

**IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA**

**IN THE BENIN JUDICIAL DIVISION**

**HOLDEN AT BENIN CITY**

**BEFORE HIS LORDSHIP: HON. JUSTICE J.O. OKEAYA-INNEH, (JUDGE)**

**DELIVERED ON MONDAY THE 8<sup>TH</sup> DAY OF DECEMBER, 2014**

**BETWEEN:**

**SUIT NO. B/315/2009**

**ROBERT JOHNSON OSHODIN (JP) ... .. CLAIMANT**

**AND**

**MTN NIGERIA COMMUNICATIONS LTD ... .. DEFENDANT**

**J U D G M E N T**

The Claimant filed this suit by a Writ of Summons on the 4th day of May, 2009 and by his Statement of Claim, Amended Statement of Claim and 2<sup>nd</sup> Further Amended Statement of Claim dated 9<sup>th</sup> day of February 2011, the Claimant claimed thus:

**WHEREOF** the Plaintiff~~s~~ claims against the Defendant~~s~~ as follows:

- 1. The sum of N137,770,710.00 (one Hundred and Thirty Seven Million, Seven Hundred and Seventy Thousand, Seven Hundred and Ten Naira) being the profit the Plaintiff would have made on the contract between it and Pahmeyer & Co.**

- 2. N100,000,000.00 (One Hundred Million Naira) general damages for emotional, physical and psychological trauma and health problems occasioned by the abrupt termination of service to the Plaintiff's telephone line No. 0803-308-6651 by the Defendant. Evidence of Plaintiff's visit to the hospital and/or his hospitalization shall be led at the trial of this suit.**

The Defendant entered appearance through their Counsel Adesuwa Omonuwa by filing a Memorandum of Appearance dated 23<sup>rd</sup> day of July, 2009. The Defendant also filed a Statement of Defence and a Further Amended Statement of Defence dated 29<sup>th</sup> day of March, 2011.

The Claimant opened his case by testifying. Claimant stated that his name is Robert Oshodin. He lives at No. 1812 Delta Crescent, G.R.A, Benin City. He is an Industrialist. Claimant stated he remembers making a Written Statement on Oath on the 14<sup>th</sup> day of February, 2013 in respect of this case. A copy of the Written Statement on Oath was shown to him. He identifies the Written Statement on Oath and states that he wants to rely and adopt Statement as his evidence before Court in respect of this case.

Claimant's Written Statement on Oath is reproduced hereunder:-

### **CLAIMANT'S WITNESS DEPOSITION**

1. I am a business man and the Managing Director of Bob Oshodin Organization, Whose address is off Km. 7, Benin-Sapele Road, Benin City.

2. The Defendant is a company engaged in the provision of telecommunication services especially of the Global System of Mobile Communication (GSM) variety with her registered Head Office at Golden Plaza Building, Awolowo Road, Falomo Ikoyi, Lagos, Nigeria, a place outside 'the jurisdiction of this Honourable Court.
3. On or about the year 2006 I entered into a contract with the Defendant for the acquisition of a business G.S.M. Line No. **0803-308-6651** as a post -paid Subscriber.
4. It was understood between the Defendant and I especially against the back drop of my status as the Managing Director of Bob Oshodin Organization, that the telephone line No. 0803-308-6651 was acquired for my business activities. I rely on the form Supplied by the Defendant and filled by me at the time of the acquisition of the telephone line No. **0803-308-6651**.
5. As a post paid subscriber, it was Well understood by the Defendant and I at the time of acquisition of telephone line No. 0803-308-6651 that Bills for service rendered by the Defendant for me would reflect call details; such as the telephone number called and the duration and amount of such calls. The Defendant kept to these terms of the agreement only for some time. Thereafter, the term of the agreement that the bill of charges and statement of account would reflect the details such as the country, the telephone number called, the duration of the call, and the cost of such call, as well as any amount previously paid at the relevant time, was flouted with reckless abandon by the Defendant.
6. I drew the attention of the Defendant to her shortcomings and registered my displeasure to the Defendant, about the lack of details in the bills on the rare occasions the Defendant sent them, and the other issues raised above through written correspondence with the Defendant. I rely on all the series of communication and/or letters between the Claimant and the Defendant over these bills.
7. Instead of acceding to my demand on her to correct the anomalies, the Defendant paid deaf ears to same.
8. The Defendant continued to send me outrageous bills without any reasonable or just cause. Despite the outrageous bills being sent to me

by the Defendant, I still went ahead to make several payments running into N770,000.00 (Seven Hundred and Seventy Thousand Naira) to wit;

a) 31 <sup>st</sup> day of July, 2008	-	120,000.00
b) 12 <sup>th</sup> ay of August, 2008	-	50,000.00
c) 27th day of August, 2008	-	100,000.00
d) 2 <sup>nd</sup> day of October, 2008	-	150,000.00
e) 28m day of October, 2008	-	200,000.00
f) 6th day of January, 2009	-	<u>150,000.00</u>
<b>Total -</b>		<b><u>N770,000.00</u></b>

I rely on the receipts issued to me by the Defendant for these payments.

9. Despite the payments made to the Defendant for which receipts were issued, the payments were not reflected in the subsequent bills sent to me, by the Defendant. The Defendant's refusal to reflect these payments in the bills sent to me made it impossible for the Claimant to ascertain at any given time whether or not he was actually indebted to the Defendant. The Defendant is therefore, stopped from asserting that Claimant was indebted to her.
10. At the time of my acquisition of my telephone line aforesaid, I made a deposit of N100,000.00 (One Hundred Thousand Naira) in my account with the Defendant. The Defendant was expected to use the said deposit to offset any indebtedness of mine to the Defendant, in the first instance, before recourse is made to me to recover any such indebtedness.
11. Sometime in 2008, Mr. H. P. Pahmeyer on behalf of his company Pahmeyer & Co. GMBH, Export+Import (hereinafter referred to simply as %Pahmeyer & Co.+), discussed the possibility of supply of furniture products to Kuwait with me. The said discussion took place in Germany. I by a letter dated 30th June, 2008, confirmed to Pahmeyer & Co. that I was in a position to handle the contract. .
12. Pahmeyer & Co. by a letter dated 7th July, 2008, asked me to confirm the completion of the overhauling of my machinery and equipment as evidence of my readiness to execute the contract. By my letter dated October 8th, 2008, I confirmed the completion of the overhauling of my machinery and equipment to H. Pahmeyer of Pahmeyer & Co.

13. Pahmeyer & Co. by its letter of 27th November, 2008, wrote to me to ask for my proforma invoice to enable it commence the processing of a letter of credit in my favour. In response, I forwarded the said proforma invoice on the 18th of December, 2008.
14. Upon the receipt of my proforma invoice, Pahmeyer & Co. awarded me a Eur,1,789,250 (One Million, Seven Hundred and Eighty-Nine Thousand, Two Hundred and Fifty Euros) which translates to N393,630,600 (Three Hundred and Ninety-Three Million, Six Hundred and Thirty Thousand, Six Hundred Naira) contract for supply of furniture to Kuwait albeit subject to further confirmation on my telephone line No. **0803308665I**, in their letter dated 9th January, 2009.
15. The usual profit margin I make in all my international contract is 35% (Thirty-Five percent).
16. Time was of the essence of the Contract between me and Pahmeyer & Co.
17. When Pahmeyer & Co. could not reach me through my telephone No. 0803308665I, it wrote me a letter cancelling the contract.
18. When the Defendant suddenly and without any justification put my telephone No. **08033086651** out of working order, it made it impossible for Pahmeyer & Co. and other business associates to reach me.
19. I did not know the Defendant had cut off my telephone line until I arrived back from the United States. The Defendant's act of cutting off my telephone line caused me untold emotional trauma and colossal business losses. When the line was cut off as aforesaid, it became impossible for me to make or receive any calls from the same.
20. I made several attempts to get the Defendant to rectify the blunders in his bills even after the disconnection but the Defendant refused and/or neglected to heed my demand. **The Claimant shall at the trial rely on his letters to the Defendant dated 17th February, 2009 and 13th March, 2009 respectively.**
21. The action of the Defendant has caused me great hardship, pain, suffering, embarrassment and colossal business/financial loses.

22. **PARTICULARS OF SPECIAL DAMAGES:**

I have lost the sum of N137,770,719 (One Hundred and Thirty-Seven Million Seven Hundred and Seventy Thousand, Seven Hundred and Nineteen Naira) being the 35% profit which the Claimant would have made on the N393 630 600 (Three Hundred and Ninety-Three Million, Six Hundred and Thirty Thousand Six Hundred Naira) which Pahmeyer and Co. awarded to the Claimant had the Defendants unreasonable and unwarranted termination of service to my telephone line No. 08033086651 now led to the cancellation of the contract

23. **WHEREOF** the Claimant claims against the Defendant as follows:

1. The sum of N137,770,719 (One Hundred and Thirty-Seven Million, Seven Hundred and Seventy Thousand, Seven Hundred and Nineteen Naira) being the profit I would have made on the contract between me and Pahmeyer & Co.
2. N100,000,000.00 (One Hundred Million Naira) general damages for emotional, physical and psychological trauma and health problems occasioned by the Defendant abrupt termination of service to my telephone line No. 0803-308-6651.

24. I verily and solemnly declare that I make this depositions in this affidavit in good faith believing same to be true and correct to the best of my knowledge and information and in compliance with the Oaths Act, 2004.

SGD (14/02/2013)  
DEPONENT

The form filled by the Claimant when he acquired the telephone line with the MTN was admitted in evidence and marked as Exhibit %A & A1+. Claimant referred to paragraphs 11,12,13, 14 & 17 of his Statement where he mentioned the correspondence with the company in Germany he had a contract with. The correspondence as stated in paragraphs 11,12,13, 14 & 17 of his Statement was admitted in evidence and marked as Exhibits %B,B1-

B4+. Claimant stated that MTN sent him Bills. The Bills from MTN sent to Claimant was admitted in evidence and marked as Exhibits %C1-C7+. Claimant stated that MTN sent him Bills without details. The Bills sent from MTN to the Claimant without details was admitted in evidence and marked as Exhibits %D and D1+. The Receipts for payments made by the Claimant to MTN in respect of Bills sent was admitted in evidence and marked as Exhibits %E, E1- E7+.

The Claimant stated that he wrote to MTN as stated in paragraph 6 of his statement. The 3 correspondence written by the Claimant to MTN was admitted as evidence and marked as Exhibit F, F1-F2.

Under cross-examination,

Claimant stated that in the form he filled as Exhibit %A+, it was stated that every month a Bill will be sent to him. Claimant stated that at the time his line was suspended there was no outstanding Bill. He stated that when he left the country over N700,000 was paid into the account. He requested that all Bills be sent to him and they did not send him any detailed Bill. He stated that Bills were normally sent to him not through the internet. Claimant stated that he never received any Email reply from the Defendant and also never received any Bill sent by the Defendant. He further stated that he never received any Email from the Defendant in respect of the Bill. He also confirmed that he tendered all the Bills sent to him from MTN.

RE-EXAMINATION: NIL.

Defendant testified by stating that his name is Olarenwaju Esho. He works with the MTN as a Digital Support Analyst. He stated that he used to work in the Billing Unit in MTN. He does not know the Claimant in person but via correspondence. Defendant stated that he remembers making a Written Statement on Oath on 16/4/13 in respect of this case. A copy of the Written Statement on Oath was shown to him. He identifies the Written Statement on Oath and states that he wants to rely and adopt the Written Statement on Oath as his evidence before the Court in respect of this case.

**DEFFENDANT'S WITNESS' WRITTEN STATEMENT ON OATH**

I, **OLARENWAJU ESHO** male, Nigerian of No. 10, Democracy Close, Nekon Wood Estate Oko-Oba, Agege, Lagos State do make Oath and state as follows:

1. That I am an employee of the Defendant.
2. That by virtue of my employment with the Defendant I am conversant with the facts of this case.
3. That I know the Claimant in this case.
4. That the Claimant is a Post Paid Customer of the Defendant with telephone line No. 08033086651.
5. That by the nature of the contractual agreement between the Claimant and the Defendant, he was entitled to demand the bills for Services rendered him.

6. That the Defendant received a letter on the 17<sup>th</sup> day of February, 2009 from the Plaintiff seeking explanation for the February 2009 bill sent to him. The said letter will be relied on at the trial of this Suit.
7. That consequent upon the letter referred to in the paragraph above, I on behalf of the Defendant, entered into Correspondence with the Claimant by Phone calls and e-mails.
8. That details of the Phone Calls and e-mails shall be provided at the trial of this suit.
9. That the Claimant's line was "hard suspended" by the Defendant when he failed to pay his bills for the services rendered him.
10. That a Phone line is "hard suspended" when bills are owed on it.
11. That the Claimant was duly informed by the Defendant explaining the state of his bills by Correspondences.
12. That the Claimant's Phone line No. 08033086651 was hard suspended for the months of May, June and July, 2009 because of the money owed on it.
13. That the delivery reports from the courier Companies that delivered the Claimant's bill for the months of January 8, 2009 to September 7, 2009 with the exception of May to July, 2009 will be relied on at the trial of this suit.
14. That the Claimant owed the Defendant over half a million naira which he refused to pay as at the time his line was hard suspended.
15. That the Defendant sent details of the bills incurred by the Plaintiff to him and he failed or refused to pay the debt owed.
16. That the details of the bills sent to the Claimant will be tendered at the trial.
17. That the monthly bill sent to the Claimant will be relied on at the hearing of this suit. .
18. That the Claimant benefitted from the services rendered him by the Defendant in line with the contractual agreement between them.

19. That despite the benefit enjoyed by the Claimant under the contract, he failed to pay for the Services rendered.
20. That the Defendant is not a party to any business transaction between the Claimant and any third party.
21. That the Defendant is not aware of the Commercial activities of its Customers, the Claimant inclusive.
22. That the failure of the Claimant to contract with any third party is not the fault of the Defendant as it was not privy to it.
23. That the Claimant had other means of Communication.
24. That the Claimant had always communicated with the Defendant through me by Phone calls and e-mails, details of these Phone calls and E-mails shall be provided at the trial of this case.
25. That the Defendant is not liable to the Claimant's Claim in its entirety in whatsoever form.
26. That the Claimant is not entitled to the claim presented before this Honourable Court.
27. That I depose to this affidavit in good faith, conscientiously believing the content to be true and in accordance with the extant rules of this Honourable Court and the Oath Act, 2004.

(SGD)  
Deponent  
16/4/2013.

Defendant stated that monthly Bills were sent to the Claimant. Bills sent from MTN to Claimant was admitted in evidence and marked as Exhibits G - G3+. Copy of E-mail correspondence sent by MTN to claimant admitted in evidence and marked as Exhibit H-H2+.

Under Cross Examination. Defendant stated that the Claimant had a Business line with MTN. Defendant confirmed Exhibits %A, C and G+ and stated that in Exhibit %G+the date, time and telephone number is not stated in Exhibit +G+.

He stated that he had no proof if Exhibit %G+was delivered to Claimant. He further confirmed Exhibits %G2 & G3+and stated that there where no details in Exhibits %G2 & G3 and also no proof that Bill was delivered to Claimant. Defendant stated that he is not aware that the major complaint between the Claimant and Defendant is that Bills were not regularly delivered to Claimant. Asked whether he stated in his deposition that Bills were not regularly delivered he said he believed so. Defendant also stated that in his deposition, he stated that he will rely on evidence of delivery of Bills to the Claimant. When confronted with the fact that he did not tell the truth when he said that he was not aware whether or not Bills were sent to Claimant, Defendant said he was not aware whether or not delivery of Bills was the main contention between the parties.

Defendant agreed that before a customer's line is cut-off, such customer is entitled to a Bill stating the details in Exhibit %G+. Defendant also confirmed that the only way a customer becomes aware whether or not he is owing is when a Bill is sent to such a customer showing the details. Defendant also stated that it is wrong for the Defendant to put out of working order the phone

line of a customer that has not been sent a Bill. Defendant further stated that Exhibit %G3 is not the last Bill sent to the Claimant and that the last Bill sent to the Claimant is not before Court.

Defendant confirmed that Exhibits %E-E7+ were payments made by the Claimant to the Defendant. Defendant further confirmed that in the month of January 2009, when claimant's line was cut off the sum of N150,000.00 was paid into the account and stated that he believes that there is a Bill in Defendant's possession reflecting the said payment.

When shown Exhibit %G3+, Defendant confirmed that there is a column in the Bill showing the payment of N150,000,00. Defendant further confirmed that Claimant's line was in credit but same was not disconnected. Defendant stated that Exhibit "G3" shows what the Claimant was owing as at the time the line was disconnected. Defendant stated that it was not true that Claimant's line was erroneously disconnected knowing that the line was in credit.

Defendant admitted that Claimant paid a deposit of N100,000.00 when the contract was entered into with the Defendant. Asked whether there is any document before Court showing that the Defendant have fallen back on the deposit before the line was cut off, Defendant replied that the said sum of N100,000.00 is a deposit and not a credit sum to be used by the Defendant

to offset debts. He further stated that the deposit is only used when the customer wants to terminate the contract. Defendant confirmed that Claimant complained that Bills were no longer reflecting details. Looking at Exhibit %6, Defendant stated that the Bill did not show details but stated that a concise Bill showing details was sent to Claimant via the E-care system and also confirmed that the said E-care system Bills were not tendered before Court. Asked to confirm that no such Bill exist, Defendant stated that the only complain the Defendant got was via-Email. Defendant stated that it is not true that once E-mails\$ are sent to customers, such Emails are lost. He stated that records of such E-mails are kept.

Defendant also confirmed that the complaints of the Claimant were brought to his attention before he made his Written Deposition on Oath and that he is aware that those complaints\$ are also in the Claimants\$ Statement of Claim. He also stated that he is aware that there was a response to the Claimants\$ complaint. When asked why he did not tender the said response to Claimants\$ complaint, Defendant stated that the response is contained in the Email he sent to the Claimant. He confirmed that in Exhibit %6+ the details of dates of call, Destination, itemized cost of each call is not stated. Defendant stated that by the Defendants\$ standard, Exhibit %6+ is a complete document pertaining to this issue. Defendant confirmed that there is another document that contains the details of calls and that same was not

tendered in Court. Defendant confirmed it tendered before Court that it delivered the other document to Claimant. On whether the Defendant delivered the delivery slip to the Claimant, Defendant stated that MTN had switched to on line based delivery system.

Defendant further stated that he could not remember when the switch took place but believed it was sometime in 2008. Defendant confirmed that the Bills for 2009 tendered by the Defendant were not delivered by E-mail. Asked whether the Bills for 2008 were delivered by Email, Defendant answered in the negative. Defendant also confirmed that Exhibits %G-G3+ were not delivered by Email.

Defendant stated that he was aware of the switch from courier to Email system of Delivering Bills. Asked if he stated that the Defendant sent Bills by Email; Defendant stated that he could not remember. When told that he was not a witness of truth, Defendant stated that all that he has stated is the truth.

There was no Re-Examination.

Learned Counsel for Defendant formulated four (4) issues for determination in this suit to wit:-

1. Was the hard suspension of the Claimant's telephone line number 08033086651 by the defendant the cause of the

cancellation of the Claimant's business contract with his business partners, Pahmeyer & Co?

2. Was the defendant's hard suspension of the claimant's telephone line number 08033086651 justified?
3. Is the Defendant estopped from claiming that any debt existed on the claimant's telephone line number 08033086651
4. Is the claimant entitled to General and/or special damages?

Arguing issue as formulated. Counsel submitted that the documentary evidence before this Honourable Court (which were in fact tendered by the Claimant himself) negate the Claimant's Claim and show clearly that he has no cause of action.

Counsel stated that the Claimant tendered a letter dated February 3, 2009 (which was received in evidence as part of Exhibits B-B4). The said letter from Messrs Pahmeyer & Co to the Claimant, informed the Claimant of the former's cancellation of a business contract owing to its inability to reach the Claimant on his telephone number 08033086651 which he provided. The Claimant concluded in his testimony (and Claim before this Court) that this cancellation was caused by the cutting off of his phone line in January 2009.

Counsel however noted that the telephone bills for January 2009 and February 2009 which were also tendered by the Claimant (and received in evidence as part of Exhibits D-D1) clearly tell a different story. Counsel

further submitted that the bill for the period January 8, 2009 to February 7, 2009 shows an opening credit balance of N77,579.64 (which tallies with the figures stated in the bill for the period December 8, 2008 - January 7, 2009 tendered by the Defendant and marked as part of Exhibits G-G3). Counsel further submitted that the said Bill for January 8, 2009 to February 7, 2009 also shows that the Claimant received international roaming calls totaling N556,607.47 during that period. Counsel maintained that this resulted in a total bill of N585,937.84 for that period which, after the deduction of the opening credit balance of N77,579.64, became N508,358.20 which debit balance of N508,352.20 was never settled by the Claimant.

It is Counsel's contention that the cancellation of the Claimant's contract with Messrs Pahmeyer & Co as stated in the latter's letter dated February 3, 2009, was not occasioned by any act of the Defendant. Counsel averred that this is because, as the documents discussed above clearly show, the Claimant's line number 08033086651 was still active as at February 3, 2009 when the cancellation was communicated to the Claimant by Messrs Pahmeyer & Co.

Counsel argued that this conclusion is both logical and obvious from the following:

- i. The bill for the period January 8, 2009 to February 2009 could only have been sent out to post-paid customers after the period

ended, i.e., after February 2007. DW1 testified that in a post-paid billing system, the customer is billed at the end of the billing period.

- ii. The telephone lines of those who failed to pay up the existing debt could only be suspended after those in debt failed to settle the bills they received. In other words, the Claimant's line could only have been suspended after some time, not immediately after February 7, 2009.
- iii. The Claimant's telephone line was not suspended in January 2009 because:-
  - (a) he had a credit balance of N77 ,579.64 from the previous month, and
  - (b) the bill for January 8, 2009 - February 7, 2009 shows that he used the said line in January 2009.
- iv. Finally, the bill for the period February 8, 2009 to March 7, 2009 which was also tendered by the Claimant (and received in evidence as part of Exhibits D-D1), shows clearly that even in the ensuing month the Claimant's line was still active. The Claimant received further international roaming calls of N4,358.58 incurring a total bill of N6,209.01. This further increased his debt to N5 14,567.21 which he never settled.

Counsel further argued that it is clear that the Claimant's telephone line number 08033086651 was active up until March 7, 2009 and could only have been suspended after the bill for February 8 to March 7, 2009 was sent to the Claimant and he failed to settle same. Counsel submitted that it is trite law that the documents speak clearly for themselves and may not be

altered or explained away or contradicted by oral testimony of the Claimant or anyone else. Counsels submitted that the Claimant therefore had other reasons for refusing or failing to take the calls from Messrs Pahmeyer & Co at the material time since roaming calls were, from the evidence before this Court, coming through to the said telephone line throughout January and February 2009. Counsel submitted that this failure cannot be imputed to the Defendant.

Counsel further submitted that the Claimant has not made out a case against the Defendant in that the evidence which he tendered in fact exonerates the Defendant. Counsel stated that the standard of proof required in civil cases has been repeatedly stated by the Courts to be credible, convincing, cogent and compelling evidence and that this is sadly lacking in this case. Counsel submitted that the Claimant's case should therefore fail on this score. Counsel relied on the case of **MOGAJI & ORS V ODOFIN & ORS (1978) 4 SC 93, 94; CHIEF MA OKUPE V B0 IFEMEMBI (1974) 1 ALL NLR 375; T LAWAL.OWOSHO V MICHAEL ADEBOWALE DADA (1984) 7 SC 149, 167-168; SALAWU AJIDE V KADIRI KELANI (1985) 11 SC 124, 159.**

On issue two which queries whether the defendant's hard suspension of the claimant's telephone line number 08033086651 is justified, Counsel submitted that from the evidence before this Honourable Court, the

Defendant did in fact hard suspend the Claimant's phone line number 08033086651 at some point in time. Counsel's argument is that it was not suspended before February 3, 2009 when the Claimant's business partner (Messrs Pahmeyer & Co) communicated the cancellation of the contract to Claimant, and that when the line was eventually hard suspended the Defendant was justified in so doing. Counsel noted that the Claimant makes heavy weather of the point that his telephone line number 08033086651 was a business line and tendered Exhibits A and A1 in support of this. Counsel submitted that the Defendant's response is that the Defendant is also in business - the business of providing telecommunication services - which business cannot survive if its post-paid customers are allowed to incur bills of hundreds of thousands of Naira without settling them. Counsel maintained that it follows that the provision of service to the Claimant by the Defendant placed a corresponding duty on the Claimant to settle his bills as and when due.

Counsel noted that the Claimant testified that:-

- (a) he was not given the details of the calls he made during the month in question (January 8, 2009-February 7, 2009), and that even after he requested for this, the Defendant failed to furnish him with those details;

- (b) he also claimed not to have received any bills between May 2008 and January 2009; and
- (c) that he paid in a total of N770,000.00 which was not reflected in the bills he subsequently received.

Counsel responded by submitting that the Claimant's argument holds no water having regard to the fact that DW1 testified that the details of the respective bills were provided by E-care system and that bills were sent by E-care system (as well as by courier agents) after the Defendant switched to digital billing system in 2007. Counsel further submitted that this fact is reflected in the bills for November 8 to December 7, 2007, February 8, 2008 to March 7, 2008, May 8 to June 7, 2008, June 8, 2008 to July 7, 2008, January 8, 2009 to February 7, 2009 and February 8, 2009 to March 7, 2009 all tendered by the Claimant. Counsel also stated that it is also reflected in Exhibits G-G3 tendered by the Defendant. Counsel further stated that the bill for November 8, 2007 to December 7, 2007 contains elaborate directions on how to obtain itemized details of the customer's bill via the E-care system on the Defendant's web site.

Counsel submitted that in response to a question on this issue, the Claimant disingenuously responded that he did not know how to use the internet, in spite of the fact that he tendered evidence of emails he sent to the Defendant, e.g. Exhibits F-F2. Counsel further noted that the Claimant also

claimed that he received no bills from July 8, 2008 to January 7, 2009 during which period he claimed that he paid in N770,000.00 (in July and August of 2008) which is allegedly unaccounted for in the bills he received. On this, Counsel submitted that Exhibits G-G13 show clearly that even as the Claimant made payments, he simultaneously incurred high bills in international roaming calls during the said period such that as at January 7, 2008 he was in credit to the tune of N77,579.64. Counsel stated that Claimant's allegation of having enough credit to take care of his bill for January 8, 2009 to February 7, 2009 is clearly false.

Counsel submitted that DW1 testified that the Defendant responded to the Claimant's request for provision of itemized details of his bill for the period January 8, 2008 to February 9, 2009. This, it did by providing him with the password to get access to that information on the Defendant's website. DW1 tendered Exhibit H in support of this. However, the Claimant claimed not to have received the email in question even though it was sent in reply to his own email sent on the same day, i.e. April 7, 2009. He also claimed not to know how to access email on his telephone. He was rather fixated on the absence of evidence of delivery of the bills. In response to this issue, DW1 testified that the Defendants sends bills to its customers in various ways, including via E-care system. Counsel submitted that the Claimant's testimony is clearly less than the truth, defies logic and is not credible.

Counsel argued that the Defendant cannot be held liable for hard suspending the Claimant's line on which he owed over half a million Naira, having failed to settle same even after he was provided with answers to the issues he raised, and certainly not for the loss of a contract which was cancelled while the said phone line was still active.

On issue 3 which questions whether the defendant is estopped from claiming that any debt existed on the claimant's telephone line, Counsel submitted that the Defendant is not estopped from claiming that the Claimant owed it money for the billing period January 8, 2009 to February 7, 2009. This is because Exhibits G-G3 clearly shows that the Claimant utilized the monies he paid in, leaving a credit balance as at January 7, 2009. Counsel contended that Claimant's assertion that he did not receive the said bills contained in Exhibits G-G3 cannot help him in that it does not alter the fact that he was provided access to all his bills and their itemized details via the password that was sent to him.

Counsel contended that Under Section 169 of the Evidence Act 2011, for the Claimant to succeed on a claim of estoppel, he has to show that the Defendant, by its act or omission, intentionally caused or permitted him to believe that he was indebted when he was in fact not indebted, or that he was not indebted when in fact he was indebted. Counsel further contended that in the instant case, the bill for January 8, 2009 to February 7, 2009

shows that Claimant had been in credit before he incurred the high bill of N585,937.84 that month and that the Claimant was not misled in any way. Counsel further contended that the bills as well as their details were all available on the internet and he was provided access to it when he requested for it. Counsel also pointed out that at no time did the Claimant ever complain either orally or in writing to the Defendant that he was not receiving his bills or that the N770,000.00 he paid in was not reflected in his bills. Counsel stated that the Claimant gave a dodgy and evasive response to this issue upon Cross-Examination and that the only issue he ever brought before the Defendant, as evidenced in his correspondences contained in Exhibits F-F2 was that he wished to register his displeasure over the Defendant's billing system %these days+. Counsel wondered what days Claimant referred to as %these days+ if he last received a bill in June 2008 as he claimed. Counsel maintained that if Claimant did not receive a bill for six months before he suddenly received a high bill in January 2009, his first point would have been to state that he had not received any bill for several months and that the monies he paid in were not reflected in the January 2009 bill. Counsel noted that the issue of the unaccounted N770,000.00 was not even mentioned in Claimant's original Writ of Summons and Statement of Claim dated 4<sup>th</sup> of May, 2009 neither was it included in the Amended Statement of Claim dated 29<sup>th</sup> of December, 2009

nor in the Second Amended Statement of Claim dated 9<sup>th</sup> of November, 2010. Counsel contended that its inclusion for the first time in the Claimant's Second Further Amended Statement of Claim dated 11<sup>th</sup> of February, 2011 is an after-thought contrived with the aim of misleading the Court and of overreaching the Defendant. Counsel urged court not to take cognizance of same, having not been proven.

On issue four which questions whether the Claimant is entitled to general and/or special damages, Counsel submitted that the Claimant having not proved his case, is not entitled to damages. Counsel further submitted that the Claimant must first prove his case before damages are assessed and argued that the law has been and will always remain that whoever asserts must prove. Counsel submitted that the Claimant has not proven that the Defendant's act in hard suspending his telephone line was the cause of the cancellation of his contract with Messrs Pahmeyer & Co, neither has he proven that the said hard suspension, when it did occur, was unjustified. Counsel placed reliance for this proposition on the cases of **UNIPETROL NIG PLC V ADIRELE WEST AFRICA LTD (2005) 14 NWLR (PT 946) 563; UTC (NIG) PLC V PHILIPS (2012) 6 NWLR (PT 1295) 136, 167-168; AND ROCKONOH PROPERTY CO. LTD V NIGERIA TELECOMMUNICATIONS PLC (2011) 14 NWLR (PT 733) 468.**

Counsel further argued that the Claimant has also not proven the special damages he is alleged to have suffered and asserted that the Claimant simply stated, without more, that his usual profit line in business is 35% without proving same in any way. Counsel submitted that Claimant led no evidence and tendered no documentary evidence showing how this 35% profit margin is achieved and maintained that the assertion remains a mere allegation which formed the basis of the Claimant's claim for special damages.

It is Counsel's contention that for a claim of special damages to succeed, it must be strictly proven by credible evidence. Counsel relied and referred court to the following cases as authority for the above proposition:-

- a) **OSHUNJIRIN & ORS V. ALHAJI ELIAS & ORS (1970) 1 ALL NLR 153 AT 156;**
- b) **IMANA V. YABUMOT HOTEL LTD V. OKAFOR (2005) ALL FWLR (PT 255) 1089 AT 1109-1110 PARAGRAPHS G-B.**
- c) **NEKA BB MFG. CO. LTD V. ACB LTD (2004) 2 NWLR (PT 858) 521 AT 527,** where the Supreme Court of Nigeria explained the standard of "strict proof" required for a claim of special damages thus:-

**"Special damages must be strictly proved . . . It simply implies that a Plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the**

**Defendant access to the facts which make such calculations possible”.**

Counsel further referred court to the following cases:-

- a) **U.B.N LTD V. ODUSOTE BOOKSTORE LTD (1994) 3 NWLR (PT. 331) 129;**
- b) **JOSEPH V. ABUBAKAR (2002) FWLR (PT 91) 1525;**
- c) **OKORONKWO V. CHUKUWEKA (1992) 1 NWLR (PT 216) 175;**
- d) **ISEOGBEKUN & ORS V. ADELAKU & ORS (2012) 3-4 MJSC 46, 75-76;**
- e) **BFI GRAND CORPORATION V. BPE (2012) 6-7 MJSC (PT 11) 124, 126.**

It is Counsel's further submission that the Claimant failed to prove or show how he arrived at his calculation of 35% profit margin hence his claim of special damages must fail.

Concluding, Counsel submitted that the Claimant has failed to prove his case and is therefore not entitled to any remedy at law. Counsel further submitted that the Claimant's allegation is not only unproven but is incredible, defies logic, and is inherently contradictory and should accordingly be dismissed having neither basis in law nor in fact.

Claimant's Counsel formulated three (3) issues for determination in this suit to wit:

- 1. Whether or not the terms of the agreement for the formation of the contract between the Claimant and the Defendant were duly kept by the Defendant**
- 2. Whether or not the sudden hard suspension of Claimant's telephone No. 08033086651 was justifiable.**
- 3. Whether or not the Claimant is entitled to damages.**

Arguing issue one above, Counsel stated that the Claimant at paragraph 5 of his Statement of Claim pleaded thus;

**“The Plaintiff avers that as a post paid subscriber, it was well understood by the Plaintiff and the Defendant at the time of acquisition of telephone line No 08033086651 that bills for service rendered by the Defendant for the Plaintiff would reflect call details such as the telephone number called and the duration of such calls. The Defendant kept to these terms of the agreement only for some time. Therefore the term of the agreement that the bill of charges and statement of account would reflect the details such as the Country, the telephone Number called the duration of the call as the cost of such call, as well as any amount previously paid at the relevant time, was floated with reckless abandon by the Defendant+**

Counsel further submitted that the Defendant did not specifically deny the material fact to wit; **that bill for services rendered would reflect the details such as the Country, the telephone number called, the duration of the call as the cost of such call as well as any amount previously paid at the relevant time contained in the Claimant's pleadings.**

It is Counsel's further submission that a Claimant's averment of facts must be met by the Defendant frontally and categorically, otherwise, the Defendant would be taken to have admitted the facts. Counsel referred court to the case of **NBC PLC V. OLANREWAJU (2007) 5 NWLR (PT. 1027) 255**

Counsel argued that despite the defendant's admission of the facts pleaded, the Claimant at the trial of this suit in line with his pleadings testified that as a postpaid subscriber, it was well understood at the time of the acquisition of the telephone line No. 0803-3086651 that bills for service rendered by the Defendant would reflect call details such as the telephone number called, the location of the call, the duration and amount of such calls as well as any amount previously paid. Counsel maintained that this piece of evidence was not challenged or contradicted by the defendants. Counsel submitted that it is the law that where a piece of evidence remains unchallenged or uncontradicted, the court is bound to believe and accept the evidence.

Counsel referred court to the case of **JOSEPH V FIRST INLAND BANK (NIG) PLC (2010) ALL FWLR (PT.504) 1487.**

He noted further that the Defendant initially kept with the terms of the agreement only for some time but thereafter flouted the terms of the agreement and Claimant tendered the bills sent by the Defendant and same was tendered and marked as Exhibits %C+, %C1-C7+. Counsel referred court to paragraph 5 of the Witness Statement on Oath and stated that the Defendant under cross-examination also confirmed that Exhibits %C+ %C1-C7+ were issued by it. Exhibits %C+, %C1 - C7+ showed the accounts details as agreed upon at the formation of the contract. Counsel stated that there is no doubt that at the inception or formation of the contract, it was agreed between the Claimant and the Defendant that the bills for service rendered would reflect call details such as telephone number called, the duration and the amount of such calls as well as any amount previously paid at the relevant time.

Counsel submitted that it is the principle of law that parties are bound by the terms agreed to in a contract and submitted further that if the conditions for the formation of a contract are fulfilled by the parties thereto, they will be bound by it. Counsel stated that it is not the function of a court to make a contract for the parties or to rewrite the one which they have made. Counsel referred court to the case of **BEST (NIGERIA) LTD V.**

**BLACKWOOD HODGE (NIG) LTD & ORS (2011) SC 31/1999.** Per Fabiyi,  
J.S.C

Counsel contended that without any explanation, the Defendant decided to flout the terms of the agreement by sending bills for services rendered without reflection of the account details agreed upon at the formation of the contract. Counsel referred court to Exhibit D, D1 and G, G1-G3 tendered by the Claimant and Defendant respectively. Counsel submitted that in the absence of any specific agreement, the Defendant cannot stop sending bills to the Claimant without the account details. On this proposition, Counsel referred court to the case of **A. I. INV. LTD V. AFRIBANK PLC (2013) 9 NWLR PT. 1359 PG. 408-409 PARAS G-A** per ALAGOA JSC.

**“ In other words, in the absence of any specific agreement that the initially agreed interest rate of 12.25% has to be reviewed upwards after a given period, can the Appellant or the trial court foist a new and reviewed interest rate on the parties? ..... ”**

Counsel stated that under cross-examination, the Defendant agreed that the subsequent bills did not show details but that a concise bill showing the details was sent to the Claimant by E-care system. On this, Counsel argued that there is no where it was stated that the MTN account details can only be accessed via the internet and that the Defendant did not also show any evidence that it was specifically agreed by the parties that the account

details will be sent by the E-care system. Placing reliance on the authority of **A.I. INV. LTD V. AFRIBANK PLC (SUPRA)**, Counsel maintained that the Defendant cannot in the absence of any specific agreement send for services rendered without the account details being attached.

Counsel argued that the wordings in E-care system provision if read as a whole, would show that anyone who wants to access the account details via the internet must first and foremost register. Thus, without a registration, a customer cannot to access the account details via the E-care system. Counsel submitted that the Defendant did not tender any document showing the Claimant's registration for the E-care system and that the Defendant did not tender any document showing the account details that was stored in the internet which Claimant could have accessed.

It is Counsel's contention that the E-care system (if any) was only an addition to the initial terms of the agreement and not that the E-care system facility altered the terms of the agreement which required the sending of bills with the account details as there was no specific agreement to that effect.

Counsel maintained that assuming (but without conceding) this Honourable Court were to believe the Defendant that the account details of Exhibit D+, D1+ and G+, G1-G3+ were provided for via the E-care system, the irresistible question is why did the Defendant not send the account details to

the Claimant upon the receipt of his complaint? and why did the Defendant not tender the account details that were posted to the internet for the Claimant to access same via the E-care system.

Counsel noted that under cross examination the Defendant testified that they have records of Email sent to customers and follows that the Defendant would have records of the account details stored on the internet to be accessed via the E- care system.

Counsel urged court to apply the provisions of Section 149 (d) of the Evidence Act and to hold that the account details of Exhibit D, D1 AND G, G1-G3 were never posted to the internet for access and that was why same could not be produced by the Defendant at the trial of this suit. Counsel referred court to the case of **ANIKE V. SPDC (NIG) LTD (2012) ALL FWLR (PT. 638) PG. 975 at 986 PARAS C-D** where the court held thus:-

**“The full import of section 149(1), Evidence Act, is that the court is entitled to presume that the evidence which could be produced and which is not produced would, if produced, be unfavourable to the party who withheld it. In other words, the party mischievously withholds such evidence he needs to discharge the burden of proof placed on him by section 135 – 137, Evidence Act, because he has something to hide. In the instant case, where the Plaintiff failed to produce the alleged employment letter of her deceased husband, the trial court rightly presumed that it**

**was deliberately withheld as it would prove if produced, that the Defendant was not the employer of the deceased”.**

On the above premise, Counsel urged court to hold that the Defendant did not duly comply with the terms of the agreement and further urged court to resolve issue one in favour of the Claimant.

On issue two as formulated, Counsel submitted that there is a common ground between the parties that the Defendant hard suspended the Claimant's telephone line No. 08033086651 and that the question is whether the hard suspension of the said line was justifiable?

Counsel submitted that the Claimant at paragraph 8 and 9 of his Witness Statement on Oath stated that the Defendant continued to send him outrageous bills without any reasonable or just cause and that despite the outrageous bills being sent to him by the Defendant, Claimant still went ahead to make several payments running into N770,000.00 (Seven Hundred and Seventy Thousand Naira) Counsel further submitted that despite the payments made to the defendants for which receipts were issued, the payments were not reflected in the subsequent bills sent to the Claimant.

Counsel submitted that the Defendant tried to justify the hard suspension of the Claimant's telephone line by tendering Exhibits G1-G3 to show that

the Claimant's account was in debit and submitted further that the tendering of Exhibits G, G1-G3+ did not avail the Defendant as the Claimant had testified that he was not in receipt of Exhibits G, G1-G3+. Also, the Defendant was aware that the major complaint of the Claimant is that bills were not regularly delivered to him.

Counsel submitted further that the Defendant did not lead any iota of evidence to show that Exhibits G, G1-G3+ were delivered to the Claimant and that despite the fact that the Defendant deposed in his Witness Statement on Oath that he will rely on evidence of delivery to the Claimant, he could not show or tender any evidence of delivery to the Claimant.

Counsel argued that it is the principle of law that a party who asserts in the affirmative has the burden of proving same and stated that in the case at hand, the Defendant had the burden of proving that Exhibits G, G1-G3+ were delivered to the Claimant since they asserted in the affirmative that the said Exhibits were delivered to the Claimant. Counsel further argued that flowing from the evidence on record, the Defendant failed woefully to establish the fact that Exhibits G, G1-G3 were delivered to the Claimant.

Counsel urged court to believe the evidence of the Claimant that he was not in receipt of Exhibits G, G1-G3 and that bills were not regularly sent to him.

Counsel noted that the said Exhibits G, G1 -G3 tendered by Defendant just like Exhibit D and D1 did not show the account details.

Counsel contended that the Defendant tried to hide under the E-care system to show that the Claimant was sent a concise bill showing the details. Counsel averred that the piece of evidence is untenable since there is no evidence before the court that the Claimant registered for the use of the E-care system neither did the Defendant show that it was subsequently agreed by both parties that the E-care system will be the only means by which the account details will be accessed. Counsel noted that the Defendant at the trial did not also tender the account details of the said bills and urged court to hold that the failure of the Defendant not to tender the account details of the bills is because no such details existed.

Placing reliance on the case of **EDOKPOLO AND CO., LTD V. BENDEL INSURANCE CO. LTD (1997) 2 NWLR (PT. 486) 131 SC.**, Counsel submitted that it is quite lawful and permissible for a Claimant or a Defendant as the case may be in a case to make use of evidence from the other side that is useful to it. Counsel submitted further that the Defendant's evidence above supports the case of the Claimant wherein he (Claimant) stated that because the details of the account were not sent to him regularly, he could not ascertain whether or not he was indebted to the Defendant and the Defendant failed to establish that apart from Exhibit G - C7+, subsequent

bills were sent to the Claimant showing the details to him. Counsel urged court to believe the Claimant.

Counsel contended that the Defendant herself agreed under cross examination that before you cut off the phone line of a customer, he is entitled to a bill stating the details and that it is wrong for the Defendant to put off the phone line of a customer who has not been sent a bill. On this, Counsel submitted that the only justification the Defendant would have for hard suspending the Claimant's telephone line is to show this Honourable Court that bills stating the account details as and when due were actually sent to the Claimant and the Claimant being aware of the debt refused to settle same. This, Counsel submitted, the Defendant has failed to prove.

It is Counsel's argument that even after the receipt of Exhibits 5, F1-F2+, the Defendant failed to send the accounts details to the Claimant. Counsel also argued that at the trial, the Defendant failed to tender the account details posted to the internet which the Claimant was expected to access. Counsel stated that no other inference can be drawn from the failure of the Defendant to tender the account details except that no such account details ever existed.

Counsel noted that the Defendant again tried to exonerate herself by stating that the responses to Exhibits 5, F1 -F2+ were sent via email which was

tendered as Exhibit H and submitted that the tendering of Exhibit %A+ did not make any sense as the said Exhibit did not also contain the details as required by the terms of the agreement. Counsel submitted further that having failed to show that the account details were sent to the Claimant and having testified that before a customer's line is cut off, he is entitled to a bill stating the details, the Defendant's hard suspension of the Claimant's telephone No. 08033086651 was not justified. Counsel urged court to resolve issue two in favour of the Claimant.

On issue three, Counsel submitted that where two parties have made a contract which one of them has broken, the damages in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i. e according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Counsel referred court to case of **PETERSON ZOCHONIS & CO LTD V. OGEDENGBE (1972) 3 SC (REPRINT)** 94 for this proposition.

Counsel contended that by virtue of Exhibits %A+ and %A1+ and at the formation of the contract, both parties agreed that bills will be sent showing the following details:

- a. The country called;
- b. The telephone number called;
- c. The duration of call;
- d. The cost of each call;
- e. Amount previously paid

Counsel submitted that the above details of the account was to enable the Claimant know what he had used and to also be aware of any indebtedness. Counsel further submitted that Claimant at the trial of this suit stated that he had a contract to execute on behalf of Pahmeyer & Co. That Pahmeyer & Co., upon receipt of his proforma awarded the Claimant a contract of Euro 1,789,230 which translates to N393, 630,600 (Three Hundred and Ninety Three Million, Six Hundred and Thirty Thousand, Six Hundred Naira) contract for the supply of furniture to Kuwait subject to further confirmation on the Claimant's telephone line 080330866S1 and that the sudden hard suspension of Claimant's line without any justification made it impossible for Pahmeyer & Co., to reach him which resulted in Claimant's loss of the contract.

Counsel further stated that the Defendant's Learned Counsel in her Final Address submitted that Exhibits D - D1 tells a different story as the documents showed that as at the 3rd of February 2009 when Pahmeyer & Co., communicated the cancellation of the contract to the Claimant, his line

was still active. Counsel argued that the above submission by Learned Counsel for the Defendant holds no water as Exhibits %D - D1+ does not show whether the line was active under the period. Counsel stated that it shows that even when the telephone line was inactive, the Defendant continued to bill the Claimant.

Counsel argued further that the Claimant wrote a letter dated the 17th day of February 2009 wherein he complained that his line was cut off by the Defendant while he was in the United States of America for five (5) weeks and stated that the Defendant did not respond to the letter neither did she deny that the Claimant's line was not cut off at that time. On this, Counsel submitted that the burden was on the Defendant to show precisely when the Claimant's line was cut off because in the arena of civil cases, the onus of proof does not remain static. It shifts from side to side. Counsel maintained that the correct position in law is that the onus of adducing further evidence is on the person who will fail if such evidence is not produced. Counsel contended that it necessarily follows that when there is no such evidence, the issue must be resolved against that person. Counsel referred court to the case of **HIGHGRADE MARITIME SERVICES LTD V. FIRST BANK OF NIGERIA LIMITED (1991) 1 NWLR (PT. 167) 290 SC; REPTICO S.A. GENEVA V. AFRIBANK (NIG) PLC (2013) 14 NWLR PT. 1373 PG. 172 PP. 207 - 08 PARAS G - A.**

Counsel argued that after the receipt of the letter dated the 17th day of February 2009 from the Claimant, the Defendant was duty bound to adduce further evidence on the issue to clarify when the Claimant's line was actually suspended since the Defendant herself suspended the said telephone line.

Counsel further urged court to believe the evidence of the Claimant that his line was cut off while he was away in the United States of America for five (5) weeks and that made it impossible for the Claimant to make or receive calls from the telephone line.

Counsel stated that it is on record that Pahmeyer & Co wrote to the Claimant on the 3rd day of January 2009 wherein it stated that the contract had been cancelled since the Claimant could not be reached on his telephone line no. 08033086651. Counsel stated further that it is also on record that the Claimant wrote to the Defendant on the 17th day of February, 2009 informing Defendant that his line was cut off while he was away in the United States of America for five (5) weeks and submitted that the logical inference to be drawn from the evidence on record is that the Claimant's line was cut off in January 2009. Counsel urged court to hold that the Claimant's line was cut off in January 2009 especially considering the fact that the Defendant failed to show this court the precise period the line was cut off since the evidence of the Claimant is more probable than that given by the Defendant.

Counsel submitted further that contrary to the Defendant's Learned Counsel submission, the hard suspension of the Claimant's telephone line by the Defendant was the cause of the cancellation of the Claimant's contract with his business partner Pahmeyer & Co. and urged the court to so hold.

Counsel further argued that if the Defendant had shown details of calls in the bills sent, this Court would have been able to determine whether or not Pahmeyer & Co., put a call through to the Claimant before coming to the logical conclusion that the Claimant had other reasons for refusing or failing to take calls from Pahmeyer & Co as submitted by Learned Counsel for the Defendant.

Counsel submitted that the Claimant led credible and convincing evidence to show that he had a contract with Pahmeyer & Co and that the contract was cancelled because Pahmeyer & Co could not reach him on his telephone line which can be seen from Exhibits B, B1 - B4+. Counsel further submitted that the result of the breach of the terms of agreement between the claimant and defendant is the loss of N137, 770,710.00 (One Hundred and Thirty Seven Million, Seven Hundred and Seventy Thousand, Seven Hundred and Ten Naira) being the profit the Claimant would have made on the contract between it and Pahmeyer & Co.

Counsel submitted that it is the principle of law that defendant has a duty to specifically traverse claim for damages and in the absence of a specific denial of the claim for damages, the implication is that the claim remains unchallenged and thereby taken as specifically pleaded and proven. Counsel referred court to the case of **OANDO (NIG) PLC V ADIJERE(W/A) LTD (2013) NWLR PT. 1377 PP. 400-401 PARAS F-A.** where the Supreme Court held as follows;

**“The Supreme Court Rules were amended in 1989 and in the amendment; Order 18 rule 13(4) was deleted in consequence of the amendment, a defendant must now specifically traverse any claim for damages in an action. Before the amendment, any allegation as to the amount of damages in a claim was regarded as denied unless it was specifically admitted Therefore, the decision of the Supreme Court in Nigeria Produce Marketing Board v. Adewunmi (1972) All NLR 870 which was based on Order 18 Rule 13(4) of the Rules to hold that any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted is no longer the law regarding pleadings. In the instant case, the suit on appeal to the Supreme Court was filed in 1989. The Respondent pleaded the current market value of a tanker of the same age and condition like that of the Respondent. However, the Appellant in its amended statement of defence only gave a general denial.**

**Thus in the absence of a specific denial of the Respondent claim, the implication was that the claim remained unchallenged and thereby taken as specifically pleaded and proved ”.**

Counsel further argued that in the case at hand, the Defendant did not specifically traverse the Claimant’s claim for special damages and that the defendant at paragraph 6 of her further statement of defence pleaded thus;

**“With particular respect to paragraphs 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the second Amended Statement of Claim, the Defendant states categorically that it does not know the details of the commercial activities of its customers and so is not in any position to confirm or deny the averments contain therein ”.**

Counsel argued that a traverse that the Defendant is not in a position to deny or admit the Claimant’s claim is insufficient and referred court to the case of **OSAFIRE V. ODI (1994) 2 NWLR (PT. 325) PG. 125 PP. 136 PARAS F - G** wherein the Supreme Court held thus:

**“an averment in a Statement of Defence that the Defendant is not in a position to admit or deny an averment in the Statement of Claim amounts to insufficient denial.**

Counsel submitted on the authority of **OANDO (NIG) PLC V. ADIJERE (W/A) LTD (SUPRA)**, that the claim remains unchallenged and thereby taken as pleaded and proven. Counsel further urged court to grant the

general damages for the emotional, and psychological trauma occasioned by the abrupt termination of the service to Claimant's telephone line and the special damages of N137, 770,710.00 (One Hundred and Thirty Seven Million, Seven Hundred and Seventy Thousand, Seven Hundred and Ten Naira) which was lost by the Claimant as a result of the cancellation of the contract between it and the Pahmeyer & Co.

Counsel submitted that cause of action has been defined by courts to mean a combination of facts and circumstances giving rise to the right to file a claim in court for remedy and includes all things which are necessary to give a right of action and every material fact which has to be proved to entitle the Plaintiff to succeed. Counsel referred court to the case of **POPOOLA ELABANJO V. CHIEF (MRS) GANIAT DOWODU (2006) 6-7 SC 24.**

Counsel submitted that in the case at hand, the Defendant failed to comply with the terms of the agreement when it refused and/or neglected to send bills with the account details showing the country called, the telephone number called, the duration of call, the cost of each call and the amount previously paid. Counsel further submitted that a cause of action arose when the Defendant without sending the account details hard suspended the Claimant's telephone line and that the hard suspension of the Claimant's line led to the cancellation of the Claimant's contract with Pahmeyer & Co., when they could not reach him on his telephone line.

Counsel submitted that the fact that the issue of N770,000.00 (Seven Hundred and Seventy Thousand Naira) only surfaced for the first time in the Claimant's Second Further Amended Statement of Claim dated February 11<sup>th</sup> 2011 is immaterial. Counsel argued that the Defendant never disputed that it was not in receipt of the N770,000.00 neither did it show that the N770, 000.00 were reflected in the bills sent even in Exhibits %G - G3+ tendered by the Defendant. Counsel further submitted that when the second Further Amended Statement of Claim dated February 11<sup>th</sup> 2011 was made, the Defendant never objected to the amendment and that there is nothing in the Second Further Amended Statement of Claim to mislead the court or over reach the Defendant.

Counsel urged court to hold that by the conduct of the Defendant, she is estopped from asserting that the Claimant is indebted to her.

Learned Counsel for the Defendant replying on points of law submitted that the letter dated February 3, 2009 (tendered as part of Exhibits B-B4) being a written document speaks clearly for itself and that in law, the Claimant may not import into it any meaning contrary to its apparent meaning or try to explain it away in a manner which contradicts its apparent meaning. Counsel referred to **Section 129(2) of the Evidence Act 2011** which provides that,

**“Evidence may not be given to show that common words the meaning of which is plain, and which, and which do not appear from the context to have been used in a peculiar sense, were in fact so used”.**

Counsel further submitted that the Claimant’s Counsel tried to justify his legally untenable argument by shifting the burden to the Defendant to show precisely when the Claimant’s line was cut off and argued that it is a time-honoured position of the law that in civil cases the burden of proof is on the party who would lose if no evidence were led. Counsel stated that in this case, the Claimant himself led evidence (via his documentary exhibits) which clearly contradicted his claim and stated that there was therefore no compulsion on the Defendant to repair or make the Claimant’s case for him. Counsel referred to the case of **Ohochukwu v. A.G Rivers State (2012) Vol. 2 MJSC (Pt 11) 1, 106-108** where the Supreme Court reiterated that it is after a Plaintiff has proved his case that the burden of proof shifts to the Defendant.

Counsel further contended that the bottom line is that at the time that the letter dated February 3, 2009 (Exhibits B-B4) was written to the Claimant cancelling his contract with Messrs Pahmeyer & Co, the Claimant’s line was active. Counsel submitted further that the said cancellation of contract forms the basis of the Claimant’s Claim before this Court and not the bogus and unproven allegation of breach of contractual terms which the Claimant

addresses in his Final Address. Counsel argued that the Claimant's case must therefore fail as it is trite law that any averments in pleadings which are not supported by the evidence led at trial go to no issue.

Counsel finally averred that the Claimant's case is therefore incurably bad.

I have carefully considered the facts of this case, the testimony of the witnesses and the final written addresses of Claimant and Defendant's Counsel. I must commend the painstaking and thorough effort of both Counsel to put forth their cases in this suit. I now turn to the issues for determination as formulated by the Defendant's Counsel. Issue one questions whether the hard suspension of the Claimant's telephone line Number 08033086651 was the cause of the cancellation of the Claimant's business contract with his business partner, Pahmeyer & Co. By a letter dated the 3<sup>rd</sup> day of February, 2009 and contained in Exhibit B4, Claimant's business contractor, intimated Claimant that:-

**“...All efforts to contact you through your phone no. 08033086651 provided by your good self proved abortive....we had no option but to give the contract to another company in Denmark because the job was urgent.”**

That effectively terminated the contract awarded to the Claimant by the said Pahmeyer & Co. The letter did not state the days and times the effort to reach Claimant was made. It stands to reason however that the efforts to

reach Claimant was made before the letter was written. That will presumably be any day and time within Claimant's billing period of January 8, 2009 to February 7, 2009 and forming part of Exhibit %D1+. The said Exhibit %D1+ shows that the Claimant had a credit balance of N77,579.64 (Seventy Seven Thousand, Five Hundred and Seventy Nine Thousand and Sixty Four Kobo) brought forward but incurred roaming charges of N556,607.47 (Five Hundred and Fifty Six Thousand, Six Hundred and Seven Naira and Forty Seven Kobo) That is Claimant's bill for January 8 to January 7, 2009. The logical inference to be drawn from Exhibit %D1+ is that for the period of January and until the 2<sup>nd</sup> day of February, which is the eve of the day the letter from Claimant's contractor was written, Claimant's line was active having incurred roaming charges. Further logical reasoning flowing from the above is that while the said line was active, the contention as evidenced in Exhibit %B4+ could not have applied. If Pahmeyer & Co withdrew its contract award to the Claimant, it certainly was not as a result of Claimant's telephone line having been suspended for Exhibit %D+ shows clearly that as at the time Pahmeyer & Co claimed they tried to reach Claimant, the said line was active.

I therefore resolve and answer issue one as formulated by the Defendant's Counsel in the negative by saying that Defendant's hard suspension of

Claimant's telephone line was not the cause of the cancellation of Claimant's business contract with his business partners, Pahmeyer & Co.

Issue two as formulated by the Defendant's Counsel queries whether the Defendant's hard suspension of Claimant's telephone line is justified. I find that this issue is exactly the same issue as formulated in Claimant Counsel's issue two. I will proceed to address the issue together for both Claimant and Defendant's Counsel. In answering this question, I shall have recourse to Exhibit %D+ which shows the debt profile of the Claimant. As I earlier mentioned, Exhibit %D+ shows that the Claimant was indebted to the Defendant to the tune of N508,358.20 (Five Hundred and Eight Thousand, Three Hundred and Fifty Eight Naira and Twenty Kobo). I would imagine that at this figure any prudent business concern will sever services to its customer for unsettled bills. The fact that details of the bills as shown in Exhibits %D+ and %D1+ were not furnished is insufficient grounds for Claimant not to have settled the said bills. Furthermore, Exhibit %D+ shows clearly that Claimant's line was in credit to the tune of N77,579.64 (Seventy Seven Thousand, Five Hundred and Seventy Nine Thousand and Sixty Four Kobo) as at January, 2009. This could only have come about as a result of past payments being credited, for Exhibits %G+, %G1+, %G2+ and %G3+ showed various sums credited in favour of the Claimant. It is in the light of the foregoing that I resolve issue two as formulated by the Defendant and

Claimant's Counsel by saying that the Defendant's hard suspension of Claimant's telephone line was justified chiefly on account of the outstanding sums unsettled by the Claimant.

Issue three as formulated by the Defendant questions whether the Defendant is estopped from claiming that any debt existed on the Claimant's telephone line. I shall once again call in aid Exhibit 1 which again shows the debt profile of the Claimant to the Defendant as evidenced in the said Exhibit 1. By the clear narratives in the said Exhibit, the Defendant is not estopped from claiming that any debt existed on the Claimant's telephone line. The age-long legal axiom that a document speaks for itself still holds sway in our adjectival law in deserving circumstances such as this. On the strength of Exhibit 1, I resolve issue three in favour of the Defendant and make no hesitation in stating that the Defendant is not estopped from claiming that any debt existed on the Claimant's telephone line.

Defendant Counsel's issue four as formulated queries whether the Claimant is entitled to general or special damage. Yet again, this issue is substantially the same as issue three as formulated by the Claimant's Counsel. I shall also proceed to address the issue as one as between the Claimant and the Defendant.

Now, what is damage? Damage in law generally refers to a disadvantage which is suffered by a person as a result of the act or default of another for which a legal right to recompense accrues. Damages are thus, the pecuniary recompense given by process of law to a person for the actionable wrong that another has done to him. **See KOPEK CONSTRUCTION LTD. V. EKISOLA (2010) LPELR-1703(SC)** per Muhammad, J.S.C

In **ECONOMIC AND FINANCIAL CRIMES COMMISSION v. ALHAJI BABA INUWA & ANOR (2014) LPELR-23597(CA)** my Lord Akeju, J.C.A reasoned thus:-

**General damages is the kind of damages which the law presumes to be the consequence of the act complained of and unlike special damages a claimant for general damages does not need to specifically plead and specially prove it by evidence, it is sufficient if the facts thereof are generally averred."**

The issue of damages arises only when there is breach of contract. Damages for breach of contract are compensation to the plaintiff for the damage, loss or injury suffered through that breach. It is meant as far as money can do it, for the plaintiff to be placed in the same position as if the contract has been performed. see **STAG ENGINEERING COMPANY LTD. v. SABALCO NIGERIA LTD & ANOR (2008) LPELR-8485(CA)**

It is trite that courts do not award damages as a matter of course. It is also trite that damage will necessarily flow from a breach of contract. Now in this proceeding, what is the breach complained of by the Claimant. Exhibit A in this proceeding is the meeting point in resolving this issue. Claimant and Defendant by virtue of Exhibit A contracted to enter into a business relationship wherein Claimant positioned himself as a post paid customer. Now who is a post paid customer? Post paid customers are those that are billed for their use of a carrier's services on a monthly basis based on the amount of services they have used. Claimant claims that by Exhibit A it was understood that as between Claimant and Defendant, Bills for services rendered by the Defendant for the Claimant would reflect call details such as telephone number called, the duration of the call, cost of such calls as well as the amount previously paid. I must say that I find nowhere in Exhibit A where it was so stated but it must be taken that it was an implied term of the agreement between the Claimant and the Defendant for as My Lord Alagoa, J.C.A stated in MULTICHOICE NIGERIA LIMITED V AZEEZ (2010) LPELR-4558(CA) on ways of determining a contract implied in fact:-

**“prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying so that, if while the parties were making their bargain an officious bystander were to suggest some express**

**provision for it in the agreement, they would testily suppress him with a common “Oh, of course...”**

The Defendant having not challenged the assertion that bills should be itemized with details in any material sense, it must be taken that the parties were ad idem on that score. It is settled law that where parties are ad idem on the terms of a contract, the function of the court is to give effect to the terms without more as it is the duty of the court to give effect to the intention of the parties. See **YADIS NIGERIA LIMITED V. GREAT NIGERIA INSURANCE COMPANY LIMITED (2007) LPELR-3507(SC)** This understanding was further strengthened by the fact that Exhibits %C . C7+ evidenced that fact that bills should reflect call details as to destination, duration, cost etc. The said understanding forming part of the implied terms of the agreement between the Claimant and the Defendant was unilaterally flouted by the Defendant as shown in Exhibits %D and D1+. Was there a breach of a term in the contract? Of course there was and that is my answer to Claimant Counsel's issue one as formulated. In **BEST (NIGERIA) LTD. v. BLACKWOOD HODGE (NIGERIA) LTD. & ORS. (2011) LPELR-776(SC)** my Lord Fabiyi, JSC reasoned thus:-

**“There is no gain-saying the point that a breach of contract is committed when a party to the contract without lawful excuse fails, neglects or refuses to perform an obligation he undertook in the contract or incapacitates himself from**

**performing same or in a way back down from carrying out a material term. See: Adeoti & Anr. v. Ayofinde & Anr. (2001) 6 NWLR (Pt.709) 336.”**

It must be noted that for a claimant to succeed in an action for breach of contract, he must establish not only that there was a breach, but also that there was in existence an enforceable contract which was breached. See **1ST CONCEPT ASSOCIATES (NIGERIA) LIMITED v. TROPICS FINANCE & INVESTMENT COMPANY LIMITED (2014) LPELR-22644(CA)** Per Oseji, J.C.A

Exhibit %A+ points to the existence of an enforceable contract between Claimant and Defendant and as I earlier mentioned, Exhibits %D . D1+ and Exhibits G, G1, G2 and G3 confirm the breach of the contract between the Claimant and the Defendant, the Defendant being in breach.

The Claim for loss of profit or anticipated profit represents a loss that has transformed into special damages which in effect is a pecuniary loss which must be proved. See **WEST AFRICA SHIPPING AGENCY (NIG) LTD V. MUSA KALLA (1978) 3 SC; IJEBU ODE L.G.A V. ADEDEJI FALOGUN & CO. (1991) 1 NWLR (PT 166); UEA PLC V BTL IND LTD (2004) 18 NWLR (PT 904) P 180; UBA PLC V. BTL IND LTD (2006) 19 NWLR (PT 1013) 61**

I find that there are no materials on which to base the award under this head of claim. In any event, having not satisfied this court that as at the time

Exhibit B4 was issued to the Claimant by Pahmeyer and Co, Claimant's line was active and having also held that the cancellation of the contract between the Claimant and Pahmeyer and Co was not as a result of the hard suspension of Claimant's telephone line with the Defendant, the claim under this head fails.

On the authority of **SPDC LTD. V. NWABUEZE (2013) LPELR-21178(CA)** I must now decide that the Claimant is entitled to nominal damage for the breach of contract for as my Lord, Onyemenam, J.C.A. held in **SPDC LTD. V. NWABUEZE (SUPRA)** on the nature of nominal damages and when it is awarded:-

**"Howbeit, a Plaintiff in a case of breach of contract is entitled to nominal damages even though he has suffered no actual damage. The violation or infraction of his legal right per se will entitle him to nominal damages without proof of any loss incurred by him as a consequence of the breach. See Obere v. Board of Management EKO Hospital (1978) 1 L.N.R. 240 at 250. Nominal damages being a small amount fixed as damages for breach of contract without regard to the amount of loss. It is awarded simply once the Plaintiff establishes a breach of contract but fails to establish a loss caused by the wrong. The essence of a judgment for nominal damages is that the Plaintiff has established a legal right. See S.W. Waddams, the Law of Damages 2477 - 478 (3rd Ed. 1997)"**

In this case, Claimant though entitled to damage for the breach of the contract as I have earlier stated has been unable to establish the loss caused by the wrong. In **LAR v. STIRLING ASTALDI (Nig) Ltd. (1977)** **LPELR-1755(SC)** my Lord Fatayi-Williams, J.S.C stated the position of the law thus:

**"It may however be unwise for a plaintiff to rely too heavily on inferences and presumptions of damage, for a failure to produce any evidence at all may result in an award of small or even nominal damages. This is because the proper approach in such circumstances is to regard an injuria or wrong as entitling the plaintiff to a judgment for damages in his favour even without loss or damage, but where there is no loss or damage such judgment will be for nominal damages only." Per FATAYI-WILLIAMS, J.S.C. (Pp. 14-15, paras. F-A)**

In the final analysis, I enter judgment in favour of the Claimant by awarding the sum of N200,000.00 (Two Hundred Thousand Naira) as nominal damage for the breach of the term of the contract between the Claimant and the Defendant, the Defendant being in breach.

This is the judgment of the court.

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**HON. JUSTICE J.O. OKEAYA-INNEH**

JUDGE

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**COUNSEL**

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|-----|--|---|-------------------|
| (1) | Chief F. O. Orbih (SAN) with S. I. Agoha | õ | For the Claimant  |
| (2) | Adesuwa Omonuwa with L. Sobola           | õ | For the Defendant |