

SUPREME COURT OF NIGERIA
FRIDAY 20TH DECEMBER, 2013. SC. 187/2005
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,
K. M. O. KEKERE-EKUN, JJSC**

FIRST BANK OF NIGERIA PLC APPELLANT
AND
ALEXANDER N. OZOKWERE RESPONDENT

BANKING - Equity - Technicality - It is unjust to allow appellant hold unto the money deposited by respondent - On technical ground that appellant was not a privy to - Contract between respondent and the company (H1)

ACTIONS - Party - Necessary party - From the circumstances of the matter - Appellant is a necessary party that is to be bound by decision in the proceedings (H2)

APPEALS - Court - Findings - The trial court's findings of facts are deemed admitted - As there is no appeal against them - And CA was at liberty to rely on same in its decision (H3)

BANKING - Restitution - Basis - From evidence on record and value of goods reflected in Bill of Exchange - Relationship between the parties was defined by \$186,990.00 - Which ought to also define refund by appellant (H4)

JUDGMENTS - Foreign currency - Award - Foreign currency judgments are within the general jurisdiction of courts in Nigeria - Depending on facts of the cases (H5)

BANKING - Restitution - Exchange control documents - Appellant does not need the documents to refund the money to respondent - Since the money has not been paid over to the principal in the transaction (H6)

EVIDENCE - Evaluation - Is the primary responsibility of trial court -

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And once properly done - Appellate court cannot interfere - Unless the decision is perverse and has occasioned miscarriage of justice (H7)

EVIDENCE - Evaluation - Interference - Where credibility of witnesses is not involved - But complaint is against improper evaluation - Appellate court is in as good a position as trial court - To do its own evaluation (H8)

JUDGMENTS - Slip - Effect - It is not every mistake that results in setting aside of judgment on appeal - As mistake must be relevant to issues between parties - And substantial as to lead to miscarriage of justice (H9)

JUDGMENTS - Perverse decision - Meaning - It is one which ignores evidence before court - And which results in miscarriage of justice (H10)

FACTS

By a writ of summons and statement of claim filed before the High Court of Anambra State Onitsha, plaintiff/respondent (as Administrator of the Estate of his brother – Cyprian N. Ozokwere) instituted this action against a Hong Kong company - Goodfit Trading Co. (1st defendant) and 2nd defendant/appellant, claiming for a refund of the sum of US\$186,990.00 or the equivalent in naira at the current exchange rate being money deposited by respondent in appellant's bank for remittance to the company in Hong Kong. Respondent also claimed interest on the said sum of money. Respondent's deceased brother had sometime in 1982, placed an order for motor spare parts from the company for a total sum of US\$186,990.00. It was agreed by the company to sell and deliver the goods in Port Harcourt. However, contrary to the terms of the agreement, the company shipped and delivered goods of a different description i.e. Ladies wear. The company went ahead to deliver to respondent via appellant documents towards the recovery of purchase price of the goods. Respondent deposited the value of the goods (US\$186,990.00) with appellant.

Along the line, respondent discovered that goods shipped and delivered were different from his order and had in fact been im-

pounded as contraband by the Nigerian Customs Service and subsequently sold by public auction. Respondent notified the company and appellant of this development. Respondent thereafter wrote to appellant demanding for a refund of the aforesaid sum of money. Appellant refused to release the money but rather contended that it was not a party to the contract between respondent and the company, and as such should not be made party in the action. Appellant argued that it received a letter from correspondent bank in Hong Kong requesting it to collect the value of the goods. It went on to contend that respondent failed to deliver the necessary Customs documents to effect the transfer of the money. In any case, appellant still withholds the money in issue. At the trial, respondent withdrew against the company on the ground that it was unable to effect service on it. At the end of hearing, the court granted respondent's claim for refund of US\$186,990.00 but struck out the claim for interest. Dissatisfied, appellant appealed to the Court of Appeal, Enugu Division. The court dismissed the appeal and affirmed the judgment of trial court. Dissatisfied further, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right to uphold respondent's claim/allegation of breach of contract of sale/supply (on which his entire case was predicated) despite lack of privity of contract with the appellant and non-joinder of the overseas suppliers against whom the breach was alleged.

2. Whether available pleadings/evidence disclosed that the respondent on record deposited US Dollar Currency with appellant bank as specifically claimed in his principal relief to warrant entry of judgment for US\$186,990.00 which the Court of Appeal upheld as "money had and received."

3. Whether the judgment in US Dollar Currency is sustainable despite uncontroverted hard evidence that the deposit sought to be "refunded" was made in naira current and that requisite documents were not furnished to enable its conversion to or remittance in US Dollar Currency.

4. Whether the Court of Appeal was influenced by unpleaded, extraneous, hasty, speculative or prejudicial considerations/conclusions in its evaluation of the issues/evidence presented before it, resulting in miscarriage of justice against the appellant.

HELD (Unanimously dismissing the appeal per **ONNOGHEN JSC**)

BANKING - Equity - Technicality

1. It is in evidence which evidence is also not disputed that the purchase price of \$186,990.00 paid by the respondent for the sale of Motor Spare Parts by description, has not been remitted to the correspondent bank for the benefit of the drawer due to the failure of the goods supplied by Goodfit Trading Company Limited to meet the description of the goods ordered.

Also not in dispute is the fact that appellant was, following the failure to remit the sum to the correspondent bank for the benefit of the drawer, instructed to pay the naira equivalent of the money into a specific account with a Nigerian bank in Nigeria which appellant also failed to comply with.

It is not also disputed that respondent made demand on the sum paid for the goods prior to any payment of the proceeds to the principal following the discovery of the defect in the goods supplied.

In the circumstances of this case, it is very unconscionable to allow the appellant to continue to hold unto the money, which no one, except respondent, has laid claim to, on a technical ground that appellant was not a privy to the contract between respondent and Goodfit Trading Company Limited and as such the equitable principles of “money had and received” does not apply to compel appellant to repay the money paid by respondent to appellant for a consideration which has totally failed. The principle is an equitable remedy which is the conscience of the law. On what basis should appellant be allowed to continue to unjustly enrich itself at the expense of the respondent who made the deposit for goods he never received? I hold the view that this is a species of action where the form does not really matter but the substance.

(p. 4219 H)

ACTIONS - Party - Necessary party

2. On the sub-issue of non-joinder of Goodfit Trading Company Limited in the action, it is settled law that there is a distinction between the desire of making a person a party to a suit and the necessity of making him a party. For a person to be a party to an action, he must be a necessary party so as to be bound by the decision in the proceedings. B

If the court can decide the claim of the plaintiff with the parties before it, it will proceed to do just that irrespective of the fact that the relief sought in the action might affect a person not joined. C

In the instant case, appellant received money from the respondent for a consideration which failed and refused even to comply with the instructions of the party on whose behalf it received same and still holds unto the money. It is very clear in the circumstances that only appellant is a necessary party in an action instituted by the respondent to claim the money paid in the circumstances of this case. (p. 4221 A) D

APPEALS - Court - Findings E

3. There is also the sub-issue dealing with the speculative nature of the holding by the lower court that when it was not possible to effect service on Good fit Trading Company Limited, the said company was dropped from the proceedings. This sub-issue is not worthy of any consideration as what is complained of is not a finding of fact made by the lower court but a confirmation of same by the trial court. F

At page 93 of the record, the trial judge, in his judgment delivered on 26th February, 2001 made the following findings of facts:- G

“The plaintiff had sued both Goodfit Trading Company Limited and the defendant who acted as the collecting banker for a Bill of Exchange drawn by Goodfit Trading Company Limited on the plaintiff for the sum of US\$186,990.00. When it was not possible to effect service of process on Goodfit Trading Company Limited even by substituted service, the said Goodfit Trading Company Limited was dropped and the plaintiff pursued the action against the defendant alone”. H

I agree with the submission of learned senior counsel for the respondent that there was no appeal against the above specific finding of facts by the trial court. It follows therefore that the said findings are deemed admitted and as such the lower court was at liberty to rely on same in its decision. I hold the considered view that the reliance of the lower court on the said findings cannot in law be described, in the circumstance of this case, as speculative. (p. 4221 E)

BANKING - Restitution - Basis

4. I have carefully considered the issues under consideration. To my mind, there is no dispute as to the value of the goods stated in the Bill of Exchange sent to appellant for collection. It is US Dollars \$186,990.00. The lower courts found and held that respondent paid that value to the appellant for onward transmission to the principal.

To me, it does not matter whether the value of US Dollars \$186,990.00 at the time was N128,198.28 which appellant claimed was the currency in which the payment was made or US Dollars \$186,990.00. What matters is the fact that the value of the goods ordered as reflected on the Bill of Exchange Exhibit P4 sent to appellant for collection is US Dollars \$186,990.00 and that value was collected by appellant.

I hold the considered view that the reliance of the lower court on the said findings cannot in law be described, in the circumstance of this case, as speculative.

I agree with the submission of learned counsel for respondent that from the evidence on record, the relationship between the parties was defined by the sum of \$186,990.00 which ought to also define the refund or restitution, by the appellant. (pp. 4224 B/4225 C)

JUDGMENTS - Foreign currency - Award

5. It is however settled law that foreign currency judgments are within the general jurisdiction of the courts of law in Nigeria depending on the facts of the cases. (p. 4225 D)

BANKING - Restitution - Exchange control documents

6. The next sub-issue is whether it was the non production of the exchange control documents that prevented the remittance of the value of the goods collected by appellant to their principal, as contended by appellant. The lower courts found that it did not. I tend to agree with them. Evidence on record which was believed by the trial court and affirmed by the lower court is that the said documents are documents which would have been issued by the Department of Customs and Excise upon the clearance of the goods by the respondent but since the goods were seized and sold by public auction by the Department of Customs and Excise for being contraband, it became impossible to produce the said documents. In any event the contract of sale by description between the respondent and Goodfit Trading Company Limited had been repudiated to the knowledge of appellant following the supply/shipment of different goods from those ordered thereby aborting the need to remit the value of the goods to the correspondent bank for the benefit of the Goodfit Trading Company Limited. It would be absurd for one to think that appellant needs those documents to enable it make a refund of the money paid by respondent to him since it has not paid it over to its principal in the transaction. Or does it mean that without the production of those documents appellant is entitled to continue to keep the money? If so, for whom? (p. 4225 E)

EVIDENCE - Evaluation

7. It is settled law that evaluation of evidence is the primary responsibility of the trial court. Once there is proper evaluation of evidence by a lower court an appellate court has no business interfering unless the decision is perverse and has occasioned a miscarriage of justice. (p. 4227 A)

EVIDENCE - Evaluation - Interference

8. Where, however, evaluation of evidence does not involve the credibility of witnesses but the complaint is against the non-evaluation or improper evaluation of evidence by the trial/lower court, an appellate court is in as good a position as the

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trial lower court to do its own evaluation. (p. 4227 B)

JUDGMENTS - Slip - Effect

9. It is settled law that it is not every mistake made by the lower court that will result in the judgment of that court being set aside on appeal. For the mistake to be considered as worthy of that effect, it must be relevant to the issue(s) in contention between the parties and substantial as to lead to a miscarriage of justice.

In the instant case, it is immaterial that the lower court stated that appellant disobeyed the instructions of the correspondent bank and withheld the fund paid by respondent as the fact remains that appellant has not paid or remitted the \$186,990.00 dollars paid by respondent neither has it made a refund of same to the respondent who has demanded same on account of the failure of consideration for which the money was initially paid by the respondent. (p. 4227 G)

JUDGMENTS - Perverse decision - Meaning

10. I do not consider the fact that the lower court, by accepting the submission of counsel for one of the parties, it makes the conclusion arrived therein perverse. A perverse decision is one which ignores the evidence before the court and which results in or amounts to a miscarriage of justice. (p. 4228 B)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. Quantum meruit – Meaning of

G What is quantum meruit?

Blacks Law Dictionary, 8th Ed. at page 1276 defines the term thus:-

H *“1. The reasonable value of service; damage, awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi contractual relationship.*

2. A claim or right of action for the reasonable value of services rendered

3. At common law, a count in an assumpsit action to recover payment for services tendered to another person.

‘Quantum meruit is still used today as an equitable remedy to provide restitution for unjust enrichment. It is often pleaded as an alternative claim in a breach of contract case so that the plaintiff can recover even if the contract is unenforceable’. (p. 4218 H)

2. Unjust enrichment – Meaning of

B

What then is “Unjust Enrichment”

Blacks Law Dictionary, 8th Edition defines the term at pages 1573 - 574 as follows:

“1. The retention of a benefit conferred by another without offering compensation, in circumstance where compensation is reasonably expected-

2. A benefit obtained from another, not intended as a gift and not legally justifiable, for to which the beneficiary must make restitution or recompense.

D

3. The area of law dealing with unjustifiable benefits of this kind’. (p. 4219 C)

REPRESENTATION

A. B. Anachebe, SAN with Messrs F. C. Anachebe (Mrs.); Charles Jibuaku; S. Muhammed and Uchenna Uche, for the Appellant
Ben Osaka Esq., for the Respondent

CASES REFERRED TO

Oghene & Sons Ltd v. Amoruwa (1986) 3 NWLR (pt. 32) 856

F

Peenock Inv. Ltd v. Hotel Presidential (1982) 12 SC 1

Lawal v. P.G.P. (Nig) Ltd (2011) 17 NWLR (pt. 742) 393

Bank of Scotland v. Dominion Bank (1891) AC 592

Green v. Green (1987) 7 SCNJ 255

G

Dawodu v. Majolagbe (2001) 3 NWLR (pt. 703) 234

APUN v. NNDC (1972) 2 SC 33

Koyo v. UBA (1997) 1 NWLR (pt. 481) 251

Balogun v. Agbola (1974) 1 ALL NLR (pt. 2) 66

Atolagbe v. Shorun (1985) 1 NWLR (pt. 2) 360

H

First Bank of Nigeria Ltd. v. A.P. Ltd (1996) 4 NWLR (pt. 443) 448

Oyedeji Akanbi (Mogaji) & ors v. Fabunmi (1986) 2 SC 431

BOOKS REFERRED TO

Blacks Law Dictionary 8th Ed. pp. 1276, 1573 – 574

Bowstead on Agency 12th Ed. Art. 124

LEAD JUDGMENT BY ONNOGHEN JSC

B This is an appeal against the judgment of the Court of Appeal,
Holden at Enugu in appeal no.CA/E/182/2001 delivered on the 17th
day of May, 2005 in which the court dismissed the appeal of the
appellant against the judgment of the High Court of Anambra State,
C Holden at Onitsha in suit no.O/410/88 delivered on the 26th day of
February, 2001 in which the court entered judgment in favour of the
respondent, then plaintiff.

In paragraph 17(a) and (b) of the Further Amended State-
ment of Claim, the plaintiff/respondent claimed against the appel-
D lant/defendant as follows: -

*“(a) Refund of the sum of US.\$186,990.00 or the equivalent
in Naira, being money deposited by plaintiff in the defendant bank
for remittance to Goodfit Trading Company Limited.*

*(b) Interest at the current rate of interest per annum on the
E total sum of US.\$186,990.00 or the equivalent in Naira from the
18th February, 1983 till date of judgment in this suit and thereafter at
5% per annum until the whole amount is fully paid”*

The judgment of the trial court on the above claims is in the
F following terms:

*“On the whole, the plaintiff’s action succeeds, I give judgment
in favour of the plaintiff against the defendant for the sum of
US\$186,990.00. There is no evidence as to the rate of interest claimed.
The court cannot act on mere conjecture and is not allowed to speculate
G as to what the prevailing rate of interest would be. This head of claim
fails and it is hereby struck out”.*

Appellant/defendant was dissatisfied with the above judgment
and consequently appealed against same to the Court of Appeal.
The issues raised by appellant for the determination of the appeal are
H as follows:-

*“1. Should the judgment against the appellant be sustained
when the appellant was not a party and/or agent to the contract of
the sales or supply of goods moreso, when the said supplier of the
goods was not made a party to the action. (Arising from Grounds 1*

and 2).

2. *Whether it was right for the court below to hold that the appellant was liable to refund the payment made by the respondent and*

If the answer to the above question is in the positive, has the appellant liable to refund the said sum in foreign currency as opposed to local currency (Naira). (Arising from Grounds 3 and 4). B

3. *Did the trial court, properly evaluate the evidence led in this suit in coming to the judgment it reached against the appellant? (Arising from Ground 5)?"* C

It is important to note that the lower court resolved the issues against appellant resulting in the instant appeal, the issues for the determination of which have been formulated by learned senior counsel for appellant, A. BEN ANACHEBE, SAN in the appellant brief of argument deemed filed on 28th November, 2007, as follows:- D

"1. Whether the Court of Appeal was right to uphold respondent's claim/allegation of breach of contract of sale/supply (on which his entire case was predicated) despite lack of privity of contract with the appellant and non-joinder of the overseas suppliers against whom the breach was alleged. (Grounds I and II). E

2. Whether available pleadings/evidence disclosed that the respondent on record deposited US Dollar Currency with appellant bank as specifically claimed in his principal relief to warrant entry of judgment for US\$186,990.00 which the Court of Appeal upheld as "money had and received." (Grounds V and VII) F

3. Whether the judgment in US Dollar Currency is sustainable despite uncontroverted hard evidence that the deposit sought to be "refunded" was made in naira current and that requisite documents were not furnished to enable its conversion to or remittance in US Dollar Currency. (Grounds III and IV). G

4. Whether the Court of Appeal was influenced by unpleaded, extraneous, hasty, speculative or prejudicial considerations/conclusions in its evaluation of the issues/evidence presented before it, resulting in miscarriage of justice against the appellant. (Grounds VIII, IX and X)?" H

On his part, learned senior counsel for the respondent, DR. ONYECHI IKPEAZU, SAN, in the brief of argument deemed filed also on 28th November, 2007 formulated a single issue for the deter-

mination of the appeal, as follows:-

“Whether the Court of Appeal was right in finding the appellant liable to refund the respondent the sum of \$186,990.00 paid on a bill of exchange and received by appellant on behalf of Goodfit Trading Company for a consideration that totally failed”.

B However, the reason why the Court of Appeal resolved the issues before it against the appellant are summarized in the judgment of that court at pages 216 - 217 of the record as follows:-

C *“(i) Appellant did not raise any credit for the respondent or any other person to towards execution of the contract between the drawer and drawee of the bill of exchange and it was not pleaded that any other institution extended any credit towards the transaction.*

D *(ii) A foreign company who is the beneficiary of the bill of exchange, sold and supplied goods of a different description from that which was bargained for and which were eventually auctioned by the Department of Customs and Excise for the reason that they were contraband goods.*

E *(iii) The respondent promptly notified the appellant of the breach by the seller before the appellant court transmit the value of the bill of exchange to the foreign seller, but the appellant persistently called the (sic) exchange control documents so as to remit the money.*

F *(iv) The appellant in spite of the instruction by the corresponding bank to pay the proceeds into their Nigerian Account failed to do so for no just cause.*

G *(v) For a period of fifteen (15) years which is outside the limitation period, neither the foreign supplier nor the correspondent bank has done anything to claim the proceeds of the bill of exchange and cannot as a matter of law, do anything towards realizing the proceeds of the bill.*

(vi) The appellant meanwhile retains the money and insists on so withholding it for no apparent reason, having abandoned the instructions of the correspondent bank.

H *(vii) For the entire duration, the respondent was denied the use of the value of \$186,990.00 while at the same time was denied the benefit of the bargain entered into for the purpose of resale of the commodities.*

(viii) Respondents did not claim damages for breach of con-

tract against the appellant. The court below did not award any damages against appellant, and not even the interest claimed on the value of the bill of exchange was awarded.

(ix) All the lower court did was order the appellant to return the value of the bill of exchange to the same party who made the payment, when no other person has presented any viable or sustainable claim for same”. B

The facts of the case, which are essentially not disputed, include the following:-

Sometime in 1982, the deceased brother of the respondent by name CYPRIAN OZOKWERE placed an order for the supply of motor spare parts valued at \$186,990.00 from Goodfit Trading Company Limited of Hong Kong payable under a D/P i.e. Document against Payment, contract. It was agreed that payment for the said goods would be made through appellant. C D

The transaction was for sale of the goods by description. It is the case of the respondent that Goodfit Trading Company Limited shipped and delivered goods of different description, namely, ladies wears, in breach of its contract with the respondent.

On or about 18th February, 1983, Goodfit Trading Company Limited delivered to the respondent through appellant Bill of Lading (which is Exhibit P3), and Bill of Exchange No.DP/GF/S037/82 dated 11th December, 1982 together with the “*Remittance for collection and/or Acceptance Order*”, Exhibit P4 and P4A, as a result of which the respondent paid a total price of the goods of \$186,990.00 as stated in the invoice, to appellant. The relevant documents indicated that the goods ordered were FEBI Motor Spare Parts. Rather than ship/supply the goods so ordered, Goodfit Trading Company Ltd shipped contraband goods which were confiscated and sold by the Department of Customs and Excise. Appellant was duly notified. The respondent then demanded a refund of the sum paid to appellant. E F G

It is the case of appellant that it received a letter of instruction from a correspondent bank, Hong Kong and Shanghai Banking Corporation of 245 Lai Chi Kok Road, Shamshuipo Kowloon, Hong Kong, together with an attached Bill of Exchange requesting it to collect the value disclosed in the Bill of Exchange; the respondent paid the sum of N128,198.28k the then value of \$186,990.00 as a result of which appellant become obligated, under international trading H

customs and letter of instruction to transfer the money through the correspondent bank, and that the respondent was under obligation to deliver to the appellant customs Bill of Entry, Tally Sheet, Customs and Excise Payment Schedule, Tax Clearance Certificate and Form M to facilitate the transfer of the funds which the respondent failed to do.

In arguing issue 1, learned senior counsel submitted that the foundation of the claim of the respondent for the refund of the sum paid to appellant is the allegation of breach of contract of sale by the overseas suppliers, Goodfit Trading Company Limited of Hong Kong, resulting from non supply of the exact goods ordered; that appellant is not privy to that contract and can therefore not be liable to any breach thereof; that breach of the contract by Goodfit Trading Company Limited of Hong Kong cannot be assumed as same has not been proved particularly when the said Goodfit Trading Company Limited is not a party to the action; that it was wrong to have struck out the name of Goodfit Trading Company Limited when there is no evidence on record that substituted service was ordered on Goodfit Trading Company Ltd and same was effected; that the action of the respondent at the trial court was fatally defective without the joinder of Goodfit Trading Company Ltd, who allegedly committed the alleged breach of contract of sale, relying on *D. O. Oghene & Sons Ltd vs Amoruwa* (1986) 3 NWLR (pt.32) 856; *Peenock Inv. Ltd v. Hotel Presidential* (1982) 12 S.C. 1; *Lawal v. P.G.P. (Nig) Ltd* (2011) 17 NWLR (Pt.742) 393. It is the further submission of learned senior counsel that the lower court was in error in holding appellant liable on the equitable principle of “*money had and received*” as the application of that principle by the court was based on speculation and prejudicial conclusions in that the said principles can only apply to or are applicable between parties to a failed contract, which senior counsel opined, is the contract between respondent and Goodfit Trading Company Ltd; that since appellant is not privy to that contract, the equitable remedy is inapplicable to appellant. Finally, learned senior counsel urged the court to resolve the issue in favour of appellant.

In his reaction, learned senior counsel for respondent referred the court to paragraph 16 of the Further Amended Statement of Claim and stated that it is the pivot of the claim of the respondent in this matter; that the amount paid on the Bill of Exchange drawn on

the appellant is still with appellant, relying on Exhibit D11 and the evidence of DW1 under cross examination at pages 24 - 29 and 62 even when Exhibit D7 from Goodfit Trading Company Limited instructed appellant to transfer the money into its Nigerian bank account that in the instant case, the non joinder of Goodfit Trading Company Limited is not fatal to the claim of the respondent as the matter can be adjudicated without their presence; that the action is for money had and received as the respondent did not claim any damages for breach of contract which would have made the non joinder of Goodfit Trading Company Limited fatal to the claim of the respondent; that respondent cannot sue Goodfit Trading Company Limited for money had and received as it never received the money; that the cause of action for money had and received for consideration that failed is founded on the equitable doctrine of quantum meruit with the objections of eliminating the concept of unjust enrichment.

It is the further submission of senior counsel that Exhibit P4 discloses that the Bill of Exchange was drawn by Goodfit Trading Company Limited and remitted through the Hong Kong and Shanghai Banking Corporation to the appellant for collection in Nigeria, as the collecting banker; that the correspondent banker or the remitting banker is therefore an agent of the drawer of the Bill of Exchange (Goodfit Trading Company Limited, while appellant being the collecting bank, is an agent of the remitting bank and a sub-agent of the said drawer. Relying on Article 124 of Bowstead on Agency, 12th Edition, learned senior counsel submitted that the respondent, in the circumstances of the facts of this case is entitled to recover the money so paid to appellant from appellant particularly as appellant is yet to part with possession of same to the principal; that once the goods supplied under the contract of sale by description failed to meet the description, the buyer is automatically entitled to repudiate the contract and claim a refund, as in this case and that appellant as an agent of the correspondent banker, and by extension an agent of the drawer of the bill of exchange, can only be liable where a bona fide demand was made prior to payment of the proceeds to the principal; that as the instance case the lower courts concurrently found, demand was duly made by the respondent, following the discovery of the defect in the goods supplied, for refund of the money and that appellant

did not, neither has it paid the money to the principal neither can the principal recover the money as such a cause of action would be caught by limitation law; appellant even refused to comply with the demand of the principal to pay the local currency into the account of their Nigerian banker; that an agent who refuses to comply with the express instructions of the principal, as in this case, cannot in the same vein hide under the protection of the principal, relying on *Bank of Scotland vs Dominion Bank (1891) A.C 592*; that Goodfit Trading Company Limited was not a necessary party having regards to the cause of action of the respondent and as such their non-joinder is not fatal to the case of the respondent.

Learned senior counsel then urged the court to resolve the issue against appellant.

The main contention of appellant in the issue under consideration is that the principle of “*money had and received*” for a consideration that has failed applies in quasi-contract situations and only between the parties to the failed contract, i.e. the respondent and Goodfit Trading Company Limited and not appellant who is not a party to that contract. Appellant has, however not denied receiving the money in question from respondent on behalf of the correspondent bank for the benefit of Goodfit Trading Company Limited under a contract of sale of goods by description which failed.

Also not disputed is the fact that appellant still retains the money so paid in its possession haven not remitted it to the correspondent bank nor paid same in local currency to a designated Nigerian bank for the benefit of Goodfit Trading Company Limited.

The question is whether it is true that the cause of action in this case is founded on contract. The answer is clearly in the negative as concurrently found by lower courts. It follows that the submission on privity of contract between the parties to this action is not relevant.

It is however accepted by both parties that a cause of action for money had and received for total failure of consideration is founded on the equitable doctrine of quantum meruit which principle is designed to eliminate the concept of unjust enrichment.

What is quantum meruit?

Blacks Law Dictionary, 8th Ed. at page 1276 defines the term thus:-

“1. The reasonable value of service; damage, awarded in an

amount considered reasonable to compensate a person who has rendered services in a quasi contractual relationship.

2. A claim or right of action for the reasonable value of services rendered

3. At common law, a count in an assumpsit action to recover payment for services tendered to another person. B

‘Quantum meruit is still used today as an equitable remedy to provide restitution for unjust enrichment. It is often pleaded as an alternative claim in a breach of contract case so that the plaintiff can recover even if the contract is unenforceable’. C

What then is “Unjust Enrichment”

Blacks Law Dictionary, 8th Edition defines the term at pages 1573 - 574 as follows:

“1. The retention of a benefit conferred by another without offering compensation, in circumstance where compensation is reasonably expected- D

2. A benefit obtained from another, not intended as a gift and not legally justifiable, for to which the beneficiary must make restitution or recompense.

3. The area of law dealing with unjustifiable benefits of this kind”. E

A combined reading of the two concepts show clearly that their application is not limited to cases of contract, the overriding design being to discourage unjust enrichment which may arise from facts not arising from contract, as in the case in the instant case, where Exhibit P4 discloses that the Bill of Exchange was drawn by Goodfit Trading Company Limited as the drawer, and remitted through the Hong Kong and Shanghai Banking Corporation to the appellant for collection in Nigeria, as the collecting banker. In the circumstance and as found by the lower courts, the correspondent banker or remitting banker, is an agent of the drawer of the bill i.e. Goodfit Trading Company Limited, while appellant, as collecting bank, is an agent of the remitting bank as well as a sub-agent, of Goodfit Trading Company Limited, the drawer of the said Bill of Exchange. F G H

It is in evidence which evidence is also not disputed that the purchase price of \$186,990.00 paid by the respondent for the sale of Motor Spare Parts by description, has not been remitted to the correspondent bank for the benefit of the drawer

due to the failure of the goods supplied by Goodfit Trading Company Limited to meet the description of the goods ordered.

Also not in dispute is the fact that appellant was, following the failure to remit the sum to the correspondent bank for the benefit of the drawer, instructed to pay the naira equivalent of the money into a specific account with a Nigerian bank in Nigeria which appellant also failed to comply with.

In Bowstead on Agency, 12th Ed. Article 124 thereof, the learned author stated as follows:-

“Where money is paid to an agent for the use of his principal, and the circumstances of the case are such that the person paying the money is entitled to recover it back, the agent is personally liable to repay such money in the following cases namely:-

(c) where the money is paid under a mistake of fact, or under duress, or in consequence of some fraud or wrongful act, and repayment is demanded of the agent, or notice is given to him of the intention of the payer to demand payment, before he has in good faith said the money over to, or otherwise dealt to his detriment with the principal in belief that the payment was a good and valid payment”. Emphasis supplied.

It is not also disputed that respondent made demand on the sum paid for the goods prior to any payment of the proceeds to the principal following the discovery of the defect in the goods supplied.

In the circumstances of this case, it is very unconscionable to allow the appellant to continue to hold unto the money, which no one, except respondent, has laid claim to, on a technical ground that appellant was not a party to the contract between respondent and Goodfit Trading Company Limited and as such the equitable principles of “money had and received” does not apply to compel appellant to repay the money paid by respondent to appellant for a consideration which has totally failed. The principle is an equitable remedy which is the conscience of the law. On what basis should appellant be allowed to continue to unjustly enrich itself at the expense of the respondent who made the deposit for goods he never received? I hold the view that this is a species of action where

the form does not really matter but the substance.

On the sub-issue of non-joinder of Goodfit Trading Company Limited in the action, it is settled law that there is a distinction between the desire of making a person a party to a suit and the necessity of making him a party. For a person to be a party to an action, he must be a necessary party so as to be bound by the decision in the proceedings - See Peenok vs Hotel Presidential (1983) 4 NCLR 122. If the court can decide the claim of the plaintiff with the parties before it, it will proceed to do just that irrespective of the fact that the relief sought in the action might affect a person not joined - see Settlement Corp. (1969) 1 WLR 1664; Green vs Green (1987) 7 SCNJ 255.

In the instant case, appellant received money from the respondent for a consideration which failed and refused even to comply with the instructions of the party on whose behalf it received same and still holds unto the money. It is very clear in the circumstances that only appellant is a necessary party in an action instituted by the respondent to claim the money paid in the circumstances of this case.

There is also the sub-issue dealing with the speculative nature of the holding by the lower court that when it was not possible to effect service on Good fit Trading Company Limited, the said company was dropped from the proceedings. This sub-issue is not worthy of any consideration as what is complained of is not a finding of fact made by the lower court but a confirmation of same by the trial court.

At page 93 of the record, the trial judge, in his judgment delivered on 26th February, 2001 made the following findings of facts:-

“The plaintiff had sued both Goodfit Trading Company Limited and the defendant who acted as the collecting banker for a Bill of Exchange drawn by Goodfit Trading Company Limited on the plaintiff for the sum of US\$186,990.00. When it was not possible to effect service of process on Goodfit Trading Company Limited even by substituted service, the said Goodfit Trading Company Limited was dropped and the plaintiff pursued the action against the defendant alone”.

I agree with the submission of learned senior counsel

for the respondent that there was no appeal against the above specific finding of facts by the trial court. It follows therefore that the said findings are deemed admitted and as such the lower court was at liberty to rely on same in its decision. I hold the considered view that the reliance of the lower court on the said findings cannot in law be described, in the circumstance of this case, as speculative.

On issues 2 and 3, which learned senior counsel for appellant argued together, it is his contention that it has not been proved that respondent deposited the money for transfer in US dollars but that it was in naira; that PW1's evidence in that respect is based on speculation as he was not involved in the deposit of the money with the appellant; that the court should evaluate the evidence adduced by both parties; that it is normal for an exporter's invoice or Bill of Exchange to be in the currency of the exporting country or the exporter's currency of choice while it is expected of the Nigerian importer, to pay naira for purposes of purchasing and remitting the dollar or preferred currency; that the court should take judicial notice of the law and fiscal policy of Government at the time of transaction which required all importers to submit exchange control documents (including form M) before the Central Bank can grant its cover convert naira and remit the required foreign exchange overseas; that appellant tendered undisputed payment schedule, Exhibit D1 which shows that the deposit was in naira currency and relied on respondent Exhibits P7-12 showing that appellant severally requested the respondent to furnish it with exchange control documents to facilitate the transaction which respondent failed to oblige; that the lower court was in error in preferring the oral evidence of respondent as against documentary evidence before the court, relying on *Dawodu v. Majolagbe* (2001) 3 NWLR (pt.703) 234; *APUN v. NNDC* (1972) 2 SC 33.

It is the further submission of counsel that the respondent did not tender a copy of the deposit slip with which the alleged dollar deposits was made; that Exhibits D3, D4, D5, D6, D7, D11 also prove the currency in which the deposit was made; that despite the above the lower court found it convenient to rely on the instructions in Exhibit P4A to reach the verdict it did; that Exhibit P4A was meant to guide appellant in the receipt of deposit on behalf of the correspon-

dent bank hence the respondent cannot take advantage of it as it was not made for his benefit; that the evaluations made by the lower court is perverse particularly as the instructions on Exhibit P4A was never pleaded; that the lower courts were in error in adding to the relief of the respondent when respondent sought a “refund” while the courts based their judgments on a claim for “*money had and received*”, thereby adding to the claim of the respondent. B

On his part, learned senior counsel for the respondent stated that PW1 gave evidence and the trial judge did find that payment for the bill was made in United States Dollar as shown on the Bill of Exchange and that if that were not the case, appellant would not have released the shipping documents to the respondent; that the lower court found no reason to disturb the finding as same was not perverse; that the account in Exhibit P4 containing the instructions shows the amount as \$186,990.00 and appellant was instructed to follow the instructions marked x; that what respondent paid was the value shown on the Bill of Exchange which is \$186,990.00 and it is irrelevant in what currency the value was purchased; that acceptance of payment in local currency was made conditional on an undertaking by the respondent to pay any difference in fluctuation; that it is only the sum of \$186,990.00 or its equivalent in naira that will adequately compensate the respondent or put him in the same position he was at the inception of the transaction; that it was the sum of \$186,990.00 that defined the relationship between the party and should also define the refund being claimed. C D E F

It is the further contention of counsel that the exchange control documents are documents which could have been issued by the Department of Customs and Excise had the goods been regularly cleared by the respondent; that the documents could not be produced because the goods were seized and sold by public auction for being contraband goods, relying on Exhibit P13 and P14; that the documents would have enabled appellant to remit the sum of \$186,990.00 collected from the respondent to the correspondent bank and the drawer of the Bill of Exchange - Goodfit Trading Company Limited; that to hold respondent to the production of those documents is to demand the impossible. G H

It is also the contention of counsel that Exhibits D5, D6 and D7, letters written to appellant by the correspondent bank are irrel-

evant as same are self serving and are not written by a person with personal knowledge or who took part in the transaction between appellant and respondent; that the letters were reactions for stipulations in Exhibits D4, D9, and D10 written by appellant; that on the other hand the learned trial judge observed both PW1 and DW2 when they testified on the issue and found as a fact that both parties engaged in the transaction based on the value disclosed on the Bill of Exchange, which is \$186,990.00; that it is immaterial whether the respondent took part in the payment of the money to appellant.

I have carefully considered the issues under consideration. To my mind, there is no dispute as to the value of the goods stated in the Bill of Exchange sent to appellant for collection. It is US Dollars \$186,990.00. The lower courts found and held that respondent paid that value to the appellant for onward transmission to the principal.

To me, it does not matter whether the value of US Dollars \$186,990.00 at the time was N128,198.28 which appellant claimed was the currency in which the payment was made or US Dollars \$186,990.00. What matters is the fact that the value of the goods ordered as reflected on the Bill of Exchange Exhibit P4 sent to appellant for collection is US Dollars \$186,990.00 and that value was collected by appellant. So when the respondent claimed as in paragraph 17(a) of the Further Amended Statement of Claim for:-

“Refund of the sum of US \$186,990.00 or the equivalent in Naira, being money deposited by plaintiff in the defendant bank for remittance, to Goodfit Trading Company Limited”, he is simply asking for a refund of the value of \$186,990.00 or its equivalent in naira simpliciter. It does not matter whether that value was paid for in US Dollars or Naira or Pounds Sterling or Ghana Cedis or whatever!!

I hold the view that the lower courts’ holding that payment of the value of the Bill of Exchange was in dollars is not perverse as same is supported by Exhibit 8 and the testimony of DW1 under cross examination as follows:-

“Q. Look at Exhibit 8 was it your letter to your correspondent bank?

A, Yes

Q. What was the sum which you confirmed to the correspon-

dent bank that was paid?

A. We confirmed to the correspondent bank that we collected the value of the goods shown on the Bill of Exchange.

Q. Read Exhibit D8.

A. Exhibit D8 read out?

A. From the contents of the letter is it true that what you confirmed to the correspondent bank as paid was \$186,990 00? B

A. Yes it was the amount we collected in local currency.

A Is there any mention of local currency in Exhibit D8?

A. There is no mention of local currency in Exhibit D8" C

I agree with the submission of learned counsel for respondent that from the evidence on record, the relationship between the parties was defined by the sum of \$186,990.00 which ought to also define the refund or restitution, by the appellant. D

It is however settled law that foreign currency judgments are within the general jurisdiction of the courts of law in Nigeria depending on the facts of the cases. See Koyo vs UBA (1997) 1 NWLR (Pt.481) 251; Broadline Enterprises vs Monthly Maritime Corp. (1995) 9 NWLR (Pt. 417) 1 at 30. E

The next sub-issue is whether it was the non production of the exchange control documents that prevented the remittance of the value of the goods collected by appellant to their principal, as contended by appellant. The lower courts found that it did not. I tend to agree with them. Evidence on record which was believed by the trial court and affirmed by the lower court is that the said documents are documents which would have been issued by the Department of Customs and Excise upon the clearance of the goods by the respondent but since the goods were seized and sold by public auction by the Department of Customs and Excise for being contraband, it became impossible to produce the said documents. In any event the contract of sale by description between the respondent and Goodfit Trading Company Limited had been repudiated to the knowledge of appellant following the supply/shipment of different goods from those ordered thereby aborting the need to remit the value of the goods to the correspondent bank for the benefit of the Goodfit Trading Company Limited. It would F G H

be absurd for one to think that appellant needs those documents to enable it make a refund of the money paid by respondent to him since it has not paid it over to its principal in the transaction. Or does it mean that without the production of those documents appellant is entitled to continue to keep the money? If so, for whom?

I therefore find no merit in issues 2 and 3 as argued together by appellant and consequently resolve same against appellant.

On issue no. 4, learned senior counsel for appellant submitted trial the evaluation of the Court of Appeal prior to its verdict appears to have been guided by arguments canvassed in the respondent brief before that court, instead of the evidence on record; that it is settled law that address of counsel is no substitute for evidence. An instance of the error is said to be the statement of the court at pages 209 and 212 of the record regarding the applicability of the statute of limitation to the recovery of the value of the Bill of Exchange in the case, which counsel submitted are conjectures which materially affected the mind of the court and occasioned a miscarriage of justice; that the conclusion was not borne out of the pleadings or issues presented for determination before the court; that the conclusion was perverse and prejudicial to the appellant. Learned counsel concludes by urging the court to re-evaluate the evidence, set aside the findings or conclusions complained of and allow the appeal.

On his part, learned senior counsel for respondent restated the facts of the case and the evidence adduced at the trial. It is the contention of counsel that the transaction involved in this case was a D/P meaning “*document against payment*” which in effect means that documents will be delivered upon payment of the amount disclosed on the Bill of Exchange, as pleaded by both parties; that the action is for refund of money paid to appellant for a consideration that failed; that appellant refused to transmit the money to the principal neither did it pay it into a Nigerian bank as instructed by the principal; that exchange control documents are not needed for payment into Nigerian bank; that the issue of limitation law is a matter of law which the courts can take cognizance of as a party is not required to plead law, particularly as the period of limitation was not being set out as a defence to the action; that the Court of Appeal did evaluate Exh. PW4 and arrived at conclusion as contained in the judgment.

It is settled law that evaluation of evidence is the primary responsibility of the trial court. Once there is proper evaluation of evidence by a lower court an appellate court has no business interfering unless the decision is perverse and has occasioned a miscarriage of justice. See Balogun vs Agbola (1974) 1 ALL NLR (Pt. 2) 66. ***Where, however, evaluation of evidence does not involve the credibility of witnesses but the complaint is against the non-evaluation or improper evaluation of evidence by the trial/lower court, an appellate court is in as good a position as the trial lower court to do its own evaluation.***

I have carefully gone through the record and the evidence adduced in support of the contending positions of the parties. It should be noted that the case of the respondent is simply a claim for the refund of a sum of \$186,990.00 paid to appellant for the benefit of Goodfit Trading Company Limited for a consideration that failed. Also to be noted is the fact that it is not the case of appellant that it paid the money over to Goodfit Trading Company Limited or correspondent bank. In fact, evidence abound on record that money in question is still in the possession of appellant.

These are some of the facts that ground the cause of action of the respondent, and there is evidence on record to support them.

It is clear from the record that the mention of statute of limitation in judgment of the lower court which senior counsel for appellant considers to be speculative has nothing whatsoever to do with the case of the parties as pleaded and canvassed before the court. It is not relevant to the determination of the action as same was a statement made by the way and has not resulted in any miscarriage of justice.

It is settled law that it is not every mistake made by the lower court that will result in the judgment of that court being set aside on appeal. For the mistake to be considered as worthy of that effect, it must be relevant to the issue(s) in contention between the parties and substantial as to lead to a miscarriage of justice.

In the instant case, it is immaterial that the lower court stated that appellant disobeyed the instructions of the correspondent bank and withheld the fund paid by respondent as

the fact remains that appellant has not paid or remitted the \$186,990.00 dollars paid by respondent neither has it made a refund of same to the respondent who has demanded same on account of the failure of consideration for which the money was initially paid by the respondent.

B I do not consider the fact that the lower court, by accepting the submission of counsel for one of the parties, it makes the conclusion arrived therein perverse. A perverse decision is one which ignores the evidence before the court and which results in or amounts to a miscarriage of justice.

C See Atolagbe vs Shorun (1985) 1 NWLR (Pt. 2) 360 at 375.

The cross examination of DW1 on the contents of Exhibits D11 otherwise known as the “*Bill History*” established conclusively the case of respondent that the money paid by respondent is still in D the custody of appellant.

The above, coupled with the telex message, Exhibit D7 also grounds the lower courts’ finding that the money is still with appellant. The said finding by the lower court in particular is not speculative at all. I therefore find no merit in issue 4 and resolve same against E appellant.

In conclusion, it is obvious that the appeal is without merit and is consequently dismissed by me with costs which I assess and fix at N500,000.00 (five hundred thousand naira), in favour of the respondent. Appeal dismissed. F

NGWUTA JSC

I read in draft the lead judgment just delivered by my learned G brother, Onnoghen, JSC and I entirely agree with the reasoning and conclusion reached.

A careful examination of the record leaves no one in doubt that the respondent’s claim is for the refund of \$186,990.00 from the appellant as money paid to it for the benefit of Goodfit Trading H Company Limited.

The consideration for the said sum failed and appellant who has been keeping the money does not lay claim to same. The appellant did not claim to have paid the money to the 3rd party for whose benefit it was paid to it - the appellant.

For the above and the fuller reasons in the lead judgment, I also dismiss the appeal for want of merit. I adopt the order for costs to the respondent.

ARIWOOLA JSC

My learned brother, Onnoghen, JSC obliged me with a draft of the lead judgment just delivered. I am in total agreement with the reasoning therein and the conclusion arrived thereat. I have nothing more to add.

The appeal is certainly without merit. It is liable to dismissal. Accordingly, I too dismiss the appeal.

I abide by the order on costs in the lead judgment.

KEKERE-EKUN JSC

This is an appeal against the judgment of the Court of Appeal, Enugu Division delivered on 17/5/2005 affirming the decision of the High Court of Anambra State, sitting at Onitsha, granting the Plaintiff/Respondents claims.

By a writ of summons and particulars of claim filed on 3/1/89 the plaintiff/respondent as Administrator of the personal Estate of late Cyprian N. Ozokwere sued Messrs Goodfit Trading Co. Ltd. (1st defendant) and the Appellant (2nd defendant) for:

(a) *“Refund of the sum of US\$186,990.00 or the equivalent in naira at the current exchange rate being money deposited by the Plaintiff in the defendant bank for remittance to Good Fit Trading Company Limited.*

(b) *Interest at the current rate of interest per annum on the total sum of US\$186, 990.00 or the equivalent in Naira from the 18th February, 1983 till date of judgment in this suit and thereafter at 5% per annum until the whole amount is fully paid.”*

Sometime in 1982 respondent’s deceased brother ordered motor spare parts from Goodfit Trading Co. Ltd. of Hong Kong for a total sum of US\$186,990.00. The Company agreed to sell and deliver to the respondent’s deceased brother at Port Harcourt. The method of payment agreed upon between the parties was “D/P sight” i.e. “document against payment”. However, contrary to the terms of

the agreement, Goodfit Trading Co. Ltd. shipped and delivered goods of a different description i.e. Ladies wear. On or about 18/2/83 Goodfit Trading Co. Ltd. delivered to respondent's brother through the Appellant (First Bank) a Bill of Lading (Exhibit P2), Invoice (Exhibit P3) and Bill of Exchange No. DP/GF/SO37/82 dated 11/12/82 together
 B with Remittance for collection and/or Acceptance order (Exhibits P4 & 4A). He immediately deposited the value of the goods, US\$186,990.00, with the Appellant. The documents indicated that the goods ordered were FEBI motor spare parts.

C The respondent's brother died on 11/5/83. Upon the grant of Letters of Administration on 30/10/84 he (respondent) discovered that the goods (ladies wear), which were different from what had been ordered, had been impounded as contraband. He notified both the appellant and Goodfit Trading Co. Ltd. of the development. He
 D discovered that the goods had been sold by public auction. He also wrote to the appellant informing it of the sale of the goods by public auction and the reason for the sale and demanded a refund of the sum of US\$186,990.00 deposited with the appellant for the benefit of Goodfit Trading Co. Ltd. The appellant failed to release the money.
 E The respondent contended that when the bill of exchange containing instructions to collect US\$186,990.00 was delivered, his deceased brother negotiated with the appellant and purchased the value of dollars shown thereon.

F The appellant's case was that it knew nothing about the sale/supply between respondent's late brother and Goodfit Trading Co. Ltd as it was not privy/party thereto. That it received a letter of instruction from a correspondent Bank Hong Kong and Shanghai Banking Corporation with an attached Bill of Exchange requesting it to
 G collect the value disclosed thereon. It contended that the shipping documents disclosed that the goods shipped were motor spare parts. That the respondent paid the sum of N128,198.28 which was the value of US\$186,990.00 (as per the exchange rate at the time) and upon such payment it became obligated to transfer the money
 H through the correspondent bank. That the respondent on his part became obligated to deliver to it all necessary documents, comprising Customs Bill of Entry Tally Sheet, Customs & Excise payment schedule, Tax clearance certificate & Form M to facilitate the transfer of the funds. That the respondent failed to deliver the vital docu-

ments but instead laid claim to the money. It maintained that the respondent was not entitled to the funds and that the foreign bank had instructed them to lodge the money into a local bank. It is however worthy of note that the appellant is still in possession of the money, as it did not comply with the instructions of the correspondent bank to pay the money into a local bank. This is what led to the institution of the suit at the trial court. B

At the trial the Respondent withdrew against Goodfit Trading Co. Ltd. on the ground that it was unable to effect service on it. The trial Court on 26/2/2001 granted the respondent's claim for refund of US\$186,990.00 but struck out the claim for interest. The appellant was dissatisfied and appealed against the decision. On 17/5/2005 the Court of Appeal, Enugu Division dismissed the appeal. Still dissatisfied the appellant has appealed to this court vide a notice of appeal dated 17/5/2005 containing 10 grounds of appeal. The appellant formulated 4 issues for determination while the respondent formulated a single issue. C D

Issue 1

Whether the Court of Appeal was right to uphold respondent's claim/allegation of breach of contract or sale/supply (on which his entire case was predicated) despite lack of privity of contract with the Appellant and non-joinder of the overseas suppliers against whom the breach was alleged. (Grounds I and II). E

Under the first issue it is the appellant's contention that the entire foundation of the respondents case was based on an allegation of breach of contract and that the two lower courts wrongly upheld the claim when there was no privity of contract between the appellant and the respondent and failure to join the overseas supplier i.e. Good Fit Trading Co. Ltd. In effect the main complaint under this issue is that Good Fit Trading Company Ltd. ought to have been made a party to the suit and that its absence was fatal to the respondent's claims. F G

With due respect to learned counsel for the appellant, it is a misconception to state that the respondent based his claim on breach of contract. This is far from the truth. The essence of the respondent's claim is captured in paragraph 16 of the Amended Statement of Claim, which reads: H

"16. In the premises the consideration for the deposit of the

said sum of US\$186,990.00 has wholly failed, and the defendant has had and received the said sum to the use of the plaintiff. Plaintiff will at the hearing of this suit rely on the defendant's letters Ref. Nos. 272: GEO/Moi of 27th June 1983; BILLS 272/CMI:cno of 29th July 1983; BILLS 272/CMI/BCI of 2nd September 1983; BILLS 272/CMI:cno of 2nd March 1984; BILLS 272/GPNA:cno of 114 February 1985; and BILLS 272/GPNA:cno of 20th March 1985 acknowledging receipt of the said sum and its inability to remit same." (Emphasis supplied)

C The first issue that calls for consideration is who is a necessary party? This has been settled in a plethora of decisions of this court including: *Green Vs Green* (1987) 7 SCNJ 269; *Oyedeki Akanbi (Mogaji) & ors Vs Fabunmi* (1986) 2 SC 431; *Peenok Investments Ltd. vs Hotel Presidential Ltd.* (1982) 12 SC (Reprint) 1 @ 11; *Uku D & Ors. Vs Okumagba & Ors*, (1974) 3 SC (Reprint) 24 @ 44. Some of the relevant considerations are:

(1) Whether the court can successfully adjudicate in the cause of action set up by the plaintiff without the party being added as a defendant.

E (ii) Whether the party would be bound by the outcome of the proceedings.

The cause of action in this matter is as expressed in paragraph 16 of the amended statement of claim reproduced above. The appellant received money for consideration that failed. It was notified of the failure promptly (through Exhibit P6) and before it had transferred the money to the remitting (or correspondent) bank. The correspondent bank was also notified vide Exhibit D3 sent by the Appellant. It retained the money. There is nothing to show or suggest that F either Goodfit Trading Co. Ltd. (the drawer of the bill of exchange) or the correspondent bank had made a demand for the money. The respondent had shown by evidence that the goods supplied by Goodfit Trading Co. Ltd. were not what was ordered and had been seized and auctioned by Customs as contraband. As found by both G H the trial court and the lower court, having regard to the circumstances of this case, Goodfit Trading Co. Ltd. was not a necessary party to enable the respondent recover his money deposited with the Appellant for a consideration that had failed.

The appellant herein was in the position of an agent. It was an

agent of the remitting bank, Hong Kong Shanghai Corporation and in effect a sub-agent of Goodfit Trading Company Ltd. In the case of an agent to whom money is paid on behalf of a principal under a mistake of fact, he is only free from liability if he pays over the money to the principal before he has notice of any wrong. This would also apply in the case of fraud. See: *Owen Vs Cronk* (1895) 1 QB 265 @ 274; *Baylis Vs Bishop of London* (1913) 1 CH 127 @ 137 - 138. In this case there was clear evidence not only that the appellant had notice that there was a failure of consideration in that the goods supplied did not match the description of the goods ordered, but it was still in possession of the money, having failed to pay same into a local bank as directed by its principal. A claim of this nature for “money had and received” is in the nature of an equitable remedy to discourage unjust enrichment. It is to prevent a defendant (such as the appellant herein) from holding on to money, which has come into his possession, which it is against conscience that he should keep. See: *First Bank of Nigeria Ltd. Vs A. P. Ltd.* (1996) 4 NWLR (pt.443) @ 448 B; *Chartered Bank Ltd. v. First African Trust Bank Ltd. & Ors.* (2005) LPELR - 11350 (CA) @ 15 - 16 E - A. The court below was therefore correct in upholding the respondent’s claim despite the fact that Goodfit Trading Co. Ltd. was not a party to the proceedings.

In the circumstances this issue must be and is hereby resolved against the appellant.

Issues 2 & 3 are:

2. Whether available pleadings/evidence disclose that the respondent on record deposited US Dollar currency with the Appellant bank as specifically claimed in his principal relief to warrant entry of judgment for USD 186,990.00 which Court of Appeal upheld as money had and received.

3. Whether the judgment in USD currency is sustainable despite uncontroverted hard evidence that the deposit sought to be refunded was made in Naira currency and that requisite documents were not furnished to enable its conversion to or remittance in US Dollar currency.

With regard to these two issues there are concurrent findings of the two lower courts that the deceased paid the value of the goods as shown on the bill of exchange. As correctly observed by learned counsel for the respondent the said value was not made out in Naira

in any of the documents. There is nothing in the record or in the exhibits tendered to suggest that the transaction between the parties was meant to be consummated in Naira. The appellant has not shown that these findings are perverse or unsupported by the evidence on record. I agree with learned counsel for the respondent that even if
B the money were deposited in Naira, as claimed by the appellant, the Naira amount represented the value disclosed in the bill of exchange i.e. US\$186,990.00.

The appellant made heavy weather of the fact that the respondent failed to produce the exchange control documents that would
C have facilitated the remittance of the foreign currency to the correspondent bank. Clearly, in the circumstances of this case that was not possible since the goods had been seized and destroyed as contraband. In any event, even if the exchange control documents had
D been available it would not alter the fact that the respondent had paid for the value of the goods. The transaction was based on D/P SIGHT meaning "*document against payment*" as disclosed on the bill, implying that the shipping documents were to be released upon payment of the value disclosed on the bill of Exchange. The value of
E the goods was US\$186,990.00 and respondent was entitled to recover it from appellant, particularly as no other party had laid any claim to the said sum. Issues 2 and 3 are accordingly resolved against the appellant.

F Issue 4

Whether the Court of Appeal was influenced by unpleaded extraneous, hasty, speculative or prejudicial considerations/conclusions in its evaluation of the issues/evidence presented before it, resulting in miscarriage of justice against the appellant.

G I agree entirely with my learned brother's reasoning and resolution of issue 4 and his finding that it lacks merit and ought to be resolved against the appellant.

For these and the fuller reasons ably marshaled in the lead judgment of my learned brother, Onnoghen, JSC of which I had a
H preview before now, I also find no merit in the appeal and hereby dismiss it. I affirm the judgment of the court below. I abide by the order on costs.