IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT ABUJA

THIS WEDNESDAY, THE 23RD DAY OF JUNE, 2021

BEFORE: HON. JUSTICE A. I. KUTIGI – JUDGE

SUIT NO: CV/2779/18

BETWEEN:

BARRISTER WOLE ABIDAKUN
(Trading under the name and style of Wole Abidakun& Co) } **…….. PLAINTIFF**

AND

DIAMOND BANK PLC ……...DEFENDANT

JUDGMENT

The Plaintiff's Claims against the Defendant as endorsed on the Writ of Summons and Statement of Claim dated 18th September, 2018 are as follows:

i. **A Declaration that the fraudulent withdrawal of a total sum of ₦727,000.00(Seven Hundred and Twenty Seven Thousand Naira) from the Plaintiff's account Number 0048112193 on the 21st July, 2018 without any authorization from the Plaintiff is wrongful, illegal and a clear exhibition of negligence on the part of the Defendant in the management of the Plaintiff's account.**

ii. **An order directing the Defendant to refund the total sum of ₦ N727,000.00(Seven Hundred and Twenty Seven Thousand Naira) to the Plaintiff forthwith being the sum fraudulently withdrawn from his account**

in custody and control of the Defendant herein on the 21st day of July, 2018

iii. Damages in the sum of N30,000.000.00 (Thirty Million Naira) against the Defendant for negligent management of the Plaintiff's account and causing the Plaintiff to incur unnecessary expenses in the course of investigation.

iv. Cost of this action assessed at N5Million.

The Defendant filed an Amended Statement of Defence dated 20th January, 2020 and the Plaintiff filed a reply to the defence dated 9th July, 2019.

In proof of his case, the Plaintiff testified in person as PW1 and the only witness. He deposed to two (2) witness depositions which he adopted at the hearing. He tendered in evidence the following documents, to wit:

1. **Letter by the Law Firm of Wole Abidakun & Co to the Commissioner of Police, F.C.T Command, Garki Area II dated 23rd July, 2018 was admitted as Exhibit P1.**

2. **Letter of complaint by the Law Firm of Wole Abidakun & Co to the Managing Director, Diamond Bank Plc dated 30th July, 2018 was admitted as Exhibit P2.**

3. **Letter of Complaint by the Law Firm of Wole Abidakun & Co to the Regional Manager, Diamond Bank Plc dated 16th August, 2018 was admitted as Exhibit P3.**

4. **Letter by the Law Firm of Waheed Gbadamosi & Co to the Branch Manager Diamond Bank Plc Michael Okpara Street, Wuse Zone 5 Abuja dated 4th September, 2018 was admitted as Exhibit P4.**

PW1 was then cross examined by counsel to the Defendant and with his evidence, the Plaintiff closed his case.

On the part of the Defendant, they also called only one witness, Oluwaseun Shodunke, the Branch Service Manager with Access Bank, formerly Diamond Bank testified as DW1. She adopted her witness deposition dated 22nd January,

2020 and tendered in evidence the Personal Account opening form of **Wole Abidakun & Co** which was admitted in evidence as **Exhibit D1**. She was then cross examined by counsel to the Plaintiff and with her evidence the Defendant closed its case.

At the close of the case, parties then filed and exchanged final written addresses. In the final address of Defendant dated 30th November, 2020, two(2) issues were raised as arising for determination as follows:

(a) Whether the Plaintiff's suit as constituted is competent.

(b) Assuming but not conceding that issue (a) is resolved in the favour of the Plaintiff, whether from the totality of evidence adduced before this court, the Plaintiff is entitled to the Reliefs sought against the Defendant."

In the final address of Plaintiff dated 21st December, 2020, three(3) issues were raised as arising for determination as follows:

" **i. Whether the Plaintiff's suit is incompetent for his failure to affix his NBA stamp on his witness statement on oath.**

ii. Whether on the preponderance of evidence, Plaintiff has made out a case to entitle him to refund of money fraudulently transferred from his account on 21st July, 2018 without his authorization.

iii. Whether Defendant herein is negligent or breached the banker/customer relationship between it and the Plaintiff herein to enable the Plaintiff entitle to ₦30Million damages."

The Defendant filed a Reply on points of law to the Plaintiff's address on 20th January, 2021.

I have set out above the issues distilled by parts as arising for determination. Issue (a) raised by the Defendant and the arguments made is in substance similar to. Issue i raised by the Plaintiff. The second issue (b) raised by Defendant clearly accommodates issues (ii) and (iii) raised by Plaintiff. The issues raised by parties can therefore be determined on the following two issues to wit:

(1) **Whether the Plaintiff's suit as constituted is incompetent for his failure to affix his NBA stamp on his witness statement on oath.**

(2) **Whether the Plaintiff has on a balance of probabilities successfully established his entitlement to any or all of the Reliefs sought.**

The two issues raised by court appear to have succinctly and with clarity captured the pith of the grievance subject of the present dispute. It is therefore based on these issues that I would proceed to determine this case. In furtherance of the foregoing, I have carefully read the final written addresses on both sides of the aisle and in the course of this Judgment, I shall make references, where necessary, to the submissions of counsel.

ISSUE (1)

Whether the Plaintiff's suit as constituted is incompetent for his failure to affix his NBA stamp on his witness statement on oath.

Now the case made out by the Defendant is that the Plaintiff having introduced himself as a legal practitioner in the two witness depositions before court is mandatorily required to affix his stamp and seal on any process, pleadings and affidavit deposed to by him and that in this case, that there is no such stamp and seal on the **witness depositions** of the Plaintiff which he adopted at trial in violation of the provision of **Rule 10(3) of the Rules of Professional Conduct (RPC)** which renders the witness depositions in this case incompetent with the attendant effect that there is no witness deposition on which the court can act. The case of **WAYO V. NDUUL (2019)4 N.W.L.R (pt.1661)60 at 73-74** was referred to. It was further submitted that once a statute provides for a procedure to be followed, a litigant has no option but to follow the procedure enunciated therein. The case of **Co-operative and Commerce Bank V. A.G Anambra State (1992)10 SCNJ 173** was referred to.

On the other side of the aisle, it was submitted on behalf of the Plaintiff that there is no law which makes it mandatory for a legal practitioner who did not initiate or file the originating process but is appearing in the case solely as a witness as in this case to affix his NBA stamp and seal to his witness deposition. That in this case, counsel who prepared the originating court processes, to wit the writ of summons and statement of claim which the deposition forms part of, and even the Reply filed in response to the statement of defence of the Defendant clearly affixed his seal provided by the Nigerian Bar Association showing that counsel is fully enrolled as

a legal practitioner and qualified to practice in Nigeria in compliance with **Rule 10(3) of the RPC** and **Order 2 Rule 9 of the 2018 Rules of Court**.

The Plaintiff finally urged the court to discountenance the objection as simply an attempt by Defendant to frustrate the determination of the case on the merit.

I have here carefully considered the interesting submissions on both sides of the aisle. Let us however carefully and properly situate the common facts of this case as this will provide factual and legal basis to resolve the complaint.

Now from the Records of court and indeed the case file which the court is at liberty to peruse, the originating processes filed in the case to wit the writ of summons and statement of claim clearly bear the seal of counsel filing the suit, **Waheed Gbadamosi,** with SCNO24140, provided by the Nigerian Bar Association showing that counsel is fully enrolled as a legal practitioner and qualified to practice in Nigeria. This same seal equally was affixed to the Reply filed by Plaintiff to the defence of Defendant. The processes filed here fully complies with the extant provision of **Order 2 Rule 9 of the FCT Rules of Court 2018.** Indeed the said provision provides as follows:

"All processes filed at the Registry, shall bear the seal of the Counsel filing the suit as provided by the Nigeria Bar Association showing that the counsel is fully enrolled as a Legal Practitioner and qualified to practice in Nigeria."

The above provision is clear and unambiguous and it cannot be extended to cover every situation as done by counsel to the Defendant. This provision clearly talks of counsel filing the processes affixing his seal and stamp approved by the NBA. As demonstrated above, there has been sufficient compliance with this provision by the counsel to the Plaintiff.

Now even with respect to the provision of **Rule 10 (3) of the RPC**, and I shall shortly refer to decisions of the Apex Court on the issue, it is difficult to situate its application in the extant case. The provision of Rule 10 (3) cannot be read in isolation from the Rule 10 (1). Indeed Rule 10 (1) ought to be the starting point to really understand its true and correct import and it provides thus:

A lawyer acting in his capacity as a legal practitioner, legal officer or adviser of any Governmental Department or Ministry of any corporation shall not sign or file a legal document unless there is affixed on any such document a

seal and stamp approved by the Nigeria Bar Association. (Underlining supplied).

The above provision is again clear. How this provision applied to a witness who happens to be a legal practitioner giving evidence in a matter, I really find it difficult to appreciate or understand. It certainly does not fly in my opinion. Again at the risk of prolixity, the originating process franked by Waheed Gbadamosi has fully complied with this provision or Rule.

The validity of the originating processes therefore have clearly not been impugned or challenged by the Defendant. On the Record, when the depositions were adopted by PW1 at the hearing, no challenge was made out by Defendant on any ground(s). Indeed learned counsel for the Defendant extensively cross examined PW1 on the basis of these depositions and what is even curious is that the substance of the final address of Defendant particular on issue 2 dealt again extensively with the same evidence of PW1 which he contends has not creditably made out a case on the evidence to entitle Plaintiff to the Reliefs sought.

Now it correct that under the provisions of **Order 2 Rule 2(1) of the Rules of Court,** one of the requirements in filing of the originating writ and statement of claim is the salutary introduction of frontloading or upfront filing of documents to be used at trial and one of such document(s) is the filing of witness deposition(s) of witness(es). Let me quickly state immediately that there is however nothing in the Rules which provides that where the witness deposition is deposed to by a legal practitioner, there is any additional requirement to be fulfilled to qualify it as a proper witness deposition. This provision of **Order 2 Rule 2(1),** is also straightforward and unambiguous. It cannot therefore be added to, altered or interpolations made to it to suit a particular purpose. See **Section 128 of the Evidence Act.** As an aside, hitherto and prior to the coming into operation of the new Rules of Court, courts must necessarily go through the drudgery of taking oral evidence of witness(es) in long hand; a process inherently cumbersome and time consuming.

The frontloading, at least, in some part will obviate or reduce the delays associated with this process of taking evidence of witnesses in long hand. The intention of the frames of the rules is to ensure that only serious and committed litigants with prima facie good cases and witnesses to back up their claim would come to court

and fewer lame duck claims would find their way to court. See **Olaniyan V. Oyewole (2008)5 N.W.L.R (pt.1079)114 at 138E.**

The crux of Defendants objection is that because in the extant witness deposition, the witness described himself as a "legal practitioner," that in addition to the seal of counsel who filed the originating process which as stated earlier was affixed on the processes in this case, that the same seal ought to be fixed to the witness deposition.

The point must be made immediately, that a witness is a person who gives evidence in a cause before a court of law. See **Black's Law Dictionary (8th Ed.) at pg 1633.** The belief or disbelief of the evidence of any witness is dependent ultimately on the quality and probative value of the evidence elicited from or proffered by that particular witness.

The character of a witness in any case does not therefore change because of his designation or description, whether a legal practitioner or even medical doctor; he remains a witness and is so treated and indeed by the provision of **Section 175(1) of the Evidence Act** is a competent witness without any qualifications. It is stating the obvious that assuming there was a provision in the Rules of Court or any law, and none has been referred to in this case, it cannot derogate from the express and specific provisions of the Evidence Act which regulates and has provided clear guidelines on the competence of witnesses.

In this case, on the record, there is no doubt that even if PW1 is a legal practitioner, he is appearing in this case as a witness and not counsel and it is difficult to legally situate how the provision relating to fixing of a seal of counsel showing that he is fully enrolled as legal practitioner and qualified to practice in Nigeria has any application to him within the purview of **Rule 10(3) RPC and Order 2 Rule 9 of the 2018 Rules of Court.**

To accept the contention of Defendant will mean that for a legal practitioner to give evidence as a witness in court, he must show his seal as provided by the NBA showing that he is fully enrolled as a legal practitioner and qualified to practice in Nigeria. I am not sure there are such strictures, legal or otherwise anywhere and none has been identified or streamlined in this case.

I even incline to the view that to accept this strange proposition of the Defendant will strike at the very basis of a fair hearing constitutionally guaranteed to all

litigants. Fair hearing in relation to a case means the trial of a case or the conduct of the proceedings therein in accordance with the relevant laws, Rule of Court and principles of natural justice. See **Ekpeto V. Wanogho (2004)18 N.W.L.R (pt.905)394.**

The true test of fair hearing is the impression of a reasonable person who was present at the trial and whether from his observation, justice has been done. The fundamental basis underlying the principle of fair hearing is the doctrine of *"audi alteram partem"* which means to hear the other side and indeed all sides. See **A.S.T.C V. Quorum Consortium Ltd (2004)1 N.W.L.R (pt.855)601.**

To therefore insist that a witness who happens to be a legal practitioner should be disqualified from giving evidence and his evidence expunged, because no seal was affixed to his deposition; a proposition not situated within clear legal rules formulated to ensure that justice is done to all the parties to a cause or matter, amounts to a denial of the right of fair hearing to such a party and would ultimately be fatal to such a proceeding.

I have carefully read the decision of our revered law lords at the Supreme Court in **Wayo V. Nduul (Supra)** relied on by defendant which is binding on all lower courts including this court under the doctrine of judicial precedent. This doctrine properly understood postulates that where the facts in a subsequent case are similar or close to the facts in an earlier case that has been decided upon, judicial pronouncement in the earlier case are subsequently utilized to govern and determine the decision in the subsequent case. See **Nwangwu V. Ukachukwu (2000)6 N.W.L.R (pt.662)674.** What is however binding on a lower court in the decision of a higher court is the principle or principles decided and not the rules and where the facts and circumstances in both cases are not similar or the same, the inferior court is not bound by the decision of the superior court. See **Clement V. Iwuanyanwu (1989)3 N.W.L.R (pt.107)39; Emeka V. Okadigbo (2012)18 N.W.L.R (pt.1331)35.**

In **Ugwuanyi V. Nicon Ins Plc (2013)11 N.W.L.R (pt.1366)546,** the Supreme Court made the point thus:

"…cases remain authorities only for what they decided. Thus an earlier decision of this court will only bind the court and subordinate courts in a subsequent case if the facts and the law which inform the earlier decision are

the same or similar to those in the subsequent case. Where, therefore, the facts and/or legislation, which are to inform the decision on the subsequent case differ from those which informed the courts earlier decision, the earlier decision cannot serve as a precedent to the subsequent one."

Now in the case of **Wayo V. Nduul,** (supra) the Apex Court made pronouncements striking out the said appeal and it predicated its decision on the failure of counsel to affix a seal and stamped approved by the NBA on 1) **The Notice of Appeal and 2) The Appellant's brief of argument.** The earlier case of **Yaki V. Bagudu (2015)18 N.W.L.R (pt.1491)288** which provided the inspiration in the **Wayo V. Nduul** case similarly dealt with the failure to affix the seal of the counsel issued by the NBA on the Notice of Appeal. These cases never donated the proposition that a witness statement deposed to by someone who happens to be a legal practitioner contained as part of an originating process properly filed with the seal of counsel who franked the originating processes must also similarly contain the seal of the legal practitioner before such practitioner can give evidence as a witness. These cases clearly are therefore distinguishable from the present case as I have demonstrated above.

Indeed in the Judgment in **Yaki V. Bagudu(supra),** the Apex Court per Onnoghen J.S.C (as he then was) explained the import of **Rule 10(3) of RPC at Pages 319-320 paras H-E** thus:

"What sub-rule (3) supra is saying is that such non-compliance renders the document so signed or filed voidable, that is why it is said that the document is "deemed not to have been properly signed or filed." In other words, the offending document/instrument can be remedied at any stage in the proceedings by an application for and production and fixing of the seal…it should be noted that the qualification to practice law as a legal practitioner is as provided for under the Legal Practitioners Act which includes being called to the Bar and enrolled at the Supreme Court of Nigeria as a legal practitioner. It is that qualification that entitles a legal practitioner to sign/frank any legal document either for filing in court of law in a proceeding or otherwise."

The respected Jurist above has captured the true import of the provision of **Rule 10(3) of the RPC** and again on the basis of his exposition, it is difficult to see how this provision has application to a witness who happens to be a legal practitioner.

The Rule properly understood relates to the practice of law as a legal practitioner which must necessarily involve being called to the Bar and enrolled at the Supreme Court of Nigeria as a legal practitioner. This qualification then entitles a legal practitioner to sign/frank any legal document for filing in a court of law. However this provision is stretched, there is no such qualifications before a legal practitioner can give evidence in court.

Except perhaps with respect to age and mental capacity as already alluded to under **Section 175(1) of the Evidence Act**, there is no qualification under the Evidence Act providing conditions for purposes of giving evidence in a civil trial. You don't have to be called to be Bar or enrolled at Supreme Court before a witness who happens to be a legal practitioner can give evidence. The qualification that allows or entitles a legal practitioner to sign/frank a legal document for filing in a court or law or proceeding has no relevance or nexus with his role as a witness in a civil trial. The provision of **Rule 10(3) of RPC** and **Order 2 Rule 9 of the Rules of Court** should therefore not be stretched beyond acceptable limits to create a scenario not contemplated by the framers. The Rule must therefore be narrowly construed or given a narrow interpretation to ensure its effectiveness and permit or allow a legal practitioner to give evidence as a witness in civil trials in support of ordinary and legitimate grievances without creating unnecessary obstacles which only serve to severely subvert the cause of justice.

The bottom line is that there is a fundamental difference between the role of a legal practitioner filing a case or suit in contradistinction to his role as a witness in a trial or hearing which I concede, not everybody, including the legally enlightened, may have the self awareness to appreciate, but it is there. I leave it at that.

Each party has a right to have his dispute determined on the merits and courts have a duty or obligation to do everything to favour the fair trial of the questions before them. See **United Spinners Ltd V. Chartered Bank Ltd (2001)14 N.W.L.R (pt.732)195 at 216A; Wakwah V.Ossai (2002)2 N.W.L.R (pt.752)548 at 562 F-G.** This is the salutary step or position I have taken in this case.

Issue 1 is thus resolved against the Defendant.

ISSUE 2

Whether the Plaintiff has on a balance of probabilities successfully established his entitlement to any or all of the Reliefs sought.

I had at the beginning of this judgment stated the Reliefs claimed by Plaintiff. The crux of the complaints or grievance situated within the pleadings is predicated on the alleged unlawful and unauthorized withdrawal or transfer made on Plaintiff's account under the watch of Defendant which Plaintiff contends occasioned damages to it. To encapsulate these complaints, the Plaintiff in this case filed a sixteen (16) paragraphs statement of claim together with a five (5) paragraphs Reply to the statement of defence of Defendant. The particulars of negligence were pleaded at paragraph 15(i-ix) as follows:

"**15. Plaintiff avers that Defendant herein was negligent in the management of his Account Number: 0048112193 which accounted for fraudulent withdrawal that took place on the said account on 21st July, 2018.**

PARTICULARS OF NEGLIGENCE

i. **Plaintiff did not authorize the transaction that took place on 21st July, 2018 around 9:26pm which led to the fraudulent transfer of a total sum of N727,000.00(Seven Hundred and Twenty-Seven Thousand Naira) from his account.**

ii. **Defendant was unable to take any step at ensuring blockage of the fraudulent transaction in spite of timeous reportage of the transaction to the Defendant by the Plaintiff.**

iii. **At the time of withdrawal/transfer of the total sum of N727,000.00 (Seven Hundred and Twenty-Seven Thousand Naira) from the Plaintiff's account Defendant was in custody and full control of the Plaintiff's money kept in his account with it.**

iv. **All efforts made and expenses incurred to ensure recovery of the fraudulently withdrawn money were solely carried out by the Plaintiff without any assistance or effort from the Defendant herein.**

v. **In spite of arrest and detention of the fraudster communicated to the Defendant herein, Defendant did not take any step towards retrieval of the money from the said fraudster.**

vi. **Plaintiff had been deprived access to his fund in the Defendant custody since 21st July, 2018 till date.**

vii. **The money fraudulently withdrawn from this account is that of the Plaintiff's clients who had been disturbing him to pay their money to them thereby subjecting the Plaintiff to an unnecessary embarrassment due to the negligence of the bank in the management of his account.**

viii. **Demand made from the Defendant to refund the fraudulently withdrawn money by the Plaintiff's Solicitors was not responded to by the Defendant till date.**

ix. **In spite of timeous reportage of the fraudulent withdrawal from the Plaintiff's account, Defendant failed to contact Unity Bank swiftly as expected of a reasonable banker and this accounted for why the entire sum had been dissipated by the fraudster before he was arrested at the instance of the Plaintiff."**

The evidence of the sole witness was largely within the structure of the statement of claim.

On the other side of the aisle, the Defendant joined issues on the critical elements of negligence and/or liability and indeed absolved itself of any blame worthy conduct in the circumstances of this case and in particular, in relation to the alleged unlawful withdrawal made from Plaintiff's account. To situate this defence, an eighteen (18) paragraphs Amended Statement of Defence was filed. The evidence of the sole witness was equally largely within the structure of the defence.

Indeed in the resolution of the present dispute, there is no better template to situate the respective positions of parties than the pleadings and evidence on record. These are the two critical elements that will be pivotal in the resolution of the extant dispute. The respective cases of parties can only be properly considered in the light of the pleadings and ultimately the quality of the evidence led.

Now flowing from the pleadings on both sides of the aisle; there are undoubtedly common grounds: 1) By paragraph 1 of the Amended Statement of Defence, the Defendant admits to the fact that the Plaintiff or to be precise the entity known as

Wole Abidakun & Co operates a corporate account with Defendant as pleaded in paragraph 2 of the Statement of Claim. (2) The Defendant vide **paragraphs 3-5 of the defence** admits paragraphs 4 and 5 of the statement of claim, at least to the clear extent that the Plaintiff's corporate account was in funds or credit to the tune of over N740,000(Seven Hundred and Forty Thousand Naira) as at 21st July, 2018 when the unauthorized withdrawal or transfer of the sum of N727,000(Seven Hundred and Twenty Seven Thousand Naira) was made from the said corporate account of Plaintiff to the account of one Obi Chimerie Justina with Unity Bank.

The logical consequence of the above established facts is that there exist a banker customer relationship between parties on the Record. It is in the context of this precisely defined relationship that the crux of this dispute with respect to who ultimately bears responsibility for the alleged unauthorized transfer from Plaintiff's account shall be determined.

Now by virtue of **Section 131(1) of the Evidence Act,** whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist. By **Section 132 of the Evidence Act** the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Also by **Section 133(1) of the Evidence Act** in civil cases the burden of first proving existence or non-existence of a fact lies on the party against whom the Judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

It is equally important to state that in law, it is one thing to aver a material fact in issue in one's pleadings and quite a different thing to establish such a fact by evidence. Thus where a material fact is pleaded and is either denied or disputed by the other party, the onus of proof clearly rests on he who asserts such a fact to establish same by evidence. This is because it is now elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established by credible evidence unless the same is expressly admitted. See **Tsokwa Oil Marketing co. ltd. V. Bon Ltd. (2002) 11 NWLR (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 NWLR (pt 316)182 at 200.**

Before evaluating the evidence to determine or situate whether a case of negligence has been made out, it may be necessary to underscore the important

point that the relationship between a banker and customer as established in this case where a bank accepts money either in savings, current on deposit account from its customer, is a relationship of debtor and creditor and the relationship is essentially contractual. See **Balogun V. N.BN Ltd (1978)II NSCC 135; 3SC 155; Afri Bnak (Nig) Plc V. A.I. Investment (2002)7 NWLR (pt.765)40.**

On the authorities also, because of the nature of the relationship, the customer has neither **"custody"** or **"control"** of monies standing in his credit in an account with the bank. What the customer has is a contractual right to demand repayment of such monies. See **Purification Tech. (Nig) Ltd V. A.G. Lagos State & 31 Ors (2004)9 NWLR (pt.879)665; Wema Bank V. Osilaru (2008)10 NWLR (pt.1094)150 at 170; Yesufu V. ACB (1981)1 SC 74.**

Let me quickly add that the above principles and dynamic must necessarily be slightly altered in relation to this modern technological applications such as Online Banking. When a customer elects or chooses to use the online banking application, he exercises his free will. There is no composition in it. In accepting to use the application, the customer has to have a user name and secret password allowing him access to his funds at any time and indeed anywhere so long as internet services are available at that particular location. This liberalization brought by these modern applications and devices has reduced the complete control banks had hitherto to accessibility to funds kept with the Banks. This means that the customer too now has some measure of "control" as to how his funds are accessed and utilised particularly in relation to the protection of the secret password and username. The standard practice is that once you agree to access the online facility, you formulate a username and a password which are critical features exclusively known only to the customer except of course he furnishes a third party. Without knowledge of the secret codes or features, it is the expectation, that nobody will have access to the funds, except the Bank who should have some measure of control over these application. This new dynamic now therefore places responsibility on the customer to safe guard his username and his password and ensure prompt report to the defendant in the event that the security features are compromised in any manner. These principles both the established and the novel, now provides a legal and factual template to situate the duties and responsibilities of parties and to resolve the extant dispute.

It appears to me imperative to state these principles in some detail to allow for a proper direction as to the party on whom the burden of proof lies in all situations. As stated earlier while the burden of proof on the pleadings is always stable, the burden of proof in the sence of adducing evidence may shift constantly as one scale of evidence or the other preponderates. The *onus probandi* in this sence rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were given on either side.

Now it must be made clear that notwithstanding the submissions on negligence on both sides of the divide, this case is essentially one predicated on alleged breach of contractual duty to take care of plaintiff's deposits. A banker/customer relationship it must be emphasised is inherently and essentially contractual. In law a distinguishing feature of the tort of negligence is accordingly the breach of duty to take care. This distinguishes it from a breach of contract. In law, a contract as exemplified by this action may contain an obligation to take care in the performance of its terms but the obligation arises from the agreement or the presumed agreement of the parties, whereas a tortuous duty of care arises from an objective view of given facts, of which an agreement may be one.

Accordingly where a contract term imports a duty to take reasonable care in performance, it can be concurrent with a duty to take care in tort, but it is by no means the case that every breach of contract involves a breach of tortuous duty as well. See **Charleswoth and Percy on Negligence (10th ed.) at Pg. 10 Par. 1-15.**

As a logical corollary to the above, it may be necessary to also state the settled principle that where a cause of action and a relief is properly claimed, a claimant cannot be refused simply because he has not stated or wrongly stated the head of the law under which he is seeking the remedy. In other words, a wrong must not necessarily be remediable under a known head of law before it is justifiable. It is a well known legal truism that where there is a wrong, there is a remedy and the courts nowadays are propelled more by the imperatives of doing substantial justice unfettered by technicalities which only serve to subvert the cause of justice. In **S.P.D.C Nig V. Okodeno (2008)9 N.W.L.R (pt.1091)85 at 118 C-F,** the Court of Appeal instructively stated as follows:

"**In the instant case, the learned trial judge was right when he held that the nomenclature of torts will not be allowed to blur its consideration of the clear averred facts of the case before it. That it is irrelevant in the determination of**

this case whether the claim is based on tort of detinue or is based on tort of trespass. I do not see this pronouncement as an abdication of lawful duties to make findings on the issue by the learned trial judge as submitted by the learned senior counsel for the appellant. The stand of the learned trial judge cannot be faulted. The court today is concerned with doing substantial justice on the matter before it, rather than place reliance on hard rules of technicality based on the principle of law that where there is a right, there is a remedy. The maxim being *ubi jus, ibi remedum*. The distinction that the trial court is called upon to make and subtitles have no substance and justification in them, but are nothing more than a dangerous inheritance from the days when forms of action and of pleadings held the legal system in their clutches."

I need not add to the above.

Now on the facts as streamlined on the pleadings, the existence of a banker customer relationship between parties on the evidence is not in doubt; it is also in evidence that the Plaintiff operates a corporate account with the Defendant. By the nature of this relationship, it is the Defendant bank that primarily has "custody" or "control" of the deposit of Plaintiff.

As stated earlier, however with the introduction of these modern application like the online banking, the relationship between the bank and the customer has now been strategically altered in terms of easy access to the funds or deposit outside the four walls of the Bank. The only limitation is the access to the username and a secret password. It then follows that on the evidence, it appears there is no dispute that the defendant has the primary duty of care to ensure the protection of the funds entrusted in its care. The bank therefore has a basic duty to watch over the money(s) in their custody and to ward of any attempt to meddle with such money, however subtle. See **UBA Plc V. Utuk (2004) AII FWLR (pt. 234) 1988 at 2004 and 2007.**

On the scope of duty owed by a bank to its customers, I cannot do any better than quote the instructive observations of Adekeye JCA (as she then was) in **S.T.B Ltd V. Anumnu (2008)AII FWLR (pt.399)405 at 428-429** as follows:

"I have to emphasise also that a bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its duty with regards to the operations within its contracts with customers. The duty to

exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer."

On the evidence, I don't think there is really any issue joined on the fact that the defendant owes the plaintiff a duty of care with respect to his deposit and this obligation clearly arises from the agreement.

I now come to the crux of this dispute relating to whether there has been a breach of this contractual duty. I now evaluate the evidence on both sides of the aisle.

The case of Plaintiff is that sometime on 21st July, 2018 at about 9:26pm, he received a notification of transfer of the total sum of N727,000(Seven Hundred and Twenty Seven Thousand Naira) from his account to a Unity Bank Account of one Obi Chiemerie Justina, a person unknown to him and that he did not authorize the transaction. Under cross examination, he stated that the transfer appeared on his handset via debit alert. The sum of N400,000 and N300,000 went to Obi Chimerie Justina while the balance of N27.000 was for recharge card.

The Plaintiff stated that he put across a call to the Defendant's call center at about 9:30pm and lodged a complaint about the fraudulent withdrawals or transfer. The Defendant in paragraph 4 denied there was any complaint. Nothing was however furnished by Plaintiff to prove or show that any such complaint was laid.

In **paragraph 7,** the Plaintiff stated that it however laid a written complaint the following date, 22nd July, 2018 to the Defendant and the Defendant responded via e-mail that the complaint would be investigated and they would get back to him on the 10th August, 2018. The Defendant in **paragraph 2** of its defence admitted this paragraph 7 as follows:

"The Defendant admits paragraphs 3,7,10,11,13 of the statement of claim."

The admission of paragraph 7 of the statement of claim by Defendant is a clear concession that the Plaintiff immediately laid a complaint of the unauthorized transfer or withdrawal the following day and the Defendant indicated that they will investigate and get back to Plaintiff on 10th August, 2018. The admission here by Defendant basically puts an end to proof of the contents of paragraph 7. This is because by the admission, the parties no more joined issues on the matters pleaded by Plaintiff in paragraph 7 of his claim. See **Akaninwo & Ors V. Nsirim & Ors (2009)9 N.W.L.R (pt.1093)439.** Indeed since proof presupposes a dispute, and

since an admission drowns the element of dispute, proof becomes superfluous in the circumstances. I shall return to this point later.

Again on the pleadings and evidence, the Plaintiff in addition to the admitted written complaint made to Defendant also wrote to the commissioner of Police F.C.T vide **Exhibit P1** dated 23rd July, 2018 to investigate the unauthorized and fraudulent transfer on his corporate account. The Plaintiff further lodged written complaints of the unauthorized withdrawal to the Managing Director of Defendant vide **Exhibit P2** dated 20th July, 2018 which on its face show that it was received on 31st July, 2018 and another complaint vide **Exhibit P3** dated 16th August, 2018 to the Regional Manager of Defendant and this letter was again received by Defendant on 16th August, 2018 going by the clear receipt stamp on the Exhibit.

The Plaintiff stated that despite these steps taken by him, in order to ensure the retrieval of this unauthorized transfer from his account, the Defendant did not respond to these letters or take any positive steps to ensure retrieval of his money and this then caused him to instruct his solicitors to write a letter of demand for the refund of the unauthorized transfer vide **Exhibit P4** dated 4th September, 2018. Again receipt of this letter was acknowledged by Defendant on the same 4th September, 2018.

The trajectory of the narrative or evidence of **PW1** with respect to the unauthorized transfer from the corporate account and the immediate steps taken to determine how the account was tampered with under the care of Defendant was not in any way materially challenged or contradicted during cross-examination. The Plaintiff here has adduced evidence sufficiently situating that his account was tampered with without his authorization. The burden then shifted to the bank to explain the unauthorized transfer under its watch.

As stated earlier by the nature of the banker/customer relationship between parties, it is the bank that ordinarily has “custody” and “control” of monies standing in the credit of the corporate account of Plaintiff and this must be so, in my view, notwithstanding the introduction of modern devices or applications to ease mode of conducting transaction(s) which as stated earlier had altered the dynamics in the relationship between a Bank and the customer. As stated earlier, the banker’s duty to exercise reasonable care and skill stretches over the whole range of banking business within the ambit of the contract with the customer.

If any unauthorized transfer or withdrawal is made, it stands to reason that the burden falls on Defendant who has custody to situate the lawfulness of the withdrawal or transfer and indeed how it was made and by whom. At the risk of sounding prolix, the control of moneys in credit of a customer's account is with the bank and what the customer has is a right to demand repayment of such moneys. See **Wema Bank V. Osilara (supra).**

Let us now here situate and evaluate the case made by Defendant in response to the complaint of unauthorized transfer made. Again, we take our bearing from the pleadings of Defendant. The following paragraphs are relevant as follows:

"**5. In further answer to paragraphs 5 and 6 of the Plaintiff's statement of claims, the Defendant states that the Plaintiff was negligent in handling the operations of its account and is not entitled to claim against the Defendant.**

PARTICULARS OF NEGLIGENCE

i. **The transfer of the sum of N727,000.00 on 21st July, 2018 at about 9:26pm was at the instance of the Plaintiff or his assigns and not the Defendant who was only used as a vehicle for the transfer.**

ii. **The transfer aforesaid (as opposed to withdrawal) of the aforesaid sum was via the online use of USSD platform of the bank and same cannot be configured without the use of the telephone line registered on the account. It was the Plaintiff's telephone number 08035898417 that was used to effect the transfer.**

iii. **The Plaintiff was responsible for the compromise or the control of his corporate account as USSD banking cannot be configured without the use of telephone line registered on the account.**

iv. **The Plaintiff lodged no written complaint with Unity Bank Plc to stop the dissipation of the funds transferred to the account of Obi Chiemerie Justina.**

v. **The transfer of the said sum by the Plaintiff was effected outside normal banking hours by the Plaintiff or his assigns.**

vi. **The online account details inclusive of the Plaintiff's account password via Personal Identification Number (PIN), password etc is only known to the Plaintiff or his assigns and exclusive of any of the Defendant bank officials.**

7. **The Defendant avers that there was no withdrawal of the sum of N727,000.00 but via electronic and/or online transfer of the said sum by the Plaintiff to the said Obi Chiemerie Justina outside normal banking hours, that is at about 9:23pm on 21st July, 2018 as the recipient of the transferred funds, Obi Chemerie Justina is unknown to it and neither does the Defendant control the banking operations of Unity Bank Plc where the account of Obi Chiemerie Justina is domiciled and as admitted by the Plaintiff in its paragraphs 5,6 and 8(a)(b) respectively."**

The sole witness for the Defendant in her deposition simply repeated the above averments of the defence. No more. All the Defendant is saying here is that it is the Plaintiff that was negligent in the handling of his account and responsible for the transfer from the account as highlighted in the defence above.

Now beyond these challenged bare averments and the rehash in the deposition of DW1, nothing was presented by the Defendant bank to put the court in any position to hold that it is the "Plaintiff" or "his assigns" who made the unauthorized transfer. I do not accept that bare viva-voce evidence suffices for a matter involving the alleged pilfering of deposits of customer's money.

The Defendant may have alluded to the use of its online **USSD platform** to perform the alleged unlawful transfer but there is nothing in evidence situating what this USSD platform means, how it works or its operational dynamics. These clearly are modern technological devices or applications that maybe online but in the absence of a demonstration of how the application works and showing that it has security features with a further demonstration of how the security checks put in place to protect it from being compromised works, the court is left in the dark on the modus operandi of this particular "USSD platform".

A clear demonstration by the Defendant Bank of how this application work is for me a legal imperative to provide firm basis to situate liability or otherwise where there is complaint of unlawful online transfer. After all they provide and offer the facilities to their customers. What further undermines the position of the

Defendant is there reaction to the complaint made by Plaintiff relating to the unlawful transfer from his corporate account. I had earlier referred to paragraph 2 of the defence wherein the Defendant admitted paragraph 7 of the claim that they received the complaint of Plaintiff and that they responded that they will investigate and report back to Plaintiff by **10th August, 2018**.

There is however nothing in the entire **pleadings of Defendant** and t**he depositions of DW1** showing that a body was constituted in the bank to look into the complaint of plaintiff or indeed whether any such body with requisite personnel with expertise exist in the Bank to carry out investigations; whether infact any investigations was conducted and what are the findings. For an institution that prides itself on documentation, it is strange that there is absolutely no paper trail situating the nature and parameters of the investigations allegedly carried out and findings, if any.

Now it is true that under cross-examination, DW1 made this bare and challenged oral averment as follows and I will quote her at length:

"The investigations as the branch service manager, I was part of those that carried out the investigation along with another staff. We did not at any time report the incident to the police. We did not sent any written report of our investigations to the Plaintiff but we orally informed him of the result. If there is any transaction from the Account because the Plaintiff has his phone, then it is by him or somebody he authorized."

The above does not show any serious concerted investigations made especially for a serious criminal complaint made in relation to unlawful pilfering of the corporate account of Plaintiff. If any in-house investigations was done, where is the report encapsulating the findings to show that the matter was treated with seriousness. It must be noted that the Plaintiff had written different letters of complaints vide **Exhibits P2, P3, and P4** to Defendant at different times impressing on the Defendant to take immediate steps to recover the money. All these letters were in my view written to underscore the importance the Plaintiff attached to his complaints. On the evidence, it would appear that no such similar level of seriousness was put on the issue by the Bank as no response or reply was written to any of these letters even though they were all received. To further underscore the lack of importance they attached to the matter, no report was prepared by Defendant of its findings. DW1 under cross-examination said they did not sent

any written report but that they orally informed Plaintiff and one wonders at the perfunctory treatment of such a serious matter.

It is really strange that absolutely no discernable steps were taken by the Defendant to liaise with their sister bank, the Unity Bank immediately they received the complaint of Plaintiff on 22nd July, 2018. By the Receipt of the transaction issued by Defendant attached to **Exhibit P1,** it shows clearly that the alleged illegal transfer was made from Plaintiff's account to the account of one **Obi Chiemerie Justina** with Unity Bank on 21st July, 2018 via online banking. Common sence dictates that if a **Corporate Account** owner or indeed owner of any account complains that he did not authorize a particular transfer, the least that must be done is to in the minimum get to the other bank to secure the funds to prevent further dissipation. This step or action, in a cruel way, I say advisedly was not done here by the Bank. I am in no doubt that if the Defendant had acted with decisiveness and with some urgency, perhaps the initial dissipation of the illegally transferred funds may have been averted. It is baffling the attempt by defendant to shift blame by stating in paragraph 5 (iv) (supra) that "the plaintiff lodged no written complaint with Unity Bank to stop the dissipation of the funds transferred to the account of Obi Chimerie Justina." This to me is a complete abdication of responsibility by the defendant Bank and a discretion of the duty of care they owe plaintiff. If any party is in any position to lay a complaint and liaise with a sister bank where an unlawful transfer was made and or account of customers, a serious problem faced by all banks, I hold that it is the defendant/bank.

It is indeed worrisome and a matter of great concern that at no time did the Defendant get across to **Unity Bank** and one then wonders at even the nature of the investigations they claimed they carried out. I incline to the view that any serous investigation must involve the sister **Unity Bank** where the money was allegedly transferred to, which the Defendant acknowledge in their Receipt of the transaction attached to **Exhibit P1**. If the argument is made that it is not the duty of the Defendant to investigate allegations of crime, but the Nigerian Police, the question then is this: why did the Defendant not report the matter to the police? Under cross-examination, the DW1 stated that they did not at any time report the matter to the police and this for me is inculpatory. If there was no report by them to the police, then there can't be any valid argument that it is not their job to investigate allegations of criminality. For the police to do their job, there has to be a report. No such report was made here.

I hold that it is the responsibility of the bank to have reported the incident of the unlawful transfer to the police to meaningfully investigate the allegations of such a serious crime. The fact that the Plaintiff took steps vide **Exhibit P1** to report the matter to the police does not in any way derogate from the responsibility on the Defendant to do the needful. On the authorities which I had earlier referred to in this case but which needs to be underscored, the customer has neither "custody" nor "the control" of monies standing in his credit in an account with the bank. The right of the customer is to demand repayment of such monies. See **Wema Bank Plc V. Osilaru (supra); Purification Tech. (Nig) Ltd V. A.G. Lagos State & 31 Ors (supra); Yesufu V. ACB (supra).**

Again the fact that these online applications have security features known only to the customer as contended by Defendant, does not mean that if there is a complaint of fraudulent activities, the duty to now report to the police now is left to the customer. The fact that the **Defendant** agreed to investigate when Plaintiff made his complaint is a recognition by Defendant that these online banking applications are not immune to activities of fraudsters.

Yes, I agree that because these facilities have security features known only to the customer and so the customer bears some responsibility to secure them, once however a customer makes a serious complaint of foul play in his account, the usual standard and rather lazy and lame response by Defendant Bank that the customer has compromised the security features will not stand or fly in the absence of a forensic investigation to determine responsibility. There must be proper in-house and then police investigations showing clearly and positively that the customer must have indeed compromised the security features or given his PIN numbers to a third party. Bare and empty verbal assertions will not suffice in this age of savvy and sophisticated criminals. The activities of fraudsters in financial and online crimes are notorious world-wide and that is why Defendant must take the matter serious and in addition to their in-house investigations must invite the **police** who are experts in such crimes to carry out in-depth investigations.

I shall here refer to the instructive decision of the Apex Court in **Houston (Nig) Ltd V. ACB (2002)F.W.L.R (pt.119)SC 1476 at 1493F-H** where Ogundare J.S.C (of blessed memory) stated as follows:

"When Victor Ndoma-Egba reported to the defendant that there had been some fraudulent withdrawals from Account No:05604, one would expect the

defendant, as banker, to take a serious view of the matter, to report to the police and carry out internal investigation. She did not have to wait for the plaintiff to demand all these. This is so because the defendant owed the plaintiff a duty of care. This relationship is contractual and has been described as that of debtor and creditor. See Yesufu V ACB (1981)1 SC 7498-99; Balogun V NBN (1978)3SC 153 at 163-164."

In this case, the Defendant never made any report to the police at all. If there were any internal investigations, it is not clear if any conclusive findings were made and I really shudder as such perfunctory treatment of such a serious criminal complaint involving deposits of customers. The point to underscore is that the bank offer these services or applications for consideration and they are not free. The banks should therefore not pretend that these are benevolent services, rendered to customers. They must therefore at all times be seen to have taken at all times be seen to have taken necessary and appropriate steps to protect the funds of their customers and once a complaint is made, it must be manifestly seen to have immediately and decisely dealt with such complaints by getting to the root of the unlawful transfer and those behind it.

Now what is interesting here is that after the filing of the action, the Plaintiff averred that the Defendant refunded the sum of **₦700,000(Seven Hundred Thousand Naira Only)** back into the Plaintiff's account.

In paragraph 4 of the Plaintiff's reply to the Defendant's statement of defence, the Plaintiff pleaded as follows:

"Contrary to the evasive denial of liability to the Plaintiff's claims herein, Plaintiff states that Defendant had refunded part of the fraudulently transferred sum to the Plaintiff herein on 1st day of December, 2018 in the sum of N700,000.00(Seven Hundred Thousand Naira Only) after filing of this suit against it."

What was the response of Defendant averment? I prefer to allow the DW1 to speak to the question. Under cross-examination, she stated as follows:

"I know money entered into Plaintiff's account about 5 months later but I am not aware that the said Chimerie paid N700,000 into the account. The total amount involved is N727,000 I am not aware that the Bank refunded N700,000."

I must confess my disquiet here at the response of **DW1**, the Branch Service Manager of Defendant. This is a matter is which there is a serious complaint of foul play. It is a matter she said she said investigated along with others and yet a refund of **₦700.000** is made into the account and she wants the court to believe that she does not know who made the payment. The question to ask here is this: Is it that the defendant bank has no record of the entries into the account in question and who made such payments? Does the said **account** have no statement of account showing the debits and lodgments made and by whom? I am in no doubt that the Bank clearly has records of the transaction and whoever made the lodgment. The failure of DW1 to honestly answer the question as to who made the refund of ₦700,000, an answer she knows and has access to by virtue of her position, leads irresistibly to the conclusion that the she is deliberately being evasive and not prepared to say the whole truth on the ₦700,000 lodgment or refund made right under the Banks watch.

Furthermore, the bank elected not to tender the statement of account of the Plaintiff which exists and which would have shown clearly who made the **₦700,000** refund payment on 1st December, 2021 into Plaintiff account. The failure to present this account of Plaintiff to delineate who made the refund allows for the invocation of the principle under **Section 147(d) of the Evidence Act** that if the Defendant had tendered the statement of account, it would have been unfavourable to the position made out by them that they do not know who made the refund of N700,000 into the Plaintiff's account. DW1 of course will not make us believe her incredible tale that the money lodged into Plaintiff's account somehow came from an unknown terrestrial sphere.

If lodgments can be made into an account with Defendant and they are not aware of who made the lodgment, then it then means that fraudulent withdrawals can equally be made without their knowledge and this then is frightening and a matter of great concern for all customers of defendant. I won't say more. It is difficult to accept that banks operate in such whimsical fashion as DW1 wants the court to believe. The entire disposition of DW1 for the Defendant is that of evasiveness unfortunately, and trying to abdicate responsibility. I am in no doubt that DW1 is not a witness of truth and she completely lacks credibility in the circumstances. By a confluence of facts as demonstrated above, I am in no doubt that the Defendant breached their duty of care and were negligent in the handling of the deposits of Plaintiff which led to the unlawful transfer of the sum of ₦727,000 out of his

account and in recognition of their own fault, they then made a refund of ₦700,000 back into the account of Plaintiff. On the whole, **Relief 1** clearly on the basis of the findings above has considerable merit and is availing.

Relief 2 for an order directing the Defendant to refund the total sum of ₦727,000.00(Seven Hundred and Twenty Seven Thousand Naira) to the Plaintiff forthwith being the sum fraudulently withdrawn or transferred from his account in custody and control of the Defendant herein on the 21st day of July, 2018 would have been **overtaken by events** but what was refunded or paid back into the account of Plaintiff was only N700,000 out of the ₦727,000 claim leaving a balance of N27,000. The analysis and findings already made have resonance and application here, so I shall be brief on this relief.

Again, I prefer to take my bearing from the pleadings, particularly the Amended statement of defence. In the defence, vide paragraphs 5(i) and 7, there is no issue or dispute that the unlawful transfer from Plaintiff's account involved the sum of **₦727,000**. As stated earlier in this Judgment, where no issue is joined on the pleadings, there will be no question of proof in such circumstances. The Defendant unequivocally admitted that the unlawful transfer involved the sum of ₦727,000. The sole witness for the Defendant under cross examination further accentuated the position that the total amount involved is ₦727,000.

If the Defendant on the evidence as found made a refund of **₦700,000**, then there can't be a logical explanation as to why the balance of ₦27,000 was not paid back which clearly forms part of the "N727,000" fraudulently transferred from Plaintiff's account. The findings of negligence and breach of duty of care covers the whole sum of N727,000 and it cannot therefore be compartmentalized or divided as done by Defendant here. The Defendant are equally liable to the Plaintiff for the **N27,000** balance as much as the N700,000 already refunded back. Relief 2 and the order sought has merit but will be on reduced terms as formulated hereunder.

Relief (3) is for damages in the sum ₦30,000.000.00 (Thirty Million Naira) against the Defendant for negligent management of the Plaintiff's account and causing the Plaintiff to incur unnecessary expenses in the course of investigation.

The law presumes that general damages flow from the wrong complained of and is usually awarded to assuage loss suffered by the plaintiff from the alleged act of

defendant complained of. Put in another way, general damages are the kinds implied by law in every breach of legal rights. Its quantification however been a matter for the court. See **Cooperative Dev. Bank Plc V. Joe Golday Co Ltd (2000)14 NWLR (pt.688)506; UBA V. BTL Industries Ltd (2001)AII FWLR (pt.352)1615; Musa Yau V. Maclean D.M Dikwa (2001)8 NWLR (pt.714)127.**

The Supreme Court in **Lar V. Stirling Astaldi (Nig) Ltd (1977)11-12 SC 53 at 63** defined general damages as such damages as may be given when the judge cannot point to any measure by which they may be assessed, except the opinion and judgment of a reasonable man. See also **Elf Petroleum Nig V. Umah (2006) AII FWLR (pt.343)1761.**

In this case, I have already held that there was a breach of duty of care. The plaintiff has obviously been deprived of the use of his legitimate funds which he kept with the bank for safe custody and denied access to his moneys to wit; #727,000 for a period of about 5 months from 21st July, 2018 to 1st December, 2018 when ₦700,000 was paid back into the account for no clear justifiable reason(s). Even at that, it was not the whole sum illegally diverted or transferred that was refunded as already demonstrated.

There is an element of good faith and trust in a relationship of banker and his customer. Without it, the relationship would be bereft of any meaning. Moneys/deposits are kept with the bank for many reasons, including for security purposes with the expectation that the customer gets the money when he wants it as long as he has sufficient credit in the account. The defendant has clearly failed in this basic duty and the plaintiff has on the evidence not had access to this funds which ultimately led to his having to incur further expenses in briefing counsel to file this action. The dislocation to the activities of Plaintiff in the nearly five months that they were denied access to the corporate account cannot be over-emphasised. The Defendant who it is expected will liaise with its sister bank where the fraudulent lodgment was made never did or even act timeously to secure and protect the funds unlawfully transferred. The Defendant similarly never reported to the police as was expected for the police to unravel the person(s) behind such criminal enterprise and in the process prevent similar occurrences from happening again. The in-house investigations they said they conducted was at best perfunctory without definitive findings or conclusions as already demonstrated. There is as yet and till date no explanation for how there unlawful

transfer was made and by whom. To worsen an already bad situation, a huge sum of **₦700,000** was paid back into the same corporate Account and the bank unbelievably with all the records at its disposal, claim they don't know who made the payment. This clearly is an intolerable situation and completely unacceptable.

The court has taken all the above into consideration in assessing the quantum of damages to be awarded. In **Access Bank Plc V. Maryland Finance Co. and Consultancy Service (2005)3 NWLR (pt.913)460,** the Court of Appeal advised that courts should not be carried away in making award of damages; that the court must not allow its mind to be affected by any high sounding figure claimed but that the court must look at the whole case dispassionately and let its award be a proper and sober assessment of the entire case.

The Plaintiff may have in his pleading averred that the moneys illegally transferred belongs to Plaintiff's clients who have been disturbing him to pay their money thereby subjecting them to unnecessary embarrassment but there is nowhere in the 19 paragraphs deposition of PW1 to situate evidence in support of the above averments. The implication is that these aspects of the averments are deemed abandoned.

Taking into account the totality of the factors adumbrated above, it is my considered opinion that the sum of ₦2,000,000 will be just and reasonable as damages in the circumstance. It appears to me a dispassionate and sober assessment of the entire case and a fair recompense.

The final relief is for cost of action in the sum of **₦5Million**. There is here absolutely no scintilla of evidence proffered by Plaintiff to situate the amount of ₦5Million claimed as cost of action. Cost of action will therefore be awarded the Plaintiff having succeeded substantially on the basis of the parameters as allowed by the rules of court under the provision of **Order 56 Rule 1(3) of the Rules of Court.**

In the final analysis and in summation, Judgment is entered for Plaintiff against the Defendant in the following terms:

1. **It is hereby Declared that withdrawal or transfer of the total sum of N727,000(Seven Hundred and Twenty Seven Thousand) from Plaintiff's account number 0048112193 on 21st July, 2018 without authorization from**

Plaintiff was wrongful and that the Defendant was negligent in the management of Plaintiff's account.

2. **It is hereby ordered that the defendant refund the sum of N27,000(Twenty Seven Thousand Naira) to the Plaintiff being the balance sum of N727,000 wrongfully transferred from the account of Plaintiff.**

3. **The sum of ₦2,000,000 (Two Million Naira) is awarded in favour of Plaintiff as general damages for the negligent management of Plaintiff's account.**

4. **Cost assessed in the sum of ₦30,000 payable by Defendant to the Plaintiff.**

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Hon. Justice A.I. Kutigi

<u>Appearances</u>:

1. **Waheed Gbadamosi, Esq., for the Plaintiff.**

2. **Austin Mwana, Esq., for the Defendant.**