TRADE BANK PLC.
V.
1. DELE MORENIKEJI (NIG.) LTD.
2. DR. DELE ZUBAIR

COURT OF APPEAL
(ILORIN DIVISION)

CA/IL/1/2003

MUHAMMAD SAIFULLAHI MUNTAKA-COOMASSIE, J.C.A. *(Presided)*
JOHN ABOYIIKONGBEH, J.C.A.;
DAVID ADEDOYIN ADENIJI. J.C.A. *(Read the Leading Judgment)*

THURSDAY 9TH DECEMBER, 2004

APPEAL - Brief of argument - Reply brief- When unnecessary.
APPEAL - Brief writing - Criticism of Judge in brief of argument -Need for counsel to exercise restraint in use of words,
APPEAL - Brief writing - Duty on counsel in respect of- Need to avoid verbose and repetitive argument.
APPEAL - Evaluation of evidence - Improper evaluation by trial court - Order appellate court can make.
APPEAL — Judgment of court — Where inconclusive - Proper order appellate court can make.
COMMERCIAL LAW - Agreement - What constitutes - Whether can be oral or inferred from conduct of parties.
CONTRACT'- Agreement - What constitutes - Whether can be oral or inferred from conduct of parties.
COURT- Brief writing - Criticism of Judge in brief of argument -Need for counsel to exercise restraint in use of words.
COURT - Decision of court - Basis of- How determined. COURT- Duty on court - Whether can make case for parties.
COURT - Speculations - Whether court can indulge in - Proper role of court.
DOCUMENT- Document tendered in evidence - Where challenged - Duty of calling maker of- On whom lies.
DOCUMENT - Documentary evidence - Document tendered in evidence by person not its maker - Authenticity of - Where challenged - Weight court can attach thereto.
EVIDENCE - Documentary evidence - Document tendered in evidence - Where challenged- Duty of calling maker of- On whom lies.
EVIDENCE - Documentary evidence - Document tendered in evidence by person not its maker - Authenticity of - Where challenged - Whether court can rely thereon.
EVIDENCE - Proof- Burden of proof in civil cases - On whom lies.
JUDGMENT AND ORDER - Judgment of court - Basis of- Where based on speculation rather than evidence - Propriety of.
JUDGMENT AND ORDER - Judgment of court - Need to be certain and conclusive.
JUDGMENT AND ORDER - Retrial order- When court can make.
JUDGMENT AND ORDER - Where judgment is inconclusive -Proper order court can make.
LEGAL PRACTITIONER - Brief writing - counsel writing brief -Need to exercise restraint in use of words.

LEGAL PRACTITIONER - Brief writing - Duty on counsel in respect of- Need to avoid verbose and repetitive argument.
PRACTICE AND PROCEDURE- Brief of argument - Reply brief -When unnecessary.
PRACTICE AND PROCEDURE - Case before court - How determined.
PRACTICE AND PROCEDURE - Documentary evidence -Document tendered in evidence - Where challenged - Duty of calling maker of- On whom lies.
PRACTICE AND PROCEDURE - Documentary evidence -Document tendered in evidence by person not its maker -Authenticity of- Where challenged- Weight court can attach thereto.
PRACTICE AND PROCEDURE - Duty on court - Whether can make case for parties.
PRACTICE AND PROCEDURE - Evaluation of evidence -Improper evaluation by trial court - Order appellate court can make.
PRACTICE AND PROCEDURE - Judgment of court - Need to be certain and conclusive.
PRACTICE AND PROCEDURE - Judgment of court - Where inconclusive - Proper order appellate court can make.
PRACTICE AND PROCEDURE - Proof- Burden of proof in civil cases — On whom lies.

Issues:

1. Whether the findings of facts and conclusions arrived at by the trial court can stand in view of the evidence before the trial court.

2. Whether having regards to the fact that the decision of the trial court in the case is inconclusive, it can be allowed to stand.
3. Whether the respondents are entitled to the damages awarded by the trial court in the light of evidence before the court.

Facts:

The respondents sought and obtained a loan of N5 million naira from the NEXIM Bank through the appellant bank, for the exportation of cocoa butter. The appellant and the respondents signed an agreement, which gave the appellant an unqualified right of lien on the stock of cocoa procured with the loan, or on the proceeds of the export transaction.

On the basis of the agreement, funds were disbursed to the respondents and the cocoa butter was exported. Subsequently, the 2nd respondent presented a proposal to the appellant that the proceeds of the export transaction should be used to import caustic soda into Nigeria on the understanding that the loan would be repaid from the proceeds of sale of the caustic soda. Consequently, the appellant disbursed additional moneys to the respondents, with which the caustic soda was imported into Nigeria.

Subsequently, the appellant wrote a letter dated 20/11/95 to the respondents to notify them of the outstanding debt on the transactions between the parties. The appellant also threatened to exercise its right of lien on the caustic soda if the debt was not paid by the respondent within a stated time.

On its part, the 1st respondent wrote a letter to the appellant in which it asked the appellant not to sell the goods without prior information to the respondents.

The loan however, remained outstanding. Consequently, the appellant sold the caustic soda. The respondents were aggrieved and filed a suit against the appellant claiming damages for breach of contract. The appellant counter-claimed for outstanding indebtedness. It pleaded that it had a lien over the caustic soda which it exercised because the respondents did not sell the goods on time. The respondents had in their amended statement of claim pleaded that the appellant had

no lien over the goods and that there was no agreement that the appellant could sell the caustic soda to offset any debt.

At the trial, the 2nd respondent testified on behalf of the respondents and admitted under cross-examination that he wrote the proposal for the importation of caustic soda with the proceeds of the cocoa butter export; that the appellant accepted the proposal and provided funds therefore. The respondents tendered their letter to the appellant in evidence and it was admitted as exhibit H. They also tendered an LPO to show that the appellant sold the caustic soda at gross undervalue and it was admitted as exhibit T. The maker of the LPO was, however, not called as a witness.

The appellant, on its part, seriously challenged the authenticity of the LPO (exhibit T) and also tendered its letter to the respondents and it was admitted in evidence as exhibit DW4.

In its judgment, the trial court found that the appellant was entitled to payment for the warehousing of the caustic soda, but dismissed its counter-claim. On the other hand, the trial court found that the appellant had only a conditional lien over the caustic soda and held that the appellant had no right to sell the caustic soda without first informing the respondents. The trial court also held that the appellant had the onus of proving the relationship between the transactions of exportation of cocoa butter, and importation of caustic soda. Consequently, the trial court entered judgment in favour of the respondents.

It calculated the market price of the caustic soda based on the amount quoted in exhibit T and made an award therefor in favour of the respondents. It, however, deferred its award on the respondents' claim for interest. It ordered that the respective parties should file their computation of the interest due and payable to the respondents. The trial court subsequently adopted the computation filed by the respondents when the appellant failed to file its computation.

The appellant was dissatisfied with the judgment of the trial court and appealed to the Court of Appeal.

At the hearing of the appeal, it was contended inter alia on behalf of the appellant that the trial court ought not to have relied on exhibit T because its authenticity was seriously challenged at the hearing. In response, it was contended on behalf of the respondents that the trial court properly relied on exhibit T and that the appellant ought to have called its maker as a witness if the appellant had good grounds for challenging the exhibit.

The respondents' counsel also raised objection to the competence of the appellant's reply brief on the ground that it was unnecessary because the respondents' brief did not raise fresh issues.

Held *(Unanimously allowing the appeal):*

1. *On What constitutes an agreement* -
   An agreement essentially consists of an offer or proposal and an acceptance. In the instant case whilst it is true that the appellant claimed a right of lien over the caustic soda in exhibit DW4. It is equally true that by exhibit H, the respondents acknowledged the existence of the lien but sought to qualify it by saying that the right should not be exercised without the 1st respondent's knowledge. There was however, no further proof that the appellant agreed to the terms sought to be introduced into the transaction by the respondents. In the circumstance, there was no consensus and therefore no agreement between the parties on that point. (Pp. 327-328, paras. G-A)
2. *On Whether an agreement can be oral or inferred from conduct of parties* –
   An agreement can be oral, or can be implied from the conduct of the parties thereto. In the instant case, although the initial agreement between the parties was written, the

conduct of the parties show that there was an extension of the agreement to cover the transaction relating to the importation of caustic soda, though not in writing. (P. 332, paras. D-F)

3. *On On whom lies burden of proof in civil cases* -
A plaintiff has the burden of proving his assertion. In the instant case, the respondents had the burden of proving that there was no nexus between the transaction of export of cocoa butter, and importation of caustic soda. Consequently, the trial court erred when it held that the appellant had the burden of proving that the transaction relating to the exportation of cocoa butter continued into the importation of caustic soda. (P. 333, paras. B-E)
4. *On On whom lies duty of calling maker of a challenged document* -
The duty of calling the maker of a document as a witness lies on the party who tenders the document in evidence. In the instant case, it was the respondents who had the duty of calling the maker of exhibit T as a witness because the document was tendered in evidence by the respondents. (P. 348, paras. C-D)
5. *On Basis of decision of court* -
Cases are mainly decided on the evidence before the court. (P. 336, para. G)
6. *On Weight court can attach to document tendered in evidence by person not its maker* -
It is wrong for a trial court to rely on a document when its authenticity has been seriously challenged and when its maker is not called as a witness. In the instant case, the trial court ought not to have placed reliance on exhibit T because its maker was not called as a witness and its authenticity was seriously challenged by the appellant. (P. 348, paras. C-D)
7. *On Need for judgment of court to be certain and conclusive* -
Judgments of court ought to be certain and conclusive otherwise they become vulnerable. In the instant case, the judgment of the trial court was not conclusive as to the amount owed by the respondents to the appellant. In the circumstance, it was fatally flawed. (P. 336, para. H)
8. *On Whether court can make case for parties* -
It is wrong for a court to make a case for the parties to a suit. In the instant case, the parties did not plead the issue of qualified or conditional lien. The appellant pleaded the issue of lien, while the respondent denied its existence outright. The trial court therefore erred when it found that the appellant had a conditional lien and made its finding a basis for rejecting the right of sale exercised by the appellant. [Overseas Construction Co. Ltd. v. Creek Ent. (Nig.) Ltd. (1985) 3 NWLR (Ft. 13) 407 referred to.] (Pp. 327, paras. E-F; 328, paras. B-C)
9. *On Whether court can indulge in speculation* -
The duty of court is not not to consider the evidence produced before it and never to proceed to indulge in speculation as to what might have happened nor should a Judge substitute his own supposition for the testimony of witnesses given an oath before him. Where a court acts on speculation rather than evidence, then it has abandoned its proper role. [Overseas Construction Co. Ltd. v. Greek Enterprises (Nig.) Ltd. (1985) 3 NWLR (Ft 13) 407 referred to.] (P. 328, paras. B-E)
10. *On When court can order re-trial of a case* -
Where a trial court does not appropriately and adequately evaluate the evidence before it, an appellate court can make an order for the rehearing of the case. In the instant case, the

trial court did not properly evaluate the evidence adduced by the parties. In the circumstance, the Court of Appeal could order a rehearing of the suit so that justice could be done to both parties. (P. 343, para. C)

11. *On Need for counsel to avoid repetitive arguments in briefs of argument* -
Per ADENIJI, J.C.A. at page 340, paras. A-C:
"I must say in regard to this very issue and in fact with respect to several other issues raised by the appellant were done in utter disregard of economy of time and words. The arguments on both sides were verbose and time consuming if not outright repetition of points already canvassed in other issues. Counsel will be helping an appellate court a great deal if issues are conveniently grouped together e.g. those that could properly be canvassed under weight of evidence, those that can be classified under matters of speculation by the lower court and those that can come under wrong formulation by the court of issues not raised in the pleadings or evidence. It becomes very cumbersome if counsel has to separately treat attack or criticize every statement made by the lower court under separate headings."

12. *On Need for counsel to exercise restraint in use of words in brief writing* -
There is the need for counsel to exercise restraint in the language used while criticising findings of a court against which they have lodged an appeal because counsel can always make their points without casting aspersions on trial Judges and without the use of intemperate language. Consequently, words such as "embellishment" and "invention", in reference to a trial court's opinion should, if possible, be avoided as the trial courts concerned have no direct opportunity to defend their stand. (P. 340, paras. D-E)

13. *On When a reply brief of argument is unnecessary* –
A reply brief of argument is unnecessary where a respondent's brief of argument does not raise any new point. In the instant case, the respondent's brief of argument did not raise any new point, so the reply brief of argument field by the appellant is a surplusage. (P. 348, para. G)

Nigerian Cases Referred to in the Judgment:

A.-G., Oyo State v. Fair Lakes Hotels (No. 2) (1989) 5 NWLR (Pt. 121)282
Abibo v. Tainuno (1999) 4 NWLR (Pt. 599) 334
Adefulu v. Okulaja (1996) 9 NWLR (Pt. 475) 301
Adeola v. Oloba (1998) 4 NWLR (Pt. 545) 224
Agbanelo v. U.B.A. Ltd. (2000) 7 NWLR (Pt. 666) 534
Aina v. U.B.A. Plc. (1997) 4 NWLR (Pt. 498) 181
Akere v. Adesanya (1993) 4 NWLR (Pt. 288) 484
Am v. Am (2000) 3 NWLR (Pt. 649) 443
Aziuna v. NMCBank Ltd. (2000) FWLR (Pt. 28) 2243
B.C.C. Plc. v. Sky-lnco (Nig.) Ltd. (2002) 17 NWLR (R. 795) 86
Bank of the North Ltd. v. Idrisu (2000) 3 NWLR (Pt. 649) 373
Capper & D 'Alberto Ltd. v. Akintilo (2003) 9 NWLR (Pt. 824) 49
Coker v. Adetayo (1992) 6 NWLR (Pt. 249) 612
Ebba v. Ogodo (2000) 10 NWLR (Pt. 675) 387
Edokpolo & Co. Ltd. v. Ohenhen (1994) 7 NWLR (Pt. 358) 511
Emaphil Ltd. v. Odili (1987) 4 NWLR (Pt. 67) 915
Ezekwesili v. Onwuagbu (1998) 3 NWLR (Pt. 541) 217

Gbadamosi v. Kabo Travels Ltd. (2000) 8 NWLR (Pt. 668) 243
Gbafe v. Gbafe (1996) 6 NWLR (Pt. 455) 417
Guinness (Nig.) Plc. v. Nwoke (2000) 15 NWLR (Pt. 689) 135
Igwe v. A.I.C.E. (1994) 8 NWLR (Pt. 363) 459
Imo Concord Hotel Ltd. v. Any a (1992) 4 NWLR (Pt. 234) 210
Incar (Nig.) Plc. v. Bolex Enterprises Nig. (2001) 12 NWLR (Pt. 728) 646
Jammal v. Slate (1999) 12 NWLR (Pt. 632) 582
Kenlik Holdings Ltd. v. R. E. Invest. Ltd. (1997) 11 NWLR (Pt. 529)438
Leko v. Soda (1995) 2 NWLR (Pt. 378) 432
N.E.R.D. v. Gonze (Nig.) Ltd. (2000) 9 NWLR (Pt. 673) 532
Ndili v. Akinsunmade (2000) 8 NWLR (Pt. 668) 293
Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 129
Nwafornso v. Tailen (1992) 1 NWLR (Pt. 219) 619
Nwankwo v. Nwankwo (1995) 5 NWLR (Pt. 394) 153
Obasuyi v. Business Ventures Ltd. (2000) 5 NWLR (Pt. 658) 668
Ogunjumo v. Ademolu (1995) 4 NWLR (Pt. 389) 254
Oji v. Ndu (1993) 1 NWLR (Pt. 268) 235
Oko v. Igweshi (1997) 4 NWLR (Pt. 497) 48
Okonkwo v. Okonkwo (2004) 5 NWLR (Pt. 865) 87
Olagunju v. Oyeniran (1996) 6 NWLR (Pt. 453) 127
Olalomi Industries Ltd. v. N.I.D.B. (2000) 17 NWLR (Pt. 795) 58
Olohunde v. Adeyeju (2000) 1 NWLR (Pt. 676) 562
Olugbode v. Sangodeyi (1996) 4 NWLR (Pt. 444) 500
Onagu v. Micho (1961) 2 SCNLR 101
Onah v. State (1985) 3 NWLR (Pt. 12) 236
Onumalobi v. N.N.P.C. (1999) 12 NWLR (Pt. 632) 628
Oshatoba v. Olujitan (2000) 5 NWLR (Pt. 655) 159
Overseas Construction Co. Ltd. v. Creek Ent. (Nig.) Ltd. (1985) 3NWLR (Pt. 13)407
Sosanya v. Onudeko (2000) 11 NWLR (Pt. 677) 34
State v. Ajie (2000) 11 NWLR (Pt. 678) 434
U.B.A. Ltd. v. Achoru (1990) 6 NWLR (Pt. 156) 254
W.R. & P.C. Ltd. v. Onwo (1999) 12 NWLR (Pt. 630) 312
WDN Ltd. v. Oyibo (1992) 5 NWLR (Pt. 239) 77

Foreign Case Referred to in the Judgment:

Stumore v. Campbell & Co. (1892) 1 QBD 317

Nigerian Statutes Referred to in the Judgment:

Court of Act, Cap. 75, Laws of Federation of Nigeria, 1990, S.16
Evidence Act, Ss. 9, 19, 20(1), 21, 38, 91(3), 137(1) and 149(d)

Nigerian Rules of Court Referred to in the Judgment:

Court of Appeal Rules, O. 1 r. 20(4)

Appeal:

This was an appeal against the judgment of the High Court of Kwara State, llorin, in favour of the respondents. The Court of Appeal, in a unanimous decision, allowed the appeal and ordered a retrial of the suit.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal, llorin
Names of Justices that sat on the appeal: Muhammad
Saifullahi Muntaka-Coomassie, J.C.A. *(Presided); John*
Aboyi Ikongbeh, J.C.A.; David Adedoyin Adeniji, J.C.A. *(Read the Leading Judgment)*
Appeal No.: CA/IL/1/2003
Date of Judgment: Thursday, 9th December, 2004
Names of Counsel: K. K. Eleja, Esq. *(with him, R. O.*
Adedipe [Miss]) *-for the Appellant*
Chief S. F. Odeyemi *-for the Respondents*

High Court:
Name of the High Court: High Court of Kwara State, llorin
Name of the Judge: Folayan, J.
Dale of Judgment: Tuesday, 5th March, 2002

Counsel:
K. K. Eleja, Esq. (*with him,* R. 0. Adedipe [Miss]) -far the Appellant
Chief S. F. Odeyemi -for the Respondents

ADENIJI, J.C.A. (Delivering the Leading Judgment): This is an appeal against the decision of M. A. Folayan, J. sitting at llorin, delivered on 5th March, 2002. The court gave judgment for the plaintiffs in the case. The defendant/bank being dissatisfied with the judgment appealed against same.

The appellant formulated 6 issues for determination to wit:

"(1) Whether the trial court was right in law to have based its decision on unpleaded facts, to have indulged in speculation in arriving at its decision and to have held that the right of lien of the appellant was a conditional one when it was not the case of the respondents on their pleading and evidence.

(2) Whether the trial court was right in law with regard to the way and manner it treated the admission of PW1 on oath to the effect that the proceed of cocoa exportation was to be used in the importation of caustic soda and whether the court was right in holding that the appellant did not proof (sic) the merger of the 2 transactions.

(3) Whether the trial court did not abdicate its judicial responsibility by failing to determine comprehensively and conclusively all the issues in controversy submitted for adjudication by the parties before it.

(4) Whether the judgment of the trial court is supportable by the materials placed at its disposal especially in its decision to dismiss the appellant's counter-claim on the purported ground of unreliability of exhibit V19.

(5) Whether the learned trial Judge was right in holding that the 1st plaintiff had in the warehouse 3,198 bags of caustic soda and in awarding N320, 000 to the 1st respondent as estimated profit.

(6) Whether the trial court was right in relying on exhibit T' to determine the prevailing market value of caustic soda at all relevant times when the said exhibit had been demonstrated to be unreliable and made for the purpose of the case by the respondents".

On his part the learned counsel for the respondent chose to give replies to the submissions of counsel for the appellant in other words he elected to rely on the issues as formulated by the appellants' counsel.

This case as a matter of fact revolves around the way and manner the trial court chose to resolve the issues in controversy particularly the facts the court relied on, whether founded or otherwise. I need say that the trial court came to certain conclusions going by the facts or presumed facts which the court felt were revealed by the evidence led in the case. Such conclusions did not go down well with the appellant's counsel who termed them speculative.

In the main, the plaintiffs had approached the NEXIM Bank for financial assistance to facilitate the export or exportation of cocoa butter. NEXIM agreed to do so only through a commercial bank wherefore the defendant/bank to wit Trade Bank Plc. was brought into the matter. The amount of N5, 000,000.00 was said to have been released to the defendant/bank for disbursement to the plaintiff/ respondents to facilitate the transaction.

The said money was eventually disbursed to the plaintiff/ respondents but in a manner not altogether satisfactory to the plaintiff/ respondents. That became an issue in contention. Apart from that, there was an additional transaction introduced into the business when the plaintiffs/respondents requested the appellant/bank to facilitate the importation of caustic soda into the country with the proceeds already generated through the receipts on the cocoa butter exported. That again generated some controversy as to whether or not it formed part of the original transaction and whether or not the defendant/ bank had a right of lien over the said item to be imported. These and many other points were at stake at the hearing, but when the appellant bank would not agree with the trial court's findings on particular aspects of the court's verdict, it filed some grounds of appeal challenging the court's view on those points.

The learned counsel for the appellant on issue number one submitted that the issue was distilled from grounds 1, 5, 11, 16 and 17 of the grounds of appeal in that the trial court in his view based its judgment on unpleaded facts with its findings grounded on speculative and unproved facts. Counsel referred to the pleadings of the parties and the evidence adduced in court especially the finding of the court that though the appellant had the power to sell the caustic soda so imported it could not do so without the knowledge of the respondents and must also sell same at the current value. The court also held that defendant had only a qualified lien over the goods imported. Counsel went on to submit that the appellant had pleaded that it had the right of lien over caustic in para. 22 of its amended statement of its defence and the respondents had pleaded in parts 5 of their amended statement of claim that the appellant had no lien over the caustic soda and never pleaded the issue of qualified lien now introduced by the trial court.

Counsel added that the court finding that the appellant could not sell the item without the knowledge of the respondents or below the current value had no support in the pleadings filed by the parties. The trial court he said simply set up a new case for the parties contrary to that formulated in the pleadings. This he claimed influenced the court's decision that the item could only be sold at the market rate of N95, 000 per metric ton as opposed to N32, 000.00 and N33, 000.00 pleaded by the appellant. This he said was wrong, since the court should have restrained itself from setting up a new case for the respondents and which step had affected the outcome of the case.

Counsel went on to give other examples of such conclusions e.g. the amount of interest payable if the amount paid by the respondent on 31st January, 1995 had been credited to its account earlier than 15th August, 1995. Counsel also attacked the finding of the court as regards liability of the respondents as it found that the total liability of the respondents ought to be based on 17% interest as per exhibits DW1 and J with effect from 29th June, 1994 to 30th January, 1995 and not from 2nd June, 1994 when the loan had not by then been released by NEXIM. He did not agree with the order of the court that the calculation should be worked out by experts and

the total sum arrived at be made the liability of the 1st respondent to the appellant. This he said was not the case put forward by the parties and the decision of a court he said, ought to be based on the issues raised on the pleadings and where a court's decision is based on unpleaded facts, it is liable to be set aside on appeal. Counsel relied on U.B.A. Lid. v. Achom (1990) 6 NWLR (Pt. 156) 254 at 70 para. F and 273 para. 13; Aw v. Am (2000) 3 NWLR (Pt. 649) 443 at 455 paras. D - E; Oshatoba v. Olujitan (2000) 5 NWLR (Pt. 655) 159 at 170 paras. F-H.

Counsel again turned to the courts' findings on p. 236 of the record on the issue of qualified lien and submitted that while the court was right in finding that the respondents gave the appellant the power to sell (the caustic soda) it was not the case of the respondents that they gave a conditional power nor the condition that they (respondents) must be informed before sale is effected nor at a particular price. The additions counsel described as embellishments and speculations invented by the trial Judge. Courts, counsel added; do not decide cases on speculations or on unverified facts. He cited Coker v. Adetayo (1992) 6 NWLR (Pt. 249) 6 12 at p.625; Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 129 at 139. In the same way he went on, courts do not premise their decision on unpleaded facts, unproved facts, or on speculations. He relied for this on Adefulu v. Okulaja (1996) 9 NWLR (Pt. 475) 668; B.C.C. Plc. v. Sky-Inco (Nig.) Ltd. (2002) 17 NWLR (Pt. 795) 86 at 116. Counsel urged the court to resolve the issue in favour of the appellant and allow the appeal.

On that issue No.1 the respondents' counsel argued that the findings of the court were based on pleaded facts and the court did not make out a case for the parties. He referred to pp. 29 - 37 of the amended statement of claim showing that the respondent did not use her caustic soda as security for the loan. Counsel referred to exhibits H & I and said the respondents had written in exhibit H that the appellant should not sell the chemicals without their knowledge and should not sell same below the market value as at that time. Counsel also referred to exhibit 1 saying that no sale could be earned out "without them". The respondent he added also gave evidence in support of the facts in the said exhibits H & I. The appellant he observed, did not adduce any evidence in support of its right of lien as the DW1 only said it was not correct to say that the defendant had no right of lien. He pointed out also that the DW1 had said again that the exhibit 1 did not contain the condition for the lien. Exhibits H & I relied on by the court contain the condition that the appellant could not sell without the knowledge of the defendants nor sell below the current price. These issues counsel emphasized, were adequately dealt with by the court. The trial court had therefore not added any unpleaded facts. It did not also set up a new case for the respondent.

On the issue that the sum of N5.097.474.08 was credited to the respondent's account counsel referred to the evidence of the appellant, under cross examination where he agreed he had said that the proceed of cocoa exported was paid on 30/1/95 but was credited as shown on exhibit V19 on 15/8/95 but the respondents had said ' that all the interest as shown were fictitious and not supportable. The appellant he pointed out had also claimed that interest is charged on any figure on the debit side meaning that even when the sum of N5, 092,474.08 was not credited on 30/1/95 the debit side was not reduced by that figure. The court he said was therefore right in finding that there was no reason why the respondents' account should not have been credited since 30th January, 1995. The trial court was therefore not guilty of misdirection or speculation, assented counsel. On the interest on NEXIM loan, counsel urged the court to affirm the view of the trial court that the calculation should start from 29/6/ 94 and not 2/6/94.

The issue of when the calculation of interest should start whether on 2/6/94 or 29/9/94 counsel maintained was abundantly pleaded. From the totality of the evidence led on both sides

counsel maintained, the trial court was right in insisting that interest on the loan should be 17% and there was no equitable basis for calculating the interest from 2/6/94 a time when the loan had not even been released by NEXIM. According to him, the DW1 had confirmed that the goods entered the warehouse on 18/11/95. If the entire payment was made in November 1995 counsel wondered where the additional freight came from, giving rise to the debiting of the respondents account with N137, 760.00 on 6/1/98. Again, the appellant claimed to have sold the caustic soda since August, 1996 in which case there would be no freight in January, 1998 giving rise to any freight charges. He finally urged the court to resolve that issue in favour of the respondents.

Having considered the submissions of counsel and the issues calling for resolution I believe it is necessary to consider first, the state of the pleadings in relation to this issue No. 1 as regards lien or no lien and then the status of such a lien if any. Para. 22 of the consequents al amended statement of defence and counter-claim filed by the appellants per p. 68 of the record reads: -

> "22. The defendant contrary to the averment in para. 29 of the statement of claim slates that to the knowledge of the plaintiff, the defendant has a lien on the caustic soda with option to sell in case of failure to pay the debt by the first plaintiff".

The above could also be read with paras. 14 and 15 of the consequential amended statement of defence and counter-claim on page 67 of the record which states thus:

> "14. The defendant avers that part of the conditions attached to the agreement in paragraph 12 was that the defendant shall see to the clearing of the goods upon arrival, that it shall provide warehouse at the first plaintiff's cost and shall have a lien on the goods until the first plaintiff pay it's debt owed to the defendant. It was understood that the debt was to be paid from the proceeds of the sale of the caustic soda.
>
> 15. The defendant states that it was the further agreement she had with the first plaintiff that if the first plaintiff did not sell the goods on time the defendant shall reserve the option to sell the goods at the prevailing price of the goods per ton and use the proceed to offset the indebtedness of the first plaintiff. These terms are contained in the letter of 22nd June, 1994. Defendant pleads 1st plaintiff's letter of 30th March, 1995." (Italics for emphasis only).

On the contrary, the respondent had pleaded in para 5 of their further and better amended reply to amended statement of claim that the appellant had no lien on the goods imported. Para 5 of the further and better amended paras states:

> "5 There was no agreement that the defendant had a lien on the 1st plaintiff's caustic soda. And no agreement that the defendant could sell the caustic soda to offset any debt."

One would note that the above are categorical statements on the issue of the existence or otherwise of a lien over the imported goods. At a stage however there was exchange of correspondence over the imported goods giving rise to exhibits H & I. Before then, there was exhibit C at the commencement of the transaction which gave the appellant unqualified right of lien as security for the facility. Under the heading for security it reads:

> "The security for the facility will include the following:-
>
> (i) Legal right of lien on the stock of cocoa or other farm produce or both procured by the company and delivered to our nominated warehouse under a tripartite agreement;

(ii) Legal right of lien on the proceeds of export transactions to be domiciled in the company's account TB Plc".

I must say that, the above did not contemplate the subsequent transaction. There are however other letters which contemplates the subsequent transaction to wit the importation of caustic soda and the issue of the right to lien on the goods so imported. Exhibit DW4 a letter from the appellant to the respondent dated 20/11/95 reads:

"We refer to the above facility and wish to confirm that your indebtedness to us as at today 20th November, 1995 isN7, 894,631.91.

We hereby recall the facility immediately and request that you make urgent arrangement to fully liquidate this debt within 21 days from the date of this letter.

Take Note that if by 10th December, 1995 you are yet to full (sic) repay this debt, we shall be forced to exercise our right of lien on the goods without further reference to you.

Please be guided accordingly.
Thank you.
Yours faithfully,
Trade Bank Plc.
(Sgd.)...
DGM Banking Operations
Sgd. DGM Banking Sgd. Manager Banking."
(Italics for emphasis only).

The above letter speaks for itself. There is another letter from the respondents marked exhibit H, dated 30th March, 1995 which reads:

"Reference to our letter of 27th March, 1995, concerning the above subject, I am writing as Managing Director of the above company and I am giving my pledge that should the proceeds from the chemicals we are bringing in not (sic) sufficient to offset the liability with the bank, I pledge my personal effects to offset the balance.

Please, do not sell when the chemicals come without our knowledge and do not sell below the market value operating during the time.

Thanks for your cooperation.
Yours sincerely,
(Sgd.)...
Dr. Dele Zubair
Managing Director".

The above was followed by another letter dated 1/11/95 from I-the respondents to the appellant in which the respondents again asked the appellant not to sell the goods without their knowledge. In the evidence in court, the respondents agreed that the appellant had a lien on the goods but that they could not sell without informing them and not below the current marked price.

The trial court considered the above letters and the evidence of the parties in concluding that though the appellant had a lien on the goods, the lien was conditional and sales should not have been affected without the knowledge of the respondent or at a lower price than the current one. The appellant has attacked that aspect of the court's decision saying it was a question of the

court setting up a new case for the parties contrary to that formulated on the pleadings, of course the respondent's counsel did not agree with the appellant on that score.

On a calm view to the whole episode one would find that in no where did the parties in fact plead the issue of qualified or conditional lien. The appellant pleaded the issue of lien while the respondent denied its existence outright. The fact of its existence was brought to the fore only through those two letters i.e. exhibits DW4 and H. The original agreement between the parties had a clause for lien. One would want to know if the existence of a lien had been established and if such lien is conditional upon certain events only.

In my view, it takes two or more parties to make an agreement and an agreement essentially consists of an offer or proposal and an acceptance. It is true that the appellant claimed a right of lien over the caustic soda going by exhibit DW4. It is equally true that by exhibit H the respondents acknowledged the existence of the lien but sought to qualify it by saying that the right should not be exercised without the company's knowledge. There was no further proof that the appellant agreed to the terms sought to be introduced into the transaction by the respondents. There was therefore no consensus and therefore no agreement on that point. The issue of qualified or conditional right to lien over the goods was not pleaded by both parties and none was in fact established. It could therefore not have been made a basis by the court, in rejecting the right of sale exercised by the appellant and the price it sold the goods.

In that regard I agree with the stand of the appellant's counsel that it was wrong for the court to make a new case for the parties and then go on to reject the price put on the sale - effected by the appellant. Issue No. 1 is consequently resolved in favour of the appellant see the case of Overseas Construction Co. Ltd. v. Creek Enterprises (Nig.) Ltd. (1985) 3 NWLR (Pt. 13) 407 at 414 where Onu, J.C.A. as he then was held:

> "It is an established principle of law that the duty of court is to consider the evidence produced before it and never to proceed to indulge in speculations as to what might have happened nor must a Judge substitute his own supposition for the testimony of witnesses given on oath before him. See Abayomi Adelenwa v. The State (1972) 10 SC 13 at 19; The Queen v. Ijoma (1962) All NLR 402 at 403; (1962) 2 SCNLR157 and Okoko & Anor. v. The State (1964) 1 All NLR 473. The Supreme Court has held in the case of The State v. Aibangbee (1988) 3 NWLR (Pt. 84) 548 that where a trial court acts on speculation rather than evidence then it has abandoned its proper role".

On issue No. 2 counsel said the issue was predicated on grounds 2, 3 & 4 of the grounds of appeal. He believed that the court was in serious error in putting a qualification on what he called unequivocal and unambiguous admission made by the 2nd respondent under cross-examination. Counsel went on to reproduce the evidence of PW1 under cross-examination and insisted that where such admission is made a party is at liberty to rely on such admission made by the adversary. Counsel relied on sections 9 and 20(1) of the Evidence Act and the case of Olugbode v. Sangodeyi (1996) 4 NWLR (Pt. 444) 500 at 516. The testimony of the 2nd respondent under cross-examination he maintained, qualified as an admission under our law, counsel referred to Kenlik Holdings Ltd. v. R.E. Invest. Ltd. (1997) 11 NWLR (Pt. 529) 438 at 447.

Counsel submitted that the court was in error to hold that the said admission was not sufficient to sustain the appellant's claim that the cocoa butter exportation proceeds was connected with the caustic soda importation and it was wrong for the court to hold that he

admission was qualified. The proof of such claim he said ought to be based on preponderance of evidence, not proof beyond reasonable doubt.

Counsel relied on Ogunjwno v. Ademolu (1995) 4 NWLR (Pt. 389) 254 at 265. He emphasized that the admission was backed by he evidence of the DW1 who said the proceeds from exportation of cocoa butter was not sufficient to offset the respondent's indebtedness the appellant bank hence both parties agreed that the proceeds [from cocoa butter be used to import caustic soda the proceeds from which would enhance the earnings of the respondents to enable them offset their indebtedness to the bank.

That piece of evidence on the relationship of the cocoa butter proceeds with the caustic soda income, counsel said was not challenged under cross-examination. The court he said was therefore wrong to have failed to act on that piece of evidence. He relied on Summonu Ololumde & Anor. v. ProfG. K. Adeyoju (2000) 10 NWLR t. 676) 562 at 572 and 589.

Counsel again referred to the court's findings on pp. 225 - 226 of the record touching on this same subject matter i.e. the relationship between the two transactions and the circumstances leading to the appellant's claim of regularity in transferring the cocoa butter proceeds to the caustic soda importation. That observation counsel said influenced the court in concluding that the cocoa butter exportation was distinct from the caustic soda importation and that the cocoa export transaction had terminated on 30th January, 1995. Counsel in this connection referred again to the evidence of |the 2nd respondent on p. 176 of the record which ran thus -

> "I remember I wrote a letter of proposal to use the proceeds of the cocoa to purchase the caustic soda because we were still having some balance with the defendant. It is because the defendant agreed with the proposal that some other funds were released to facilitate the importation of the chemical. I agree I am an international businessman".

Counsel went on to say that it was not obligatory on the appellant to produce every evidence including documents in its custody. According to learned counsel, despite the none tendering of the letters I mentioned by the court there was sufficient evidence on record to link the two transactions. The trial court he submitted was therefor wrong in using the failure of the appellant to tender the letters of 26/ 1/95 and 27/3/95 as the basis for his holding that the cocoa export was a distinct transaction from the caustic soda import or that the cocoa export transaction terminated on 30/1/95. Counsel relied on Janimal v. State (1999) 12 NWLR (Pt. 632) 582 at 597; State v Aiie (2000) 11 NWLR (Pt. 678) 434 at 450 - 451, C - F; Oji v Ndu (1993) 1 NWLR (Pt. 268) 235 at 243. He then urged the court to hold that the two transactions are the same and that the appellant had proved that point.

The counsel to the respondent felt otherwise and argued on issue No.2 that the arguments put forth by the appellant in that regard were misconceived. According to him, the agreement for the exportation of cocoa butter was for 4 months and it had expired before the issue of importation of caustic soda cropped up. Counsel is of the view that even though there was a letter to the appellant for extension of the facility, there was no response to same, hence the facility could not be validly said to have been extended. The lower court he said was therefore right to say that the caustic soda importation was distinct from the original agreement and its conditions were not transferable to the caustic soda importation transaction. He was emphatic that the respondent's obligation under the caustic soda transaction was discharged when the appellant sold the caustic soda.

Counsel explained that by qualified admission the court meant that the 1st respondent admitted the state of the company's credit balance on cocoa butter exportation which was to be

added to a fresh loan from the appellant for the importation of caustic soda. Counsel on interpretation of admission cited Nwankwo v. Nwankwo (1995) 5 SCNJ44; (1995) 5 NWLR (Pt. 394) 153.

Counsel added that even where the admission was proved, it would have no value since the money paid belonged to NEXIM and its money could not be converted to a project for which it did not give the loan while the terms, of the NEXIM agreement could not be transferred to another project. A borrower, who has paid his loan in banking practice he argued, ought to be discharged from his obligation under the agreement. The appellant could not produce some letters as exhibits and withhold others where as the appellant was bound to produce material witnesses. Counsel cited Onah v. State (1985) 3 NWLR (Pt. 12) 236 at 237; N.E.R.D. v. Gome (Nig.) Ltd. (2000) FWLR (Pt. 21) 848; (2000) 9 NWLR (Pt. 673) 532 where the Court of Appeal also applied section 149(d) Evidence Act against the appellant who failed to produce a material witness. Counsel then urged the court to hold that appellant's failure to produce documents dated 7/3/95 and 26/1/95 was fatal to the appellant's case. He urged the court to resolve issue No. 2 in favour of the respondents. In my view, issue No. 2 is not difficult to resolve. It is in fact akin to issue No. 1 i.e. whether or not it was proper for the lower court to describe the admission of the 2nd respondent on oath as insufficient to prove the fact in issue. At first the 2nd respondent had denied that the cocoa butter proceeds were used in financing the caustic soda importations see p. 175 para. 3 of the record but he later agreed under cross-examination on p. 176 thus:

> "I remember I wrote a letter of a proposal to use the proceed of the cocoa to purchase the caustic soda because we were still having some balance with the defendant. It is because the defendant agreed with the proposal that some other funds were release (sic) to facilitate the importation of the chemical. I agree I am an experienced international businessman".

The above explains the basis for the commencement of the 2nd phase of the contractual relationship between the parties. The DW1 further explained on p. 187 of the record that the proceeds from the cocoa butter exportation was not enough to offset the indebtedness of the 1st respondent to the appellant hence the respondent applied to be allowed to use the proceeds on cocoa export to import caustic soda so that what ever accumulated sum was realized would be used to offset the respondent indebtedness to the appellant/bank. The appellant, DW1 said, accepted the proposal. That he said was a continuation of the first transaction.

The court in its finding however held a different view and held on p. 224 of the record thus:

> "Although under cross-examination, the 2nd plaintiff admitted that he agreed he wrote a proposal to use the proceeds of the cocoa butter to import caustic soda but there is no document to back it up. The said letter dated 30/3/95 referred to as the application for loan for caustic soda by the 2nd plaintiff (PW1) by the heading and opening paragraphs shows that there is either a previous letter or discussion on the subject matter. The heading reads. Re Importation of Chemicals from Romania and the opening paragraph says - 'We take this time to appreciate your effort in helping it concerning the above subject'."

The court then went on to say that the burden was on the appellant to prove that what it asserted. Honestly I do not see how this conclusion arises. The admission made by the 2nd respondent was clear and unambiguous. It was even backed by documents i.e. exhibits H and DW4. The explanation leading to the 2nd phase of the transaction was very clear and understandable. The DW1 had testified that because the credit balance in the respondent's

account would not be adequate to offset their indebtedness to (he appellant/ bank, the proposal to extend the facility to importation of caustic soda was accepted. This is understandable in that by so doing, the proceeds accruing to the respondents would be enhanced and thus enables them to offset their indebtedness to the bank. That much had been admitted by the 2nd respondent. All he really cared about was sale of the caustic soda with the company's knowledge and sale of same at the then prevailing market price.

It is true that there was a written agreement drawn up at the initial state of the relationship but to complete the transaction to the benefit of both parties, there was an extension of the transaction to cover importation of caustic soda though not in writing. The ball was in fact set rolling by the application of the respondents for extension of the facility even though there was nothing to show in p writing that the request was granted. It can however be gathered from the circumstances of the case that such request was granted hence additional funds were released to the respondents to facilitate the importation of the caustic soda. I need say that there can be an oral agreement as well as agreement by conduct. In this case the respondents enjoyed the facility arising from such agreement. The situation could not have been otherwise or how would one draw the line of distinction in the circumstances? To deny the respondents that facility could mean loss to both parties.

The argument of counsel to the respondents that the loan from NEXIM had been repaid and the terms could not be transferred to the second transaction is neither here nor there. NEXIM has not complained and in any case NEXIM had its right only against the appellant according to the initial agreement, not the respondents. The issue of non-transferability of the terms of the agreement connecting NEXIM to the second transaction was never raised in the respondents' application to the appellant neither was it raised while the facility was made available to the respondents. I therefore find it difficult to agree with the lower court in its finding that the agreement to import caustic soda was so distinct that its terms could not be used in determining the liability of the respondents to the appellant. In another breath the court held that some letters of 26/1/95 and 27/3/95 ought to have been produced by the appellant to sustain its claim that the transaction continued. The appellant was the defendant in the case and it relied on exhibits DW4 and H to show that the transaction continued. That was beside the admission of the 2nd respondent under cross-examination. How then could the non-production of those letters be used to find against the appellant on that score? I believe it was for the plaintiff/respondents to prove that the transaction did not continue and had terminated at a point in time not for a defendant to strive to prove what has in fact been admitted in writing and in evidence.

I therefore agree with the appellant's stand that the appellant had sufficiently proved the merger of the two transactions. That issue No. 3 is resolved in favour of the appellant and the unilateral date of the termination of respondent's obligation to the appellant imposed by the lower court is uncalled for.

Issue No. 4 is principally concerned with the question of interest payable on the facility granted to the appellant. Counsel submitted that there was no agreement between the parties as to the exact total amount of interest payable on the loan as each party tended to interpret the judgment already given according to the party's own notion of what the resultant judgment was. Counsel referred to exhibit P and the supplementary record of proceedings to show that the appellant believed that what was due to the respondents was N5,715,272.13 while the respondents' original calculation as revealed in respondents counter-affidavit of 15/5/02 was N5,916,688.02. The figure in the respondents' counter-affidavit of 4/7/02 however was N17, 899,276.36.

He pointed out that there was in fact no agreement between the parties on what the actual figure was and took the clumsy situation as arising from the court's failure to resolve issues comprehensively and pronounce in certain terms the actual amount due to the respondent based on the judgment. The failure of the court in that respect vitiated the judgment and this court should have no difficulty

In isetting same aside and ordering a retrial. Counsel in that regard referred 10 the case of the Bank of the North Ltd. v. Idrisu (2000) 3 NWLR (Pt. 649) 373 at 390 para. A showing that a court judgment should be final and never made the subject of further interpretation Where such a situation exists, the court has to order a retrial; counsel therefore urged the court to so order. Counsel in addition referred to the case of WR & PC Ltd. v. Onwo (1999) 12 NWLR (Pt. 630) 312 at 326.

Counsel for the respondent however took a different stand and as2ued that the court gave judgment which certainly and actually resolved all the issues arising between the parties. Counsel then went through the testimonies of the witnesses to show how the loan was approved by NEXIM and later disbursed piece meal by the appellant bank with the rate of interest fixed at 17%' starting from 21/9/94 to 30/1/95 when the 1st respondent repaid the loan. Interest ht emphasized, should start from the date of the piece meal disbursement. The trial court he went on, had to order calculation of interest due to finally resolve the issue. Exhibit P produced at the instance of the respondents was then provided. The court he added give enough room to the appellant to produce its own figures since it disputed the content of exhibit P, but it failed eventually to file ore wherefore the court accepted exhibit P as the basis for the emulation of interest as computed by the respondent's own expert. Counsel could not see why the appellant is now complaining about tint aspect of the case.

The learned counsel also argued that the respondent was entitled to interest calculated at 21% as the court did, he referred to the respondents claim on p. 172 of the record where the PW1 asked that tin amount due to them be calculated at 21% interest from 30/8/96 to the date of judgment and 10% thereafter till the total sum was pad fully. The fact that the trial court did not quote the claim verbatim in the judgment he said, did not mean that the judgment was not precise. This court he pointed out could make pronouncement on matters pleaded but not specifically pronounced upon by the trial court. He relied on section 16 of the Court of Appeal Act, Cap. 75, LFN, 1990. Cappa & D 'Alberto Ltd. v. Akintilo (3)03) 4 SCNJ 328 at 343, (2003) 9 NWLR (Pt. 824) 49; Emaphil Ltd. v. Odili (1987) 4 NWLR (Pt. 67) 915 & 921; Order 1 rule 20(4) Court of Appeal Rules.

Counsel further said that the inadvertence must be due to the court's error in omitting to look at the respondent's further amended statement of claim at p. 40 which superseded their initial claim.

In my view issue No. 3 does not involve any difficulty. The court gave its judgment of 5th March, 2002 but left that aspect of calculation of interest to be worked out by an expert, based on the court's final figures. Exhibit P prepared by an expert at the instance of the respondent was then filed in court. The appellant -vas nm comfortable with the contents of exhibit P and therefore; ask for time to file its own as a judgment debtor. Room was given to it to do so on a number of occasions up to 31st January. 2003 when the court refused further adjournment and gave judgment on p.272 of the supplementary record in the following terms:

> "If the judgment/debtors had filed their papers and the figure is different from what is filed by the judgment creditor then there would be need for an address to prove the figure, but having served the judgment creditor (sic) this paper for so

> long and they have nothing before the court contradicting or challenging that figure, the court has no option than to adopt the expert computation of interest of exhibit Pas contained in the judgment of this court. The expert computation of interest contained in the exhibit P in the judgment delivered on 5/3/02 is hereby declared as the judgment sum in this case".

In the first place it was abundantly clear that the judgment of 5/3/02 was not conclusive in the absence of the required certainty as to the amount of interest payable by the respondents to the appellant. Secondly it was agreed by the parties that there was a dispute and therefore uncertainty over the sum computed by the expert who infact submitted the figures in exhibit P at the instance of the respondents already described as judgment creditors in the supplementary proceedings that followed the attempt to calculate the interest due. This is borne out by the submissions of counsel on both sides. Mr. Ahmed had this to say on p. 267 para. 2 of the supplementary record:

> "... Also the controversy surrounding the interest to be paid because experts from both sides are giving conflicting figures. As at June this year the controversy even up to the present moment has not been resolved".

In any case the court allowed the judgment/debtor 10 tile its own version of what the interest should be. When the expert of the judgment/debtor (appellant) was not forth coming the court adopted the calculation of the expert for the respondents as its judgment .That I must say is the crux of the matter. One wonders if a court could leave an open ended judgment for so long (about 12 months) and later adopt the version of one of the parties as the judgment of the court. This was done in default of filing of the appellant's own figures, can one therefore say that line of action has resolved the controversy arising from the computation of interest? Certainly no. The situation is compounded by the adoption by the court of the stand of one of the parties, though due to the default of the other party. No matter how approached, the issue of interest or the total sum payable by either party remains unresolved, a situation which the law frowns upon. In that case of the Bank of the North (supra) per Chukwuma-Eneh, JCA (as he then was) concluded his decision thus.

> "... And as rightly submitted by the learned appellants' counsel by that pronouncement, the trial court has failed to resolve the fundamental issues in controversy between the parties including the finding that the respondent had over paid his loan. This is even so when the amount he owed remained unascertained".

Same applies to this case. The actual amount owed remains unascertained even now. I have noted respondent's counsel observation that this court can make pronouncement even in such a case. He in fact admitted that the court was in error when he submitted on p. 3 para. 126 of the supplementary record thus.

"It is humbly submitted that the inadvertence of the trial court must have arisen from looking at (sic) original claim of the respondents on page 2 of the records instead of the respondent's further amended statement of claim on page 40 of records. As earlier argued, the respondent's further amended statement of claim superceded all earlier claim in the pleadings".

I do not believe this court can do such a thing, or it will be falling into the same error. The invitation is declined. Cases are mainly decided on the evidence before the court. Complications set in when the court gives an open ended judgment and starts to look for facts to round it up. Judgments are supposed to be certain and conclusive else they become vulnerable, I therefore agree with the appellants' counsel that that aspect of the case is not supportable and that

is fatal to the proceedings. The issue No.3 is resolved in favour of the appellant. This court's finding in that regard goes to the root of the matter.

Issue No. 4 is principally on the treatment meted out to exhibit V19 by the lower court. That is the concern of the appellant's counsel, especially the court's view that exhibit V19 was not reliable and holding that the appellant did not sell the caustic soda at the best available price and that it sold without notice to the respondents when the contrary was the case. Counsel referred to the testimony of DW1 on pages 188-189 of the record on this point particularly on the efforts made by the bank to make the respondents find buyers for the caustic soda which were all to no avail. Counsel could therefore not see how the court came to the conclusion that the caustic soda was not sold at the best available price in spite of the contents of exhibits V6, V18 and V19. Counsel therefore described the judgment as perverse and urged the court to set aside the finding relying on Aina v. U.B.A.Plc. (1997) 4 NWLR (Pt. 498) 181 at 189. Learned counsel again attacked the finding of the court at p237 of the record to the effect that it was not stated how many metric tons were sold for either N32.000.00 or N33.000.00 and that no record of the sale was shown whereas exhibit V19 contained the break down of the sale on diverse dates. Counsel stressed that the lower court had a duty to consider and give full effect to exhibit V19 in coming to a decision in the case. He relied on Donatus I. Onwnalabi v. N.N.P.C. & Anor. (1999) 12 NWLR (Pt. 632) 628 at 640; Akere v. Adesanya (1993) 4 NWLR (Pt. 288) 484 at 497; Gbafe v. Gbafe (1996) 6 NWLR (Pt. 455) 417 at 428. Counsel held the view that had the court properly considered exhibit V19 along side the evidence of the DW1, the decision would have been different.

Counsel next turned to the issue of Public Relations money of Nl08.974.36 and criticized the finding of the court in that regard relying on exhibits DW4, V6 and V18. These he said, were notifications of the position of respondent's account at various times and they took account of the PR money now disputed and to which there was no challenge till the action was filed and which the PW1 (2nd respondent) admitted under cross-examination. With that admission, a case of acquiescence had been established against the respondents counsel maintained.

The challenge to exhibit V19 was premised on fraud said learned counsel and that had to be proved beyond reasonable doubt. He relied onLeko v. Soda (1995)2NWLR (Pt.378)432at442, Abibo v. Tamuno (supra) at p. 340. Counsel later ran through the evidence on record 10 show that the disputed payment of N84, 000.00 was made and the respondents made the drawing in evidence per exhibits DW9-DW12. Counsel Concluded that the evidence offered by the respondents on the issues of fraud was of poor quality hence none had been proved. He referred to Nwafornso v. Taibu (1992) 1 NWLR (Pt 219) 619 at 631; Edokpolo & Co. Ltd. v. Ohenhen (1994) 7 NWLR (Pt. 358) 511 at 531; In Re: Otuedon (1995) 4 NWLR (Pt. 392) 655 at 670. Counsel added that a party that tendered a document at trial could not be allowed to impugn same in reference lo exhibit VI9, relying £ on Igwe v. A.l.C.E. (1994) 8 NWLR (Pt. 363) 459 at 476.

On the dismissal of the appellant's counter-claim counsel argued that this was wrong as the dismissal was based on exhibit V19 which the court described as unreliable when the claim of the appellants was not premised on exhibit V19 above. He referred to the court's finding on p. 241 of the record where the court held that the exhibit V19 on which the defendant relied was unreliable and that the counter claim of the defendant/appellant therefore failed whereas on p. 232 of the record the court had ordered the working out of the liability of 1st respondent on the cocoa butler business. The court again had g found on pages 232 - 233-234 that the appellant was entitled to certain sum of money from 1st respondent

Counsel also fell that the trial court was wrong in entering judgment for the respondents in the circumstances. He relied heavily on exhibit V5 in which the respondent pleaded for lime to bring up p repayment proposals. Thai admission, counsel said was conclusive and the appellant was relieved of further burden. Counsel referred to sections 19 and21 of Evidence Act; Olagunyi v. Oyeniran (1996) 6 NWLR (Pt. 453) 127 at 143; Agbanelo v. U.B.N. Ltd. (2000) 7 NWLR (Pt. 666) 534 at 5559. The respondents were therefore estopped from denying their indebtedness to the appellant he said. He cited the cases of Ebha v. Ogodo (2000) 10 NWLR (Pt. 675) 387 a' 40:-405- Sosanya v. Onadeko (2000) 11 NWLR (Pt. 677) 34 at 61-62

Counsel thereafter turned to the evidence of PW1 as a whole and observed that he denied most assertions just to turn over to admit them under cross-examination. Counsel made specific reference to such admissions during the testimony of PW1 in court. A party who i. j testified contrary to his pleading is liable to have his claim dismissed said counsel. The court he went on was therefore in error to have glossed over such contradictions and then proceeded to give judgment for the respondents. He relied on Oko v. Igweshi (1997) 4 NWLR (Pt. 497) 48 at 61-62.

The case for the respondents was in the circumstances liable to be dismissed counsel stated and cited - Incar (Nig.) Plc. v. Bolex Enterprises (Nig.) (2001) 12 NWLR (Pt. 728) 646 at 668. He urged the court to resolve the issue in the appellant's favour.

In his response to issue No. 4, the counsel for the respondents summarized the argument of appellant's counsel on this issue and further submitted that the court was right in holding that the appellant did not prove that, the caustic soda was sold at the best price available. He referred to the courts finding at p237; 236 and exhibits, V6, V 18 and V19 and pointed out that issues were properly joined on the total stock as at 30/8/96. He also referred to the evidence on both sides on this point and concluded that the appellant did not prove the quantity it sold, and at what current price it sold each ton or bag. He therefore urged the court lo uphold the finding of the lower court in that respect. It was clear he said that the appellant did not notify the respondents before sale of the item was affected. He also referred to appellant's letter to the respondent - exhibit VI8 dated 14/12/95 in which the appellant noted the passionate appeal of the respondents to stay disposal of the caustic soda. He pointed out that by that letter, action to sell the caustic soda was stayed, but there was no further notice before exhibit V6 dated 9/8/96 was written to notify the respondents that sale had commenced and the record of proceeds in exhibit V19 was this fraudulent or the entries were fictitious

Since the appellant did not give a break down of sale affected the court was right in relying on exhibit T (the L.P.O.), exhibit V19 he said contains disparity both in quantity and amount of sales.

Counsel continued to detail evidence of parties in that regard and concluded that appellant's counter claim - made it a plaintiff in the case relying on Stumore v. Campbell & C<>. (1892) 1 QBD 317. The appellant therefore had the duty to prove its counter claim and exhibit V19 could not help it. He referred to section 38 Evidence Act as to books of account regularly kepi in the course of business which is relevant but could not by itself be sufficient evidence of a Person’s liability.

Counsel in addition made copious reference to evidence with respect to the issues of fraud and exhibit DW16 tendered in evidence. He held the view that the PW1 gave evidence of the fraud. He urged the court to dismiss that issue and also find (hut the finding of the lower court was not against the weight of evidence.

I must say in regard to this very issue and in fact with respect to several other issues raised by the appellant were done in utter disregard of economy of time words. The arguments on both sides were verbose and time consuming if not outright repetition of points already canvassed in other issues. Counsel will be helping an appellate court a great deal if issues are conveniently grouped s together e^. those that could properly be canvassed under weight of evidence, those that can be classified under matters of speculation by the lower court and those that can come under wrong formulation by the court of issues not raised in the pleadings or evidence. It becomes very cumbersome if counsel has to separately treat, attack or criticize every statement made by the lower court under separate headings.

I need also point out that counsel need to exercise restraint in their language while criticizing findings of a court against which they have lodged an appeal. It is a notorious fact that the Judges criticized have no direct opportunity to defend their stand. In any case, lawyers can always make their points without casting aspersions g on trial Judges and without the use of intemperate language. Words such as embellishment, invention, in reference to the Judge's opinion, should if possible be avoided.

I now come to the point at stake. It is as to the evidential value of exhibit V19 in particular and appropriateness of the weight placed on same by die lower court. The appellant's counsel made copious references to pieces of evidence from the witnesses and the exhibits tendered in the case. The counsel for the respondents also made lengthy reference to the evidence on record and the exhibits he believed were relevant to justify the findings of the court.

In this regard, I believe that an examination of some of the relevant exhibits will be of assistance. Exhibit V6 is a letter from the appellant to the respondents - dated 9/8/96 intimating them of their (respondents) failure to bring fourth buyers to buy the caustic soda and telling them about the prices currently prevailing then and j-[also urging the respondents to urgently liquidate their debit balance of N8.430.533 as at 31/7/96. Exhibit V17 is a letter from Conair Cargo Services Ltd., dated 13/10/95 showing their company's charges. Exhibit VI8 is a letter from the appellant to the respondents on the respondents' pledge to lodge six million naira into its export account on or before 22/12/96 in which also contained paras. 2, 3 and 4 directly relevant to this issue under consideration. The paragraphs read:

> "... Your passionate plea to stay action on disposal of the caustic soda consignment in the warehouse has been noted. We however, wish to inform you that the best price offer we have now is N55, 000.00 per M/T.
>
> You should therefore note that your failure to lodge into your account with us a bank draft for a value not less than 6 million naira on or before 22nd December, 1995 will leave us with no choice than to dispose of the goods at best ruling-price at the time as (sic) the price could either go up or deteriorate.
>
> We also want to call your attention to the fact that continuous delay in disposing off the goods will not only mean increasing ware housing charges but also worsening of your account position in terms of interest charges and unpredictable price fluctuations."

One would note that the above paragraphs actually cover many points in this appeal. Exhibit V19 is the statement of respondents' account as at 31/1/98. It shows discounts, drawings interest charges, transportation charges, utilization commission C.O.T.; payment for forex purchased tax changes, the amount of export proceed of N60,324.70 charges 1OR fax message import duty and related charges, clearing charges, value of cheque No. 00471 nylon bags for spilled caustic soda; proceed of 5 tons of caustic soda proceed of 37 tons of caustic soda; proceed

of 25 tons of caustic soda; proceed of 12.5 tons of caustic soda; proceed of 37 tons of caustic soda; proceed of 86 bags of caustic soda, re-bagging of 86 bags of caustic soda; proceed of 37 tons of caustic soda etc. It is noted that the price for each sale is indicated in the exhibits.

The letters reproduced show the indebtedness of the respondents at the time the letter was written. It is the version of the appellant that at no time before the action was taken did the respondents write to challenge - their indebtedness as shown in the exhibits tendered. The PW1 admitted this much in his evidence under cross-examination when he said on page 178 of the record:-

> "It is true that prior to the filing of this case, we did not write to challenge the amount of indebtedness - credited to me. I got exhibit T after I received exhibit V6 informing me of the commencement of the sale of the caustic soda by the defendant. By exhibit B what the NEXIM put at the disposal of the defendant to be disbursed to me is N5, 000,000.00 tagged "Face Value" on exhibit B and what is paid back by the defendant to NEXIM is N4/769,863.01 as tagged "proceed" On exhibit B and that is why we say they have committed fraud".

The above is admission that exhibit T was in fact received by respondents after exhibit V6 showing commencement of sale and at no lime did the respondents challenge the appellant as to their indebtedness before the action. The preceding letters also show that the appellant gave the respondents' time to procure a buyer failing which the commodity would be sold. That again was consequent upon the default of the respondents to lodge the sum of N6 million into their account with the appellant bank.

Where therefore is the basis for the respondents' complaint that they had no notice of sale of the commodity? Was in fact there any undertaking to further notify them before sale? The respondents concluded by saying that because the amount sent by NEXIM was different from the amount paid by the bank to NEXIM that was evidence of fraud. One would want to see and know if there had in fact been proof of fraud on the required standard. My view is that none has been established.

The court again held on pages 231 - 232 thus:

> "...Bearing in mind, the expenses involved like loading and transportation. So I hold that the 1st plaintiff is liable to pay the amount of warehousing the caustic soda as given by the defendant which when added up in exhibit V19 is N720, 000.00 as against the N564, 000.00 calculated by her."

But then the court went on to dismiss the appellant's counter-claim inferring that there was nothing payable to it any longer. See the court's conclusion at p241 of the record. It reads.

> "The plaintiff's claim succeeds to the extent of the amendment on the figures above made in exhibit P and the working of interest now to be on compound interest basis. Judgment is therefore entered in favour of the plaintiff as per exhibit P as amended. The plaintiff's are entitled and are hereby awarded N320, 000.00 general damages.
>
> For the reasons earlier discussed, the counter-claim of the defendant fails and it is hereby dismissed".

I wonder how the court came to the above conclusion in view of its earlier findings that the defendant was at least entitled to some amounts. Again the basis for declaring exhibit V19 a regular book of account in the bank as unreliable is not quite clear having regard to the evidence already led and the pleadings of the parties. The court must have jumped some of the salient facts due to the procedure adopted. I am therefore of the firm view that the court did not

appropriately and adequately evaluate the evidence before it in this regard. The issue No. 4 is therefore resolved in favour of the appellant. To do justice to both parties therefore the proper thing is to order a rehearing.

On issue No. 5 the appellant's counsel submitted that the court was wrong to have held that the 1st respondent had 3198 bags of caustic soda which was neither damaged nor rebagged as claimed by the appellant. The appellant also complained about the award of N320, 000.00 to the respondents as estimated profits. He contended that the respondent had no access to the warehouse and on the few occasions that they had access it was through the permission of the appellant hence they had no means of knowing the amount of caustic soda that was damaged whereas exhibit V19 showed the number of bags that had to be rebagged.

Counsel did not therefore know why the court preferred the evidence of the respondents a bare denial to that of the appellant and urged the court to reverse the decision. He relied on Ndili v. Akinswnade (2000) 8 NWLR (Pt. 668) 293 at 334 - 335.

The sum of N320, 000.00 awarded he said amounted to double compensation because it had been taken care of in exhibit P. When a plaintiff had been awarded damage for his actual loss he could not again be compensated in respect of the same loss. He relied on Onaga v. Micho (1%1) 2 SCNLR 101 at i05-106; Imo Concorde Hotel Ltd. v. AMYZ ('992.) 4 NWLR (Pt. 234) 210 at p. 227. In any case he said the award had not been proved. The claim he said was in the realm of special damage which was not proved according to the laid down standard. He relied on Obasuyi v. Business Ventures Ltd. (2000) 12 WRN 1) 2 at 131, (2000) 5 NWLR (658) 668; Adeola v. Oloba (1993) 4 NWLR (Pt. 545) 224 at pp. 228 - 229; Imo Concorde Hotel Ltd. case (supra) p. 226 Olalomi Industries Ltd. v. NIDB (2002) 17 NWLR (Pi. 795) 58 at 84. He urged the court to A resolve the issue in favour of the appellant.

The respondents' counsel adopted part of his argument in para 4(b) on issue 4. He then referred to the evidence of the parties generally and insisted that the respondents had direct access to the warehouse. He added that the respondents claimed for general damages and pointed out that the N320, 000.00 awarded did not amount to double compensation. It took into consideration the 2nd respondents' evidence on the profit he could have made if they had sold the caustic soda themselves. He concluded that the general damages of N320, 000.00 claimed by the respondents was reasonable in the circumstances of the case and it did not fall within the realm of double compensation. He urged the court to resolve the issue in favour of the respondents.

In my view the issue No. 5 is wholly misconceived. That the respondent had no access or had only limited access to the warehouse is no proof that some bags were actually damaged. In the second place the court did not award the N320, 000.00 as special damage but as general damages. This issue appears not to have arisen at all. It is completely baseless. It is therefore resolved against the appellant.

On issue No. 6 the appellant's counsel argued that the respondents has pleaded and insisted that the price of the caustic soda was N95,000.00 per metric ton where as the appellant had maintained that the commodity was sold for lesser value of N32,OOO.00 and N33,000.00 per ton. Exhibit T was the document F tendered to back the price put on the item by the respondents. Counsel reproduced a portion of the testimony of the 2nd respondent under cross-examination, to show the reliance he placed on exhibit T launched an attack on same pointing out that exhibit T and did not show the nature of the company's business, so was the number, of Q its certificate of incorporation while the maker of exhibit T was not called as a witness. Counsel also pointed out that exhibit T was issued on 29/8/96 after exhibit V6, written to show

commencement of sale had been written on 9/8/96. He wondered how the maker of exhibit T, TAACO (Nig.) Ltd. had to wait till commencement of sale of the H caustic soda before issuing exhibit T. He felt there was something fishy as regards exhibit T and was therefore an unreliable documentary evidence as regards the prevailing price of the caustic soda when it was sold by the appellant. He believed that the lower court was wrong in relying on exhibit T just for failure as the court put it, of the, appellant to submit receipts and invoices to show the price the commodity was sold. Exhibit T, counsel submitted was prepared for the purposes of this case. The court, counsel added, had a duty to ascertain the probative value of a document placed before it particularly when the maker is not called as witness. He relied on Guinness (Nig.) Plc. v. Nwoke (2000) 15 NWLR (Pt. 689) 135 at 145-146.

The court, counsel insisted was in error to have ascribed much value and weight to exhibit T when its maker did not testify before it. He relied on the cases of A.-G., Oyo Slate v. Fair Lakes Hotels (No.2) (1989) 5 NWLR (Pt. 121) 282-283, 288-289 and 291-292 as well as section 91(3) Evidence Act.

Counsel went on to submit that where a court placed reliance on such a document, a complaint of denial of justice could be entertained, and the appellate court can reverse such decision. He referred to Ezekwesili v. Onwuagbu (1998) 3 NWLR (Pt. 541) 217 at 239. He added that exhibit T having been prepared in anticipation of this case necessarily lacked probative value. Counsel cited section 91(3) of Evidence Act; WON Lid. v. Oyibo (1992) 5 NWLR (Pt. 239) 77 at 95-96; Gbadamosi v. Kabo Travels Lid. (2000) 8 NWLR (Pt. 668) 243 at 276. He urged the court to resolve the issue in favour of the appellant.

The counsel to the respondents in his reaction submitted that the appellant had argued on wrong premise as there was no certainty on how many tons of caustic soda were sold at N32,000.00 or the number of tons sold at N33,000.00. No receipts were tendered. No proof of the number of damaged bags and exhibit V19 relied upon by the appellant was full of fictitious entries and therefore unreliable.

He observed that there could not have been any sale as indicated on exhibit V6 as no date of sale was indicated on the exhibit. There was also no indication that the whole stock of the goods was sold by the appellant. Counsel was also of the view that exhibit V6 could not help the appellant going by the words ".. .about 4.8 million naira used in exhibit V6 showing that the appellant was not certain as to the proceeds of sale. The price of N95.000 placed on a ton of the item he said was therefore reasonable. Counsel said the omission in exhibit T of the registration no., nature of business and the Managing Director's name went to admissibility of the document in evidence but the appellant never raised objection to same hence it was estopped from raising objection now. He relied on Alade v. Olukade (1976) 2 SC 183, 188-189.

Counsel was also of the opinion that the complaint on non-calling of maker of exhibit T as witness was baseless since it was tendered in evidence without objection from the appellant. It was therefore the duty of the appellant to prove that the document exhibit T was inadmissible or unreliable relying on section 137(1) Evidence Act. The appellant he said should have subpoenaed Taaco (Nig.) Ltd. with known address to testify for it instead of relying on counsel's address which could not be a substitute for evidence. He relied on Ezuma v. NMC Bank Ltd. (2000) FWLR (Pt. 28) 2243, 2263 para. 1; (2000) 10 NWLR (Pt. 675) 638. In any case he added, such particulars said not to be on exhibit T need not be indicated on it, as an LPO (Local Purchase Order) and if the appellant wished, it could procure them from the Corporate Affairs Commission. Counsel finally urged them to uphold the court's findings.

As can be seen, the appellant launched an attack on exhibit T principally because the lower court relied on it on finding for the respondents in respect of what the price of the commodity should be. It is therefore necessary to examine a few things. As already noted from the onset, the argument of the appellant's counsel to the effect that the respondents had little or no access to the ware house did not amount to proof of the number of bags of the commodity that were damaged. The appellant was the party making the assertion. He therefore had that burden to prove that some of the commodity got damaged and infact the number of bags so affected.

I have examined exhibit T. It did not show any certificate number but being an L.P.O. it did not necessarily need to show one or even the name of the Managing Director or the nature of its business. It however has the date of issue as 29/8/96 a date after exh. V6 had in fact been written. Exhibit V6 is the letter dated 9/8/ Q 96 from the appellant to the respondents. It reads:

> "In view of your long delay in bringing forth buyers for the caustic soda and huge amount of money being spent on the stock as warehouse changes, the bank has started sale of the caustic soda.
>
> From the prevailing prices now, it is expected that about N4.8 million will be realized as proceeds from the sales of the total stock as rate of damages is very high.
>
> Given the current balance of N8, 430,583.30 DR on your account as at 31st July, 1996 and the expected total proceeds when deposited into your account, a sum of N3.630, 583.30 DR is expected to be outstanding on your account excluding interest subsequent to the month of July.

In view of the foregoing, the bank wants you as a matter of urgency to forward your proposal for the liquidation of the outstanding debit balance on your account". (Italics for emphasizing only).

With the foregoing, it is apparent that exhibit V6 preceded exhibit T hence it was issued after sale had commenced. It is now necessary to see if the court placed reliance on exhibit T to the exclusion of exhibit V6 and the nature of reliance placed on same. The relevant portion of the lower courts' findings on this aspect of the case can be found on p. 337 of the record.

"They could not say how many metric tons were sold forN32, 000.00 and N33, 000.00 respectively. No invoice or receipt was tendered to authenticate their claim of the ruling price and the price they actually sold the caustic soda. In the absence of any of these documents, the court has no option than to believe the local purchase order exhibit T tendered by the 1st plaintiff as the ruling price at the time which is N95,()00.00 per metric ton and I so hold that this is the ruling price. Since, the agreement is that the defendant must not sell below the current market price and sales should not commence without the knowledge of the first plaintiff. From exhibit V19 sales commenced from 23/7/96 or there about and exhibit V6 was written and dated 9/8/96 over 2 weeks after the commencement of the sales, this is a breach of the agreement. I therefore hold that the 1st plaintiff is entitled to N95.000.00 per metric ton as claimed vide exhibit T because there is no other document before the court showing the current price." (Italics for emphasis only).

It is apparent, going by the above that the court relied on exhibit T mainly to find in that regard for the respondents, it is equally true that the 2nd respondent was extensively cross-examined on the issue of exhibit T and other aspects of the case. See p. 177 of the record. It was therefore not mere admission of the document but issue of the serious attack launched at it. Coupled with that, is the fact that the authenticity of the exhibit T having been impugned by the appellant, one would expect the respondents to call the maker to know how he came about

raising the L.P.O. - exhibit T and to know if he was aware that sales had commenced before its issuance. The man was never called. In spite of this the court went on to say that the appellant did not submit documents to establish the then prevailing price of caustic soda and thereafter went ahead to rely on that exhibit which had been seriously challenged.

It will be noted that the appellant was the defendant in the case and he challenged exhibit T in its defence. How then could the court rely on such document just because the defendant failed to tender receipts or invoices to establish the current market price of the chemical? I believe that it should have been the other way round. Counsel for the respondents also harped on the failure of the p defendant/appellant to prove the current price saying it could have called the maker of exhibit T itself. I do not see how that became the responsibility of the appellant. What should be appreciated is that the challenge was not as to admissibility of the document but as to its authenticity and the reliance placed on it by the court which I believe is wrong in law.

I now come to the objection raised by the respondents to the reply brief filed by the appellant's counsel to the respondents' brief of argument. It was the contention of the respondents at the hearing that their own brief did not raise any new point hence respondents' counsel urged this court to strike out the brief filed on 6/4/04.

The appellant's counsel however, felt that the objection was misconceived as the reply brief filed by the appellant was proper. He relied on the case of Okonkwo v. Okonkwo (2004) 5 NWLR (Pt. 865) 87 at 125-126.

On the objection filed, it is my view that the reply was in fact a f surplusage. All the points canvassed therein had been touched in the briefs each filed. There was no new point raised in the respondents' brief too hence the filing or non filing of the reply brief had not much to do with the case. It did not in fact affect the substance of the case on appeal. It is therefore struck out.

On the whole, I find that the appeal has merit. It is therefore allowed. The judgment of the lower court is in its entirety set aside. Because of the nature and circumstances of the case, the matter is remitted to the Kwara State Judiciary for hearing de novo by another Judge of Kwara State High Court. Costs are assessed at N10, 000.00 in favour of the appellant as against the respondents.

MUNTAKA-COOMASSIE, J.C.A.: I have had an opportunity of reading in draft the judgment of my learned brother, Adeniji, JCA, just read and delivered. The issues, though intricate, were competently thrashed out by my learned brother. I admire the reasons and conclusion adumbrated therein, leading me to adopt same as mine.

Appeal is meritorious same is hereby allowed by me. I abide by the consequential orders made in the lead judgment including order as to cost.

IKONGBEH, J.C.A.: I have read before now the judgment just delivered by my learned brother, Adeniji, JCA. I am in total agreement with him that the appellant's complaint that the materials before the trial court did not justify its decision is well founded. I agree that the appeal ought to be allowed. I allow it. I abide by all the consequential orders.

Appeal allowed.