

AFRIBANK NIGERIA PLC
V.
AMINU ISHOLA INVESTMENT LTD.
COURT OF APPEAL
(ILORIN DIVISION)

CA/IL/42/2000

MUKITALA AREMU OKUNOLA, J.C.A. (Presided)

PATRICK IBE AMAIZU, J.C.A.

WALTER SAMUHL NKANU ONNOOHCN, J.C.A. (Read the Leading Judgment)

MONDAY, 10th DECEMBER, 2001

ACTION - Action for breach of contract and libel - Damages for each cause of action - Whether awardable.

ACTION - Action in detinue - What plaintiff must plead and more.

ACTION - Cause of action - Joinder of causes of action – Condition under which may be allowed - Order 4 rule 1(1) (a), Kwara State High Court (Civil Procedure) Rules, 1989.

ACTION - Cause of action - Meaning of.

AGENCY - Banker - Role and duty of- Cheque drawn on banker by customer - What represents - Whether tantamount to order of principal to his agent.

APPEAL - Award of damages by trial court - Altitude of appellate court thereto - When it will interfere therewith.

APPEAL - Findings of fact by trial court - Party wishing to challenge on appeal - Duty thereon - Whether can validly challenge same without filing a cross-appeal.

APPEAL - Findings of fact by trial court - Respondent aggrieved thereby - Proper step to take.

BANKING - Bank - When will be held liable for ion of conversion or detinue.

BANKING - Banker - Role and duty of- Cheque drawn on banker by customer - Implication of- Whether tantamounts to order of principal to his agent.

BANKING - Banker/customer relationship-Nature of- When creditor is entitled to sue on banker-customer relationship.

BANKING - Deposit account - Breach of contract in relation to -Exemplary damages therefor - Whether granted as of course.

BANKING - Dishonour of cheque - Where wrongful - Right of action by customer against bank - Whether he can sue for defamation or breach of contract.

COMMERCIAL I AW - Banker - Role and duty of- Cheque drawn on banker by customer- What represents - Whether tantamount to order of principal to his agent.

COMMERCIAL I AW - Chattel - Meaning and types of- Money -Whether can be accounted as chattel.

CONTRACT- Action for breach of contract and libel - Damages for each cause of action - Whether awardable.

CONTRACT- Terms of contract - Construction of-Altitude of court thereto.

COURT - Award of damages by trial court - Attitude of appellate court thereto - When it will interfere therewith.

COURT - Findings of fact by trial court - Party wishing to challenge on appeal - Duty thereon — Whether can validly dial lenge same without filing a cross-appeal.

COURT - Reliefs - Relief not claimed - Whether court can grant.

DAMAGES - Action for breach of contract and libel - Damages for each cause of action - Whether awardable.

DAMAGE'S - Award of damages - Unliquidated money demand -Award of damages therefor - Guiding principle.

DAMAGE'S - Award of damages by trial court -Attitude of appellate *Court thereto*-When it will interfere therewith.

DAMAGE'S - Award of damages in action for breach of contract – Measure of damages –claim for general damages - whether maintainable.

DAMAGE'S - Breach of contract - Assessment of damages - Applicable principles.

DAMAGES - Exemplary damages - Whether recoverable as a matter of course - Need to plead specifically.

JUDGMENT AND ORDER - Interest - Award of interest - Principles governing.

JUDGMENT AND ORDER - Reliefs - Relief not claimed - Whether court can grant.

PRACTICE AND PROCEDURE - Action - Cause of action - Meaning of.

PRACTICE AND PROCEDURE-Action for breach of contract and libel - Damages for each cause of action - Whether award-able.

PRACTICE AND PROCEDURE Award of damages by trial court – Attitude of appellate court thereto - When it will interfere

PRACTICE AND PROCEDURE - Breach of contract - Damages therefor Assessment of- Applicable principles.

PRACTICE AND PROCEDURE - Causes of action - Joinder of cause of action Whether allowed - Condition under which may be allowed Order - rule 1(1)(a), Kwara State High Court (Civil Procedure) Rules,

PRACTICE AND PROCEDURE - Findings of fact by trial court -Party wishing to challenge on appeal - Duty thereon - Whether can veil idly challenge same without filing a cross-appeal.

PRACTICE AND PROCEDURE -merest - Award of interest -Principles governing.

PRACTICE AND PROCEDURE - Pleadings - Damages - Exemplary damages - Need to plead specifically.

PRACTICE AND PROCEDURE - Pleadings - Interest - Where claimed as of right - Need to include on writ of summons and plead facts that show entitlement thereto.

PRACTICE AND PROCEDURE - Reliefs - Relief not claimed -Whether court can grant.

TORT - Chattel - Meaning and types of - Money - Whether can be accounted as chattel.

TORT- Detinue -Action in detinue - What plaintiff must plead and prove.

TORT- Detinue - Action in detinue - Whether money can be subject matter thereof.

TORT - Torts of conversion and detinue - When banker will be liable therefor.

WORDS AND PHRASES - Cause of action - Meaning of.

WORDS AND PHRASES - Chattel - Meaning and types of- Whether money qualifies as.

Issues:

1. Whether the trial court was right to have assessed and awarded damages for breach of contract and detinue having regard to the nature of the respondent's claim before the trial court.
2. Whether the trial court's award of N2 million exemplary damages was proper having regard to the facts of the case.
3. Whether the trial court was right in awarding interest at the rates higher than 12.25 percent per annum specifically agreed to by the parties.

Facts:

In August, 1988, the respondent opened a fixed deposit account with the sum of N467,000.00 at the Ilorin Kwara State branch of the appellant. It was agreed by the parties that an initial interest of 12.25 per cent per annum would be payable on the deposit and that the monthly interest on the fixed deposit will be transferred into the respondent's current account every month. The parties also agreed that the initial rate of interest of 12.25 per cent per annum could be renewed upwards at the end of the year by negotiation. There was however, no provision in the parties' agreement that where a party refused to negotiate the upward review of interest payable on the deposit, the other party could unilaterally review same.

The appellant, in compliance with the agreement, paid interest for the months of August and September, 1988.

On 31st October, 1988, the respondent repudiated the fixed deposit agreement and gave notice of its intention to withdraw the whole amount as provided under the agreement but the appellant refused to give the respondent access to the money on the ground that it had received instruction from the Central Bank of Nigeria to freeze the respondent's account.

In November 1989, the respondent demanded for an upward review of the interest payable on the deposit account from 12.25 per cent per annum to 25 per cent per annum but the appellant refused to enter into any negotiation with the respondent on increase of the interest rate.

Dissatisfied with the action of the appellant, the respondent instituted an action at the High Court in which it claimed for the release of the sum of N467,000.00 it deposited with the appellant; interest thereon at the rate of 12.25 per cent per annum from August 1988 till November 1989; and interest on the sum of N467,000.00 at the rate of 25 percent per annum from December 1989 till the date of judgment in the suit and thereafter at the rate of 10 per cent per annum until payment of the judgment debt. The respondent also claimed the sum of N20 million naira being general damages for the appellant's failure to allow the respondent to withdraw money from its deposit account or as damages for breach of contract, or for wrongful detention of the respondent's money from 1988 till date of the suit.

In its judgment, the trial court found that the respondent's suit was based solely on the tort of detinue arising from the wrongful detention of the respondent's money. Consequently, it ordered the release of the money and awarded interest thereon as claimed by the respondent. The trial court also awarded the sum of N2million as exemplary damages in favour of the respondent.

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

Held (Unanimously allowing the appeal):

1. *On Meaning of cause of action -*

Cause of action is the entire set of facts or circumstances giving rise to an enforceable claim. It also includes all those things necessary to give a right of action and every fact which is material to be proved to entitle the plaintiff to succeed. [Emiator v. Nigerian Army (1999) 12 NWLR (Pt.631) 362; Ibrahim v. Osim (1987) 4 NWLR (Pt.67) 965; Patkun Ltd. V. Niger Shoes Mfg. Ltd. (1988) 5 NWLR (Pt.93) 138 referred to.] (P. 61, paras.D-F)

2. *On when causes of action may be joined -*

By virtue of Order 4 rule 1(1)(a) of the High Court of Kwara State (Civil Procedure) Rules, 1989, a plaintiff may in one action claim a relief against the same defendant in respect of two or more causes of action if the plaintiff claims, and the defendant is alleged to be liable, in the same capacity in

respect of all causes of action. Consequently, a customer, whose cheque is wrongfully dishonoured can claim; for both defamation and breach of contract in one single action. [Balogim v. NBN Ltd. (1978) 3 SC 155 referred to.] (R62, paras.F-C)

3. *On Ingredients of a claim in detinue -*

Generally, an action in detinue involves goods and or chattel in its substratum and possession. Thus a claim in detinue for the recovery of goods wrongfully detained presupposes the existence of the following:

- (a) that the goods were in the possession of the plaintiff;
- (b) that the defendant without any lawful excuse or consent or permission of the plaintiff took away the goods; and
- (c) that the plaintiff had demanded the return of the goods and the defendant refused to return them. (P.62, paras.D-F)

4. *On Meaning of chattel -*

Chattel means a moving or transferable property; especially personal property and chattels are either personal or real. Personal chattel may be so called because they belong to the person of a man or for that which is being injuriously withheld from a person and for which he has no means of recovering except through personal action. Chattel real on the other hand are such as either appertain not immediately to the person but to some other things by way of dependency or such as are issuing out of some immovable thing to a person, for instance a lease or rent for a term of years. (Pp.62-63, paras, F-B)

5. *On whether money qualifies as good or chattel –*

Money is not to be accounted as goods or chattel because it is not of itself valuable. (P.62, para. H)

6. *On whether money can be subject matter of a claim in detinue-*

Money in specie, for example, coins and notes can be converted while money in abstract, for example, money in a bank account cannot be converted. Thus, the former can be the subject in a claim for detinue, or conversion, the latter cannot be. In the instant case, the subject matter of the respondent's claim, is money in the abstract. In the circumstance it cannot ground an action for detinue. (P.63, paras. D-F; p.64, para. A)

7. *On Nature of banker-customer relationship –*

The relationship between a banker and customer where a bank accepts money either in current or deposit account from its customer is a relationship of debtor and creditor. [Balogtm v. National Bank of Nigeria Ltd. (1978) 11 NSCC 135 referred to.] (P.66, paras. G-U)

8. *On Role and duty of banker and nature of relationship between banker and customer –*

The role or predominant business of bankers is the business of banking which consists in the main in the receipt of monies on current or deposit account and the payment of cheques drawn by as well as the collection of cheques paid by a customer. Therefore, the receipt of money from or on account of his customer by a banker constitutes the banker the debtor of the customer, and the banker undertakes to pay only part of the money thus due

from him to the customer against written orders of the customer. Accordingly, the relationship so constituted is that of principal and agent and, therefore a cheque drawn on the banker by the customer represents the order of the principal to his agent to pay, out of the principal's money in his hands, the amount stated on the cheque to the payee endorsed on the cheque. [Balogun v. NBN (1978) 11 NSCC 135 referred to.] (Pp.66-67, paras.G-D)

9. *On when cause of action accrues in banker/customer relationship -*
Where a banker refuses to pay a customer's cheque when the banker holds in hand an amount equivalent to that endorsed on the cheque belonging to the customer such an act of refusal amounts to a breach of contract. In the instant case, both parties had a contract under which the respondent deposited money with the appellant which money the appellant refused to pay to the respondent upon its demand for same. In the circumstance, the appellant committed a breach of its contract with the respondent. (P.64, paras. D-E)
10. *On when banker will be held liable for tort of conversion or detinue -*
A banker like every other bailee will be liable for conversion or detinue as the case maybe where he asserts a title adverse to that of the true owner or where he detains the goods from the rightful owner for a unreasonable time. The instant appeal however is no one of the instances where the appellant bank can be held liable for conversion or detinue. This is because from the totality of the fact of the case, the relationship that existed between the parties was emphatically the of bank and customer relationship which said relationship is founded on contract and nothing more, Thus, the argument of the respondent that the action of the appellant in refusing to pay up the deposit a previously agreed between the parties amounts I commission of the tort of detinue is not acceptable (P. 64, paras. B-E; P. 65, paras. B-C)
11. *On Need to specifically plead damages in unliquidated money demand -*
Before a court can consider the quantum of damage in an unliquidated money demand, whether t| damages claimed is general, special, exemplary punitive etc, such damages must be pleaded and there must be evidence in proof of the damages to assist the court in assessing the quantum to be awarded. [Seven-Up Bottling Co. Pic v. Abiola and Sons Co. Ltd. CA/IL/112/or 21/5/2001 referred to.] (P.68. paras. A-C)
12. *On Need to specifically plead claim for exemplary damages -*
A claim for exemplary damages must be pleaded. In the instant case, the claim for exemplary damages was not pleaded by the respondent. That being the case, an award of exemplary damages by the trial court cannot stand. [Seven-Up Bottling Co. Pic v. Abiola and Sons Co. Ltd. CA/IL/112/ or 21/5/2001; Eliochin (Nig.) Ltd. v. Mbadiwe (1986) 1 NWLR (Pt.14) 47 referred to.] (P.68, paras. A-E)
13. *On whether exemplary damages recoverable upon dishonour of a cheque or non- payment of a deposit by a banker -*
Exemplary damages are not recoverable as a matter of course in an action in contract by a customer for the dishonour of his cheque by a banker or as in

the instant case, for the refusal of the banker to pay over to the customer, its deposit. (Pp.67-68, paras. H-A)

14. *On Measure of damages for breach of contract –*

In a claim for breach of contract, the plaintiff is only entitled to damages actually resulting from the breach of contract provided that such damages could reasonably have been within the contemplation of the parties at the time when the contract was made. In the instant case, the award of interest on the sum of money deposited by the respondent with the appellant is an award of damages which flows directly and naturally from the failure of the appellant to keep its own part of the contract between the parties and the award was within the contemplation of the parties at the time when the contract was made. On the other hand, the award of N2 million as general damages is improper because the same was not within the contemplation of the parties at the time the contract was made and it amounts to double compensation having regard to the award of interest on the deposit and the order of payment of the deposit already made in favour of the respondent. [P.Z. & Co. v. Ogedengbe (1972) 1 All NLR 202; Swiss Nigerian Wood bid. v. Bogo (1971) 1 UILR 337; Alraine (Nig.) Ltd. v. M. A. Eshiett (1977) 1 SC 89; Mobil Oil (Nig.) Ltd. v. Akinfosile (1969) 1 NMLR 217; Okongwu v. NNPC (1989) 4 NWLR (Pt.1 15) 296; Ijebu Ode Local Govt. v. Adedeji Balogun & Co. Ltd. (1991) 1 NWLR (Pt.166) 136; DHL Int. (Nig.) Ltd. v. Chidi (1994) 2 NWLR (Pt.329) 720 referred to.] (Pp.71-72, paras. C-D)

Per ONNOGHEN, J.C.A. at pages 71-72 paras G-D: "It is the law as stated by the Supreme Court in P.Z. & Co. v. Ogedengbe (1972) 1 All NLR 206; Swiss Nigerian Wood bid. v. Bogo (1971) 1UILR 337 at 341, that apart from damages actually resulting from the breach of contract, the plaintiff is entitled to no other form of general damages since same could not have been contemplated by the parties at the time of entering into the contract.

Therefore, the damages recoverable are the losses reasonably foreseeable by the parties and foreseen by them at the time of the contract as inevitably arising if one of them broke the contract. That being the case there can be no room for claims which are merely speculative or sentimental unless these are specifically provided for by the term of the contract. See also Alraine (Nig.) Lid. v. M. A. Eshiett (1977) 1 SC 89; Mobil Oil (Nig.) Ltd. v. Akinfosile (1969) NMLR217; Okongwu v. NNPC (1989) 4 NWLR (Pt.115) 296; Ijebu-Ode Local Govt. v. Adedeji Balogun & Co. Ltd. (1991)1 NWLR (Pt.166) 136; DHL Int. (Nig.) Ltd. v. Chidi (1994) 2 NWLR (Pt.329) 720 at 738 and 742. The position of the law being what it is, it follows that the award of N2 million damages in addition to the deposit of N467, 000.00 with Afribank (Nig.) Plc. v. A. I. Invest. Ltd. 51 interest thereon at the rate of 12.25% per annum from 1988 to December 1988 minus the months of August and September 1989 already paid is an award in contravention of the principle of law governing award of damages in cases of breach of contract as reproduced supra. That being the case, it is my view and I agree with learned counsel for the appellant that the award of the said N2 million damages under the circumstances amounts to double compensation which is frowned upon by law. That being the case, it is

my view that the said damages of N2 million be and is hereby set aside and issue No. 2 resolved in favour of the appellant."

15. **On whether separate damages awardable in action for breach of contract and libel** Where an action is founded both on breach of contract and libel as it is usually the case where a banker wrongfully dishonors a customer's cheque, the successful plaintiff is entitled to damages arising from the breach of contract and general damages for libel. In the instant case, the action was based on breach of contract. Therefore, the respondent is only entitled to damages for breach of contract. (P.71, paras. E-G)
16. **On Principles governing award of interest -**
A party will be entitled to claim interest where the claim is as of right, for example, by agreement or where it is supported by statute or mercantile custom or convention. In the instant case, the respondent is entitled to interest only at the agreed rate of 12.25% Per annum. [Ekwunife v. Wayne (West Africa) Ltd. (1989) 5 NWLR (Pt.1 22) 422 referred to!] (Pp. 74, paras. E-G; 75, para. A)
17. **On Need to expressly plead claim for interest as of right -**
Where a party claims interest as a matter of right, the proper practice is to claim interest as a matter of right, the proper practice is to claim entitlement to it on entitlement to it on the writ of summons and plead facts which show t such an entitlement in the statement of claim. [Ekwunife v. Wayne (West Africa) Ltd. (1989) 5 NWLR (Pt.122) 422 referred to.] (P.74, paras. G-H)
18. **On whether court can grant relief not claimed by a party**
A court is not competent to award to a party a relief which he did not ask for. In the instant case, the respondent did not seek for exemplary damages. In the circumstance, the award of exemplary damages in favour of the respondent was improper. (P.68, paras. C-O)
19. **On Attitude of court to construction of terms of a contract -**
The principle of sanctity of contract enjoins courts to deal carefully with agreements as reached by the parties. (P.75, paras. G-H)
20. **On Attitude of appellate court to award of damages by trial court -**
An appellate court will not interfere with an award of damages by the trial court on the ground that it would have awarded a different amount if it had tried the case at first instance. An appellate court may, however, interfere with the award of damages by a trial court where it is satisfied that the trial court in assessing the damages, applied a wrong law or a wrong principle of law such as taking into account some irrelevant factors or leaving out of account some relevant factors, or that the amount awarded is either so ridiculously low or so extremely f and inordinately high that it must have been a wholly erroneous estimate of the damage. In the instant case, the trial court did not only award exemplary damages which was not pleaded but also based the award on the wrong principles of law. In the circumstance, the Court of Appeal can interfere with the award of damages by the trial court (p. 68 paras F-G)

21.
appeal -

On Duty on respondent wishing to challenge finding of fact by trial court on

Without a cross-appeal challenging the findings of a trial court on a particular issue or issues, a respondent cannot legally be heard submitting something contrary to the findings before the Court of Appeal. In the instant case, the trial court was emphatic throughout its judgment including the assessment of damages due to the respondent that the action was founded in detinue. Without a cross-appeal challenging the findings of the trial court on this issue, the respondent cannot be heard submitting something contrary to the Court of Appeal. (P.66, paras. B-E)

Per ONNOGIEN, J.C.A. at page 66 paras B-E: "From the passages quoted supra, it is very clear that the trial court never found that the respondent had two causes of action - one in contract and another in detinue. Rather the Judge was emphatic throughout his judgment including the assessment of damages due to the respondent, that the action is founded in detinue. This is a clear finding of fact by the lower court which the respondent has not challenged by way of a cross appeal. Even though it is clear from the pleadings and evidence of the respondent and address of counsel that the respondent was claiming both in contract and detinue that is clearly not what the trial court found. It is my considered view that without a cross appeal challenging the copious findings of the trial court on the issue of the action being grounded on detinue alone, the learned SAN cannot legally be heard submitting the contrary to this court. In other words in view of the above findings of the learned trial Judge the judgment of the court can only stand if the relationship between the parties is founded on detinue as decided therein since the issue of the cause of action being also on contract is not properly before this court - being the Court of Appeal."

Nigerian Cases referred to in the judgment.

African Reinsurance Corp. v. Fantaye (1986) 1 NWLR (Pt. 14) 113
Allied Bank (Nig.) Ltd. v. Akubueze (1997) 6 NWLR (Pt.509) 374
Alraine (Nig.) Ltd. v. M. A. Eshietl (1977) 1 SC 89
Balogun v. NBN Ltd. (1978) 3 SC 155
Bella v.A.-G., Oyo State (1986) 5 NWLR (Pt.45) 828
Benin Rubber Producers Ltd. v. Ojo (1997) 9 NWLR (Pt.521) 388
DHL Int. (Nig.) Ltd. v. Chidi (1994) 2 NWLR (Pt.329) 720
Lkwunije v. Wayne (West Africa) Ltd. (1989) 5 NWLR (Pi. 122) 422
Elochin (Nig.) Ltd. v. Mbadiwe (1986) 1 NWLR (Pt.14) 47
Emialor v. Nigerian Army (1999) 12 NWLR (Pl.631) 362
LBN Ltd. African Petroleum Ltd. (1996) 4 NWLR (Pt.443) 438
Ibrahim v. Osim (1987) 4 NWLR (Pl.67) 965
Ijebu Ode Local Govt. v. Balogun & Co. Ltd. (1991) 1 NWLR (Pt. 166) 136
Jos Steel Rolling Co. Ltd. v. Bernestieli (Nig.) Ltd. (1995) 8 NWLR (Pt.412) 201
Mobil Oil (Nig.) Ltd. v. Akinfosile (1969) 1 NMLR 217
Nwonve & Son. Ltd. v. CCB Plc (1993) 8 NWLR (Pt.310) 210
W.A.O.S. Lid. v. [AC (Nig.) Ltd. (2000) 13 NWLR (Pl.683)68
Okongwit v. NNPC (1989) 4 NWLR (Pt.115) 296

Olaogun Liu. Ltd v. S.J. & M. (1992) 4 NWLR (Pt.235) 361
Ordia v. Piedmont (Nig.) Ltd. (1995) 2 NWLR (Pt.379) 516
P.Z. & Co. v. Ogedengbe (1972) 1 All NLR 202
Patkun Ltd. v. Niger Shoes Mfg. Ltd. (1988) 5 NWLR (Pt.93) 138
Seven-Up Bottling Co. Plc v. Abiola and Sons Co. Ltd. CA/IL/112/01-21/5/2001
Swiss Nigerian Wood Ind. v. Bogo (1971) 1 U1LR 337 U.B.N Ltd. v. Odusote Bookstores Ltd. (1995) 9 NWLR (Pt.421) 558 Union Bank v. Ozigi (1991) 2 NWLR (Pi. 176) 677

Foreign Cases Referred to in the Judgment:

Hadley v. Baxendale (1954) Exch. 341
Rosenthal v. Aldenon & Sons Ltd. (1946) KB 374
Mills v. Brooker (1919) 1 KB 555

Nigerian Rules of Court Referred to in the Judgment:

High Court of Kwara State (Civil Procedure) Rules, 1989, 0.4, r. 1(1)(a)

Foreign Statute Referred to in the Judgment:

Torts (Interference with Goods) Act of England 1977

Books Referred in the Judgment:

Bullen & Leake & Jacob's Precedents of pleadings Vol.1 2001
Ed, paras. 25-07
Black's Law Dictionary 7th Ed., 229
Paget's Law of Banking 10th, Ed. P.272
Magregor on Damages 13th Ed., paras. 537- 538

Appeal:

This was an appeal against the judgment of the High Court of Kwara State given in favour of the respondent. The Court of Appeal, in a unanimous decision, allowed the appeal.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal, Ilorin

Names of Justices that sat on the appeal: Muritala Aremu

Okunola, J.C.A. (Presided): Patrick Ibe Amaizu, J.C.A.;

Walter Samuel Nkanu Onnoghen, J.C.A. (Read the Leading Judgment)

Appeal No.: C A/1 L/42/2000

Date of Judgment: Monday, 10th December, 2001

Names of Counsel: Duro Adeyele, Esq. (with him, O. Olawoyin, Esq.) - for the Appellant

Yusuf O. Ali, SAN (with him, S.U. Solagberu, Esq.) –for the Respondent

High Court:

Name of High Court: High Court, Kwara State Name of the Judge: Ahmed O. Belgore, J.

Suit No.: KWS/188/91 Dale of Judgment: Tuesday, 21st December, 1999

Counsel:

Duro Adeyele, Esq. (with him, O. Olawoyin, Esq)- for the Appellant

Yusuf O. AH, SAN (with Mm, S.U. Solagheru, Esq.) –far the Respondent

ONNOGHEN, J.C.A. (Delivering the Leading Judgment): This is an appeal against the judgment of the High Court of Justice of Kwara Stale in suit NO. KWS/188/91 delivered by Hon. Justice Ahmed Belgore on 21st December, 1999 in favour of the respondent in which he ordered the return of the sum of N467,000.00 which was kept as a fixed deposit to the

respondent with interest thereon) and further awarded general damages of N2 million against the appellant.

The facts of the case include the following:

Sometime in August 1988 the respondent as a customer of the appellant opened a fixed deposit account with the sum of N467,000.00 at the Ilorin branch of the appellant. It was agreed by the parties that an initial interest of 12.25% per annum would be payable on the deposit and that the monthly interest on the fixed deposit shall be transferred into the respondent's current account every month. The parties also agreed that the initial rate of interest of 12.25% per annum could be renewed upwards at the end of the year by negotiation. The appellant, in compliance with the agreement, paid interest for the months of August and September 1988.

On 31/10/88 the respondent repudiated the fixed deposit agreement and gave notice of its intention to withdraw the whole amount as provided under the agreement but the appellant refused to give the respondent access to the money on the ground that it has received instructions from the Central Bank of Nigeria to freeze the respondent's account. Dissatisfied with the action of the appellant the respondent instituted the action at the lower court claiming as per its further amended statement of claim, paragraph 38 thereof

He follows his reliefs:

"38. WHEREOF the plaintiff claims as follows;

- i Declaration that the failure or refusal of the defendant to allow the plaintiff to withdraw from its deposit account No. 70-100-029 constitutes a breach of contract and the plaintiff (sic) constitutional right to its property and is therefore wrongful and illegal.
- ii. AN ORDER directing the defendant to release to the plaintiff the principal sum of N467,000.00 deposited into the account plus interest calculated at the rate of 12.25% per annum from August, 1988 till November, 1989.
- iii. AN ORDER directing the defendant to pay the plaintiff by way of special damages additional interest calculated at the rate of 25% or any other rate found due by the court on the Principal sum plus accrued interest from December 1989 till the date of judgment.
- iv. Order directing the defendant to pay 10% interest on whatever sum adjudged due to the plaintiff from the date of judgment till liquidation,
- v. AN ORDER directing the defendant to pay the plaintiff the sum of N20,000,000.00 representing general damages suffered by the plaintiff as a result of the failure of the defendant to allow the plaintiff to withdraw money from the deposit account and or as damages for breach of contract and or for the wrongful detention of the plaintiff's money since 1988 to date." see the further amended statement of claim at pages 32 to 37 of the record.

I want to point out herein the fact that the respondent was paid the agreed interest of 12.25% per annum for August and September, 1988 as averred at paragraph 12 of the further amended statement of claim but went ahead to claim interest for those months in paragraph 38(ii) reproduced supra.

Anyway, dissatisfied with the judgment of the lower court, the appellant has appealed to this court on five grounds of appeal out of which learned counsel for the appellant, DURO ADEYELE Esq. has formulated three issues for the determination of this appeal in "his brief of argument deemed

filed on 25/9/01, which brief was adopted in argument of the appeal on 21st November, 2001. The issues are as follow s:-

- "1. Whether the plaintiffs cause of action is founded in contract or in tort of detinue and whether the learned trial Judge was right to have assessed damages for breach of contract and detinue instead of contract only
2. Whether the further award of N2 million damages did not amount to double compensation in view of the earlier award for loss of interest.
3. Whether the learned trial Judge was right in awarding! interest at rates higher than 12.25% specifically agreed to by the parties."

On the other hand, learned SAN for the respondent Yusuf O.I

Ali, Esq. in his In id of argument filed on 25/9/01 which he also!

adopted in argument, formulated two issues out of the said five grounds of appeal. The issues are as Follows:-

"1. Whether having regard to the whole circumstances of this case, the learned trial Judge was not right to have awarded the damages of two million naira (N2.000,000.00) in favour of the respondent on the ground that the appellant wrongfully held on to the money of the respondent under the principle of detinue and whether the award amounted to double compensation;

2. Whether the learned trial Judge was not light having regard lo the fact of the case It) have awarded more than 1 2.25% percent interest on the principal sum." It is however my view that even though the issues as formulated by both learned counsel arise from and do cover the grounds oil

appeal the issues formulated by learned counsel for the appellant be. preferred. They are very brief and to the point being canvassed.

In arguing issue No. 1 learned counsel for the appellant submitted that the relationship between a bank and its customer is contractual as restated by the Court of Appeal in *Union Hank v. Ozigi* (1991) 2 N WLR (Pi. 176) 677 at 694 per Ogundere, J.C.A. Learned counsel also cited and relied on *FUN Ltd. v. African Petroleum Ltd* (1996) 4 NWLR (Pt.443) 438 at 445; *Nwonye A Sons I.id. v. CCB Plc.* (1¹)93) 8 NWLR (Pt.310) 210 at 220. That from the facts of the instant case the relationship between the parties is contractual; the terms of which have been slated in paragraph 5(i) - (vi) of the further amended statement of claim which the appellant also admitted in its further amended statement of defense. That any incomplete, irregular or even non-performance of the terms agreed upon by the parties is a breach of contract. That it is trite law that where a banker refuses to pay a customer's cheque when the banker holds in hand an amount equivalent to that endorsed on the cheque belonging to the customer amounts to a breach of contract. That a refusal to honour a customer's cheque is akin lo what the appellant did in this case and argued that the same principle ought to apply in both cases.

Referring to the Supreme Court decision in *Balogun v. National Bank of Nigeria Ltd* (1978) 11 NSCC 133 per idigbe, JSC and pages 69, 83-85 of Pages Law of Banking 8th Ld. learned counsel submitted that since it has been held that when a banker accepts money either on current or deposit account, a relationship of debtor and creditor is created, it follows that no fiduciary relationship exists i between the appellant and the respondent in respect of the fixed deposit contract.

That the absence of a fiduciary relationship means that the appellant cannot be liable in detinue particularly as the appellant was not a bailee of the respondent's goods or chattel.

That money is not chattel capable of being wrongly detained. That the appellant was a debtor in relation to the money. Learned counsel then cited and relied on *Ordia v. Piedmont (Nig.) Ltd.* (1995) 2 NWLR (Pt.379) 516 at 532-533.

Learned counsel further submitted that the court was wrong in holding at page 161 of the record that the respondent's claim was no longer in contract but tort which entitled it to exemplary damages. That the case of *Allied Hank- (My.) Ltd. v. Akubueze* (1997) 6 NWLR (Pt.5(9) 374 relied upon by the learned trial Judge does not support his judgment. Counsel then urged the court to set aside the findings of the trial Judge on the liability of the appellant in detinue and the consequent assessment of exemplary damages based thereon in that they are not supported by law neither are they justifiable. That the measure of damages in cases of breach of contract is that of foreseeability as established in *Hadley v. Baxendale* (1854) 9 Exch. 341. That the award of N2 million is contrary to the applicable principle of law to cases of breach of contract and submitted that this is a proper case for this court to interfere with the assessment and set same aside. That the respondent did not claim exemplary damages in its further amended statement of claim neither did either counsel address the court on same. That the issue was raised by the trial Judge *sue motu*. Learned counsel then urged the court to resolve the issue in favour of the appellant. On his part, learned counsel for the respondent, Y. O. Ali, Esq. SAN, submitted that from the pleadings it is clear that the respondent's case is based on two causes of action namely breach of

contract and the tort of detinue. That a plaintiff can found his claim on more than one cause of action if the facts of the case justifies it. Learned counsel then cited and relied on Order 4 rule 1(1)(a) of the High Court (Civil Procedure) Rules of Kwara State on joinder of causes of action and the case of *Balogun v. MW* (1978) 3 SC 155 at 173 to the effect that a customer whose cheque is wrongly dishonoured can always bring claims for defamation and breach of contract in the same action.

That the respondent made unequivocal demand for the return of its deposit to no avail. That money is a form of chattel and in the torts of conversion and detinue there are elements of contract because the chattel would normally have come to the possession of the adverse holder by agreement and it is the refusal after demand by the owner that turns it into conversion or detinue. Learned counsel then submitted; that the tort of detinue was clearly made out and cited and relied on *Benin Rubber Producers Ltd. v. Ojo* (1997) 9 NWLR (Pt.521) 388 at 411; *W.A.O.S. Ltd. v. U.A.C. (Nig.) Ltd.* (2000) 13 NWLR (Pt.683) 68.

That in an appropriate case damages can be awarded in an action for both breach of contract and tortious liability as stated by the learned authors of *McGregor on Damages* 13th ed. paragraphs 53 - 538.

That a bank can be liable for the tort of conversion or detinue as stated in *Pages Law of Banking* 10th Ed. at page 272.

That if the interest as agreed or varied had been paid remitted to the account of the respondent, it could have spent same in furtherance of its business apart from the principal sum deposited. That the trial Judge was right to have awarded general damages in addition to the interest having regard to the peculiar facts and circumstances of this case. That an appellate court will not tarnish the award of damages made by the trial court once the damages are justifiable in the peculiar circumstances of the case. For this counsel referred to *union Bank Ltd. v. Odusote Bookstore Ltd.* (1995) 9 NWLR (Pt.421) 558 at 585-586.

The appellant had not shown that the damages awarded was based on erroneous estimate or that it was too high in the circumstances when the appellant persisted for eleven years in the unlawful detention of the appellant's fund. That the appellant has also not shown that he suffered any miscarriage of justice in the manner the matter was decided by the lower court.

That even if the learned trial Judge was wrong to have based his award of damages on detinue (which is not conceded), the principle of law in the maxim *ubi jus ubi remedium* will avail the respondent regardless of the nomenclature given to such damages. For this learned SAN relied on *Bella v. A.-CL, O/o State* (1986) 5 WLR (Pi.45) 828 at 889 - 890. He therefore urged the court to solve the issue against the appellant.

I have gone through the record of proceedings, arguments of both learned counsel on the issue under consideration and it is very clear that whereas learned counsel for the appellant's argument is to the effect that the respondent's cause of action is in contract and not the tort of detinue, learned SAN for the respondent contends that the respondent has two causes of action - contract and detinue, I The position being as slated above, the first thing to be determined is the question of cause of action. This term has been fined by the courts in very many cases. For instance in *Emiaior v. Nigerian Army* (1999) 12 NWLR (Pt.63I) 362 at 369 - 370 the supreme Court defined it as the entire set of facts or circumstances giving rise to an enforceable claim, It also includes all those things necessary to give a right of action and every fact which is material to be proved to entitle the plaintiff to succeed. See also *Ibrahim v. Osinm* (1987) 4 NWLR (Pt.67) 965; *Patkun Ind. Ltd. r. Niger Shoes ltd.* (1988) 5 NWLR (Pt.93) 138.

I agree with the submission of learned counsel for the respondent, Ali Esq., SAN that under a the provisions of Order 4 rule (1)(a)of the Kwara Stale High Court (Civil Procedure) Rules, 1989 thereafter referred to as the High Court Rules, 198') and many decided authorities including *Balogun v. N.B.N. Ltd.* (1978) 3 SC 155 at 173 a plaintiff may in one action claim relief against the same defendant in respect of two or more causes of action. Order 4 Rule of the said High Court Rules, 1989 provides expressly as follow :-

1(1) Subject to rule 3, a plaintiff may in one action claim relief against the same defendant in respect of two or more causes of action:

(a) If the plaintiff claims, and the defendant is alleged to be liable, in the same capacity in respect of all the causes of action."

The issue to be determined is whether even though it is a well known and established principle of law and practice that a customer whose cheque is wrongfully dishonoured can always institute claims for defamation and breach of contract in one single action, a customer who maintains a deposit account and demands the payment of his deposit which was refused by the bank can institute a claim for both breach of contract and detinue in respect of that deposit account. It is not in dispute that the respondent did demand the payment of his deposit but the appellant refused to comply on the ground that the Central Bank of Nigeria did freeze the respondent's account. From the submissions of both counsel it is clear that they admit that the relationship between a banker and its customer is based on contract but the learned SAN is of the further view that where the same set of facts can equally ground an action in detinue the customer can claim damages for same in addition to damages for breach of contract.

Generally speaking, it is my view that an action in detinue involves goods and or chattel in its substratum and possession. Thus; a claim in detinue for the recovery of goods wrongfully detained presupposes the existence of the following to wit; that the goods were in possession of the plaintiff, that the defendant, without an lawful excuse or consent or permission of the plaintiff took away the goods and the plaintiff had demanded the return of the said good and that the defendant had refused to return them - see *Rosenthal v. Alderton and Sons* (1946) K.B. 374.

The term chattel has been defined in Black's Law Dictionary 7th Ed. 229 as follows:
"Movable or transferable property; esp. personal property".

The learned authors proceeded to quote the following passage from Thomas Blount, *Nome lexicon: A Law - Dictionary* (1670), at the same page 220 to wit;

"That money is not to be accounted goods or chattels, because it is not of itself valuable ... Chattels are either personal or real. Personal may be so called in respects: one because they belong immediately toll person of a man, as a Bow, Horse, etc. The other for that being anyway injuriously withheld from us, we have no means to recover them, but personal actions. Chattels real, are such as either appertain not immediately to the person, but to some other things, by ways of dependency, as a box with chattels of land, apples upon a tree, or a tree itself growing on the ground (O)r else such as are issuing out of some immovable thing to a person, as a lease or rent for the term of years."

The above quoted definition and passage clearly show that realty can only be the subject-mater of detinue when severed from the land such as coal taken from a coal mine - see *Mills v. Brooker*

(1919) 1 K.B. 555. However, the most important thing revealed in that passage is the emphatic statement "that Money is not to be accounted Goods or chattels ..." This is very relevant to the issue

under consideration. However, the learned authors of Bullen & Leake & Jacob's Precedents of Pleadings, Vol. 1 2001 Ed. at paragraph 25 - 07 while commenting on the exclusion of money in the subject

matter of conversion under section 14(1) of the Torts (Interference with Goods Act 1977 (being the Act which abolished detinue in English Law and substituted thereto the tort of conversion by

Detention) stated *inter alia* as follows:-

"The exclusion of "Money" is slightly misleading. Money in specie (i.e. coins and notes) can be converted. It is money in the abstract e.g. in a bank account which cannot."

From the facts of this case it is beyond any doubt that the subject matter of the alleged detinue is not money in specie but money in a deposit account with the appellant.

The learned SAN for the respondent has referred this court to a i passage at page 272 of Paget's Law of Banking 10th Ed. to wit:

"The conclusion seems to be that there is conversion where the defendant asserts a title adverse to that of the true owner, either in himself or a third party, or where he detains the goods from the rightful owner for an unreasonable time, thereby impliedly doing so. If the depositor himself applies, any delay is unreasonable, and refusal is a negation of his title."

In support of his contention "that a bank will be liable for the tort of conversion or detinue as the case may be".

While it is conceded that in an appropriate case a banker can be liable for conversion and detinue the facts of this case do not make the present case one of such instances. As has been earlier demonstrated in this judgment the subject matter of the action not being money in specie cannot ground an action for detinue. That apart, it is very instructive to note that the learned SAN quoted the passage from a chapter dealing with SAFE CUSTODY which in effect deals with the banker's role or function or duty as a bailee. In such a situation, it is my considered opinion that the banker, like every other bailee, will be liable for conversion or detinue as the case may be, where he asserts a title adverse to that of the true owner or where he detains the goods from the rightful owner for an unreasonable time. It is therefore my view that the said passage relied upon by the learned SAN is not relevant to the issue under consideration. From the totality of the facts of the case it is my view that the relationship that existed between the parties in the instant case on appeal was emphatically that of banker and customer which said relationship is founded on contract and nothing more. It is trite law that where a banker refuses to pay a customer's cheque when the banker holds in hand an amount equivalent to that endorsed on the cheque belonging to the customer, such an act of refusal to pay amounts to a breach of contract. In the present case on appeal, both parties are agreed that there was a contract between them, the terms of which include the following:

- (a) That the deposit account of N467,000.00 shall initially attract an annual interest of 12.25%.
- (b) That the annual interest shall be payable at the end of every month from the date of the deposit into the account and credited directly to the plaintiff's current account No. 36-180-369M with the defendant.
- (c) That the duration of the account was to be 12 months with liberty to the plaintiff after giving notice to the defendant to withdraw any amount from the deposit in the account for the purpose of its business during the currency of the agreed period of deposit.
- (d) Interest would only be paid on any amount standing to the credit of the account at the end of every month.
- (e) Interest payable on the deposit could be reviewed upwards from time to time at any rate agreed by the parties after negotiation.
- (f) The account could be renewed for another period of time at the expiry of the first year of deposit - see paragraph 5 of the further amended statement of claim at page 321 of the record and paragraph 1 of the further amended statement of defence at page 45 of same which expressly admitted the said paragraph 5 of the further amended statement of claim.

It follows therefore that when the respondent demanded for the payment of its deposit and the appellant refused to comply the appellant committed a breach of its contract with the respondent and I so hold. I therefore do not agree that the action of the appellant in refusing to pay up the deposit as previously agreed between the parties amounts to both a breach of contract and commission of the tort of detinue as canvassed by learned SAN for the respondent.

However, is the learned SAN right in contending that the respondent's action was based on contract and tort of detinue. In short, what did the learned trial Judge find?

In the judgment of the learned trial Judge particularly at page 160 of the record, His Lordship held *inter alia* thus:

".. I also hold that the defendant is liable to plaintiff in detinue as pleaded in paragraph 37A of the further amended statement of claim ... In the assessment of damages, it has been held by the Supreme Court in *Elisah Oladeji Kosile v. Aniusa Olaniyi Folarin* (1989) 4 SCNJ (Pi. 11) 198, 204 that a successful party in an action for detinue is entitled to an order of specific restitution of the chattel, or, in default its value and also damages for its detention up to the date of judgment." Again at page 161 the learned trial Judge continued as follows:

"The declaration being sought by the plaintiff in paragraph. 38(1) and the general damages for breach of contract now becomes inappropriate in view of paragraph 37A of the further amended statement of claim. The plaintiff's case is no longer in contract but in tort which entitles it to the award of exemplary damages as adumbrated by the Supreme Court in Allied Bank of Nig. Ltd. v. Jonas Akabueze (1997) 6 NWLR (Pt.509) 374 *Since the case is founded on detinue. the plaintiff is out rightly entitled to a refund of deposit in sum of N417, 0000 (HI. As agreed by the parties, the plaintiff is also entitled to 12.25% interest rate per annum on its deposit from October, 1988 to July 1989 being the initial duration of the deposit.*" (All emphasis supplied.)

From the passages quoted *supra*, it is very clear that the trial court never found that the respondent had two causes of action -one in contract and another in detinue. Rather the Judge was emphatic throughout his judgment including the assessment of damages due to the respondent, that the action is founded in detinue. This is a clear finding of fact by the lower court which the respondent has not challenged by way of a cross appeal. Even though it is clear from the pleadings and evidence of the respondent and address of counsel that the respondent was claiming both in contract and detinue, that is clearly not what the trial court found. It is my considered view that without a cross appeal challenging the copious findings of the trial court on the issue of the action being grounded on detinue alone, the learned SAN cannot legally be heard submitting the contrary to this court. In other words in view of the above findings of the learned trial Judge the judgment of the court can only stand if the relationship between the parties is founded on detinue as decided therein since the issue of the cause of action being also on contract is not properly before this court - being the Court of Appeal.

Now the oilier sub-issue within the issue under consideration is whether the trial Judge was right to have assessed damages for detinue instead of breach of contract under the circumstances of this case.

I having held that the relationship between the parties is governed by contract and not detinue, it follows therefore that the measure of damages in this case must be as laid down in the law of contract for breach of contract and nothing else. In the case of *Balogun v. National Hank of Nigeria Ltd.* (1978) 11 NSCC 135 the Supreme Court (Hut stated clearly that the position of the bank and its customer when accepting money either in current or deposit account is a relationship of debtor and creditor. At page 140 of the report Idigbe JS(as he then was) had these to say:-

"We think it is necessary, at this stage to trace the. History of this aspect of the law relating to damages for breach of contract the role predominating business of bankers is a business of banking which consists in the main in the receipt of monies on current or deposit account and the payment of cheques, drawn by as well as the collection of cheques paid

by a customer - See also *Atkin J. in Joachim. Son v. Swiss Hank Corporation* (1922) 3 K.B. 110 at 127. Therefore, the receipt of money from or on account of his customer by a banker constitutes the latter the debtor of the former (*holey v. Hill* 1848 21 1L (as 28): and the banker undertakes to pay any part of the money thus due from him to the customer against the written orders of the customer *Joachim son v. Swill Bank (supra)*. Accordingly, the relation, so constituted is that of principal and agent and, therefore a cheque drawn on the banker by the customer represents the order of the principal to his agent to pay, out of the principal's money in his hands, the amount stated on the cheque to the payee endorsed on the cheque. Therefore, it has long been established that refusal by a banker to pay a customer's cheque whether he holds in hand an amount, equivalent to that endorsed on the cheque, belonging to the customer amounts to a breach of contract for which the banker is liable in damages. *The only question which arose in these circumstances, has always been that relating to the quantum of amount of damages. He general rule for the measure or quantifying damages for breach of contract was that established by leading cases of Hadley v. Baxendale (J854) 9 ('A/I. 341 which is that the party in breach is liable in damages in the amount which flows directly and naturally from his failure to keep his own part of the contract or bargain provided that .such damages could be reasonably have been within the contemplation of the parties at the time when the contract was made."* (Emphasis supplied by me.)

It is therefore my view that the learned trial Judge erred when he held at page 161 of the record that "the claim of the plaintiff was no longer in contract but in tort which entitles him to exemplary damages." Apart from the fact that it is generally accepted that exemplary damages are not recoverable as a matter of course in an action in contract by a customer for the dishonor of his cheque by banker or as in the instant case for the refusal of the banker to pay over to the customer its deposit, it is trite law that such exemplary damages must be pleaded - See the decision of this court in seven Up *Bottling Co. Plc. v. Ahiola and Sons Co Ltd. and Anor.* Appeal No.CA/IL/112/99 delivered on 21st May, 2001 at page 23 thereof"

Where it is stated *inter alia*:-

"U is my view that before a court can consider the quantum of damages in an unliquidated money demand, whether the damages claimed is general, special, exemplary, punitive, etc., such damages must be pleaded and there must be evidence in proof of the damages to assist the court in accessing the quantum to be awarded

See also the judgment of the supreme court in the case of *Eliochin (Nig.) Ltd. v. Mbadiwe* (1986) 1 NWLR (Pt. 14) 47 at 64 – 65 per Obaseki JSC (as he then was). In the present case exemplary damage was nowhere pleaded in the further amended statement of claim. To that extent alone the award of exemplary damages by the lower court cannot stand a court is not competent to award to a party that which he did not ask – consequently the findings of the learned trial judge on the liability of the appellant the detinue and the consequent assessment of exemplary damages based there on is hereby set aside. It is trite law that through an appellant court is not allowed to substitute a figure of its own for that awarded by the lower court simply because it would have a different figure if it had heard the case at first instance, if it is satisfied either that the Judge in assessing the damages, applied a wrong law or a wrong principle of law such as taking into account some irrelevant factor or leaving out of account

some relevant factor or that the amount awarded is either so ridiculously low or so extremely and inordinately high that it must have been a wholly erroneous estimate of the damage, it can intervene and review the damages awarded. In the instant case the learned trial Judge did not only award exemplary damages when none was pleaded but based the award on the principle of law in the tort of detinue which is a wrong principle as opposed to the principles of breach of contract arising from banker customer relationship.

I will briefly return to this aspect when considering issue No. 2 dealing with the award of N2 million general damages. For now, it is my opinion that in view of the facts with the applicable law, issue No. 1 be and is hereby resolved in favour of

On issue No. 2 which is whether the further award of N2 million damages did not amount to double compensation in view of the earlier award for loss of interest, learned counsel for the appellant submitted that it was wrong for the learned trial Judge to award N2 million as general damages in addition to the award of interest on the amount fixed with the appellant. That the basis of the award of N2 million is not clear since the trial Judge had expressly recognized that "the business opportunities frustrated by the defendant was N550,000.00." That if the respondent is entitled to any damages at all, it should not have exceeded N550,000.00.

Learned counsel further submitted that assuming the fixed deposit agreement between the parties had run its normal course, all that the respondent would have been entitled to would have been interest at 12.25% per annum which was agreed upon. That under the principle for assessment of damages for breach of contract, the respondent would have been entitled to no more than the interest that would have accrued; relying on *Hadley v. Baxendale* *Supra* and *Kaycee v. R.S.C. Ltd.* (1986) 2 NWLR (Pt.23) 458 at 468. That the further award of N2 million damages after awarding interest from ; 1989 to the date of judgment amounts to double compensation. For this learned counsel cited and relied on *Adeola v. Olaoba* (1998) 4 NWLR (Pt.545) 224 at 229 and *Kuycee R.S.C Ltd. Supra* at 468. Still submitting further, learned counsel stated that since the cause of action is in contract and not in tort, the award of N2 million amounted to an award in general damages which cannot go together with that for special damages in contract cases. That to award both amounts to double compensation which is frowned upon by the law. He then cited the case of *DHL International Nig. Ltd. v. Udechiikwu* (1996) 2 NWLR (Pt.329) 720 at 742, *P/and Co. Ltd. v. Ogedengbe* (1972) 1 All NLR (Pt. 1) 202 and *SWISS Nig. Wood Ind. v. Bogo* (1971) UILR (Pt.3) 337 at 341. That there was no evidence to show that the appellant agreed to pay anything to the respondent other than the agreed rate of interest for the sum placed in the fixed deposit. That whatever angle one looks at the award of N2 million as general ;H damages it is unsustainable and ought to be set aside. Learned .counsel then urged the court to resolve the issue in favour of the appellant.

As regards the submissions of learned SAN for the respondent on this issue, it is as summarized when dealing with issue No.1. However, the learned SAN submitted that contrary to the submissions of his learned friend that the relationship between the parties was in contract and that general damages cannot be awarded, the learned authors of McGregor on Damages 13th Ed. in paragraphs 537-538 have made the point that in appropriate cases, damages could be awarded in an action for both breach of contract and tortious liability. That the submission of the learned counsel for the appellant to the effect that if the respondent was entitled to any damages at all it should have been limited to five hundred and fifty thousand

naira is a concession and an admission by the appellant that the respondent was indeed entitled to damages, the quantum being something else. That the appellant failed to appreciate the fact that the principal sum of N467,000.00 deposited by the respondent with the appellant in 1988 would have earned monthly interest which could have been available for the immediate use of the respondent as it wished but for the wrongful act of the appellant. That the trial court was right in awarding general damages in addition to the interest having regard to the peculiar facts and circumstances of this case.

That an appellate court will not interfere with the award of damages made by the trial court once the damages awarded are justifiable in the peculiar circumstances of the case. To this counsel

cited and relied on *Union bank Ltd. v. Odusote bookstores Ltd.* (1995) 9 NW 1.R (Pi.421) 558 at 585 - 586. That the appellant has not shown that the damages awarded was based on erroneous estimate

nor has it shown that it suffered any miscarriage of justice. He then urged (he court to resolve the issue against the appellant.

To begin with it has been held earlier in this judgment that the relationship between the parties is governed by contract simpliciter and as such the measure of damages is as laid down in *Hadley v Baxendale supra*. In the present case particularly as regards the issue under consideration, both parties are agreed that the learned trial court awarded interest on the principal sum fixed with the appellant from 1988 till judgment.

It is considered view that the award of interest for the period stated amounts to an award of special damages arising from the breach of contract committed by the appellant. to keep his own part of the contract or bargain and that award is obviously within the contemplation of the parties at the time when the contract was made.

What is the status of the N2 million general damages awarded in addition to the interest? The learned SAN for the respondent has argued that the submission of his learned friend to the effect that if the respondent was entitled to any damages at all it should have been limited to N550,000.00 is an admission that the respondent is entitled to general damages. This is not supported by the record and the appellant's brief. In the first place the appellant's counsel was only referring to the views of the learned trial Judge on the matter. That apart, from the trend of the argument in this appeal that submission can only be understood as one made in the alternative particularly as it has been the case of the appellant that the relationship between the parties is governed by contract and not detune or both and as such the respondent is entitled to no other measure of damages except as envisaged in breach of contract cases.

That apart, learned SAN has been talking of the "peculiar facts and circumstances" of this case when the facts of the case are very straight forward and admit of nothing other than a contractual relationship in which the terms and conditions have been agreed upon by the parties.

It is my view that the submission of learned SAN that in an appropriate cases damages can be awarded in an action for both breach of contract and tortious liability begs the issue which is simply whether in an action for breach of contract as in this case damages can be awarded twice for the same breach. Of course where an action is founded both on breach of contract and say libel as is normally the case where a banker wrongfully dishonor's a customer's cheque, the successful plaintiff is entitled to damages arising from the breach of contract and general damages for libel. However, that is not the position in the instant case where the cause Of action is breach of contract with no additional liability, tortious or otherwise.

It is the law as stated by the Supreme Court in *P./.. & Co. Ltd. I v Ogedengbe* (1972) 1 All NLR 206 and *Swiss Nigerian Wood Ind..v Bogo*(1971) 1 UILR 337 at 341, that apart from damages actually resulting from the breach of contract, the plaintiff is entitled to no other form of general damages since same could not have been Contemplated by the parties at the time of entering into the contract. Therefore the damages recoverable are the losses reasonably foreseeable by the parties and foreseen by them at the time of the contract as inevitably arising if one of them broke the contract. That being the case there can be no room for claims which are merely speculative or sentimental unless these are specifically provided for by the terms of the contract. See also *Alraine (Nig.) Ltd. v. M.A. Eahiett* (1977) 1 SC 89 at 96; *Mobil Oil (Nig.) Ltd. v. Akinfosile* (1969) NMLR 217; *Okongwu v. NNPC* (1989) 4 NWLR (Pt. 115)1 296; *Ijebu Ode Local Govt. v. Adedeji Bulogim & Co. Ltd.* (1991)1 NWLR (Pt.166) 136 and *DHL Int. (Nig.) Ltd. v. Udechukwu* (1996)| 2 NWLR (Pt.329) 720 at 738 and 742.

The position of the law being what it is, it follows that the I award of N2 million damages in addition to the deposit oil N467.000.00 with interest thereon at the rate of 12.25% per annum! from 1988 to December, 1989 minus the months of August and! September, 1988 already paid is an award in contravention of the! principle of law governing award of damages in cases of breach of I contract as reproduced supra. That being the case, it is my view and| I agree with learned counsel for the appellant that the award of I said N2 million damages under the circumstances amounts to double compensation which is frowned upon by law. That being the case, it is my view that the said damages of N2 million be and is hereby set aside and issue No. 2 resolved in favour of the appellant.

The third and final issue is whether the learned trial Judge was! right in awarding interest of rates higher than 12.25% per annum specifically agreed upon by the parties.

In dealing with this issue learned counsel for the appellant! submitted that interest is not payable except it is agreed upon by the parties or the right to it is conferred by statute. For this leaned counsel referred the court to *Job Steel Rolling Co. Ltd. v. Be, (Nig.) Ltd.* (1995) 8 NWLR (Pt.412) 201 at 208 - 209 and *Olaogun, Ent. Ltd. v. S. ./.. t A/.* (1992) 4 NWLR (Pi.235) 361 at 385.

That the learned trial Judge awarded interest on the deposit at the rate of 12.25% per annum from October 1988 to 14th August 1989; 18.25 percent interest from 15th August, 1989 to 14th December 1989 and thereafter at the rate of 25 percent up to the date of judgment i.e. 21/12/99. 'that the award of interest at 12.25% from October 1988 to August 1989 is not contestable since it was the agreed rate of interest by the parties.

That the trial Judge's justification for the award of interest rate other than the agreed 12.25% is firstly on the ground that there no negotiations to vary the rate because the appellant would not entertain them and secondly the alleged admission of DW1 during cross-examination that between 1989 and 1992 lending rate rose between 45 percent and 60 percent in "some banks". That the evidence of DW 1 was on "lending rate" as opposed to "deposit rate" and that the appellant was not said to be one of the banks that operated within those rates.

That even if lending rate rose to 200 percent in some banks, the trial Judge would still not be justified in awarding interest at any rate more than 12.25% because the parties did not agree on any other rate. That what the trial Judge did was to make an agreement for the parties; relying on *African Reinsurance Corp. v. Feintaye* (1986) 1 NWLR(Pt.14) If 3 at 605. Learned counsel then urged the court to resolve the issue in favour of the appellant and-allow the appeal.

In his reply learned SAN for the respondent referred the court to paragraph 5(v) of the further amended statement of claim where it is pleaded that interest on the deposit could be reviewed upwards from time to time to any rate agreed by the parties after negotiation and paragraph 27 of the same further amended statement of claim stated inter alia:

"Interestingly the appellant admitted expressly Paragraphs 5 and 27 of the further amended statement of defence."

That exhibits 28 and 29 were tendered by PW. 1 in support of the claim for interest and that these documents were not contradicted by the appellant. That since the appellant refused to negotiate with the respondent as regards the upward review of interest rate the court being a court of law and equity should not allow the appellant to Benefit from his wrongful act.

By That a party is entitled to claim interest where it is claimed as of right, as in this case, or where such is supported by statute or convention. That the respondent pleaded his entitlement and supported his claim by oral and documentary evidence. Learned RAN then referred the court to the case of Ekwunife v. Wayne West v Mrican Ltd. (1989) 5 NWLR (Pt.122) 422 at 445.

That the award of interest over and above 12.25% does not amount to setting up a new case for the respondent as contended by his learned friend. That given the facts of the case and the peculiar circumstances of the same, the learned trial Judge was right to have awarded interest in the manner it was done in this case. He therefore urged the court to resolve the issue against the appellant and dismiss the appeal.

To begin with while it is correct that the appellant admitted paragraph 5(v) of the further amended statement of claim in its paragraph 1 of the further amended statement of defence it is not correct that it also admitted paragraph 27 of the said further amended statement of claim. Now the said paragraph 27 pleaded thus:

"27. By its letter dated 21st November, 1989 the plaintiff, demanded for an increase of the interest on the deposit] account of 25% per annum but the defendant by it is latter dated 22nd November, 1989 refused to entertain an negotiation on increased interest.

The plaintiff shall lead oral and documentary evidence oft regime of interest on deposit in commercial banks ij Nigeria over the period of 1988 to 1994 and deregulates interest rates on deposits of the period of 1991 - 199! in particular."

However paragraph 1 of the further amended statement I defence which is alleged to have admitted the said paragraph 27S as follows:-

" 1. The defendant admits paragraphs 1, 2, 3, 4, 5, 6,7,8, 13, 14, 19, 20 and the first sentence of paragraph 21 the amended statement of claim", (italics supplied), Thus it is very clear that the appellant did not admit the whole of paragraph 27 as alleged.

It is trite law, and both counsel arc agreed that a party will be entitled to claim interest where the claim is as of right e.g. by agreement or where it is supported by statute or mercantile custom or convention. In the case of Ekwunife v. Wayne West African 1 (supra) at page 445 the Supreme Court stated the position of the law as follows:

"Interest may be claimed as a right where it is contemplated the agreement between the parties, or under a mercantile custom, or under a principle of equity such as breach-a fiduciary relationship. See London, Chatham &Do Railway v. S.E. Railway (1893) A.C. 429 at page 43' Where interest is being claimed as a matter of right, the prop! practice is to claim entitlement to it on the writs plead facts which show such entitlement in the statement of claim.

In Nigeria, as the law is that a statement of claim the writ, for which see Udechukwu Okwnka (1956) 1 PSC 70 at page 71; (1856) SCNLR 189; Ekpan & Anor v. Uyo (1986) 3 NWLR (Pl.26) 63; if even it was not claimed on the writ but is pleaded in the statement of claim and evidence given which show entitlement thereto, the court may, if satisfied with the evidence, award interest.

Adjudication on the plaintiff's right to interest in such a case is, based on the evidence placed before the court. The evidence called at the trial in such a case will also establish the proper rate of interest and the date from which it should begin to run - whether from the accrual of the cause of action or otherwise. As far as I am aware, there is no law in Plateau State, or indeed in any other State of the Federation, which regulates the award of this class of interest."

It is my view that when one says that he is claiming interest as of right, he is saying in effect that it is based on an agreement between the parties. That being the case the question is what is the agreement between the parties on which the claims for interest of the respondent is based? The answer is as contained in paragraph 5 of the further amended statement of claim earlier reproduced in extenso in this judgment. Paragraph 5(v) in particular provides that the interest payable on the deposit could be reviewed upwards from time to time to any rate agreed by the parties after negotiation. This provision clearly shows that it is not mandatory but permissive. To my mind, it is the same as saying that the interest payable on the deposit may be reviewed upwards etc. from the agreed 12.25% per annum. That being the case it is my view that until that is done by negotiation the Agreed rate of 12.25% per annum will continue to govern the transaction between the parties. There is no provision to the effect that where a party refuses to negotiate the upward review of interest payable the other party can unilaterally impose a rate of interest on the other simply because the contract between the parties did provide for a permissive upward review of the rate of interest as in the present case. The principle of sanctity of contract enjoins us to deal carefully with the agreements as reached by the parties.

In the present case there is no doubt that the respondent is entitled to interest, the issue is at what agreed rate? From the totality of the facts before the lower court the only rate of interest agreed by the parties to the transaction is 12.25% per annum and I am of the firm view that any award above that rate is contrary to what was agreed and therefore invalid.

I agree with learned counsel for the appellant that it does not matter whether lending rate rose to 200% in some banks the parties are bound by their agreement in so far as no negotiation took place between them to review upwards the agreed rate of interest of 12.25% per annum.

As regards the alleged admission of DW1 to the effect that between 1989 and 1992 lending rate rose to between 45% to 60% in some banks the said evidence has nothing to do with the rate of interest paid by the appellant bank.

That apart the respondent pleaded in paragraph 27 of the further amended statement of claim - the second statement thereof which was not admitted by the appellant, that it shall lead oral and documentary evidence of the regime of interest on deposit in commercial banks in Nigeria over the period of 1988 to 1994 and deregulated interest rates on deposits of the period of 1991 to 1993 in particular - emphasis supplied. There is no evidence that the deposit as pleaded is the same as lending interest as testified to by DW I. Obviously they cannot mean the same thing without evidence to that

effect. In effect it is my view that issue No. 3 be and of interest made by the learned trial Judge over and above the agreed rate of I 2.25% per annum is hereby set aside. In their place it is hereby substituted the agreed rate of 12.25% per annum for period covered by the rates of interest already set aside.

In conclusion I am of the firm view that there are merits in this appeal which is accordingly allowed. The judgment of Justice A.O. Belgore in suit No. KAVS/188/91 delivered on 21st December, is hereby varied to the extent contained in this judgment. Due to the circumstances of this case it is herein ordered that parties bear their costs.

Appeal allowed.

OKUNOLA, J.C.A.: I have had the opportunity of reading in draft the lead judgment of my learned brother Onnoghen JCA just delivered.

I agree with his reasoning and conclusion that there are merits in this appeal which should be allowed.

I too allow the appeal and abide by the consequent¹ orders made in the said lead judgment of Onnoghen JCA including the order as to costs.

Appeal allowed.

AMAIZIJ, J.C.A.: I had the privilege of reading before now, the judgment just delivered by my learned brother, Onnoghen, JCA.

My learned brother has dealt adequately with the issues canvassed and I have nothing useful to add.

I adopt his reasoning and conclusion. The appeal has merit and consequently it is allowed. I abide by the order on costs.

Appeal allowed.