

IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP: THE HON. JUSTICE V.O. EBOREIME, JUDGE
SITTING IN HIGH COURT NO. 10, BENIN CITY
ON WEDNESDAY THIS 25TH DAY OF NOVEMBER, 2015

SUIT NO. B/8/2007

BETWEEN:

PALATINATE ABILITIES NIG LTD CLAIMANT

AND

INTERCONTINENTAL BANK PLC DEFENDANT

JUDGMENT

This Judgment is in respect of the Claim initiated by the Claimant under the old Rules of this Court vide the Writ filed on the 5th day of January, 2007. The Claim of the Claimant in the “PLAINTIFF’S STATEMENT OF CLAIM” at page 5 of the case file is as follows:

“WHEREOF THE PLAINTIFF CLAIMS against the defendant as follow:

The return of the sum of N97,000.00 (Ninety-seven Thousand Naira) unlawfully deducted from the Account of the Plaintiff as the purported interest on the overdraft facility and any further sum which has been unlawfully deducted from the Current Account No. 179-A4164-001 and the sum of

N500,000.00 (Five Hundred Thousand Naira) as general damages for breach of contract.”

The Defendant’s extant Statement of Defence/Counter Claim was also filed under the old Rules of this Court on the 24th day of May, 2011 wherein the Defendant counter-claimed against the Claimant at page 40 of the case file as follows:

“WHEREOF the Defendant claim against the Plaintiff as follows:

- 1) The payment of the sum of N99,120.52 (ninety nine thousand, one hundred and twenty naira fifty two kobo) and any further sum accruable on the account being outstanding debit balances standing in the Plaintiff’s account with the Defendant representing various charges including interest, service charge, commission on Turnover and VAT.
- 2) Interest at 20% on the said sum until judgment and 15% until satisfaction of the judgment.
- 3) The sum of N1,000,000.00 (one million naira only) for general damages.

Still under the old Rules of this Court, the Claimant filed the “PLAINTIFF’S REPLY TO DEFENDANT’S AMENDED STATEMENT OF DEFENCE AND DEFENCE TO COUNTER CLAIM” on the 5th day of March, 2012 at page 53-55.

In compliance however with the extant Rules of this Court, Edo State High Court (Civil Procedure) Rules, 2012, the Claimant filed its List of Witnesses and List of Documents to be relied upon on the 6th day of December, 2012 at pages 63-75 of the case file.

The Defendant also under the extant Rules filed the Defendant’s List of Witnesses and List of Documents to be relied upon on the 4th day of January, 2013 at pages 76-85 of the case file.

The Claimant filed its Additional List of Witnesses on the 1st day of March, 2013 at pages 87-89 of the case file while the Defendant also filed her Additional List of Witnesses on the 10th day of July, 2013 at pages 100-104 of the case file.

It should be noted that both the Claimant and the Defendant abandoned their respective List of Witnesses as they only called their respective Additional Witnesses which this Court shall consider later.

The Claimant opened his case and closed same on the 13th day of May, 2013 by calling one witness, Roland Eguavoen, who adopted his

witness statement on oath filed on the 1st day of March, 2013 as his evidence-in-chief in this case. This Statement on Oath is reproduced as follows:

“I, Roland Eguavoen, Male, Christian and Nigerian Citizen of No. 6 Owie Street, Off Alohian Street City, do hereby make Oath and state as follow:

1. That I am the manager in the Claimant’s company and by my schedule of duties I am conversant with the facts of this case.
2. That the defendant are bankers to the Claimant’s company.
3. That the Defendant was previously known as Equity Bank and had its name changed to Intercontinental Bank upon consolidation of Bank in accordance with the Federal Government Policy in 2005 and has now been changed to Access Bank. That prior to the said consolidation, claimant opened a current account No. 0179-A41646-001 with the Defendant then operating under the name “Equity Bank Nigeria Limited”.
4. That in June 2006, the Claimant issued a cheque No 03619942, post dated to 27th July 2006 in favour of Stephen Idugboe & Sons Ltd in anticipation of business transaction between it and Stephen Idugboe & Sons Ltd.

5. That the said cheque was presented by the employee (sic) in whose favour it was written and the defendant erroneously honoured the cheque in favour of the drawee without reference or confirmation from the Claimant representative and against banking practice. I hereby seek to rely on a copy of the said cheque in evidence.
6. That the claimant usually formally applies in writing for an overdraft facility whenever it needed same and the approved terms are conveyed back to it in writing, as is the usual banking practice. I hereby seek to rely on the previous letter of the defendant dated 15th January 2004, 16th February 2004, the claimant's letter dated 6/2/2004 and a copy of the previous overdraft.
7. That I got to know from the statement of account that the Defendant has been debiting claimant's account since July 2006. The Defendant has also charged interest of N97,000.00 thereon. I hereby seek to rely and tender the two statement (sic) of account.
8. That in spite of several letters of notification, protest and letter written by me, the Defendant continued to debit the said account and charge outrageous interest thereon as if the

claimant took an overdraft. I hereby seek to tender the protest letter in evidence.

9. That the action of the Defendant by honouring the cheque and debiting interest from the claimant's account without authorisation or confirmation from the Claimant in line with banking practices amount to breach of contract.

10. That in defence to the Defendant's Counter Claim, I repeat and reply on paragraphs 1 to 14 of the Claimant's Reply to the Defendant's Amended Statement of Defence.

11. That paragraphs 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of the Defendant's Counter Claim are untrue and I put the Defendant to the strictest proof of the facts contained.

12. That in specific response to paragraph 25, of the Defendant's Counter Claim, I state that the said cheque was never returned to the Claimant by the Defendant.

13. That in specific response to paragraph (sic) 22 and 28 of the Defendant's Counter Claim, the Claimant's account was never in debit as at 25/8/2006 or 31/8/2006 and put the Defendant to the strictest proof of the facts contained therein. The Defendant is hereby given notice to produce its statement of account from 1st July 2006 to date.

14. That in specific response to paragraph 14 of the Defendant's Counter Claim, I state that the said cheque book was never issued to the Claimant on the said date and that if any cheque book was ever issued to Claimant it already paid for it.

15. That in specific response to paragraph 27 of the Defendant's Counter Claim, I state that I was not aware of such charges and that the bank does not charge customers for deposit booklet.

16. That in specific response to paragraph 29 of the Defendant Counter Claim, the claimant is not in breach of contract between itself and the Defendant and further state that the Defendant's Counter Claim was brought in bad faith and that it is petty, frivolous and an afterthought and urge this Honourable Court to dismiss it in its entirety.

17. That I urge this Honourable Court to grant the Claimant as per its Statement of Claim.

18. That I make this deposition in good faith, conscientiously and in accordance with the Oath Act."

In the course of the hearing of the Claimant's case, four exhibits were admitted in evidence as follows:

1. Exhibit “A” – Equity Bank of Nigeria Limited Cheque with a First Bank of Nigeria Plc stamp dated 27/07/06 for the sum of N2,100,000.00 (Two Million, One Hundred Thousand Naira) issued in favour of Stephen Idugboe & Sons Ltd.
2. Exhibit “B” – Equity Bank of Nigeria Limited letter to the Claimant dated 15th January, 2004 and titled: “TEMPORARY OVERDRAFT OF 1,000,000.00 (ONE MILLION NAIRA).
3. Exhibit “B1” - Equity Bank of Nigeria Limited letter to the Claimant dated 16th February, 2004 and titled: “TEMPORARY OVERDRAFT OF 2,000,000.00 (TWO MILLION NAIRA).
4. Exhibit “B2” – Claimant’s Letter to the Manager, Equity Bank of Nig. Ltd. dated 6/2/04 and titled: REQUEST FOR OVERDRAFT.
5. Exhibit “C” – Claimant’s Statement of Account with Intercontinental Bank Plc for the period of 30 July, 2006 – 31 July, 2006.
6. Exhibit “C1” – Claimant’s Statement of Account with Intercontinental Bank Plc for the period of 31 July, 2006 – 31 August, 2006.
7. Exhibit “D” – Claimant Letter of Protest to the Defendant written by Olugbemi Robinson Adisa & Co. dated 28th September, 2006 and titled: RE: CURRENT ACCOUNT 0179-A41646-001 UNLAWFUL DEBT.

The Claimant's witness was accordingly cross examined by the Defendant on this day by its learned counsel, O.N. Uzor.

On the 31st day of March, 2014, the Defendant opened and closed its case by calling one witness, Ikemefuna Anthony, who adopted his witness statement on oath filed on the 10th day of July, 2013 as his evidence-in-chief before this Court. This evidence is reproduced as follows:

"I, Ikemefuna Anthony, male, Christian, Branch Manager of Access Bank Plc, Airport Road, Benin City do hereby make oath and state as follows:

1. That I am the Branch Operation Manager of the Defendant Airport Road Branch, Benin City.
2. That the Defendant is now known as Access Bank Plc.
3. That by virtue of my said position I am conversant with the facts of this case.
4. That in defence of the claimant's claim, I repeat and rely on paragraphs 1 – 18 of the Defendant/Counter Claimant Amended Statement of Defence.
5. That I admit paragraphs 1, 2, 3 and 4 of the Claimant's statement of claim.

6. That I aver that the Drawee presented the cheque for clearing and that the cheque was returned unpaid as the Claimant had no sufficient funds in his account.
7. That the claimant in some instances apply formally for an overdraft facility and this is usually granted where he met the conditions for the grant of same.
8. That the Defendant/Counter Claimant did not breach any contract between her and the Claimant, as all the actions taken by the Defendant/Counter Claimant were within normal banking practice.
9. That the Defendant/Counter Claimant did not give value to the cheque as the claimant did not have sufficient funds in his account. The said cheque was brought for clearing and the claimant's account was debited with the value of the cheque and the interest accruable for such transaction was electronically generated by the bank's system.
10. That I further state that when it was discovered that the claimant had no funds in his account after repeated efforts to clear the cheque by the Drawee the said cheque number 0319942 was returned unpaid and the claimant account was reverted with the value of the cheque credited accordingly.

11. That apart from the cheque that was presented by the drawee for clearing on the claimant's account which accrued interest as the account was overdrawn, the Defendant/Counter Claimant also rendered other services to the claimant which said services attracted charges which were debited against the claimant.

12. That I deny paragraphs 9, 10 and 11 of the claimant's statement of claim and put the claimant to the strictest proof of the facts contained therein.

13. That in answer to paragraph 9 of the claimant statement of claim, I state that the Claimant's purported letter to withdraw the cheque was an after thought when the claimant knew that the cheque had already been presented for clearing by the Drawee's bank and returned unpaid as there was insufficient funds in the claimant's account.

14. That in further answer to paragraph 9 of the claimant's statement of claim, the Defendant/Counter Claimant did not receive any letter withdrawing the cheque and that the cheque was later returned to the claimant as value was not given to the cheque due to insufficient funds in claimant's account with the Defendant/Counter Claimant.

15. That the Defendant/Counter Claimant did not charge outrageous interest against the claimant for the cheque which was issued by the claimant which cheque was presented by the drawee for clearing, which said cheque for the sum of N2,100,000.00 (two million one hundred thousand naira) only was debited on the account of the claimant and interest charged in accordance with normal banking practice concerning issuance of dud cheque as the claimant's account was already in debit.

16. That when the cheque was returned unpaid due to insufficient funds in the claimant's account, the claimant's account was reverted and reversed with the value of the cheque only as the charges already made were legitimate charges for the transaction.

17. That in answer to paragraph 10 of the claimant's statement of claim, the Defendant/Counter Claimant only deducted legitimate interest charged on the overdraft account of the claimant in accordance with banking practice.

18. That in answer to paragraph 11 of the claimant's statement of claim, the Defendant/Counter Claimant did not breach any contract(sic) between the parties as he acted within the best

banking relationship with the claimant and she returned the cheque to the claimant when the claimant's account did not have sufficient funds for the payment of the said cheque.

19. That the Defendant/Counter Claimant denies liability in its totality as per the claimant's claim and in furtherance state that the claimant is not entitled to the refund of the sum of N97,000.00 (ninety seven thousand naira) or any amount for that matter as the said sum is legitimate interest charges for the transaction carried out by the Plaintiff when he issued a dud cheque knowing that it had insufficient funds in his account to cover the cheque which said cheque was presented for clearing by the Drawee (Stephen Idugboe & Sons Ltd).

20. That the Defendant/Counter Claimant counter claims against the claimant as per her counter claim.

21. That in proof of the Defendant/Counter Claimant counter claim, I rely on paragraphs 1 to 8 of the Defendant/Counter Claimant's Statement of Defence and paragraphs 19 – 29 of the Defendant/Counter Claimant's counter claim.

22. That the Claimant is customer of the Defendant/Counter Claimant who operates a current account number 017941646-001.

23. That the Defendant/Counter Claimant provides various banking services to the claimant in the course of the bank/customer relationship with the claimant.
24. That the claimant's account was in debit as at 25/07/2006 to the tune of N3,487.35 (three thousand, four hundred and eighty seven naira, thirty five kobo).
25. That the Defendant/Counter Claimant issued cheque number 03619942 to one Messrs Stephen Idugboe & Sons Ltd, which said cheque was presented for clearing on he(sic) 31/7/2006 and the value of the cheque was debited to the claimant's account.
26. That the claimant's account was debited with interest for the transaction in accordance with the banking practice for such transactions.
27. That the Defendant/Counter Claimant later returned the cheque to the claimant when the claimant refused or neglected to fund his account that would have enabled the Defendant/Counter Claimant to conclude the transaction.
28. That the Defendant/Counter Claimant issued a cheque book to the claimant at a cost of N1,500.00 (one thousand five hundred naira) only on 16/8/2008.

29. That the Defendant/Counter Claimant also issued a reference letter to the claimant on the 23/8/2006 and the claimant was duly charged with the sum of N2,500.00 (two thousand five hundred naira only) for the service rendered.
30. That on the 30/8/2006, the claimant's account was debited with the sum of N200 (two hundred naira only) for the deposit booklet.
31. That the claimant's account was in debit as at 31/08/06 in the sum of N99,120.52 (ninety nine thousand, one hundred and twenty naira, fifty two kobo) which sum is increasing every month as the claimant has refused, neglected and failed to fund his account to offset the outstanding debit balance in his account despite repeated appeal by the Defendant for the claimant to run his account diligently. I shall rely on the Claimant Statement of Account.
32. That the action of the claimant is a breach of contract between the parties as the claimant has refused to fund his account leading to the account being debit causing the Defendant losses, inconveniences and damages.
33. That the claimant pay the sum of 99,120.52 (ninety nine thousand, one hundred and twenty naira, fifty two kobo) and

any further sum accruable on the account being outstanding balances standing in the claimant's account with the Defendant/Counter Claimant representing various charges including interest, service charge, commission on turnover and VAT.

34. That the claimant's claim has (sic) brought in bad faith, frivolous and gold digging.

35. That we urge this Honourable Court to dismiss the claimant's claim and grant the Defendant's counter claim.

36. That I depose to this statement on oath to the best of knowledge, information and believe, and in accordance with the relevant provision of the Oath Law of Edo State of Nigeria.”

The sole witness for the Defendant/Counter Claimant was crossed examined on this day by the learned counsel to the Claimant, K.N. Osemwenkhae, Esq. In the course of hearing the case of the Defendant/Counter Claimant, one exhibit was admitted in the case:

1. Exhibit “E” – Intercontinental Bank Statement of Account of the Claimant for the period of 22-02-2006 to 27-12-2006.

The Defendant, through its learned counsel, filed its Final Written Address on the 6th of May, 2014 which was adopted by the learned counsel as his submission before this Court on the 2nd day of December, 2014. Therein, the learned counsel to the Defendant canvassed four issues for determination as follows:

- “1. Whether the Claimant has successfully established that the deductions made from it’s (sic) account is (sic) unlawful to be entitled to it’s (sic) claim
2. Whether this Honourable Court should attach much weight to Exhibit “E” – the claimant’s statement of account
3. Whether the Defendant’s witness evidence before this court ought to be relied upon by this Honourable court
4. Whether the defendant is entitled to her counter claim against the Claimant herein having regard to the evidence led and the Exhibit duly tendered.”

On his issue one, learned counsel submitted that he who asserts must prove as the case of the Claimant is hinged on his proving that it anticipated funds to be in his account before the presentation for clearing of the cheque he issued or that to inform the Defendant and the Drawee in writing to withdraw the cheque for lack of funds in the account; that he did not request

for a Cheque Book and a Reference Letter; and that it was unlawful for the Defendant to present the cheque for clearing and generate interest thereon having met the required numbers of C.B.N clearing days. He further submitted that the Claimant failed to prove any of these thus exculpating the Defendant of any breach of contractual agreement between it and the Claimant as the Defendant has the duty to honour the cheque the Claimant presented to it. He cited the cases of DIKE THADEUS VS AFRICAN CONTINENTAL BANK LTD (2000) 5 NWLR (PT 657) 441 @ PG 455-456 PARA H-D RATIO 3; U.B.A VS JULIUS ABHAFIDON (1994) 1 NWLR (PT 318) PG 90 Ratio 8 & 9 @ Pg 120 @ Para A-G. He further submitted that having presented the cheque, Exhibit “A” for clearing, the Claimant’s account was credited and from there, the Defendant was entitled to generate interest from the “temporal overdraft according to banking policy and practice.” He referred to the cases of VEEPEE IND LTD VS COCOA IND. LTD (2009) 169 LRCN Pg 127 Ratio 1 @ Page 143 JJ; DIAMOND BANK LTD VS PATNERSHIP INV. CO. LTD (2010) 179 LRCN PG 84.

On his issue two, learned counsel to the Defendant submitted that the evidence of the sole witness to the Defendant was not hearsay and should be accepted by this Court to determine the issues arising in this case because the Claimant did not file a counter affidavit to the evidence of the Defendant on oath. He cited the cases of THE REG. TRUSTEES OF NATIONAL

ASSOCIATION OF COMMUNITY HEALTH PRACTITIONERS OF NIG.
& ORS VS MEDICAL AND HEALTH WORKERS UNION OF NIG
&ORS (2008) 158 LRCN PG 25 @ PG287 JJ Ratio 9; ABUBAK MUSA
VS E.I. CHUCKS (2008) 154 LRCN Pg 1@ Pg 18 KZ Ratio 5. He also
referred to Section 115 (1) & (3) of the Evidence Act. He submitted that
even if the evidence of the Defendant's witness on oath is defective in form,
this Court can use it if proved that it was sworn before a person duly
authorized on the strength of Section 113 of the Evidence Act. Learned
counsel, on this issue, finally cited the cases of REV. RUFUS
ONUEKWUSI VS THE REG TRUSTEES OR (sic) THE CHRIST
METHODIST ZION CHURCH (2011) Vol. 198 LRCN Pg 140 Ratio 6 at
Page 161 EEJ and ONOFOWOKAN VS WEMA BANK PLC (2011) VOL
200 LRCN Page 33 Ratio 12 at Page71FK.

On his issue three, learned counsel submitted that Exhibit "E" should
attract much weight from this Court because it is upon it being the statement
of account of the Claimant in a permanent form, that this Court can decide
the relevant issues in the case. He cited the cases of UNITY LIFE & FIRE
INSURANCE CO VS I.B.W.A. LTD (2001) 7 NWLR (Part 713) Pg 610;
ABUBAK MUSA VS E.I. CHUCKS (2008) LRCN Page 1 at Page 18 KZ,
Ratio 5 and concluded that the Claimant did not debunk the veracity of this
Exhibit "E".

And finally on his issue four, learned counsel to the Defendant adopted his submission on his issue one as his argument in this issue four; that the Defendant has proved that the Claimant is indebted to the Defendant; that the Defendant is entitled to collect interest on the debit sum and that the Claimant has failed, refused and neglected to pay up its indebtedness to the Defendant. He referred to the cases of U.B.A. VS JULIUS IBHAFIDON (SUPRA) and DIAMOND BANK LTD VS PARTNERSHIP INV. INC. LTD & ANOR (SUPRA). He therefore urged this Court to dismiss the Claimant's claim and grant the Counter Claim of the Defendant.

On the part of the learned counsel to the Claimant, he brought a Motion on Notice after this case was adjourned for Judgment. The learned counsel to the Defendant contested the application. Earlier today, I ruled on the application and held that it was meritorious and extended time for the Claimant to file its Final Written Address. I also gave an order deeming the Final Written Address as properly filed. Same is deemed by me as having been adopted and worthy of review. On this Written Address, the learned counsel to the Claimant, K.N. Osemwenkhae, Esq. canvassed three issues for determination as follows:

- “1. Whether the Defendant was right in treating the Claimant's postdated cheque as an overdraft.

2. Whether from the facts of this case and evidence led, the Defendant has not breached its banking contract with the Claimant to entitle the Claimant to damages.
3. Whether the Defendant/Counter claimant has led cogent and credible evidence in proof of its Counter Claim.”

On his issue one, learned counsel submitted that it was wrong for the Defendant to treat the postdated cheque from the Claimant as an overdraft as both mean different things by the definition of Black’s Law Dictionary (8th ed.). He further submitted that it is trite that in an instance where an application is made for an overdraft to a bank, the bank sends the terms of the agreement to be accepted or rejected by the applicant. He cited the case of ALHAJI M.U. & SONS LTD V L.B.N. PLC (2006) 2 NWLR (Part 964) 288 R 3. Learned counsel argued that in the instant case, there was no application for an overdraft as it usually did in time past as revealed by the evidence in this Court and the exhibits. He concluded on this issue that the conversion of Exhibit “A” to an overdraft and the subsequent interest arising there from was unjustified and illegal.

On his issue two, learned counsel submitted that the conversion of Exhibit “A” to an overdraft facility by the Defendant without authorization was against banking policy and practice on the authority of SECTION 48,

BILL OF EXCHANGE ACT, CAP B8, LFN, 2004; that on the strength of this Act, the notice of a dishonoured cheque must be brought to the attention of the drawer and the Defendant having failed in this regard has breached its contract. He further submitted that the charging of interest for the issuance of cheque booklet was a breach of contract as Exhibits D and D1 issued by the Defendant showed that it ought to be at no cost to the Claimant. He referred to the case of I.T.P.P. LTD V UBN PLC (2006) 12 NWLR (995) (sic) 483.

On his issue three, learned counsel submitted that the Defendant has not proved its counter claim as required by law and cited the provision of Section 113 of the Evidence Act, 2011 and the cases of TSOKWA OIL MARKETING CO. V B.O.N. LTD (2002) 11 NWLR (PT 777) 163; A.C.B. PLC V ODUKWE (2005) 3 NWLR (PT 911) 67. Learned counsel further submitted that the conversion of the postdated cheque to an overdraft and the subsequent charges of interest on it was fraudulent on the part of the Defendant; that this is what the Defendant/Counter Claimant intends to benefit from which this court should not allow. He cited the cases of AIC LTD V. NNPC (2005) NWLR (Part 937) 563 at 584 PARAS. B-C; CHETTIAR V CHETTIAR (1962) AC 294; BUSWELL V GODWIN (1971) 1 ALL ER 418 at 428. Learned counsel further submitted that the evidence led by the DW1 on how the postdated cheque was treated by the

Defendant was at variance with its pleadings at paragraphs 6 and 7 of the Amended Statement of Defence and as such, the trite position of the law is that that piece of evidence from the DW1 should go to no issue on the authority of L.C.I.R. V MOHAMMED (2005) 11 NWLR (Part 935) 1 C.A; NEPA V. OLAGUNJU (2005) 3 NWLR (913) (sic) 602 C.A. Learned counsel argued further that there were inconsistencies in the evidence led by the Defendant on the treatment of the cheque presented to it looking at the evidence led in paragraphs 6, 9 and 10 of the Defendant's Statement on oath; that the court cannot pick and choose from two contradicting pieces of evidence but to discountenance both. He referred to the cases of ONUGBOGU V STATE (1974) 9 SC 1; ADUN V OSUNDE (2003) 16 NWLR (PT 847) 643; ALHAJI M.U. & SONS LIMITED V L.B.N PLC (2006) 2 NWLR (Part 964) 288 R 3. Learned counsel finally submitted that what can be gleaned from the DW1 on cross examination is that his evidence was as told him by mouth and document thus passing as hearsay evidence on the authority of Section 38 of the Evidence Act, 2011. He therefore concluded by submitting that this Court should grant the Claimant's reliefs and hold that the Defendant/Counter Claimant has failed to prove its counter claim.

COURT:

I have considered the case of both the Claimant and the Counter Claimant through their pleadings, the evidence led, the admitted exhibits, their respective final written addresses and the authorities cited by them therein. I am of a firm belief that one narrow issue to be determined in this case is as follows:

- 1.) Whether the Claimant or Defendant cum Counter Claimant has proved their respective cases on preponderance of evidence led.

On this lone issue, it should be stated from the onset that the pivotal grouse of the Claimant is that the Defendant, its banker, sometime in the year 2006 converted the postdated cheque he issued to a third party to an overdraft and began to charge interest thereon which, in the opinion of the Claimant, was fraudulent on the part of the Defendant and also a breach of contract. The Defendant did not deny that it was a postdated cheque that the Claimant issued but argued that since there was no sufficient fund in the account of the Claimant when the drawee presented the cheque, it treated it as an overdraft and began to charge interest on it as required in banking policy. The pivotal fulcrum of the case of the Counter Claimant was that it has rendered services to the Claimant and the Claimant has refused to fund his account with it thus leading to a breach of contract.

The law is quite trite that a cheque is a written order to a bank to pay a sum on one's account to oneself or to another person. See BOLANLE v. THE STATE (2007) NSCQLR VOL. 29 Page 1268 where Niki Tobi, JSC held at page 1290 that:

“A cheque is a written order to a bank to pay a certain sum of money from one's bank account to oneself or to another person. It is for all intents and purposes an instrument for payment. It metamorphosis into physical cash on due presentation at the bank and that makes it legal tender.”

The issuing of the cheque, in my respectful view, was an offer to the Defendant by the Claimant. And it is trite that there are three valid ingredients of a valid contract which are offer, acceptance and consideration. See OMEGA BANK PLC v. O.B.C. LIMITED (2005) NSCQLR VOL. 21 Page 772 where Edozie, JSC held that:

“It is trite law that there are three essential ingredients of a valid contract viz: an offer, an unqualified acceptance of that offer and a consideration.”

For a contract to be enforceable, there must be a consideration which must have some value in the eyes of the law. See AUGUSTINE ABBA v. SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA

LIMITED (2013) NSCQR VOL. 54.3 PAGE 1362 where Rhodes-Vivour, JSC held at page 1391 thus:

“Before there is a contract there must be a definite offer by the offeror and a definite acceptance by the offeree, and contracts are enforceable when there is consideration. Consideration is something that indicates conclusiveness that the promisor intended to be bound. Consideration is thus mandatory for enforceability. Consideration must move from the promisee and it need not be adequate but must have some value in the eyes of the law. An offer must be accepted before there is a valid contract.”

Was there an acceptance of the offer by the Defendant? Did the Defendant furnish a consideration of value in the eyes of the law? If it did, then the parties would be bound by the contract which terms would be deduced from the prevailing plausible inferences from the relationship created by the parties. Strangely though, the Defendant admitted that it only treated the cheque as an overdraft facility. Ordinarily, where a customer draws a cheque for a sum more than that standing to his account, it ought to be seen as a request for a loan if honoured and treated as an overdraft from the bank. See ALHAJI AMINU ISHOLA v. SOCIETE GENERALE BANK (NIG.) LIMITED (1997) ECL Page 270 particularly at page 289 where Iguh, JSC held thus:

“The principle of law is long settled that if a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is nothing but a request for a loan and, if the cheque is honoured, the customer has borrowed the money by way of overdraft from the bank. See *Cuthbert v. Roberts Lubbock and Co.* (1909) 2 Ch. 226 and *A.C.B. Ltd. v. Egbunike and Another* (1988) 4 NWLR (Pt. 88) 350 at 365. In the present case, it is the concurrent findings of both trial court and the court of Appeal that the total withdrawals of the appellant from his current account were N447,772.71 while his total lodgments were N337,777.37. These findings are fully supported by admissible evidence before the court, inclusive of the appellant’s admission at trial. They are also neither perverse nor erroneous in any way. In my view, by overdrawing his account, requested for an overdraft which the respondent by honouring his cheque duly granted. It is immaterial to the respondent’s claim that the appellant did not enter into a formal agreement with the respondent in 1980 before the overdraft facilities were granted.” (Emphasis supplied by me).

It is also the law that a banker is only obliged to pay a cheque when there are sufficient and available funds in the account of the drawer. The

banker only contracts to honour such cheques when the above criteria are fulfilled. See the reasoning of Iguh, JSC at page 320 in FIRST AFRICAN TRUST BANK LTD v. PARTNERSHIP INVESTMENT COMPANY LIMITED (2003) NSCQLR VOL. 16 Page 287 where the learned lord held that:

“A banker, without doubt, is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purposes, or provided the cheques are within the limits of an agreed overdraft. It needs be emphasized that there must be sufficient funds to cover the whole amount of the cheque presented for in the absence of special arrangement, there is, as a general rule, no obligation on the banker to pay any part of a cheque for an amount exceeding the available balance. The banker only contracts with the customer to honour cheques when he has “sufficient” and “available” funds in hand.”

Did the Defendant honour the cheque the drawee presented to it? Definitely not as the Defendant gave evidence that it returned the cheque unpaid as a result of “insufficient” funds in the Claimant’s account. See paragraphs 6, 9 and 10 of the DW1’s statement on oath which is reproduced as follows:

6. That I aver that the Drawee presented the cheque for clearing and that the cheque was returned unpaid as the Claimant had no sufficient funds in his account.
9. That the Defendant/Counter Claimant did not give value to the cheque as the claimant did not have sufficient funds in his account. The said cheque was brought for clearing and the claimant's account was debited with the value of the cheque and the interest accruable for such transaction was electronically generated by the bank's system.
10. That I further state that when it was discovered that the claimant had no funds in his account after repeated efforts to clear the cheque by the Drawee the said cheque number 0319942 was returned unpaid and the claimant account was reverted with the value of the cheque credited accordingly."

The DW1, during cross examination in the course of hearing, also said:

"The sum of N2,100,000.00 was debited by my bank against the Claimant. When we debited it, the Claimant did not have that much money in his account. We treated it as an overdraft and as a result we started charging interest on it immediately. Claimant never applied for an overdraft facility."

Could the action of the Defendant above have been as a result of the agreements between the parties in respect of their banking relationship? This is quite in doubt as the precedents laid down by the Claimant and the Defendant in respect of an overdraft facility is evidenced by Exhibits “B” and “B1” wherein the Defendant replied to the applications for overdrafts by the Claimant; the Defendant gave the terms and conditions for such overdrafts which the Claimant accepted by signing the acceptance columns therein.

The law is quite trite that parties are bound by the terms of their agreement. See WILLIAM EVBUOMWAN & 2 ORS v. JONATHAN ELEMA & 2 ORS. (1994) ECL 147 where Adio, JSC held at page 153 thus:

“If parties enter into an agreement they are bound by its terms. One cannot legally or properly read into the agreement the terms on which the parties have not agreed.”

It is my belief and I so hold that there was no contract between the Claimant and the Defendant for an overdraft facility when Exhibit “A” was presented to the latter by a third party. Furthermore, it cannot be deduced from the evidence adduced that the Defendant furnished any consideration to the offer made by the Claimant. Neither the Claimant nor the Drawee

benefitted from the Defendant supposed action as what can be seen from Exhibits “C”, “C1” and “E” were mostly done for the benefit of the Defendant. In order words, it will be right to say that the Defendant/Counter Claimant furnished no consideration to the offer made by the Claimant in issuing a postdated cheque which when presented met insufficient funds in the drawer’s account.

Before the presentation of the postdated cheque which the Defendant wrongly converted to an overdraft facility, the balance of the Claimant’s Account with the Defendant as at July 25th, 2006 was N3,487.35 (Three Thousand, Four Hundred and Eighty Seven Naira, Thirty Five Kobo). The three exhibits referred above showed this figure. It was after this that the cheque of N2,100,000.00 (Two Million, One Hundred Thousand Naira) was lodged. Thereafter, N1,500.00 (One Thousand, Five Hundred Naira) and N2,500.00 (Two Thousand, Five Hundred Naira) were debited against the Claimant’s Account on August 16th, 2006 and 23rd August, 2006 for cost of cheque booklet and service for reference letter respectively. Now, having held that there was no contract for overdraft between the parties, it was wrong for the Defendant to unilaterally begin to charge interests for an offer it did not furnish any consideration. I therefore discountenance the interests flowing therefrom.

The only plausible transactions worthy of consideration from Exhibits “C”, C1” and “E” after the 25th day of July, 2006 concern the N1,500.00 (One Thousand, Five Hundred Naira) cost of cheque book and the N2,500.00 (Two Thousand, Five Hundred Naira) service charge for reference letter. The Claimant did not contest the fact that the Defendant rendered service to him for a reference letter. See paragraph 27 of the Defendant’s Counter Claim and paragraph 29 of the DW1’s Statement on Oath which are reproduced as follows:

“27. The Defendant avers that she also issued a reference letter to the Plaintiff on the 23/8/2006 and the Plaintiff was duly charged with the sum of N2,500.00 (two thousand five hundred naira for the service rendered and also on the 30/8/2006, the Plaintiff account was debited with the sum of N200.00 (two hundred naira) for deposit booklet.”

“29. That the Defendant/Counter Claimant also issued a reference letter to the claimant on the 23/8/2006 and the claimant was duly charged with the sum of N2,500.00 (two thousand five hundred naira only) for the service rendered.”

The above averment and evidence were neither attacked nor challenged by the Claimant. The Claimant is thus deemed to have admitted

the piece of evidence flowing from the Defendant as the law is quite trite that facts not denied are deemed admitted. I so hold. See GOVERNOR OF ZAMFARA STATE & 30 ORS v. ALH. SULEIMAN MOHAMMED GYALANGE & 12 ORS (2012) NSCQR VOL. 51 PAGE 1 where Mukhtar, JSC held at page 25 thus:

“The settled law is that evidence that is neither attacked nor successfully challenged is deemed to have been admitted and the court can safely rely on the evidence in the just determination of a case.”

The issue of N1,500.00 (One Thousand, Five Hundred Naira) cost of cheque booklet was however challenged by the Claimant to the effect that it ought to be at no cost. I agree with him. The evidence on record through Exhibits “C” and “C1” shows that it was meant to be at no cost. These Exhibits emanating from the Defendant has as their introductory paragraphs *inter alia* thus:

“Dear Customer,

In line with CBN directive on cheque standard, please call at your branch to collect new cheque book that meets the standard at no cost. The old cheque book becomes invalid

for transactions effective 1st September 2006.” (Emphasis supplied with underlining).

Why would the Defendant have gone ahead to charge any interest or collect any fee for the issuance of a cheque book which it had made the Claimant believe would be” at no cost”? That was unfair. I therefore discountenance that cost for the cheque book.

Both the Claimant and the Counter Claimant claim damages from each other for breaches of contract. Damages for a breach of contract is to restore the aggrieved party to the position he would have been had the breach not occurred. See UNITED BANK FOR AFRICA PLC v. BTL INDUSTRIES LIMITED (2006) NSCQLR VOL. 28 Page 381 where Musdapher, JSC held at page 418 thus:

“The essence of damages in breach of contract cases is based on *restitutio in integrum*. That is the award of damages in a case of breach of contract is to restore the plaintiff to a position as if the contract has not been performed.”

I have held that there was no contract between the Claimant and the Defendant in respect of the postdated cheque which the Defendant converted to an overdraft facility. Immediately the Claimant knew of this action of the Defendant, he stopped operating the account and never lodged any cash in it

since July, 2006 when he said he knew of how the Defendant treated his cheque till date. So, there was really no fund in the account apart from the N3,487.35 (Three Thousand, Four Hundred and Eighty Seven Naira, Thirty Five Kobo) that was standing to the Claimant's credit as at 25th July, 2006. The vital question to be asked is whether damages and interests can flow from an offer for contract that was rejected. The unequivocal answer is an emphatic no. This is the trite position of the law. See OMEGA BANK PLC v. O.B.C. LIMITED (supra) where Musdapher, JSC held at page 794 thus:

“Damages for breach of contract are compensations to the plaintiff for the damages, loss or injury suffered through that breach. It is meant to, as far as money can do, for the plaintiff to be placed in the same position as if the contract has been performed. But there must be a contract and its breach before the issues of damages and interest can arise. Accordingly under the circumstances and having regard to my finding that there was no contract entered into by the parties, the respondent having rejected the offer made by the appellant, the question of damages became non-issues in this appeal and are struck out.” (Emphasis supplied by me).

I fully align myself with the reasoning of the apex Court of this land above.

Both the case of the Claimant and that of the Defendant are therefore caught in the same quagmire of incompetence as neither of their cases can stand on nothing – a non existing contract.

In the final analysis, I hold on this lone issue that apart from the N3,487.35 (Three Thousand, Four Hundred and Eighty Seven Naira, Thirty Five Kobo) less the N2,500.00 (Two Thousand, Five Hundred Naira) charged for the issuance of reference letter for the Claimant, every other charges in the Claimant's account are discountenanced by me. Both the claim of the Claimant and the counter claim of the Defendant are unmeritorious and are dismissed by me accordingly. Each party is to bear its respective cost.

HON. JUSTICE V. O. EBOREIME
JUDGE
25th November, 2015.

Counsel:

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