IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
HOLDEN AT COURT NO. 27
TODAY TUESDAY THE 8TH DAY OF MARCH 2022
BEFORE THE HON. JUSTICE O. O. ABIKE-FADIPE

SUIT NO.: LD/ADR/186/2014

BETWEEN

REAL INTEGRATED AND HOSPITALITY LTD **CLAIMANT**

AND

1. ZENITH BANK PLC
2. STATE UNIVERSAL BASIC EDUCATION (SUBEB) OF GOMBE STATE **DEFENDANTS**

Judgment

The claimant commenced this action by a writ of summons sealed on 4th April 2014, accompanied with a statement of claim dated 3rd April 2014 and frontloaded processes solely against the 1st defendant. The 2nd defendant was joined by order of Court dated 9th June 2014. The claimant consequently amended its processes to reflect the joinder and filed an amended writ of summons sealed on 9th July 2014, accompanied with an amended statement of claim and frontloaded processes. By a further amended statement of claim dated 14th June 2016 and filed on 16th June 2016, the claimant claimed against the defendants jointly and severally for:

a. **A declaration that the 1st defendant is in breach of contract when on 7th October, 2011 it refused the claimant to draw from its account No. 1012465427 despite the fact that the said account was in enough credit to cover the withdrawals sought to be made on the said date.**
b. **An order of perpetual injunction restraining the 1st defendant by itself, its servants, officials and privies howsoever called from disturbing or refusing the claimant from operating its account No. 1012465427 in the 1st defendant's bank or from**

honouring the claimant's transfer or payment obligations to third parties from the said account as long as same is in credit.

c. **Interest of 15% per annum on the sum of N=872,780,552.84 (Eight Hundred and Seventy-Two Million, Seven Hundred and Eighty Thousand, Five Hundred and Fifty-Two Naira, Eighty Four Kobo) from May 17, 2011 when the Advance Payment Guarantees expired till judgment and thereafter at the rate of 10% per annum until final liquidation thereof.**
d. **Interest on the judgment sum at the rate of 10% per annum from judgment date till final liquidation thereof.**
e. **Costs of this action in the sum of N=5,000,000.00 (Five Million Naira) only.**

The 1st defendant entered appearance on 16th May 2014 and filed a statement of defence dated 16th May 2014, accompanied with frontloaded processes. The first defendant amended its pleadings and filed a 2nd amended statement of defence dated 21st January 2020, accompanied with frontloaded processes.

The 2nd defendant filed a statement of defence dated 14th July 2016, accompanied with frontloaded processes. The 2nd defendant amended its pleadings and filed an amended statement of defence dated 30th January 2020, accompanied with frontloaded processes.

The claimant filed a further amended reply to the 1st defendant's amended statement of defence dated 1st February 2016, accompanied with frontloaded processes.

Trial in the suit commenced on 13th April 2018. The parties all called one witness each.

The claimant's sole witness was Bernard M. Jamaho, senior legal officer, who testified as CW1. He confirmed and adopted his written statements on oath deposed to on 9th March 2016 and 16th June 2016 as his evidence in chief. Several documents were tendered and received in evidence through CW1 as exhibits C1(a – c) to C6. CW1 was cross-examined by both defence counsel and was re-examined. He was discharged and the claimant closed its case on 14th January 2020.

The 1st defendant's sole witness was Aburime Ehimare, head of the 1st defendant's Garki branch, who testified as DW1. He confirmed and

adopted his written statements on oath deposed to on 12th September 2014 and 21st January 2020 as his evidence in chief. Several documents were tendered and received in evidence through DW1 as exhibits D1 to D15. DW1 was cross-examined by the 2nd defendant and claimant's counsel but was not re-examined and was discharged. The 1st defendant closed its case on 9th February 2021.

The 2nd defendant's sole witness was Haruna Yelma, a civil servant with the 2nd defendant, who testified as DW2. He confirmed and adopted his written statement on oath deposed to on 30th January 2020 as his evidence in chief. Several documents were tendered and received in evidence through DW2 as exhibits D16 to D22. He was cross-examined by the 1st defendant and claimant's counsel but was not re-examined and was discharged. The 2nd defendant closed its case on 22nd September 2021.

Claimant's Case

The claimant is a customer of the 1st defendant with a current account No. 1012465427 at its Abuja Branch. The claimant alleged that the 1st defendant was aware of the nature of its printing, publishing, importation and supply businesses vide the lodgments into its account and by virtue of a request for letter of reference dated 17th January 2011. Pursuant thereto, the 1st defendant had approved the issuance of advance payment guarantees (APGs) to the 2nd defendant for the supply of 700,000 units of Advanced English Dictionary and Senior Illustrated Dictionary in 2 tranches.

The APGs were offered for a fee of 0.5% flat payable upon acceptance of the offer, a lien on the total sum of N=872,780,552.84 which was to be placed in a non-interest yielding account with the 1st defendant's treasury as collateral, and to take effect from the date the cleared funds were received for a valid period of 120 days or when the 2nd defendant completely recoups the advance payment sum, whichever was earlier, but not later than May 17 2011 (exhibits C1a, C1b and C1c).

The claimant accepted the offer on the same date and the 2nd defendant advanced the sums of N=718,760,455.28 and N=154,020,097.56 being 70% and 15% of the total contract sums and paid 1% fee of N=3,211,125.00 and 0.5% fee of N=2,800,000.00.

The claimant alleged that the 1st defendant was directly involved and in charge of the transactions and issued a letter of credit to the manufacturers of the customized dictionaries (exhibit C2). The 1st defendant also received their delivery and cleared them at the port and supervised the delivery to and acceptance by the 2nd defendant of the dictionaries (exhibit C3). The remaining 7 containers which were yet to be formally received by the 2nd defendant had been deposited in a warehouse chosen by officials of the 2nd defendant. The claimant had been surcharged for all the expenses by the 1st defendant.

From 17th January to May 2011 and up till 26th June 2011, the claimant was not allowed to touch the N=872,780,552.84 which had been paid into its account by the 2nd defendant on 25th and 27th January 2011. On 7th October 2011, the claimant had instructed the 1st defendant to transfer the sum of N=250 million to G. K. O Properties Limited's account No. 1012018373 domiciled with the 1st defendant but the 1st defendant had failed or neglected to make the payment (exhibit C4). The claimant also instructed the defendant, on the same date, to transfer N=23,040,000.00 to Jamilu Sani's account No. 2001314315, also domiciled with the 1st defendant, which was not honoured by the 1st defendant (exhibit C5). On 7th October 2011, the claimant's account was in credit with over N=900 million.

The claimant alleged that the 1st defendant had no justification for holding unto the N=872,780,552.84 and refusing the claimant access to its funds.

1st Defendant's Case

The 1st defendant averred that the claimant's account was domiciled in its Mararaba, Nasarawa State branch but denied being aware of the business the claimant was engaged in.

The 1st defendant had issued two APGs in the total sum of N=872,780,552.80 on behalf of the claimant in favour of the 2nd defendant on 17th January 2011 (exhibits D2 and D3). It was part of the conditions that the amount would be received into the claimant's account with the 1st defendant who would place a lien on them as cash collateral until the claimant had been discharged by the 2nd defendant. However, the 1st defendant had only received the sum of

N=785,502,507.44 from 1st January to 30th June 2011 into the claimant's account.

The 1st defendant alleged that it was not a party to the contract between the claimant and the 2nd defendant for the supply of the dictionaries and that the letter of credit transaction between the claimant and itself was a separate and distinct contract therefrom which did not impose any obligations on the 1st defendant. The 1st defendant further averred that it had been professional in its conduct towards the claimant from 17th January 2011 in line with its letter of offer of the same date (exhibit D1).

The 1st defendant denied receiving any instruction from the claimant which was turned down and that the claimant had access to the funds in its account with the 1st defendant which it had utilized except for the amount deposited as cash collateral for the APGs. The 1st defendant's refusal of access to the cash collateral was predicated on clause 4 of exhibit D1. Further, that by letters dated 16th June 2011 (exhibits D4 and D5), the 2nd defendant had called in the APGs on ground of non-performance by the claimant on the contract and had also informed the claimant of its intention to terminate the contract (exhibits D6 and D7). On 7th July 2011, the 2nd defendant demanded the return of the guaranteed sum from the 1st defendant (exhibit D8).

The claimant had filed Suit No.: FCT/HC/CV/5354/11 challenging the termination of the contract and urging the Court to compel the defendant to pay the guaranteed sum to the claimant. The suit was struck out on 8th May 2012 for want of jurisdiction (ruling is attached to exhibit D10). Thereafter, the 2nd defendant renewed its demand for payment through its solicitors vide letters dated 21st February 2013 (exhibit D9) and 14th August 2013 (exhibit D10).

The claimant instituted another suit No.: FCT/HC/CV/3741/2012 against the 1st defendant and to which the 2nd defendant was joined. The suit was again struck out on 10th February 2014 for want of jurisdiction (exhibit D12).

The 1st defendant could not carry out any instruction from the claimant to transfer the guaranteed sum over which the 1st defendant had a lien until the 2nd defendant had written to the 1st defendant discharging it from liability.

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During the pendency of this suit, the 2nd defendant had sued the 1st defendant in Suit No.: GM/20/2016 and on 6th June 2016, the 1st defendant was ordered to pay the 2nd defendant the guaranteed sum plus 10% post judgment interest (exhibit D14). The 1st defendant had appealed against the judgment in Appeal No.: CA/YL/80/2016 but the appeal was dismissed on 29th November 2017 and the Court of Appeal upheld the judgment of the lower Court (exhibit D15).

2nd Defendant's Case

The 2nd defendant alleged that the contract for the dictionaries had been entered into in Gombe State.

The 2nd defendant alleged that the APGs had other terms and conditions which had not been stated by the claimant and that the amount could only be released to the claimant on receipt of a letter discharging the claimant from the 2nd defendant to the 1st defendant. The 2nd defendant had advanced the money and not the Universal Basic Education Commission in Abuja.

The contract was between the claimant and the 2nd defendant and not with the 1st defendant and so the 1st defendant could not have received the dictionaries, cleared them at the Port or supervised delivery to the 2nd defendant. The 2nd defendant had never taken delivery of the dictionaries or chosen a warehouse for their deposit. The contract had been for three months, and the claimant had committed to delivering within 8 weeks vide letter dated 13th December 2010. The contract had been awarded and executed in four stages for the total sum of N=1,026,800,650.40.

The 2nd defendant alleged that the 1st defendant, if it had turned down the claimant's request, was not out of place because the claimant had not executed the contract within the time agreed. The 2nd defendant had written to the 1st defendant notifying it of the claimant's default and had called in the 1st defendant's obligation to it vide letters dated 9th May 2011 (exhibits D16 and D17). By letters dated 16th June 2011, the 2nd defendant had written to both the claimant and the 1st defendant demanding for the payment of the APGs due to non-performance (exhibits D18 and D19) and had also sent a reminder dated 7th July 2011 to the 1st defendant (exhibit D20). The 2nd defendant averred that the

amount of the APGs were not to the benefit of the claimant who had not performed on the contract and was to automatically revert to the 2nd defendant.

The 2nd defendant alleged that the claimant had been forum shopping to reap where it did not sow by filing Suits No.: FCT/HC/CV/5354/11 and FCT/HC/CV/3741/2012 which had both been struck out. The claimant was aware that the 2nd defendant had demanded refund from the 1st defendant of the APGs sums.

At the close of trial, the Court directed parties to file final written addresses. The final written addresses were adopted on 14th January 2022. Benson Nweze Esq. adopted the 2nd defendant's final written address dated 13th October 2021 and aligned with the 1st defendant's submissions in its reply on points of law. The 1st defendant's final written address dated 10th November 2021 and reply on points of law dated 13th December 2021 were adopted by Wahab Dako Esq. B. J. Akomolafe Esq., with M. O. Oduguwa (Ms.), adopted the claimant's final written address dated 13th December 2021.

The counsel to the 2nd defendant formulated three issues for determination, to wit:

1. **Whether this honourable Court has the discretion to grant reliefs contained at paragraph 27 of the claimant's statement of claim or make pronouncement on paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 24 and 26 of the claimant's statement of claim considering the fact that the aforesaid paragraphs are in respect of contract between the claimant and the 2nd defendant to be executed in Gombe State.**
2. **Whether the Court can grant the reliefs sought by the claimant at paragraph 27 of its statement of claim before this honourable Court particularly the APG sums in custody of the 1st defendant or interest thereof in absence of any instructions from the 2nd defendant and whether this suit does not amount to abuse of court process and forum shopping.**
3. **Whether the 1st defendant was right in refusing to honour the claimant's instructions for the transfer of N=250,000,000.00 and N=23,040,000.00 on 7th October, 2011 and whether or not the claimant has the locus to sue on the APG money when**

there is already a dispute between the claimant and the 2nd defendant on the performance of the contract between them.

Arguing the first issue, counsel submitted that jurisdiction was the hallmark of every suit without which all actions taken in the suit would be nullity. Counsel submitted that for a Court to assume territorial jurisdiction, it determines where the contract was made, where it was to be performed and where the defendant resides. Counsel submitted that the 2nd defendant had credited the claimant's account in Gombe State where the contract was to be performed. Counsel submitted that the claimant had not satisfied these requirements to entitle it to reliefs 27(h & i) and the averments in paragraphs 6 to 17, 19, 24 and 26 of the claimant's statement of claim bordered on the performance of the main contract in Gombe State. Counsel submitted that exhibits C1b and C1c were for contract to supply dictionaries in Gombe State and mentioned the 2nd defendant as the beneficiary.

Counsel submitted that a Court of one State could not try issues emanating in another State vide the provisions of Section 279 of the 1999 Constitution. He referred to **Ocean Fisheries (Nig.) v. Veepee Ind. Ltd** (citation not supplied), **Micmerah Int'l Agency Ltd v. A. Z. Pet. Products Ltd** (citation not supplied) and **Arjay Ltd v. Airline Management Support Ltd (2003) 4 NSCQLR 29 @ 50**.

Counsel submitted that to the extent that the 2nd defendant was the beneficiary of the amount covered by the APGs, the claimant lacked the locus standi to lay claim to it.

Counsel submitted that there was no doubt from the statement of claim that there was a dispute over the performance of the contract which the Court lacked the jurisdiction to try. He referred to paragraph 3(a) to (g) of the claimant's reply to the 2nd defendant's statement of defence which he submitted was an admission of the dispute by the claimant. Counsel also referred to paragraphs 6 to 27 of the statement of claim and submitted that the dispute could only be resolved in Gombe State and until the dispute is resolved, the claimant could not sue on the APGs.

Counsel submitted that the Court has a duty to look at a party's case holistically as well as the claim to determine whether it can assume jurisdiction thereon. He referred to **A. D. H. Ltd v. A. T. Ltd (2006) 10 NWLR (Pt. 989) 635 @ 651**, **Nigergate Ltd v. Niger State &**

Government (2008) 13 NWLR (Pt. 1103) 111 @ 143 C – F, APGA v. Anyawu & 2 Ors (2014) 7 NWLR (Pt. 1407) 541 @ 573 – 574 H – AB and **Dairo v. UBN Plc (2007) NWLR (Pt. 1059) 99 @ 142 – 143 B – D.**

Counsel submitted that a Court having jurisdiction over the principal and entire claims was the Court to determine the entire claim and not one which had jurisdiction over part of the claim. He referred to **Dagazau v.Bokir Int'l Co. Ltd (2011) 14 NWLR (Pt. 1267) 261 @ 319 -320 G – A.** Counsel submitted that the claim on the contract and the APGs ought to be placed before a Court which has jurisdiction over both, i.e., Gombe State High Court. Counsel submitted that the only option open to the claimant after the two suits in the FCT were struck out was to file an action in the Gombe State High Court and not to file the instant suit. He referred to **Ibori v. Federal Republic of Nigeria (2009) All FWLR (Pt. 487) 159 @ 189 – 190 E – E.**

Counsel submitted that apart from exhibits C4, C5 and C6, the other exhibits tendered by the claimant were not relevant to the claim before this Court and should be expunged. He referred to **Haruna v. AG Federation (2012) 49 1410 @ 1443.** Counsel submitted that evidence on performance of the contract had nothing to do with a banker-customer relationship which involved the operation of an account.

Counsel argued the second and third issues together.

Counsel submitted that there was no provision under the APGs placing any obligation on the 1st defendant to the claimant. Counsel submitted that although the APGs had been issued at the request of the claimant, it was not privy to the APGs and lacked the locus to sue on them until the 2nd defendant had authorized the 1st defendant to pay the money to it. Counsel referred to paragraph 4 of the APGs and the cases of **AG Federation v. A. I. C. Limited (2000) 2 NSCQR 1111 @ 1126, Akinsanya v. UBA Ltd (2012) 4 NSCQR 635 @ 743 – 744 C – D** and **Chief Gafaru Arowolon v. Governor of Ogun State (2011) NSCQR 67 @ 88, Pacers Multi-Dynamics Ltd v. The MV Dancing Sisters Ltd (2012) 49 NSCQR 285 @ 305 – 306 C – D.**

Counsel submitted that the claimant could not sue the 1st defendant for breach of contract because there was a lien on the money guaranteed

by the APGs. Counsel submitted that the claimant could not say it had more than the money secured by the APGs in its account and at the same time claim that money as it would amount to double speak. He referred to **Longe v. FBN Plc (2006) All FWLR (Pt. 313) 46 @ 71 D – E**. Counsel submitted that the 1st defendant was therefore justified in not allowing the claimant to withdraw from its account.

Counsel submitted that it did not lie with the claimant to deny the existence of exhibits D16 to D22 as they had not been addressed to it. Counsel that the claimant was abusing process and forum shopping by going after the 1st defendant on the money guaranteed by the APGs, rather than suing the 2nd defendant on the main contract.

Counsel submitted that the Court could not grant a relief not sought for. He submitted that the claimant had not claimed the sum of N=872,787,552.84 but had rather claimed 15% pre-judgment and 10% post-judgment interest on the sum, which claims could therefore not succeed. He referred to **Omokuwajo v. FRN (2013) 54 182 @ 209**. Counsel submitted that the Court could also make a consequential order on the sum. He referred to **AG Federation v. AIC Ltd (supra) @ 1130**.

Counsel submitted that the claimant having admitted the existence of a dispute between itself and the 2nd defendant, the defendants had been discharged of the burden of proving the fact. He referred to **Achilihu v. Anyatonwu (2013) 53 474 @ 513**. Counsel submitted that the admission by CW1 of the existence of the two cases in the FCT High Court was conclusive proof that the issues in those cases had not been resolved to entitle the claimant to the money guaranteed by the APGs. He referred to **Mangtup Din v. African Newspaper of Nig. Ltd (2012) 4 NSCQR 928 @ 932** and **AG Nasarawa State v. AG Plateau State (2012) 50 337 @ 368**.

Counsel submitted that exhibits D16 – D22 having preceded exhibits C4 and C5, the 1st defendant was right not to accede to the claimant's instruction.

Counsel urged the Court to dismiss the claim.

The 1st defendant's counsel formulated a sole issue for determination, to wit:

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Considering the facts of this case and the totality of the evidence adduced by parties before this honourable Court, has the claimant been able to establish that it is entitled to the APGs sum in the custody of the 1st defendant?

Counsel referred to Section 133(1) of the Evidence Act and submitted that the burden of proving the existence or non-existence of a fact lay on the person against whom judgment would be entered in the absence of evidence on both sides and that the onus was on the person seeking a declaration on breach of contract that such breach had occurred. He referred to **Adeoti v. Ayorinde (2001) 6 NWLR (Pt. 709) 336** and **Saka v. Ijuh (2010) 4 NWLR (Pt. 1184) 405**. Counsel relied on the case of **Nwaolisah v. Nwabufoh (2011) 14 NWLR (Pt. 1268) 600 @ 633 C** for the definition of "breach of contract".

Counsel submitted that the claimant's pleadings showed that the crux of the claim was the claimant's purported entitlement to the APG funds and the 1st defendant's breach thereof. Counsel defined "breach of contract" and submitted that the claimant had failed to prove any failure or unequivocal, distinct and absolute refusal by the 1st defendant to fulfil any promise or undertaking to the claimant without lawful excuse or that the 1st defendant breached any of the terms and covenants in the offer letter or the APGs.

Counsel submitted that it was not in dispute that a lien had been placed on the APGs sum or that it was not to be released to the claimant without a letter from the 2nd defendant discharging the 1st defendant from all liabilities and obligations thereunder or that the 1st defendant was to pay the money over to the 2nd defendant upon the claimant's failure to perform under the contract. Counsel submitted that the claimant's cause of action over the money would not arise until the 1st defendant had been discharged by letter in writing from the 2nd defendant. Counsel further submitted that because of exhibits D4 to D8, the 1st defendant could not be compelled the amount securing the APGs. Counsel submitted that DW1's evidence in paragraph 26 of his written statement on oath deposed to on 16th May 2014 had not been controverted by the claimant.

Counsel adopted the definition of "lien" in the cases of **Afrotec Tech. Serv. (Nig.) Ltd v. MIA & Sons Ltd (2000) 15 NWLR (Pt. 692) 739**

@ 798 F and **Livestock Feeds Plc v. Okezie (2002) 10 NWLR (Pt. 775) 341** and submitted that since the claimant had failed to prove that the lien had been removed, the 1st defendant cannot be liable for breach of the contract. Counsel submitted that the fact that the claimant had commenced an action against the 2nd defendant further confirmed that the 2nd defendant had terminated the contract.

Counsel submitted that after the two cases filed by the claimant at the FCT High Court had been struck out, the 2nd defendant immediately demanded for payment vide exhibits D9 and D10. During the pendency of this suit, the 2nd defendant had filed another suit in Gombe State High Court, which Court had directed the 1st defendant to pay the money to the 2nd defendant and this judgment had been affirmed by the Court of Appeal vide exhibits D14 and D15. Counsel submitted that the Court of Appeal subsists until set aside on appeal. He referred to **PDP v. Okorocha (2012) 15 NWLR (Pt. 1323) 205** and **Magnusson v. Koiki (1991) 4 NWLR (Pt. 183) 119**.

Counsel submitted that the evidence before the Court shoed that the amount paid into the account of the claimant by the 2nd defendant was N=785,502,507.44 and not N=872,780,552.84 and so the claimant could not be entitled to the latter sum. Counsel submitted that exhibit D11 speaks for itself in the absence of allegations of fraud or improper execution. He referred to **Beredugo v. College of Sc. & Tech (1991) 4 NWLR (Pt. 187) 651 @ 660 G**.

Counsel submitted that the claimant had failed to prove that exhibits C4 and C5 had been received by the 1st defendant or that the 1st defendant had refused to honour its instructions. Counsel submitted that the claimant could only succeed on the strength of its own case and not on the weakness of the defence. He referred to **Progress Bank of Nig. Ltd v. Ugonna Nig. Ltd (1993) 3 NWLR (Pt. 435) 202**.

Counsel submitted that there was nothing in exhibit C6 to show that the 1st defendant had refused to carry out the claimant's instructions with reference to the entry of 11/10/2011. Counsel submitted that the claimant had been making withdrawals on its account before and after 7th October 2011so long as that balance in its account was sufficient to cover the APG sum. Counsel submitted that the claimant had failed to prove the declaration for breach of contract. He referred to **Chitex Ind. Ltd v. O. B. I. (Nig.) Ltd (2005) 14 NWLR (Pt. 945) 392**. Counsel

submitted that the burden was on the claimant to prove its entitlement to the declaratory relief which could not be granted even on admission by the 1st defendant. He referred to **Mohammed v. Wamako (2018) 7 NWLR (Pt. 1619) 573** and **Nduul v. Wayo (2018) 16 NWLR (Pt. 1646) 548**.

In respect of the claimant's claim for 15% pre-judgment interest, counsel submitted that parties were bound by their agreement and the claimant could not read terms not agreed by the parties into the agreement. He referred to **Womiloju v. Kiki (2009) 16 NWLR (Pt. 1166) 143**, **AG Rivers State v. AG Akwa Ibom State (2011) 8 NWLR (Pt. 1248) 31** and **Abdulaziz v. Garba (2021) 3 NWLR (Pt. 1764) 379**. Counsel submitted that exhibit D1 clearly stated that the APGs sum was to be paid into a non-interest yielding account and that the expiry date of 17th May 2011 did not mean the money would begin to accrue interest from that date.

Counsel urged the Court to dismiss the claim with substantial costs.

The claimant's counsel formulated three issues for determination, to wit:

1. **Whether or not the contents of the further amended statement of claim filed on 16th June, 2016 are not such that the honourable Court could assume jurisdiction to entertain.**
2. **Whether or not the 1st defendant could be right to deny knowledge or participation in the execution and actualization of the contract between the claimant and the 2nd defendant by virtue of the nature of the letter of credit and its uniform rules of international trade.**
3. **Whether or not the 1st defendant has not breached the contract of banker/customer relationship with the claimant in the circumstances of this case.**

Arguing the first issue, counsel submitted that in determining cause of action jurisdiction, the statement of claim was the paramount process to be considered. He referred to **FUT Minna v. Olutayo (2018) 7 NWLR (Pt. 1617) 176 @ 195 A**. Counsel submitted that the reliefs sought by the claimant centred around the 1st defendant's failure to fulfill its obligations under the contract of APG entered with the claimant and that it was a notorious fact that the 1st defendant's head office was in Lagos State.

Counsel submitted that the two cases instituted in the FCT High Court had been struck out for want of jurisdiction and had not been determined on the merits. Counsel submitted that the instant suit was instituted against the 1st defendant for failure to honour the claimant's payment instructions, but the 2nd defendant had been joined on the application of the 1st defendant although the claimant never amended its reliefs.

Counsel submitted that the ruling of this Court delivered on 7th July 2015 had determined the issue of jurisdiction and thus the issue was caught by issue estoppel. He referred to **Ajiboye v. Ishola (2016) 13 NWLR (Pt. 998) 628 @ 643 – 644 H – B**. Counsel submitted that the only recourse open to the defendants was to appeal against that ruling. He referred to **Cocacola (Nig.) Ltd v. Akinsanya (2017) 17 NWLR (Pt. 1593) 74 @ 150 – 152** and **Ngere v. Okuruket 'XIV' (2017) 5 NWLR (Pt. 1559) 400 @ 483 B – E**.

Counsel submitted that a case which was struck out could be reopened, relisted, or refiled. he referred to **Ajibola v. Rasaki (2019) 5 NWLR (Pt. 1665) 284 @ 293 C – G**.

Arguing the second issue, Counsel submitted that in letter of credit transactions, there was a uniform standard procedure which governed its issuance and application as provided under Section 8(a) of the Uniform Customs and Practices (UCP). He referred to the case of **Nwangwu v. FBN Plc (2009) 2 NWLR (Pt. 1125) 203 @ 226 A.** Counsel also adopted the definitions of "letter of credit" and "documentary credit" given in the case of **Conoil v. Vitol SA (2018) 9 NWLR (Pt. 1625) 463 @ 487 D, B – C**. Counsel submitted that under the provisions of the Uniform Commercial Code and the UCP, letters of credit were governed by four autonomous but interconnected contractual relationships viz: the contract for sale of goods between the buyer and the seller, the contract between the buyer and the issuing ban, the contract between the issuing bank and the confirming bank, and the contract between the confirming bank and the seller. He referred to **Owigs & Obigs (Nig.) Ltd v. Zenith Bank Plc (2020) 49 WRN 66 @ 94 – 95** and Femi Adekanye (2010) The Elements of Banking in Nigeria, CIBN Press Limited, 4th Edition at pages 157 – 158.

Counsel submitted that the stages which must be strictly complied with in a letter of credit transaction involved the importer, the issuing bank, the advising bank, the import inspection agent who issues a clean report finding to the advising bank, the exporter, the shipper who issues a bill of lading to the advising bank who sends the documents to the issuing bank who then releases them to the importer to clear the goods. Counsel submitted that it was therefore irrefutable that the issuing bank, the 1st defendant, actively participated in the execution contract to ensure due diligence.

Counsel submitted that DW1's evidence under cross-examination was in contradiction to the standard uniform and universally laid down procedure for international commercial transactions involving letters of credit. Counsel submitted that the transactions for 17th May 2011 and 27th May 2011 on exhibit C6 showed that the 1st defendant had paid Rocksmarine Freight Forwarders Ltd for the transportation of the books to Gombe under the 1st defendant's officials' supervision by debiting the claimant's account (exhibit C3).

Further, counsel submitted that on 28th February 2011, the 1st defendant had deducted the sum of N=4,363,092.77 being 5% of the APG sum of N=872 million from the claimant's account and could not now allege that it only received N=718,760,455.38 as the APG sum.

Counsel submitted that DW1 was not a witness of truth. Counsel submitted that DW1 had admitted that the 1st defendant had received the bill of lading, the receipt of the goods from the exporter and payment to the exporter and was at the stage of ascertaining the worth of the contract already performed by the claimant when it was taken to Court. Counsel submitted that facts which had been admitted required no further proof. He referred to **NRMA & FC v. Johnson (2019) 2 NWLR (Pt. 1656) 247 @ 261 D**.

Arguing the third issue, counsel submitted adopted the meaning of "guarantee" in Femi Adekanye's The Elements of Banking in Nigeria 2010 CIBN Press Limited 4th Edition and the case of **Skye Bank Plc v. Cornelio Colombara & Anor (2014) LPELR-22641(CA)**. Counsel submitted that the words used in a contract of guarantee would not be construed in isolation but considering the surrounding circumstances at the time it was executed. He referred to The Modern Contract of Guarantee Vol. 1 @ page 29 paras. 1-65. Counsel submitted that the

word and conditions in a contract are to be strictly interpreted and nothing extraneous can be interpreted into it. Counsel defined an advance payment guarantee.

Counsel referred to the conditions in exhibits C1a, C1b and C1c and submitted that the contents of a document could not be varied or altered by the oral arguments of the defendants. He referred to **Nursing & Midwifery Council of Nigeria v. Ogu (2019) 10 NWLR (Pt. 1680) 233 @ 243 B – C**. Counsel submitted that the Court was required to holistically consider a document in interpreting it. He referred to **Ogah v. Ikpeazu (2017) 44 WRN 1 @ 46 line 35**. Counsel submitted that the defendants had failed to consider the lifespan of the APGs on which the lien was also predicated.

Counsel submitted that the failure of the 2nd defendant to demand for the money secured by the APGs before 17th May 2011 when they expired discharged the 1st defendant from all liabilities on them and the 1st defendant had maliciously and mischievously held on to the money despite deducting several charges from the claimant.

Counsel submitted that the defendants had failed to establish that the 2nd defendant had terminated the contract before the APGs expired as the 1st defendant failed to prove that it was in possession of the letter dated 9th May 2011.

Counsel submitted that there was evidence from the claimant's account that the 1st defendant had deducted charges in respect of the clearance and transportation of the goods to the 2nd defendant on 12th, 17th, 19th and 27th May 2011 and also deducted charges on the transactions on 23rd and 31st March 2011. Counsel submitted that the 1st defendant was fully aware that the claimant had performed its part of the contract.

Counsel submitted that the guarantee was predicated on the principal contract and so the claimant could not be removed from the entire agreement.

Counsel submitted that a claim for pre-judgment interest was automatic and could be claimed as of right or where a statute provided for it. Counsel submitted that where it is claimed as of right, it would be claimed on the writ and pleaded facts to show entitlement thereto would be averred in the statement of claim. He referred to **Interdrill (Nig.)**

Ltd v. UBA Plc (2017) 13 NWLR (Pt. 1581) 52 @ 72 – 73 F – C and **Skymit Motors Ltd v. UBA Plc (2021) 5 NWLR (Pt. 1768) 123 @ 144 A – C**. Counsel submitted that the claimant had rightfully claimed for the pre-judgment interest as of right and on the fiduciary relationship between it and the 1st defendant.

Counsel submitted that the relationship between a bank and its customer was one of debtor and creditor and the customer had the right to demand for repayment of the monies in the bank's custody which the bank was under an obligation to obey, otherwise it would be liable in damages. He referred to **Wema Bank v. Osilaru (2007) LPELR-8960(CA)**.

Counsel submitted that upon the expiry of the APGs the money reverted to the claimant as of right and that the 1st defendant having admitted that it did not honour the claimant's instructions the facts ought to be taken as admitted. He referred to **Mohammed v. Farmers Supply Co. (KDS) Ltd (2019) 17 NWLR (Pt. 1701) 187 @ 206 F – H**. Counsel submitted that the denial of the instructions had not arisen during trial and the counsel's submissions could not take the place of legal proof. He referred to **Okuleye v. Adesanya (2014) 12 NWLR (Pt. 1422) 521 @ 539 B – C** and **Olagunju v. Adesoye (2009) 9 NWLR (Pt. 1146) 225 @ 255 G – H**.

Counsel submitted that all the charges taken from the claimant had been on the sum of N=872,780,552.84 and not N=785,502,507.44 as claimed by the 1st defendant and the fact that the 15% to which the claimant was entitled was not paid did not negate the fact that it was entitled to it.

Counsel submitted that the case filed in Gombe High Court which judgment had been affirmed by the Court of Appeal should be discountenanced by this Court and treated as abuse of proceedings because the instant case was pending before this Court for about two years before that case was filed.

Counsel submitted that exhibits D5, D6, D7, D9 and D10 had been prepared in anticipation of proceedings and cannot be relied upon by the Court. He referred to **NBC Plc v. Ubani (2014) 14 NWLR (Pt. 1398) 421 @ 460 – 461 C – G, NSITEMB v. Klifco Nig. Ltd (2010)**

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13 NWLR (Pt. 1211) 307 @ 323 C – D and Section 83(3) of the Evidence Act 2011.

Counsel urged the Court to grant the claim.

In the reply on point of law, the 1st defendant's counsel submitted that:

There was no provision in letters of credit of Uniform Rules of International Trade that an issuing bank should participate in the actualization of a contract. He referred to Article 13 of the Uniform Rules for Collections No, 522. Counsel submitted that by the provisions of Section 8(a) of the UCP, it was common knowledge that parties to international commercial transactions by letters of credit only dealt in documents and not goods. He referred to **Cinoil v. Vitol SA (2018) 9 NWLR (Pt. 1625) 463 @ 487 B – D**. Counsel submitted that the 1st defendant owed no obligation to the claimant other than a commitment to pay the beneficiary and confirm documents. Counsel also referred to the cases of **Akinsanya v. UBA Ltd (1986) 4 NWLR (Pt. 35) 273** and **Nasaralai v. Arab Ban (1986) 4 NWLR (Pt. 36) 409 @ 410**.

Counsel's reply to the claimant's submissions under its third issue was a further argument of the 1st defendant's position as argued in its written address. A reply on points of law is to answer fresh issues of law raised in an opponent's brief and not a rehash of arguments already made in the party's written address. See the case of **Ecobank (Nig.) Ltd v. Anchorage Leisures Ltd & Ors (2016) LPELR-40220(CA)**, where the Court of Appeal held:

"By law where a reply on points of law translates to re-arguing a party's written address or brief of argument, it will be discountenanced by the Court. That was the stance of the Lower Court and the holding is within the ambit of the law. See OKPALA VS IBEME (1989) 2 NWLR (PT 102) 208; FRN VS IWEKA (2011) LPELR (9350) CA; OPENE VS NJC (2011) LPELR (4795) CA.

In UBA PLC VS UBOKOLO (2009) LPELR (8923) CA this Court held that a reply brief is not meant to improve the quality of the argument in the Appellant's brief. In the same way, a reply on point of law is not meant to improve on the quality of a written address." Per OSEJI, J.C.A (Pp. 42 paras. B).

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I shall therefore discountenance all submissions made by counsel thereon.

The 2nd defendant has raised the issue on whether this Court has the jurisdiction to entertain this case. In the case of **Ochala & Ors v. John & Ors (2019) LPELR-47001(CA)**, the Court of Appeal held that:

"A judgment given without jurisdiction cannot be affirmed, such judgment is invalid, null and void as it cannot be erected on any pedestal, where such judgment is given, it will collapse on appeal like pack of cards because it must be set aside."

See also the case of **Gbaniyi Osafile & Anor v. Paul Odi & Anor (1990) LPELR-2783 (SC)**.

Thus, it is incumbent upon this Court to first determine whether it can assume jurisdiction over this matter to avoid falling into the pitfall of dissipating its energy on a matter to no end or purpose. In the case of **Madukolu v. Nkemdilim (1962) 1 All NLR**, the Supreme Court laid down the veritable principle, to the effect, that a Court's jurisdictional competence to entertain, hear and determine (adjudicate upon) a case is contingent upon the following factors or conditions:

a) **That the court is properly constituted as to numbers and qualifications thereof;**
b) **That the processes are initiated in accordance with due process of the law; the subject matter of the case is within its jurisdiction, and there is no feature therein which prevents it from exercising jurisdiction; and**
c) **The case is initiated by the process of law, and upon satisfying any condition precedent to exercise of jurisdiction.**

It is clear from a reading of the 2nd defendant's submissions that it is alleging that this Court lacks the territorial jurisdiction to determine this case because the base contract was entered into in Gombe State, the contract was to be performed in Gombe State, the monies for the advance payments were transferred from Gombe State and the 2nd defendant itself is resident in Gombe State. In other words, the 2nd defendant is challenging this Court's territorial jurisdiction to entertain this suit, i.e., premised on the second factor.

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In the case of **Lemit Engineering Ltd v. RCC Ltd (2017) LPELR-42550(CA)**, the Court of Appeal stated thus:

"Now, when it comes to the issue of territorial jurisdiction, the issue must be looked from two different perspectives. To determine the issue, I find it necessary to state that, the term territorial jurisdiction may be used to refer to the geographical area in which the cause of action arose for determination or adjudication. It may also mean the jurisdiction of the Court to entertain cases involving persons residing within the limits of a defined territory. Territorial jurisdiction may therefore mean:

(a) Jurisdiction over cases arising in or involving persons residing within a defined territory; or
(b) Territory over which a government, one of its Courts or sub-divisions has jurisdiction.

In determining the issue of territorial jurisdiction therefore, it would be necessary to first consider whether the dispute or facts constituting the dispute has inter-state elements. That being so, where the dispute as to the proper adjudication is between the High Court of one State and that of another State or between the High Court of a State and the High Court of the Federal Capital Territory, the issue of the appropriate or more convenient forum is to be determined under the rules of Private International Law formulated by the Courts in Nigeria. This is because, Nigeria operates a Federal Constitution with each of the Federating States and the Federal Capital Territory, having its own High Court. See Ogunsola v. A.N.P.P. & 2 Ors (2003) 9 NWLR (pt.826) p.462; Iyanda v. Laniba II (2003) 8 NWLR (pt.801) p.267; Joshua Dariye v. The F.R.N. (2015) LPELR - 24398 (SC) Where it is as to which of the judicial divisions within the State the matter will be instituted, the matter will be governed by the High Court (Civil Procedure) Rules of that State...

It is therefore the law that a Court in one State cannot have jurisdiction to hear and determine a matter which lies exclusively within the territorial limits and thus jurisdiction of the High Court of another State. In other words where the facts or elements that gives rise to the cause of action occurred

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<u>entirely within the territorial or geographical limits or confines of one State, the High Court of another State cannot have the jurisdiction to hear and determine that suit</u>...

... From the cases cited above, <u>it is not in doubt that the territorial jurisdiction of a High Court of a State is an indispensible element or factor of the jurisdiction of such High Court on matters brought before it. To determine whether or not a Court has the jurisdiction to hear and determine a suit therefore, the Court will look at the Writ of Summons and/or the Statement of Claim. In other words to determine whether or not the Court has jurisdiction to entertain a particular suit, the processes to be considered are the processes filed by the Plaintiff, which are the Writ of Summons and Statement of Claim or the Original Summons as the case may be</u>... It is therefore the Plaintiff's claim that determines whether or not the Court has jurisdiction." Per Tsammani, J.C.A (Pp. 20-24 paras. C).

A careful look at the claimant's amended writ of summons and further amended statement of claim reveals that the claimant's cause of action is premised on the 1st defendant's failure to honour its payment instructions of 7th October 2011. The claimant's references to the advanced payment guarantees (APGS) are to establish that as at the date of the payment instructions, the 1st defendant was aware that the claimant had completed the supply of the books to the 2nd defendant and so the money in its account was free from the lien placed thereon in consequence of the APGs.

It is instructive to note that the claimant had only sued the 1st defendant in its original claim, and it was the 1st defendant who applied to join the 2nd defendant. Even after the joinder, the claimant did not change its averments except to introduce the 2nd defendant and to claim jointly and severally against the defendants.

The substantive relief as contained in paragraph 27 (f) is directed against only the 1st defendant. Indeed, the other reliefs which are for an order of perpetual injunction and pre-judgment and post-judgment interest are ancillary reliefs which can only be granted on the success of the substantive relief. The substantive relief states:

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A declaration that the 1st defendant is in breach of contract when on 7th October 2011 it refused the claimant to draw from its Account No. 1012465427 even though the said account was in enough credit to cover the withdrawals sought to be made on the said date.

In the case of **Mr. David I. Karinga Stowe & Anor v. Godswill T. Benstowe & Anor (2012) LPELR-7838(SC)**, the Supreme Court held that:

"There can be no doubt that a statement of claim in civil litigation is a critical Court process and it is filed by the plaintiff to be served on the defendant. Its main aim being to allege all material facts of the case the plaintiff is to rely on in proving his case in Court against the defendant. <u>Ordinarily, the concluding part of a statement of claim otherwise called the "prayer" or the "relief sought" is where the plaintiff sets out the reliefs or remedies he claims in the action against the defendant. Without this part, a statement of claim contains bare assertions to no end and liable to be struck out as the parties are deemed not to have joined issues in the suit.</u>" Per Chukwuma-Eneh, JSC (Pp. 16 paras. A).

Thus, to the extent that no substantive relief has been sought by the claimant on the APGs, the averments in respect thereof are bare assertions which are merely descriptive of how the claimant became entitled to its relief against the 1st defendant. I so hold.

As can be gleaned from the 1st defendant's address for service, as well as exhibits C1 series, D1 to D5, D8, D9, D10 and D16 to D22, the 1st defendant's head office is located at **Zenith Heights, Plot 87, Ajose Adeogun Street, Victoria Island, Lagos**. Furthermore, exhibit C1a, which is the offer of advance payment guarantees was written to the claimant alone and not to the 2nd defendant. Upon the acceptance of the offer by the claimant, the claimant and the 1st defendant entered the contract to issue the APGs.

The territorial jurisdiction of the Court to adjudicate on the instant case is based on the cause of action comprised by the contractual relationship of banker/customer between the claimant and the 1st defendant and exhibit C1a which establishes another contract between them. Since

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the 1st defendant carries on business in Lagos State and exhibit C1a was performed in Lagos State, the jurisdiction of this Court is governed by the provisions of Order 4 rule 1(3) of this Court's Rules which states:

Actions for the specific performance, or upon the breach of any contract, may be commenced and determined in the Judicial Division in which such contract ought to have been performed or in which the Defendant resides or carries on business.

The defendants have alleged that this suit constitutes an abuse of process because the claimant had filed two suits in the FCT High Court which had been struck out for want of jurisdiction. The first case was in Suit No.: FCT/HC/CV/1991/2010 between Real Integrated & Hospitality Ltd v. Universal Basic Education, Gombe State, Attorney General Gombe State and Zenith Bank Plc and the subject matter of that action was the base contract between the claimant and the 2nd defendant. The case was struck out because the Court held that the cause of action had arisen in Gombe State (exhibit D12). The second case was in Suit No.: FCT/HC/CV/3741/2012 between Real Integrated & Hospitality Ltd v. Zenith Bank Plc and the subject matter were for damages for breach of contract and damages for tort of defamation. The Court struck out the case for want of jurisdiction holding that Mararaba Town where the defendant's branch in which the claimant's account was domiciled was in Nasarawa State and not in Abuja and did not carry-on business in Abuja to vest the Court with jurisdiction over the case.

In the case of **Fasakin Foods Nig. Ltd v. Shosanya (2006) LPELR-1244(SC)**, the Supreme Court held:

"...where a court lacks jurisdiction, the order is to strike it out to enable the party commence the action de novo in a competent court of jurisdiction." Per Tobi, J.S.C (Pp. 30 paras. A).

The defendants also contend that the claimant is forum shopping having filed the two suits in the FCT. In the case of **Jaak Ltd v. First Bank (2019) LPELR-48938(CA)**, the Court of Appeal held:

"The underlining reasoning that propel the lower Court to strike out the Appellants suit as is evident from the judgment was that the suit constituted an abuse of Court process. That the action of the Appellant in filing Suit No: LD/1117/2013 before the

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lower Court in full view of Suit No: HOD/107/90 wherein the Appellant had been joined as a party was actuated by a desire for Forum Shopping. Forum Shopping is the practice of choosing the most favourable Judicial Division in which a claim may be heard. It denotes the rather reprehensible practice of choosing the most favourable territorial jurisdiction or Court in which a matter or cause may be entertained and adjudicated for the sole purpose of getting a favourable hearing, and result. It is a specie of abuse of Court process. In DINGYADI & ANOR VS INEC & ORS (2010) LPELR 95 (SC). The Apex Court per Chukwuma Eneh JSC expounded on the concept thus:-

'The term abuse of process connotes simply the misuse of Court's process and it includes acts which otherwise interferes with the Course of justice. Clearly the acts includes where without reasonable ground a person institute frivolous vexations and oppressive actions and also by instituting of multiplicity of actions or is on a frolic acts of Forum Shopping i.e., seeking for a favourable Court to entertain a matter. It also includes depriving the Court of jurisdiction.....'"

The two cases filed at the FCT High Court were struck out on 8th May 2012 and 10th February 2014 for want of jurisdiction, whereas the writ of summons in this suit was sealed on 4th April 2014. At the time the instant suit was filed, there was no action pending by the claimant or against the claimant by either of the two defendants. Upon the striking out of the two suits, the way was open for the claimant to file its action in a competent Court with territorial jurisdiction over the subject matter and therefore the filing of this case neither amounts to forum shopping nor constitutes an abuse of court process. I so hold.

There is no dispute between the claimant and the 1st defendant that they have a customer/banker relationship between them consequent upon which the claimant approached the 1st defendant for the issuance of APGs in satisfaction of one of the conditions of the contract to supply books to the 2nd defendant. The offer for the issuance of the APGs was made by the 1st defendant in its letter dated 17th January 2011 (exhibit C1a/D1 and was accepted by the claimant. The consideration for the issuance of the APGs was 0.5% each for the two tranches of N=718,760,455.38 and N=154,020,097.56 (total sum N=872,780,552.84) at the non-refundable fee of N=3,593,802.28 and

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N=770,100.49 respectively (total fee of N=4,363,902.77). The next ... was a lien on the total sum which was to be placed in a non-interest-bearing account with the 1st defendant's treasury. The claimant was also to be responsible for all legal fees, out of pocket expenses, taxes and commissions relating to the APGs.

The APGs' monies were transferred into the claimant's account by the 2nd defendant on 25th and 27th January 2011. On 17th February 2011, the 1st defendant debited the claimant's account with the sum N=1,348,000,000.00 described as "APG SUM TRFD TO SUNDRY GUARATEE". The 1st defendant also debited the claimant with the ... APG fee on N=872m from SUBEB GOMBE on 28th February 2011.

Specifically, the Security clause of exhibit C1a/D1 states:

Lien on the total APGs sum of N872,780,552.84 (Eight Hundred and Seventy Two Million, Seven Hundred and Eighty Thousand, Five Hundred and Fifty Two Naira, Eighty Four Kobo) to be placed in a non-interest bearing account with Zenith's Treasury.

Under clause 2 of the "Other Conditions" clause, the parties agreed that:

By acceptance of this offer, Real Integrated authorizes Zenith to place the APGs sum upon receipt in a non-interest bearing account with Zenith as collateral for the APGs.

Although the sum of N=1,348,000,000.00 debited from the claimant's account on 17th February 2011 is more than the total APGs sum, the money was debited from the claimant's account after the 2nd defendant transferred the advance payment and was transferred to a sundry account. This is in accordance with the agreement of the parties.

In the case of **UBN Plc v. Ajabule & Anor (2011) LPELR-8239(SC)**, the Supreme Court held:

"In the law of contract, the law is that a written contract agreement entered into by parties is binding on them. Where there is any disagreement between the parties to such written agreement on any particular point, the only reliable evidence to resolve the claim is the written contract of the parties. The reason being that where the intention of the parties to a contract

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are clearly expressed in a document the court cannot go outside the document in search of other document not forming part of the intention of the parties." Per Adekeye, J.S.C (Pp. 39 paras. C)

The Court cannot go outside the terms of exhibit C1a to find that the 1st defendant did not remove the APGs sums as agreed by the parties particularly when the statement of account tendered by both the claimant and the 1st defendant (exhibits C6 and D11) support that condition.

Apart from the entries of 25th and 27th January 2011, 17th February 2011 and 28th February 2011, there is no other entry on the claimant's statement of account showing that the APGs sum transferred was credited into the claimant's account. In other words, this Court can presume that the 1st defendant followed the agreement of the parties to the effect that the APGs sums would be placed in a non-interest-bearing account with the 1st defendant's treasury and that it is over the money so transferred that the 1st defendant has a lien pursuant to Section 167(c) of the Evidence Act 2011 in the absence of evidence contrary to that fact. See the case of **Unilorin & Ors v. Obayan (2018) LPELR-43910(SC)**.

Flowing from the preceding paragraph, the only logical conclusion that can be reached by the Court is that having removed the amount to secure the APGs sums from the claimant's account on 17th February, 2011, the 1st defendant could not rightly and legally exercise a right of lien over the monies in the claimant's account which was in credit.

The claimant has averred that it instructed the 1st defendant vide its letters dated 7th October 2011 to transfer the sums of N=250 [illegible] and N=23,040,000.00 to G. K. O. Properties Limited and Jamilu Sani Paki respectively (exhibits C4 and C5). Both accounts were domiciled with the 1st defendant. Although the 1st defendant denied receiving any instruction from the claimant which it turned down, it averred in paragraph 25 of its 2nd amended statement of defence that:

25. There is no way the 1st Defendant will carry out any instruction to it by the Claimant requesting the 1st Defendant to transfer any sum of money from the collaterized fund in the Advance Payment Guarantees to which the 1st Defendant had a lien until such a time [illegible]

1st Defendant receives a written letter from the 2nd Defendant discharging the 1st Defendant from liability under the Advanced Payment Guarantees.

Under cross-examination, DW1, the sole witness for the 1st defendant admitted that the Managing Director of the claimant had visited the branch (i.e., Mararaba) and had also sent his staff with instruction for payment.

Again, premised on the foregoing and pursuant to the provisions of Section 167(c) of the Evidence Act 2011, it is safe to presume that the claimant delivered exhibits C4 and C5 to the 1st defendant. See the case of **Unilorin & Ors v. Obayan (2018) LPELR-43910(SC)** where the Supreme Court held:

"This Court went on to say that the Court is bound to draw the inference where there is no evidence to the contrary, and further added that there is also the presumption that where there is no evidence to the contrary things are presumed to have been rightly and properly done which is expressed in the common law maxim in latin omnia praesumuntur vite esse acta. There is presumption that where a letter has been properly addressed and mailed, the letter will be presumed to have been received by the addressee. See: Nwosu v. Udeaja (1990) 1 NWLR (Pt. 125) 188; Amodu v. Amode (1990) 5 NWLR (Pt. 150) 356." Per Aka'ahs, J.S.C (Pp. 11-13 paras. F).

I find and hold that the 1st defendant received exhibits C4 and C5.

Exhibit C6 shows that between 4th October 2011 and 11th October 2011, there was a credit balance of N=1,142,022,279.66 in the claimant's account. It is pertinent to recall at this point that the 1st defendant had already transferred the sum of N=1,348,000,000.00 from the claimant's account to "SUNDRY GUARATEE" on 17th February 2011 after the 2nd defendant made the advance payments into the claimant's account which had not been returned into the account. It is also pertinent to state that although the 1st defendant had certified exhibit C6 and had tendered a statement of the claimant's account as exhibit D11, the last entry on exhibit D11 was for 30th June 2011. The question then arises, if the 2nd defendant was not attempting to hide anything why did it not

tender a statement of account which included the transactions for 4th and 11th October 2011?

Pursuant to Section 167(d) of the Evidence Act 2011, this Court holds the presumption that the 1st defendant could have produced the evidence but failed to do so because it would be unfavourable to it. The statement of account is an entry in a banker's book, and it is properly held in the custody of the 1st defendant. See the case of **Oloja & Ors v. Gov., Benue State & Ors (2015) LPELR-24583(CA)**.

In the case of **Diamond Bank Plc v. Ugochukwu (2007) LPELR-8093(CA)**, the Court of Appeal held:

"The relation in law between a banker and his customer is that of debtor and creditor, and so when a bank credits the current account of its customer with a certain sum, the bank becomes a debtor to the customer in that sum and conversely when a bank debits the current account of its customers with a certain sum, the customer becomes a debtor to the bank in that sum since the relationship between a banker and his customer is that of debtor and creditor, whichever party is the creditor is entitled to sue, if demand for payment was not complied with. So held the Supreme Court in Yesufu v. ACB Ltd. (3) (1976-1984) 3 N.B.L.R. p. 607, (1976) 1 All NLR (Pt.1) 328." Per Rhodes-Vivour, J.C.A (as he then was) (Pp. 18-19 paras. F)

It is a well settled principle of law that when a banker refuses to pay a customer's cheque or follow the customer's instruction to pay and the customer has sufficient funds in its account to cover the amount, it is a breach of contract. See the case of **Aminu Ishola Investment Ltd v. Afribank Nig. Plc (2013) LPELR-20624(SC)**. In the instant case, the 1st defendant was clearly in breach of the banker/customer relationship it had with the claimant when it refused to comply with the claimant's instructions to transfer funds on 7th October 2011 vide exhibits C4 and C5. I so hold.

The law distinguishes the quantum of damages to be awarded to a claimant who has proved that his cheque was dishonoured without just cause between trading and non-trading customers. In **Allied Bank of Nigeria Ltd v. Akubueze (1997) LPELR-429(SC)**, the Supreme Court held:

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"On the issue of damages, however, in this class of cases, a distinction has been drawn between trading and non-trading customers. As regards trading customers or customers in business, the law presumes injury to them without proof of actual damage and they are entitled to substantial damages although they neither pleaded nor proved actual damage. See Wilson v. United Counties Bank Ltd. (1920) A.C. 102 at 112 H.L where after reviewing the authorities, Lord Birkenhead, L.C. stated:

'The ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit.'"

In the case of **Ojiakor v. FCMB (2015) LPELR-40418(CA)**, the Court of Appeal adopted the reason for the exception on damages for breach of contract in a case where the bank wrongfully dishonours the customer's cheque as stated in the case of Wilson v United Counties Bank Ltd (1920) A.C. 102 at 112 H.L. where after reviewing the authorities, Lord Birkenhead, L.C. stated:-

"The ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit."

In the case of **Ecobank Nigeria Plc v. Rono Rufus Opara (2019) LPELR-48828(CA)**, the Court of Appeal when seeking to resolve the issue, "Was the sum of N5 Million, awarded to Respondent, in keeping with the measure of damages to be awarded in proved contract transaction in banker/customer contract?", held:

"The old case of Hirat Aderinsola Balogun Vs National Bank of Nigeria (1978) 7-8 SC 111 ... appears to have left the determination of appropriate damage at the discretion of the Court that heard the case, when it said:

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'As it is always extremely difficult to have an accurate estimate of the extent of damages under this head, it has, therefore been laid down by a long line of cases beginning with that of Marzetti Vs Williams (1830) 1B & Ad 415 that damages in such cases are at large which is to say that in such cases, a jury may within reason make an award of any sum as they may consider the circumstances of the breach of contract or dishonour of cheque warrant although there has been no proof of any actual loss (i.e. special damage) to the customer.' ...

See also the views of Kekere-Ekun JSC in that case of Union Bank of Nigeria Plc Vs Chimaeze (Supra), where she further stated what the trial Court should consider in coming up to his discretion as to the measure of damages, awardable: she said:

'... (a) trader is entitled to recover substantial damages for the wrongful dishonour of his cheque, without pleading and proving actual damage or loss...'

My Lord Okoro JSC appeared to have further widened the basis of the exercise of discretion by a trial Court to accommodate what may appear as an award beyond just compensation. In the case of First Bank of Nigeria Plc Vs A.G. of the Federation & Ors (2018) LPELR 46084 SC; (2018) 7 NWLR (Pt.1617) 121, my lord held:

'In Eliochin Nig. Ltd & Ors Vs Victor Ngozi Mbadiwe (1986) 1 NWLR (Pt.14) p. 47, this Court held that the primary object of an award of damages is to compensate the Plaintiff for the harm done to him or a possible secondary object which is to punish the defendant for his conduct in inflicting that harm. It was further held that such secondary object can be achieved by awarding in addition to the normal compensatory damages, damages which go by various names to wit; exemplary damages, punitive damages, vindictive damages and even retributive damages. This comes into play whenever the defendant is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence, fragrant disregard of the law and the like.'

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... The law is always that the trial Judge is the one to determine what constitutes general damages, which automatically flows from the wrong by the defendant, once his claim in contract or tort succeeds, whether or not he pleaded the general damage and/or proved any actual injury/loss!"

See also the case of **UBN Plc v. Chimezie (2006) LPELR-11747(CA)**.

The Supreme Court in the case of **Hirat Aderinsola Balogun v. National Bank of Nigeria Ltd (1978) NGSC 7; All NLR 63** endorsed the ratio in the case of **Rolin v. Steward (185) 14 C. B. 595; 139 ER 245** where that Court held:

"the jury in estimating the damage may take into consideration the actual and necessary consequences which must result to the plaintiff from the defendant's action for slander of a person by way of his trade."

The apex Court went on to state that

"slander of a person by way of his trade or business (profession or calling) is actionable without proof of special damage and, substantial damage may be awarded although actual damage was not proved."

The case of **Inoma v. Nzekwu (2007) LPELRR-8715(CA)** was a claim on slander. The Court held that although slander was actionable on proof of damage that:

"There is, however, also damage or loss suffered by a plaintiff which, as exception to the general rule is actionable per se, that is, without proof of damages, this includes an imputation that the Plaintiff has committed an offence punishable by death or imprisonment or the uttering of the words which tend to injure the Plaintiff in his trade or profession."

I have gone to great lengths to copiously show by these authorities that because of the sui generis nature of the claim for breach of contract made against the 1st defendant for the dishonouring of the claimant's instructions even though it had sufficient funds to cover the total amount of the instructions at the date the instructions were given and because

the claimant to the knowledge of the 1st defendant was a trading company, the claimant is entitled to substantial damages. Although the 1st defendant attempted to deny that it knew that the claimant was a trading company, there was sufficient evidence before the Court that not only had the 1st defendant issued the APGs knowing that the claimant was to supply the 2nd defendant with books, the 1st defendant was the issuing bank for the letter of credit opened on behalf of the claimant in favour of the company that exported the books from India and collected the bill of lading for onward transmission to the claimant to enable it clear the books at the Port.

As I have found, the 1st defendant had debited the APGs sums and more from the claimant's account since 17th February 2011 and transferred it to a sundry holding account and therefore had no lawful basis whatsoever to deny the claimant access to the funds in its account which was in credit over N=1 billion at the time the claimant issued the instructions. It is evident also that the 1st defendant also denied access to the 2nd defendant between 10th February 2014 when the second suit filed by the claimant was struck out and 4th April 2014 when the instant suit was filed even though there was no reason for it to continue to do so.

The 1st defendant has been the beneficiary of the malevolent game of chess it plunged both claimant and the 2nd defendant into, holding the sum of N=872,780,552.84 in its custody without paying interest thereon from 17th February 2011 until 2nd February 2016 when the Court ordered that the money be paid into an interest yielding account in the names of the claimant and the 2nd defendant pending determination of the suit, which order was curiously varied by the consent of all the parties on 20th September 2016 so that the money remained in the 1st defendant's custody without interest.

The act of the 1st defendant was unconscionable and detrimental to the goodwill of the claimant and its trade credit with its customers. It was a deliberate and malicious act against the interest of the claimant and the 1st defendant continues to enjoy the largesse in bad faith. Exhibits C4 and C5 clearly state that the funds to be transferred were to offset part of the claimant's indebtedness for the importation of dictionaries, but the 1st defendant was impervious to this need. I therefore find and hold that the claimant is entitled to substantial damages against the 1st defendant for the injury caused to it.

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Furthermore, it is usual and customary that a bank keeps money for its customer at a cost of charges and sundry fees, and in turn gives that money to customers who require loan facilities at the premium lending rate. That is what the business of banking entails and that is how the 1st defendant makes its profit. In this instance the 1st defendant has robbed "Peter" (the claimant) to pay "Paul" (customers that borrow from it) and has thereby made profits to which it is not entitled and which it deprived the claimant of.

The 1st defendant has denied the claimant access to the sum of N=872,780,552.84 in its account since 17th October 2011 when it took the decision not to heed the payment instruction given by the claimant on the unfounded excuse that it held a lien over the money even though it had clearly transferred the sum to a sundry account as required under exhibit C1a. In the case of **Petgas Resources Ltd v. Mbanefo (2006) LPELR-6040(CA)**, the Court of Appeal held:

"Pre-judgment interests as in the present case are claimed as of right based on agreement between the parties or merchantile custom or equity. I agree with the respondent submission that since his claim for mesne profit was successful at the lower Court, the sum of money involved which the appellant had withheld or prevented him from it use, for a certain period should attract some interest. In some cases the Court can grant a pre-judgment interest on a monetary or liquidated sum awarded to a successful party even where such a party did not plead or adduce evidence to prove it. Like damages, such interest naturally accrue from the defendant failure to pay the sum involved over or period of time thereby depriving the plaintiff from the use and enjoyment of the sum involved." Per Adamu, J.C.A (Pp. 16-17 paras. F).

Also, in the case of **NPA v. Aminu Ibrahim & Co & Anor (2018) LPELR-44464(SC)**, the Supreme Court per Sanusi, JSC held as follows:

"The law is well settled that before a prejudgment interest can justifiably be awarded, a plaintiff often pleads that he is entitled to such interest and also that where he so pleads it, he must prove the basis for his entitlement of same by showing that it

was supported either by statute or contract agreement between the parties or based on mercantile custom or on principle of equity. Such claim of interest is normally Pleaded and proved... It is however a valid law that a Court can still grant pre-Judgment interest on a monetary or liquidated sum awarded to a successful party, even in a situation where such a party did not plead or adduce evidence in proof of such claim. Such interest, like in the instant case, naturally accrues from the failure or refusal to pay the amount involved over a long period of time, thereby depriving a party from the use of and/or enjoyment of the sum involved which is the fruit of his Judgment ..."

The 1st defendant, a bank involved in trading in the money market, has denied the claimant access to its monies for nearly 12 years depriving it of the use and enjoyment of the money. The claimant is therefore entitled to the pre-judgment interest of 15% claimed by the claimant on the sum of N=872,780,552.84 from 7th October 2011, not as APGs sums, but rather as damages for the unwarranted and unlawful withholding of the money claiming a lien thereon when it had transferred the APGs sum from the claimant's account since 17th February 2011.

It is not correct as contended by the defendants that the claimant cannot be entitled to this interest because there was no substantive claim for it because the claimant has proved that the money was rightfully in its account for its lawful use.

The judgment in Suit No.: GM/20/2016 between the 2nd defendant and the Attorney General of Gombe State as plaintiffs and the 1st defendant as sole defendant dated 6th day of June 2016 (exhibit D14), which was affirmed by the Court of Appeal on 29th November 2017 in Appeal No.: CA/YL/80/2016 (exhibit D15), is not relevant to the determination of the issue in this case because what was determined therein was the 1st defendant's obligation to the 2nd defendant under the APGs whereas in this case, the claim was by the claimant against the 1st defendant for the withholding of its funds without excuse. I so hold.

In the circumstances, as there are no claims sustained against the 2nd defendant, judgment is entered for the claimant against the 1st defendant solely as follows:

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1. **The 1st defendant is in breach of contract when on 7th October, 2011 it refused the claimant to draw from its account No. 1012465427 despite the fact that the said account was in enough credit to cover the withdrawal sought to be made on the said date.**
2. **The 1st defendant by itself, its servants, officials and privies howsoever called are hereby restrained from disturbing or refusing the claimant from operating its account No. 1012465427 in the 1st defendant's bank or from honouring the claimant's transfer or payment obligations to third parties from the said account as long as same is in credit.**
3. **Interest of 15% per annum on the sum of N=872,780,552.84 (Eight Hundred and Seventy-Two Million, Seven Hundred and Eighty Thousand, Five Hundred and Fifty-Two Naira, Eighty Four Kobo) from 7th October 2011 when the 1st defendant denied the claimant access to the funds in its account which was in credit at that date till judgment.**
4. **Interest on the judgment sum at the rate of 10% per annum from judgment date till final liquidation thereof.**
5. **Costs of this action in the sum of N=2,500,000.00 (Two Million Five Hundred Thousand Naira) only.**

I so rule.

8/3/2022

Hon. Justice O. O. Abike-Fadipe
Judge

COURT OF LAGOS STATE
HIGH
Sign: Date: 10-3-2022
CASH OFFICE, IKEJA

CERTIFIED TRUE COPY

Fashola Tairat
COMMISSIONER FOR OATH
HIGH COURT IKEJA