odogwu (2006) 2 SCM 95. ***What then is “an issue”?***

E ***An issue is a point in dispute between two or more parties in an appeal. It may take the form of a separate and discrete question of law or fact or a combination of both. In other words, an issue is a point that has arisen in the pleadings of the parties which forms the basis of the dispute or litigation which requires resolution by a trial court.*** See Black’s Law Dictionary.

F Ninth (9) Edition, page 907, Metal Construction (WA) Ltd. V. Milgliore & Ors (Vice Versa) (1990) 1 NWLR (pt.126) 299; (1990) 2 SCNJ 20; Egbe V. Alhaji & 2 ors (1990) 1 NWLR (Pt.128) 546 (1990) 3 SCNJ 41, Ishola V. Ajiboye (1998) NWLR (Pt.532) 91. ***However, where a court finds that there is proliferation of issues or the issues formulated or posed for determination are clumsy or not clear, a court is empowered to reformulate issues in an appeal. This is to give the issue or issues distilled by a party or***

H ***the parties precision and clarity.*** See; Okoro V. The State (1988) 12 SC 191, (1988) 12 SCNJ 1911 Latinde & Anor V. Bella Lajunfin (1989) 5 SC 59, (1989) 5 SCNJ 59, Awojugbagbe Light Industries Ltd. V. P.N. Chinukwe & Anor (1995) 4 NWLR (pt.390) 379, (1995) 4 SCNJ 162, Lebile V. The Registered Trustees of Cherubim &

Seraphin Church of Zion of Nigeria, Ugola & 3 Ors (2003) 2 SCM 39, (2003) 1 SCNJ 463.

In Unity Bank & Anor V. Edward Bonari (2008) 2 SCM 193 at 240, this court had opined thus:

"It is now firmly settled that the purpose of re-framing issue or issues is to lead to a more judicious and proper determination of an appeal. In other words, the purpose is to narrow the issue or issues in controversy in the interest of accuracy, clarity and brevity." See also, Musa Sha (Jnr.) & Anor V. Da Ray Kwan & 4 ors (2000) 5 SCNJ 101 (2000) 8 NWLR (Pt 670) 685. In the instant case, the court below did not even reformulate or re-frame the issues posed by the Respondent before it. When compared with the issue formulated by the appellants on the same point, the issues formulated by the Respondent were said to be a mere elaboration of the issues formulated by the Appellants. As shown above, in my view, a consideration of the issue formulated by the appellants on the same point raised more elaborately by the Respondent in its own issue, by the court below did not occasion any miscarriage of justice. The court is not bound to prefer the style of the Respondent to that of appellants in the formulation of issues for determination. In Sha V. Kwan (supra) at 705 this court has stated thus:

"So long as it will not lead to injustice to the opposite side, appellate courts possess the power and in the interest of justice, to reject, modify or re-frame any or all issues formulated by the parties..."

With the preference by the court below of the style of the appellants in the formulation of the issues for determination, the appellant herein has failed to show what injustice has been caused to its case. In the circumstance, issue No.1 is misconceived, to say the least, and it is hereby resolved against the appellant.

Issue No.2

Whether the Court of Appeal did not completely misunderstand and mis-apply the law and principles governing the appropriate rates, mode of calculation and period of calculation of interest applicable to the 1st Respondent's indebtedness to the Appellant?

In arguing this issue, the appellant urged the court to note that the determination of the critical questions arising thereunder, other than that relating to the appellant's right to charge compound against

simple interest, only become significant if the issue it has formulated for determination herein is decided against it. The appellant contended that the court below's misunderstanding and mis-application of the law and principles applicable in determining the appropriate rates, mode of calculation and period of calculation of the interest applicable to the 1st Respondent's indebtedness may be conveniently divided into four points.

The first arose from the finding made by the court below to the effect that the agreement entered into between the parties left no room for the application of the general rules of banking practice relating to the charging of interest on banking facilities. The appellant referred to the decision of the court below on the agreement of the parties as contained in Exhibits T1, T2 and W and submitted that the finding made by the court on the documents was incorrect. They contended that the issue in dispute arose precisely because the situation giving rise to it was not expressly provided for by the terms of the agreement between the parties and the question that arose was as to what should be implied in the circumstances. The appellant contended further that there was no dispute between the parties as to the fact that the agreement contained in Exhibits T1, T2 and W did not contain any express provision for the charging of interest after the review/expiry dates stated therein. What was in dispute was what the rights of the appellant would be in the circumstance. While the Respondents contended that the appellant should only be entitled to damages for the failure of the Respondents to make repayment on the facilities at their due dates, the appellant contended that it would be entitled to continue charging interest on the outstanding amounts at the prevailing rates of interest until the debts were fully discharged. The appellant submitted that there was no agreement between the parties as to what would happen if the 1st Respondent failed to repay its indebtedness at the review/expiry dates of the facilities granted to it. This court is urged to hold that the court below erred when it excluded the application of the general rules of banking practice and the mercantile custom of bankers which authorize the application of interest to the outstanding debt balances on a customer's account on the basis that these rules have been impliedly excluded by the agreement of the parties. The appellant further submitted that being a bank, it was entitled to continue to charge interest on the undisputed

debit balances on the 1st Respondent's accounts.

The second question for consideration is the finding made by the court below to the effect that the agreement of the parties did not stipulate for the charging of compound interest thus limiting the appellant's entitlement to simple interest for the entire duration of the facilities granted by it to the 1st Respondent. The appellant contended that in deciding that the appellant could not charge compound interest at all on the facilities granted by it to the Respondent the court below not only misinterpreted and rewrote the agreement of the parties, it also made a case for the respondents other than that which they made for themselves. The appellant urged the court to reverse the finding made by the court below to the effect that the appellant was not entitled to charge compound interest on the facilities it granted to the 1st Respondent at all or even after the alleged expiry of the facility.

The third question said to have arisen is the finding of the court below to the effect that the power of the trial court to award interest to the appellant on the sum owed to it by the Respondent after the alleged due dates of the facilities granted, is regulated by Order 40 Rule 7 of the High Court (Civil Procedure) Rules of Oyo State. The Appellant contended that the proper interpretation to be placed on the provisions of Order 40 Rule 7 of the Oyo State High Court (Civil Procedure) Rules, 1988 and similar provisions in the Civil Procedure Rules of Other States of the Federation was given by *Hausa V. First Bank of Nigeria Plc* (2000) 9 NWLR (Pt.671) 64 at 71-73. They submitted that the limitation imposed thereby on the power of the court to award interest is in relation to post judgment interest but not pre-judgment interest.

The fourth point upon which the learned justices of the Court below erred is in their finding reversing the decision of the learned trial judge awarding interest to the appellant at the original rates of interest agreed, calculated at compound interest, up until the date of judgment and 10% simple interest thereafter until liquidation and substituting therefore, an order awarding the appellant interest at the rates agreed up until the alleged expiry dates of the facilities and thereafter at 10% per annum up until the date of judgment and thereafter, all to be calculated at simple interest. The appellant relied on the cases of *Ekwunife V. Wayne (W/A) Limited* (1989) 5 NWLR

(pt.122) 422 at 45-447 and Hausa V. First Bank of Nigeria Plc (supra) as authorities for the proposition that the powers of the court to award interest can be based on any of the following three grounds:

- (i) The agreement of the parties
- (ii) The existence of a custom of the trade concerned permitting the award of interests, and
- (iii) Where the award of interest is stipulated by Statute.

The appellant submitted that in Hausa V. First Bank of Nigeria Plc (supra) the court took special note of the peculiarities attaching to banks in this regard and drew a distinction between banks and other creditors. On this second issue, the appellant urged the court to hold that the court below erred in its resolution and determination of the appropriate rate, mode of calculation and period of calculation of interest applicable to the first Respondent's indebtedness to the appellant.

In responding to the second issue, the Respondents contended that the issue turns on the question as to whether there could be implied into the agreement of the parties, general rules of banking practice and the universal custom of bankers. This same issue, the respondents said was raised by the appellant before the court below on issue No.2 to the appeal and it advanced copious arguments thereon. The Respondents objected to the competence of the arguments on the ground that at no time did the appellant plead any general banking practice or mercantile custom of bankers as the basis for charging interest after the expiry of the contract. The respondents further contended that, in fact it was never the appellant's case that interest was payable until expiry date after which mercantile custom take over. They submitted that it is the law that matters not made out on the pleadings cannot be the subject of appeal. It was contended that what the appellant relied upon on the pleadings as authority for varying interest rates was Central Bank of Nigeria (CBN) guidelines and considerations relative to the cost structure of the bank. It was further contended that it was only after the Respondents at the trial court challenged appellant's right to charge interests beyond the expiry dates in Exhibits T1, T2 and W that the appellant fell back on banking practice, mercantile custom or forbearance as a life saving device.

The Respondents contended that the appellant at sometime

based its right on banking customs and at other time on Exhibit E which were never pleaded neither was it mentioned in evidence at the trial as the basis of its right to compound interest. Therefore, the trial court made no finding on the point. The Respondents however conceded that the court below went too far as regards the finding on compound interest before expiry date. The issue was not properly B before it. They therefore submitted that no miscarriage of justice occurred thereby with the slip. They contended that the appellant's pleadings and the relief claimed are for interest simpliciter and the contract Exhibits T1, T2 and W did not specify whether it is com- C pound or simple interest. The appellant therefore suffered no prejudice arising from the grant of simple interest instead of compound interest. They urged the court to resolve this issue against the Appellant.

As clearly stated above, the Appellant's claim as endorsed on D its pleadings was for the sum of N1,782,222.78 being the balance of banking facilities and interest thereon granted to the 1st Respondent. Furthermore, the Appellant claimed interest on the said sum at the fixed rate of 39% per annum from the 12th August, 1993 until judgment is given and thereafter at the fixed rate of 10% per annum until E final liquidation of the judgment debt. There is no doubt as earlier stated, that the crux of this matter was, which of the documents tendered and admitted is governing the parties transaction. The appellant contended initially that the transaction was governed by Exhibit F E - Thirty Party Legal Mortgage, while the Respondents, position remains that the transaction was governed by Exhibits, T1, T2 and W. Exhibit T1, which runs and continues on T2 is a letter dated November 6, 1987 purported to be from the Appellant addressed to the 1st Respondent, headed "*Sanction of Credit Facilities*"; and Exhibit W is G dated May 26, 1987 from the Appellant addressed to the 1st Respondent headed "*Renewal of your Overdraft for N150, 000*".

It is clear from the pleadings containing the original claim of the appellant on pages 37-39 of the record that the interest chargeable and which was being charged on the facilities granted to the 1st Respondent was based on "*the rates applicable from time to time*". H These rates were said to be based on Central Bank of Nigeria Monetary Policy guidelines. It is note-worthy that it was not the appellant's case that the charging of compound interest on the 1st Re-

spondent's account was based on mercantile custom of bankers, which allowed charging of compound interest on accounts in debit on the absence of express agreement. This led the trial court and the court below to have held that the appellant failed to prove the variation of interest charged on the 1st Respondent's account. There was no appeal on this point to the court below. The court below also held that not only was the Appellant not entitled to charge interests at the agreed rate as awarded by the trial court, upon the expiration of the facility, it was only entitled to damages for delayed payment. And that these damages were to be awarded at the discretion of the court. Hence, it was granted at the court's rate by the court below.

There is no doubt that Exhibits T1, T2 and W contained both the secured loan and secured overdraft. The two documents also contained the fixed interest the appellant was to charge on the loan and overdraft. The loan was to be for a short term. Each facility had its expiry date. The loan's review or expiry date was 30/11/1987 while the overdraft facility was to expire on 31/01/88. I agree with the appellant that there was no express agreement between the parties as to what would happen if the 1st Respondent defaulted or failed to repay its indebtedness at the review or expiry dates of the facilities granted to it. But I am unable to agree that the court below erred in excluding the application of the general rules of banking practice and the mercantile custom of bankers. This was neither pleaded nor made the appellant's case at the trial nor was it proved or established. In other words, it may mean that it was never intended to guide the transaction between the parties. At best the agreed interest rate could have continued to operate until the matter went to court when it would stop and the court's rate comes into operation. There is no doubt, the variation in the interest rates and turnover charged was as a result of the compound interest being charged on the facilities by the appellant. This variation on the interest rates, the trial court held was not proved and the court below also agreed that the variation was not proved hence it was not entitled to charge compound interest. Indeed, the issue of compound interest charged before the expiry date of the facilities was not properly before the court below. The court was there-

fore not competent to deal with it as it did. The court erred in this regard. But I agreed with the Respondents that the appellant, not having shown that the issue was ever its case, failed to show that a miscarriage of justice thereby occurred. In effect, the appellant failed to show that the court below misunderstood and mis-applied the law and principles of calculation and period of interest applicable to the transaction between the Appellant and the 1st Respondent. Accordingly issue No.2 is resolved against the appellant. B

Issue No.3

This issue is whether the court of Appeal did not err when it held that the 3rd Respondent herein was sued as a surety and thus came to the erroneous conclusion that the action against him was premature and incompetent, he not having been served with a demand notice. C

This issue arose from ground No.8 of the appellant's Notice of Appeal, challenging the finding of the court below. That the appellant's action against the 3rd Respondent was incompetent and premature because the 3rd Respondent was not served with a demand notice prior to the institution of the action. The Appellant contended that the above finding of the court below was based on the Respondents contention that the 3rd Respondent was sued as a surety and as such, his liability would only have arisen after an unsuccessful demand would have been made on the principal debtor, the 1st Respondent. And that it was only after such unsuccessful demand on the principal debtor and a subsequent demand on the surety that an action could properly be commenced against him. The Appellant's argument however on the other hand was that the 3rd Respondent was not sued in his capacity as a surety or guarantor but in his capacity as a Mortgagor. The Appellant contended that the relationship between itself and the 3rd Respondent was based on the terms of Exhibit E, the Deed of Third Party Legal Mortgage, executed in favour of the Appellant by the 3rd Respondent to secure the indebtedness of the 1st Respondent. The appellant referred to its pleadings, paragraphs 8 and 9 of further amended Statement of Claim at page 37 of the record of Appeal to show that the 3rd Respondent was sued in his capacity as a Mortgagor. The appellant referred to clauses 1 and 6 of Exhibit E on how to make demand on the Respondents in this matter. The Appellant urged the court to reverse the decision of D E F G H

the court below on this point and hold that the institution of this action against the 3rd Respondent was not premature or incompetent, a demand notice having been served on the 1st Respondent in accordance with the terms of Exhibit E.

B On issue No.3, as contended by the appellant that the 3rd Respondent was sued not as surety as held by the court below but as mortgagor, the Respondents found little or no difference in the incidence of the two words having regard to the facts of this case. They referred to Exhibit E, in paragraph 4 where the 3rd Respondent is C described as surety between himself and the 1st Respondent, although as between him and the appellant, he is deemed a principal debtor. They submitted that it cannot be wrong to say that the 1st Respondent was sued as surety to the 1st Respondent. The Respondents contended that the real issue as stated in the appellant's brief of argu- D ment is whether having regard to the provisions of the tripartite legal Mortgage (Exhibit E) a demand from the 3rd Respondent was or was not essential or whether a demand from the 1st Respondent suffices to establish the liability of the 3rd Respondent under Exhibit E. The court below averted its mind to that issue and resolved it E against the appellant. The Respondents submitted that the court below rightly decided the issue and it will not matter whether or not the lower court rightly or wrongly described the 3rd Respondent as surety or mortgagor once it averted its mind to the effect of the contract F from the parties, that is, Exhibit E. They relied on, *Jikantoro V. Dantoro* (2004) All FWLR (Pt. 216) 390. They contended that in this case it is common ground that demand was made from the 1st Respondent only but not from the 3rd Respondent. They referred to Exhibit E, in particular Clause 1 and contended that the effect of the clause is that G in law, the surety has made himself a principal debtor and this enables the creditor to proceed against him even without recourse to borrower. They referred to *Fortune International Bank Plc V. Pegasus Trading Office (Gmbh) & ors* (2004) All FWLR (Pt.199) 1312 at 1323.

H The Respondents contended that in the instant case, Exhibit E gives the Appellant as a creditor the option to demand from the 1st Respondent and sue it for the recovery of the debt, or demand from the 3rd Respondent and sue him severally. They submitted that if it had been the intention of the parties that where joint action is pro-

posed one demand would be sufficient, Exhibit E would have said so. The Respondents referred to Clauses 1 and 6 of Exhibit E and contended that in this case, in their ordinary sense, mean what they actually say, that the Appellant has a choice to make its demand from both the customer and the Mortgagor, and proceed to enforce its right against both, or choose to proceed against either of them. They submitted that the court below gave correct interpretation to clauses 1 and 6 of Exhibit E which required the bank to make a demand before enforcement. The Respondents however submitted that in the event of the court holding otherwise, no miscarriage of justice has occurred because although the appellant had the right to exercise its power under Exhibit E cumulatively, in this action, it pleaded Exhibit E only as regards 3rd Respondent's property offered as security. It evinced no intention in the claim before the trial court to proceed against him on his personal covenant to pay the debt. Even though the claims are jointly and severally against all defendants, there is no averment fixing the 3rd defendant with liability on his personal covenant. They urged the court to resolve this issue against the appellant.

It is clear from Exhibit E - the Deed of Third Party Legal Mortgage, that in the indenture made on 31/01/86 between the 1st Respondent as customer to the Appellant and the 3rd Respondent, the 3rd Respondent though guaranteed the facilities granted to the 1st Respondent by the Appellant, he was described and called a Mortgagor. Paragraph 1 of the said indenture states as follows:

"1. The customer and the Mortgagor hereby jointly and severally covenant with the Bank on demand in writing made to the customer and the mortgagor or to either of them to pay the Bank the balance which on the account of the customer with the bank shall for the time being and whether on or at any time after such demand be due or owing to the Bank in respect of all money now or from time to time hereafter owing by the customer for which the customer may be liable either solely or jointly with any other persons, firms or companies..." Paragraph 4 of the Indenture, inter alia, reads thus:

"4. ALTHOUGH as between the customer and the Mortgagor, the mortgagor is only surety for the customer yet as between the Mortgagor and the bank, the Mortgagor shall be deemed to be principal debtor for the money hereby secured"

On how to make and who makes demand for payment of the money lent to the 1st Respondent, paragraph 5 of the Indenture, inter alia, reads:

“6. A DEMAND for payment or any other demand or any notice under this security may be made or given by any Manager, Officer or Agent of the Bank by letter served personally on the customer and the Mortgagor or either of them sent by post address to the Customer and the Mortgagor or either of them at their respective addresses, as given by this security or at their respective last known place or places of business or abode.....”

There is no doubt that Exhibit E was created to secure the facilities granted to the 1st Respondent by the Appellant. The 3rd Respondent therefore became a Mortgagor to the Appellant after he agreed to secure the loan and overdraft granted to the 1st Respondent, with his personal property. As shown on Exhibit E, the 1st Respondent was the principal debtor while the 3rd Respondent was the Surety. Where both were sued jointly they remained principal and Surety, to be liable solely or jointly with any other persons, firms or companies. But where they are sued severally, for the indebtedness of the 1st Respondent each of the 1st and 3rd Respondents stand as principal debtor to be liable to pay, in which case each party shall be entitled to a formal demand for payment before any action could commence to enforce payment of the indebtedness.

Ordinarily, as agreed in Exhibits T1, T2 and W at the expiration of the date fixed, there had to be a demand for repayment from the customer and surety or Guarantor, that is, the 1st and 3rd Respondents respectively. In Exhibit D, Letter of Guarantee, the money (s) due to the Appellant from the 1st Respondent was guaranteed to be paid “within two days after demand by the Appellant.” If there had been no such agreement as to payment on demand, it has been said that, “the fact that the obligation of the guarantor arise only when the principal has defaulted in his obligation to the Creditor does not mean that the creditor has to demand payment from the principal or from the surety, or give notice to the surety, before the creditor can proceed against the surety.” See Andrew & Millet - Law of Guarantee 1st Edition page 162. African Insurance Development

Corporation V. Nigeria Liquefied Natural Gas Ltd. (2000) 4 NWLR (Pt. 653) 494 at 505. Fortune International Bank Plc. V. Pegasus Trading Office (GmbH) & Ors (2004) 1 SCM 21 at 31 (2002) All NWLR (Pt. 199) 1312 at 1325. It is clear from the pleadings and Exhibits that the 3rd Respondent was both a surety to the 1st Respondent's indebtedness as well as a Mortgagor on the security of the facilities, in relation to the Appellant. The 3rd Respondent became liable to repay or be held responsible for the indebtedness of the 1st Respondent sequel to being a Mortgagor of the security for the loan and overdraft granted to the 1st Respondent. He is therefore entitled to a formal demand from the Appellant since demand for repayment was part of the terms of the contract. B C

In the result, the court below was right to have held that the 3rd Respondent was sued as a surety hence the action against him was premature and incompetent not having been served with a demand notice. Accordingly issue No.3 is resolved against the Appellant. D

Issue No.4

Whether the court of Appeal did not err when it refused to enter judgment for the Appellant in accordance with the terms of its claims before the trial court, giving due allowance for the learned trial Judge's disallowance of the charges for commission on Turnover charged on the first Respondent's account. E

This issue is said to have arisen from grounds 9, 10, 11 and 14 of the Appellant's grounds of appeal challenging the finding of the Court below refusing to allow the Appellant's cross-appeal and enter judgment for the Appellant in terms of its claim before the trial court. The issue formulated earlier in the Cross Appeal before the court below is: F G

"Whether the learned trial judge was right in holding that there was no satisfactory evidence of Variation of interest rates by the Cross Appellant."

The appellant referred to the holding of the court below on this issue at pages 129-130 of the record of appeal and submitted that by that holding the court below misunderstood the first issue formulated for its determination on the cross appeal and also misunderstood the judgment of the trial court. The Appellant contended that what the trial court held was that there was no sufficient evi- H

dence of the variations made because the appellant did not prove the relevant Central Bank of Nigeria guidelines. The Appellant submitted that the court below relied on irrelevant considerations in determining what was in essence, a question of fact. If the court below had given consideration to relevant factors, it would not have concluded that the amount claimed by the Appellant was preponderous or excessive or outside the contemplation of the 1st Respondent at the time it obtained the facilities that gave rise to the debt. The appellant referred to the relevant portions of the pleadings and various documents tendered and admitted by the trial court as Exhibits A-W, which included the comprehensive statements of the first Respondent's account with the Appellant. It submitted that the court below erred for holding that the Appellant failed to plead and lead credible evidence in support of its claim before the trial court hence it urged the court to reverse and set aside the decision. The Appellant further urged the court to hold that the court below erred when it failed to enter judgment in favour of the appellant in terms of its claim before the trial court giving due allowance for the learned trial judge disallowance of the charges for commission on turnover charged on the 1st Respondent's account.

On this issue No.4, the Respondents submitted that the court below erroneously but in their view honestly made its finding on the issue whether the Appellant had a right or not to vary interest rates. Indeed, there was no appeal before the court below against the finding of the trial court on the point, though the issue arose from ground 2 of the Appellant's cross appeal.

The Respondents contended that Exhibit E could not have assisted the Appellant to establish that it had right to vary interest in so far as it was pleaded and tendered for a different purpose but not the issue of right to vary interest. It was submitted so that both courts below had concurrently found that the Appellant did not prove that the interests applied on variation were sufficiently proved. The Respondents submitted that even if the Appellant disagreed with the finding on its right to vary, it raised no ground of appeal capable of upsetting the concurrent findings that it did not prove variation as claimed which makes the issue of right to vary academic and one that cannot advance the case of the Appellant any further. There is no doubt that whether or not the Appellant had right to vary interests

chargeable on the accounts of the 1st Respondent was not decided upon by the trial court, hence the point was not made an issue before the court below.

Before the trial court and in the pleading of the appellant there was no averment on either Exhibit E or mercantile custom of bankers for the purpose of charging interest. The trial court found that variation was not proved. The court below on this point agreed with the trial court that the appellant failed to prove by credible evidence the variation in the interest rates, hence failed to prove its entitlement to its claim as contained in its pleading. Indeed, apart from Exhibit E, now being sought to be used by the appellant as basis for variation of interest rates, not having been pleaded nor tendered in evidence before the trial court in proof of interest, the two last documents, Exhibits T1, T2 and W show clearly that the terms and conditions of the two facilities were separately and distinctively negotiated independently of Exhibit E.

The following distinctive features of Exhibits E, T1, T2 and W were submitted by the Respondents and I agree entirely:

(a) In Exhibit E by clauses 1 and 6, the debt becomes payable only when demand is made. See *Ishola V. SGBN* (1997) 2 NWLR (Pt.488) 405. In Exhibits T1, T2 and W, the expiry dates are fixed and whether or not demand had earlier been made, the contract expires on the due dates, thus making failure to repay a breach of contract. See; *Ijale V. A.G. Leventis* (1951) All NLR 762 at 771.

(b) In Exhibit E clause 5, Interest will be stipulated by the appellant from time to time as it becomes necessary, while in Exhibits T1, T2 and W the interest rates are already clearly stated and there is no provision for variation or further stipulation except by mutual agreement.

(c) In Exhibit E, clause 5, interest can be capitalized but there is no such stipulation in Exhibits T1, T2 and W as interest is accessory on the principal.

(d) As stated by DW1 at page 43 of the record, the transaction in Exhibit T1, T2 and W in terms of the short duration and fixed interest not stated to be per annum, is a "one-off" transaction whilst under Exhibit E a running account is contemplated thus letting in the maxim *generalia specialibus non derogant* meaning that the general

provision in Exhibit E will not be interpreted in a way that will derogate from the effect of the special provision in Exhibits T1, T2 and W. See *Dada V. Ishinkalu* (1995) 5 NWLR (pt.395) 755 at 778, *Kraus Thompson Org. V. NIPSS* (2004) ALL FWLR (pt.218) 187 at 812.

The Respondents submitted that the court below was right to rely on Exhibits, T1, T2 and W on their merit rather than Exhibit E in respect of interest. The court is urged to resolve the issue against the appellant and I have no hesitation in holding that having failed to be consistent on its claim, the court below no doubt was right when it refused to enter judgment for the appellant in accordance with the terms on its claim before the trial court. Issue four as formulated is resolved against the appellant.

ISSUE No.5

This is whether the Court of Appeal did not err when it failed to make finding on the second issue formulated for determination on the cross appeal as to whether the liability of the 3rd Respondent was limited to N150,000 or N250,000.00 in any event.

The issue is said to have arisen from ground 12 of the appellant's amended grounds of appeal, challenging the failure of the court below to make a finding on the second issue formulated for determination on the cross appeal on the basis that the issue had been overtaken by events arising from their determination of an issue in the main appeal. It is clear that the contention of the appellant in ground 12 of its amended notice of appeal was to the effect that its second issue in the cross appeal at the court below was not considered by the court below, which glossed over it on the pretext that its decision on the main appeal made that unnecessary.

There is no doubt, that, generally, the court below ought to have considered all issues placed before it for determination not being the final court on the matter. But a litigant can only be heard to complain if the issue not so considered is material and substantial in the particular circumstance. See *Onifade V. Olayiwola* (1990) 7 NWLR (Pt.161) 130 at 159 ***and if the appellant had suffered any miscarriage of justice.*** See; *State V. Ajie* (2000) FWLR (Pt.15) 2831 at 2842. ***In the instant case, I am satisfied that no miscarriage of justice has occurred, the reason being that although the appellant has the right to exercise its power as a creditor under Exhibit E cumulatively, but***

in the instant action, Exhibit E, as an Indenture was only pleaded and used as regards 3rd Respondent's property offered, as security for the 1st Respondent's facilities granted by the appellant. The appellant failed to show in clear terms in its claim that it intended to proceed against the 3rd Respondent on his personal covenant to get him pay the debt as in the case of the 2nd Respondent. No wonder formal demand was not served on him by the Applicant.

With reference to paragraphs 8 and 9 of the pleadings, all that the Appellant pleaded was in relation to the security, offered by the mortgage of the 3rd Respondent's property with Exhibit E. The action was not indeed related to the enforcement of Exhibit E against the 3rd Respondent's property and neither was the action against him on his personal covenant to pay the 1st Respondent's indebtedness. There is no doubt, and as earlier stated, the rights of a Mortgagee as the Appellant herein against the Mortgagor, the 3rd Respondents, is cumulative in the sense that it may decide either way, whether to enforce the security against the property or sue upon the personal covenant to the Mortgagor, for payment or go for both. Yet, it must be clearly stated in the pleadings which form the creditor has chosen, to recover its money. See Megany's Manual of the Law of Real Property, 67th Edition page 484.

In the instant case, the reliefs stood jointly and severally against all the defendants and there is no averment in the pleadings to show that the 3rd Respondent was being pursued on his personal covenant on the 1st Respondent's indebtedness. Issue No.5 is also resolved against the Appellant.

In the final analysis, all the issues formulated, and argued are resolved against the appellant. The appeal therefore fails for lacking in merit and is accordingly dismissed.

Now to the Cross appeal by the Respondents. From the Notice of Cross appeal, the sole issue formulated for determination is as follows:

"Whether having held that what the plaintiff/appellant was entitled to after the expiry date of the contract was damages for breach of contract, the lower court was right in awarding simple interest at the court rate of 10% per annum from the date cause of action arose up to date of judgment when no claim for damages or compensation

for delayed payment was pleaded or proved.”

The issue was said to be raised from Grounds 1 and 2 of the grounds of appeal in the Notice of Cross Appeal. The Cross Appellants referred to the Cross Respondent’s claim in the pleadings as for N1.8 million being the debit balance on the account of the 1st Respondent as at 11th August, 1993 and further interests up to judgment at the rate of 39% per annum. Reference was further made to the decision of the trial court that after holding that the plaintiff did not prove variation of interest rates failed to grant plaintiff’s relief as claimed but nevertheless gave judgment for the appellant/Cross Respondent, upholding its right to continue charging interests even up to date of judgment, applying the agreed rate at compound interest on the facility in Exhibits T1, T2 and W, thus rejecting the Defendants/Respondents/Cross Appellants contention that after the date of expiry date of the contract and payment was delayed in breach of contract, what was claimable was interest by way of compensation or damages which unfortunately were not claimed. That led to the appeal filed by the Cross Appellant to the court below which allowed the appeal in part.

The Cross appellants had contended at the court below that when the contract had expired, special damages by way of interest had to be pleaded and proved, the rate payable being at the discretion of the court which in ordinary circumstances will be the usual court rate so that the creditor may not be at an advantage for its failure to promptly sign up judgment against the debtor. The cross appellants contended that it is ironical that despite holding as it did above, even when there was no claim for compensation or damages, the court below also fell into same error as the trial court by applying the court rate of 10% simple interest from the date the cause of action arose up to date of judgment. In other words, the court below merely charged the simple interest rate of 10% per annum.

The cross appellants further contended that the effect of the judgment of the court below is to hold that at the end of the contract period and for delaying payment or for being in breach of contract to pay on the due date, some interests at the discretion of the court was payable even without any pleading or evidence as the law demands in respect of special damages. The Cross appellants submitted that the court below was therefore partly wrong to the extent that it

did not hold that whatever was claimable would not be a continuation of the contract to interest, but had to be pleaded and proved as damages or compensation as none was so pleaded or proved in this case it was not grantable. They relied on *Airoe Construction Ltd V. University of Benin* (1985) 1 NWLR (Pt.2) 287. And submitted further that it is trite law that the court has no jurisdiction to grant a relief not claimed relying on, *Ekpenyong V. Nyong* (1975) 2 SC 71 at 80-82 (Pt.108) 192 at 205. The Cross appellants conceded that the Cross Respondent is entitled to earn interest as agreed on Exhibits T1, T2 and W but it is not entitled to interest after expiry date. It was further conceded that it can claim interest by way of damages as may be pleaded and proved for any breach of contract provided there are averments on the pleadings as to the loss suffered by reason of the breach. They submitted that in this case, the cross Respondent stated in the relief claimed the debit balance as at 1/8/93 but there was no claim or averments as to the damage suffered if any. It is note-worthy that the cross Respondent did not appeal against the decision of the Court below that the facilities expired on the dates shown on them, that is, Exhibits T1, T2 and W.

In conclusion, the cross appellants finally submitted as follows:-

That Exhibits T1, T2 and W are explicit in their terms as to the duration of the contract and the obligation of the cross appellants as to payment of interests being accessories on the principal. In the absence of any express provisions, there is no room to infer obligation to pay interest until the principal is fully paid just as there can be no application of any custom to extend the frontiers of the contract as negotiated by the parties. That even though Exhibit E will by ordinary rules of construction of clause 5 thereof make provision for the appellant to charge interests until the principal is fully paid, its terms were not pleaded and proved as applicable to the contract. And even if so proved, without conceding its provisions cannot override the expressed and distinctly negotiated terms of Exhibits T1, T2 and W which came into force after the making of Exhibit E.

The Cross appellants finally submitted that Exhibits T1, T2 and W take effect on their own terms and expired on the dates stated thereon, leaving the cross Respondent to its remedies in damages for breach of contract. They relied on *Sapara V. UCH* (1988) 4 NWLR (Pt.88) NWLR (Pt.85) 58. They urged the court to allow the cross

appeal by overturning the decision of the court below in part which allowed cross Respondent's claim to interest after the expiry date of the facilities covered by Exhibits T1, T2 and W without having pleaded and proved same.

B In the cross Respondent's brief of argument, the sole issue of the cross appellants was adopted. The Cross Respondent reiterated and adopted its arguments and its appellants brief of argument and Reply brief in opposition to the argument canvassed in the cross appellants brief of arguments and urged the court to dismiss the cross appeal for lacking in merit and allow the appellant's appeal. As shown C above, the cross appeal is only against a part of the decision of the court below. In particular the part where the Cross Respondent was awarded interest after the contract had expired and after holding that what the cross Respondent was entitled to was damages for breach. D The court below in its judgment had held as follows:

"Applying the above principle of law to the facts of the instant case, the N180,000.00 was recoverable on 30/11/87 and the rate of interest chargeable should be 19% per annum simple interest and the interest rate should be from the date the agreement came into E effect up to the date the facility expired on 30/11/87 as the indebtedness cannot be treated as an overdraft after 30/11/87 since such was not provided for in the agreement, it is therefore not open to the court to award the applicable interest rate 19% per annum, to cover F from 1/12/87 up to the date of judgment until the amount is fully settled. This is because what the respondent was entitled to after the debt became due is damages for breach. See; Airoe Construction Ltd. V. University of Benin (1985) 1 NWLR (Pt.2) 287. The power of the court to make the award falling outside the date the sum was due G is regulated by the provisions of order 40 Rule 7 of the High court (Civil Procedure) Rules 1988 of Oyo State. The rules set a maximum of 10% per annum."

There is no doubt that the Court below was right to the effect that the trial court was wrong in awarding interest as H agreed in favour of the cross Respondent as pre-judgment interest. Ordinarily, interest is not payable on ordinary debt in purely commercial transaction, in the absence of a term to that effect expressly or impliedly in the contract or mercantile usage or custom of the parties or as may be contained in a

statute. It may also be in place through fiduciary relationship between the parties. See RNA Ekwunife V. Wayne (West Africa) Ltd. (1989) 5 NWLR (Pt.122) 422. In Himma Merchants Ltd. V. Alhaji Inuwa Aliyu, (1994) 6 SCNJ (Pt.1) 87 (1994) 5 NWLR (Pt. 347) 657, this court in a similar situation held per Onu, JSC:

“...Where therefore there is no evidence whatsoever, as in the instant case, that the claim of interest is founded upon any rationale e.g. mercantile custom or trade usage known to the parties the claim of interest for 20% per month from July, 1988, which anti-dates the judgment passed on 27th October, 1989 by the trial court is without foundation and ought to have been disallowed by the court below.” See also; Union Bank of Nigeria Ltd. Vs Prof. A. O. Ozigi (1994) 3 NWLR (Pt.333) 385 (1994) 3 SCNJ 42 at 56.

It is note-worthy that in this case, the Cross Respondent claimed prejudgment interest and same was awarded in reduction. It has been held in effect “that in purely commercial transactions a party who holds on to the money of another and keeps it for a long time without any justification and thus deprives that other of the use of funds for the period should be liable to pay compensation by way of interests.” See; Nigerian General Superintendence Co. Ltd. Vs Nigeria Ports Authority (1990) 1 NWLR (Pt.129) 71, Adeyemi V. Lan & Baker (Nig.) Ltd (2000) 7 NWLR (Pt.653) 33.

However even where interest is not claimed in the Writ of Summons, the Court is entitled, in appropriate cases, to award interest in the form of consequential order. See; N.G.S.O. Ltd V. N.P.A. (supra) Ferrero & Co. Ltd V. Henkel (Nig) Ltd (2011) 8 SCMLR at 11. In the instant case, it is clear that Cross Respondent merely claimed the pre-judgment interest upon expiry of the contract and the facility was due for repayment, yet it failed to plead specifically and adduce credible evidence to establish such claim. In my view, the Plaintiff/Cross Respondent was therefore not entitled to any prejudgment interest as awarded by the court below. Exhibits T1, T2 and W does not envisage or contemplate that the same interest being paid on the facilities will continue after the expiry dates, until judgment. Parties are bound by the contract they voluntarily entered into and cannot act outside the terms and conditions contained in the said contract. In the same vein, neither of the parties to a contract can alter nor read into a written agreement a term which is

not embodied in it. The cross Respondent failed to prove its entitlement to the prejudgment interest claimed hence it was not entitled to it as awarded. The court below was therefore in error in awarding the simple interest on the facilities from the date cause of action arose. All that the Cross Respondent was entitled to was the post-judgment interest, which was guided by the appropriate trial court (Civil Procedure) Rules. The Cross Respondent did not plead any damages as a result of breach of contract.

In the circumstance, the cross appeal succeeds and it is hereby allowed. The award of interest pre-judgment interest in the name of damages, by the court below is set aside, not having been specifically pleaded and proved by the cross Respondent. Even though costs follow events, there shall be no order on costs.

D

MUKHTAR JSC (CFR)

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Ariwoola JSC. I am in complete agreement with his reasoning and conclusion that the appeal has no merit, and deserved to be dismissed. I also allow the cross-appeal, and abide by the consequential orders made in the lead judgment

F

GALADIMA JSC

In its further Amended Statement of Claim, the plaintiff (now the Appellant) had claimed before the lower court as follows:

"Wherefore the Plaintiff claims from the defendants jointly and severally the sum of One Million, Seven Hundred and eight two thousand two hundred twenty two naira, seventy-eight kobo (N1,782,222,78) being the balance of banking facilities and interest thereon granted to 1st Defendant by the plaintiff at its Ilora Branch, Oyo State in 1985 and 1987 and jointly and severally guaranteed by the 2nd and 3rd defendants which sum was outstanding at the close of business on 11th August, 1993. The defendant defaulted in the payment of the said sum as agreed whereupon the plaintiff demanded its repayment from each and everyone of them who have notwithstanding such demand, neglected, omitted and or refused to pay

same.

2. The plaintiff claims interest on the said sum of N1,782,22,78 at the rate of 39% per annum from the 17th August 1993 until judgment is given and thereafter at the rate of 10% per annum."

The trial court, considering the pleadings and evidence before it entered judgment for the plaintiff. Defendants were aggrieved with the judgment and they filed a Notice of Appeal to the Ibadan Division of the Court of Appeal. On their part the plaintiff filed a cross appeal. In its considered judgment, the court below allowed the appeal and entered judgment for the Plaintiff/Appellant herein in the sum of N180, 000 with 19% interest up to the expiry date of the loan on 30/11/87. It is also ordered that 10% per annum be paid by the Respondents herein in this appeal from 1/12/87 up till judgment date of 27/10/97 and 10% per annum from 28/10/97 until the entire amount is fully liquidated. Also ordered is the sum of N150, 000, with interest of 15% per annum and 10% per annum from 28/10/97. The cross-appeal was dismissed for lacking in merit. Dissatisfied with the above judgment of the court below, the parties (hereafter referred to variously as Appellants/Cross-Respondent and Respondent/cross-Appellant respectively appealed to this Court.

Appellant Notice of Appeal contains fourteen Grounds of Appeal. Appellants/cross-Respondents Notice has two Grounds of Appeal. Appellants formulated six issues while the Respondents adopted the issues formulated by the Appellant. It is noteworthy that the Respondents raised some preliminary objections contending essentially that issues 2 formulated from grounds 3, 4, 5, 6, 7 and 13 from the Grounds of Appeal was incompetent as it does not arise from the case of the Appellant as originally formulated on the pleadings. It is also contended that issue 4 said to have been formulated from Grounds 9, 10, 12, and 14 of the Grounds of Appeal is incompetent on the ground that none of the appellant's grounds of appeal to the court below was a challenge on the failure of the trial court to grant its claim founded on the debit balance in the account. That all the appellant did was to challenge specific findings as to variation of interests which can only be integral part of its claim and on which even if successful would not have the effect of reviving its original claim. They submitted that there was no decision on the matter by the court below hence the Appellant raised no ground of appeal thereon. That

the issue does not derive its source from a ground of appeal and therefore it is incompetent. The Respondents further contended that the issue dealt with in ground 11 of the Appellant's grounds of Appeal never arose at the trial court and was therefore not properly before the court below especially as no leave of court was sought and
B obtained to raise it as a fresh issue. It is therefore urged on this court to strike out issue 4 and all the grounds associated with it.

In response to the Respondents' preliminary objection, the appellant submitted that those grounds of appeal referred to by the
C Respondents arose from the judgment of the court below therefore are competent.

These two issues (2 and 4) are distilled from grounds of appeal being attacked. In this lead judgment the two issues have been re-produced. It is trite that issues must necessarily relate to facts or law
D decided by the court whose decision is appealed against. In other words, an appeal is decided upon issues raised or formulated for determination of the court. I agree that there may have been more grounds of appeal than necessary from which the two issues 2 and 4
E complained about were said to have been formulated. However, on a careful reading of the grounds and the issues arising herefrom, I am unable to see any harm done or damage caused to the substance of the matter. For this reason, I find that the objection lacks merit and same is overruled. The issues are competent and shall be considered
F in this appeal. The nature of the Appellant's claim as endorsed on its pleadings is not in doubt. But the crux of the matter was which of the documents tendered and admitted governs the transaction between the parties. The Appellant contended initially that the transaction was governed by Exhibit "E" - the Third Party Legal Mortgage, while the
G Respondents, have contended that the transaction was governed by Exhibits "T", "T2" and "W".

My observation is that when the pleadings containing the original claim of the appellant on pages 37 - 39 of the record is carefully read, it will be clear that the interest chargeable and which was being
H charged on the facilities granted to the 1st Respondent, was based on "*the rates applicable*" from time to time computed by the central Bank of Nigeria Monetary Policy's Guidelines. It should be noted that it was not the appellant's case that the charging of compound interest on the 1st Respondent's account was based on mercantile custom of

bankers, which allowed charging in debit in the absence of express agreement. This led to the findings of the two courts below to the effect that the appellant failed to prove the variation of interests charged on the 1st Respondent's account. It is note-worthy that there was no appeal on this point to the lower court below. The court below also held that not only was the Appellant not entitled to charge interests at the rate as awarded by the trial court upon the expiration of the facility, it was only entitled to damages for delayed payment. That these damages were to be awarded at the discretion of the court. That is why it was granted at the court's rate by the court below.

It is note-worthy that Exhibits 'T1' 'T2' and 'W' contained both secured loan and secured overdraft. The two documents exhibited also contained the fixed interest, the appellant was to charge on the loan and on overdraft, while the loan was to be for a short term; with expiry date for each facility; with the loan's review or expiry date fixed on 30/11/87, the overdraft facility was to expire on 31/01/88. Although there was no express agreement between the parties as to what would happen if the 1st Respondent defaulted, or failed to repay its indebtedness at the review or expiry dates of the facilities, granted to it, yet it is difficult to contend that the court below erred in excluding the application of general rules of banking practice and the Mercantile Custom of Bankers. This was neither pleaded by the Appellant and made it its case at the trial nor was it established by evidence. This may mean that it was never intended to guide the transaction between the parties. The practice is that the agreed interest rate could be allowed to continue to operate until when the matter went to court for adjudication, thereafter it would stop when the rates awarded by the court comes into operation.

It is also note-worthy that the variation in the interest rates and turnover charged was as a result of the compound interest being charged by the appellant on the facilities. This variation on the interest rates, the trial court and the court below rightly held that the variation was not proved; hence the Appellant was not entitled to charge compound interest. The court below erred in delving into the issue of compound interest which was not properly before it. The Respondents have rightly submitted therefore that the appellant not having shown that the issue was ever its case, failed to show that a miscarriage of justice really occurred. In sum the appellant has failed

to show that the court below mis-applied the correct law and principles of calculation and period of interest applicable and guiding the transaction between the Appellant and the 1st Respondent. It is in the light of the foregoing that issue 2 is resolved in favour of the Respondents. Issues 3, 4, and 5 have been meticulously considered
 B in the lead judgment and resolved against the Appellant. I have carefully considered the said issues and have come to the same conclusion. Consequently the Appeal fails.

As for the cross-appeal, it is only against a part of the decision
 C of the court below. In particular, the part where the Cross Respondent was awarded interest after the contract had expired and after holding that what the Cross-Respondent was entitled to was damages for breach. However it is clear that the Cross Respondent merely claimed the pre-judgment interest upon expiry of the contract and
 D the facility. It did not plead specifically and adduce credible evidence to establish such claim I also hold the view that the cross-Respondent was not entitled to pay pre-judgment interest as awarded by the court below. Exhibits 'T1' 'T2' and 'W' do not contemplate that the same interest being paid on the facilities will continue after expiry dates,
 E until judgment. The parties are bound by the terms and conditions contained in their contract, and cannot act outside these terms and conditions. Neither of the parties to a contract can alter nor read into a written agreement a term which is not embodied in it. The cross-
 F Respondent has not established its entitlement to the prejudgment interest claimed; hence it cannot be entitled to it as awarded. The court below, with due respect, erred in awarding the simple interest on the facilities from the date cause of action arose.

I agree also that all the cross-Respondent was entitled to was
 G the post-judgment interest which is guided by the appropriate Rules of the trial court that is its Civil Procedure Rules. Consequently the cross-appeal succeeds and it is allowed. The award of pre-judgment interest by the court below is set aside not having been specifically pleaded and proved by the Cross-Respondent. In sum, I agree with
 H my learned brother ARIWOOLA JSC that the Appeal lacks merit and it should be dismissed and it is dismissed. The cross appeal succeeds. No order is made as to costs.